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IN THE
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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.*

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OF THE

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[1] Resigned December 31, 1917.

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Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[2] Died November 17, 1917.

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Hon. JAMES D. ELLIOTT, District Judge, South Dakota..... Sioux Falls, S. D.
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Hon. JEREMIAH NETERER, District Judge, W. D. Washington..... Seattle, Wash.

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CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

LEWELLYN, Internal Revenue Collector, v. GULF OIL CORP.

(Circuit Court of Appeals, Third Circuit. October 8, 1917.)

No. 2254.

1. INTERNAL REVENUE ⟸9—CORPORATIONS—INCOME TAXES.

Though a corporation and a number of subsidiary corporations all of whose stock (except directors' shares) it owned were engaged in a common enterprise, where the corporation and each of the subsidiaries attended to its own branch of the enterprise, and each of the subsidiary corporations owned its own assets, carried on its own business, owed its own debts, paid its own taxes and enjoyed its own income, there was no such identity between the main corporation and the subsidiaries as to render a dividend received by the main corporation from the subsidiaries nontaxable under Corporation Excise Act Aug. 5, 1909, c. 6, 36 Stat. 112, and Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 114.

2. INTERNAL REVENUE ⟸9—CORPORATIONS—INCOME TAXES.

Where the subsidiary corporations had accumulated earnings, none of which had become capital, but which had been used in carrying on the several enterprises in which the companies were engaged, but which had been sometimes used to aid others of the subsidiary corporations, instead of being used to promote the particular business that had earned them, and the subsidiary corporations declared dividends, which were not paid in cash, but were paid by the main corporation taking over the debtor and creditor accounts existing among the subsidiary corporations, the property received by it was received as a dividend, and was taxable under the Corporation Excise Act of 1909 and the Income Tax Act of October 3, 1913; it being immaterial that one of the stockholders received almost all of the dividend, or that the stockholder in question was itself a corporation, and not an individual.

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

Action by the Gulf Oil Corporation against C. G. Lewellyn, Collector of Internal Revenue. Judgment for plaintiff (242 Fed. 709), and defendant brings error. Reversed, with instructions.

E. Lowry Humes and B. B. McGinnis, both of Pittsburgh, Pa., for plaintiff in error.

J. H. Beal and W. A. Seifert, both of Pittsburgh, Pa. (Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., of counsel), for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

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

McPHERSON, Circuit Judge. In this suit the Gulf Oil Corporation seeks to recover the taxes for 1913 that were assessed against it under the act of October 3, 1913. Payment was made under protest, and repayment was refused by the Commissioner of Internal Revenue. The Corporation recovered a judgment of $128,524.95. 242 Fed. 709.

The trial was without a jury, and for convenience we repeat here the findings of fact in the District Court:

"(1) The Gulf Oil Corporation is a corporation duly organized under the laws of the state of New Jersey. C. G. Lewellyn is the collector of internal revenue for the Twenty-Third district of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America.

"(2) The Gulf Oil Corporation, on the 14th day of February, 1914, in compliance with the provisions of the act of Congress of October 3, 1913, made a return of its annual net income for the 12 months ending December 31, 1913, as required by said act. In making said return the Gulf Oil Corporation certified that it had not included in the statement of gross income for the year 1913 certain dividends, amounting to $11,424,440, received by it from subsidiary companies out of earnings and surplus of said subsidiary companies accrued prior to January 1, 1913.

"(3) In said return the Gulf Oil Corporation showed net income for the 12 months ending December 31, 1913, of $886,250.44, but under date of May 1, 1914, the said C. G. Lewellyn, collector, mailed to said corporation notice of an assessment of tax thereon amounting to $9,072.56. A claim for abatement of this overcharge, amounting to $210.06, was filed with the collector June 9, 1914, and on June 30, 1914, the Gulf Oil Corporation paid to the said C. G. Lewellyn, collector, the sum of $8,862.50, being the amount of said assessment, less the $210.06 for which abatement was claimed. Said claim for abatement having been disallowed, said Gulf Oil Corporation, on the 5th day of November, 1914, paid the said collector the additional sum of $210.06, with interest amounting to $6.30, making a total payment of $216.36.

"(4) On the 30th day of December, 1914, the said C. G. Lewellyn, collector, acting under instructions from the Commissioner of Internal Revenue at Washington, D. C., mailed notice and demand for tax assessment against the Gulf Oil Corporation for the year ending December 31, 1913, amounting to $114,034.34. In fact, this additional assessment amounted to $114,244.40, being the 1 per cent. upon the entire amount of the dividends received by the Gulf Oil Corporation from subsidiary companies out of surplus accrued to such subsidiaries prior to January 1, 1913, and payable to the Gulf Oil Corporation prior to March 1, 1913, and said additional assessment was based solely on said dividends. In making the assessment, however, the Commissioner of Internal Revenue reconsidered and allowed the previous claim or abatement of $210.06, erroneously assessed against the corporation in the original assessment, and credited the same as having been paid upon the assessment of December 30, 1914, leaving the net balance of such assessment $114,034.34 as stated.

"(5) The notice and demand of the said C. G. Lewellyn, collector, for the payment of this additional tax recited that if the tax is not paid on or before January 8, 1915, it would be the duty of the collector to collect said tax, together with 5 per cent. additional and interest at the rate of 1 per cent. per month until paid.

"(6) That subsequently the plaintiff filed with the defendant for presentation to the Commissioner of Internal Revenue a claim for the abatement of said income tax amounting to $114,034.34, a copy of which claim is attached to and made a part of plaintiff's statement as Exhibit A. That after an examination of said claim for abatement the Commissioner of Internal Revenue rejected the same.

"(7) On February 17, 1915, the said Gulf Oil Corporation paid to the said C. G. Lewellyn, collector, said additional income taxes assessed for the period ending December 31, 1913, in the sum of $114,034.34, and at the same time filed with said C. G. Lewellyn a written protest, a copy of which protest is attached to and made a part of plaintiff's statement as Exhibit B.

"(8) That subsequently the plaintiff filed with the said C. G. Lewellyn for presentation to the Commissioner of Internal Revenue a claim for the refund of the net amount of the assessment of said income tax, to wit, $114,034.-34, and also the amount of the credit allowed thereon of $210.06, representing an overassessment against the corporation on the basis of its return as originally filed, the two amounts constituting the entire amount of the additional assessment in the sum of $114,244.40. A copy of the said claim for refund is attached to and made a part of plaintiff's statement as Exhibit C.

"(9) That after consideration of said claim for refund, the Commissioner of Internal Revenue rejected the same, and the said C. G. Lewellyn was instructed to notify the Gulf Oil Corporation, and on or about April 13, 1915, did so notify said corporation, that said claim was rejected, a copy of which notice is attached to and made a part of plaintiff's statement as Exhibit D.

"(10) That plaintiff is a holding company, and continuously since its organization in February, 1907, it has been the owner of all of the capital stock of the J. M. Guffey Petroleum Company, the Gulf Pipe Line Company, the Gulf Pipe Line Company of Oklahoma, and for many years has been the owner of all of the capital stock of the Indiana Oil & Gas Company and the Gulf Commissary Company, except in the case of each company of directors' qualifying shares, and was the owner of said shares during all of the period in which the earnings have accumulated out of which the dividends in question in this case were declared and paid.

"That with the exception of the Indiana Oil & Gas Company and the Gulf Commissary Company, and a dividend of the J. M. Guffey Petroleum Company hereafter referred to, no dividends were paid by any of the above-named subsidiary companies prior to December 31, 1912. All of the earnings of said companies prior to said date were either invested as earned in the extension and development of the properties and business of the companies mentioned or allowed to accumulate in the treasuries of such companies respectively, and all of the said earnings were actually used and required in carrying on the business of the subsidiary companies.

"In January of 1913 the officers of the Gulf Oil Corporation, plaintiff, decided that the accumulated earnings and surpluses of these subsidiary companies should be taken over by the plaintiff company in the form of dividends and accordingly:

"(11) On February 7, 1913, the J. M. Guffey Petroleum Company declared and authorized out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend of which the Gulf Oil Corporation received $3,749,750. Payment of said dividend was made April 11, 1913.

"(12) On February 7, 1913, the Gulf Pipe Line Company declared and authorized out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend, of which the Gulf Oil Corporation received $4,-724,055. Payment of said dividend was made April 11, 1913.

"(13) On February 7, 1913, the Gulf Pipe Line Company of Oklahoma declared and authorized out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend of which the Gulf Oil Corporation received $2,597,660. Payment of said dividend was made April 11, 1913.

"(14) On January 8, 1913, the Indiana Oil & Gas Company declared and authorized out of its accumulated surplus earned prior to January 1, 1913, the immediate payment of a dividend, of which the Gulf Oil Corporation received $338,000, and on February 24, 1913, declared and authorized the immediate payment of a dividend, of which the Gulf Oil Corporation received $10,000. Payment of the dividend declared January 8, 1913, was made on that day and payment of the dividend declared February 24, 1913, was made on February 25, 1913.

"(15) On December 17, 1912, the Gulf Commissary Company declared and authorized out of its accumulated surplus earned prior to December 17, 1912, the payment of a dividend, of which the Gulf Oil Corporation received $4,975. Payment of said dividend was not made until January 4, 1913.

"(16) Payment of said dividends by the J. M. Guffey Petroleum Company, the Gulf Pipe Line Company, and the Gulf Pipe Line Company of Oklahoma was made as follows:

"The several companies mentioned, together with certain other companies, constituted a single enterprise carried on by the plaintiff; that enterprise consisting in a general way of the production and purchase of crude oil, the transportation of oil, and the refining and marketing thereof. During the period in question the business of producing and purchasing oil was carried on principally in the state of Oklahoma, where also the oil was gathered and stored; the transportation of oil by pipe lines from points in the state of Oklahoma and in Texas to the Gulf of Mexico, where the company owned refineries in which the refined products were manufactured. The marketing of these products was carried on over a large part of the United States and in foreign countries, and for the purpose of shipping such refined products the company owned and operated its own fleet of carrying vessels.

"At the time of the declaration of the dividends before referred to all of the earnings of the subsidiary companies had been retained in those companies, treating the subsidiary company collectively, although for the purposes of the enterprise as a whole, it was necessary that the funds or credit of one subsidiary be loaned to and used by another. As a result of this at the time of the declaration of said dividends there existed among the subsidiary companies considerable indebtedness, evidenced by book accounts; such indebtedness arising almost entirely through transactions between such companies in the purchase and sale of oil or property.

"All of these funds were either invested in properties or actually required in the carrying on of the business of the subsidiary companies, so that the subsidiary companies were without moneys with which to make payment of this intercompany indebtedness. For the purpose of clearing the transaction the matter was consummated on the same day, to wit, April 11, 1913, and in this way:

"The Gulf Oil Corporation took over upon its books the amount of the dividends before mentioned (other than the Indiana Oil & Gas Company and the Gulf Commissary Company, which it had already received) and at the same time set up upon its books accounts receivable owing to it by various subsidiaries aggregating the amount of the dividends so received. Upon the books of the subsidiary companies entries showing the same facts were made, and all of these entries were made upon vouchers passed between the parties to the transactions.

"As a result, the subsidiary companies collectively, after the payment of this dividend, owned substantially the same amount as prior thereto had been owing to some of the subsidiaries by other subsidiaries, but such indebtedness was shifted so that it was owing entirely to the Gulf Oil Corporation; and the Gulf Oil Corporation, after the payment of the dividends, had no property assets which prior thereto was not represented in the shares of stock of the subsidiary companies owned by it, but it had upon its books accounts receivable of subsidiary companies, which together with the shares of stock of the various subsidiary companies owned by it represented the same property and assets as was represented by the shares of stock alone prior to the declaration and payment of said dividends.

"(17) The only dividend declared by the J. M. Guffey Petroleum Company prior to January 1, 1913, was a dividend of $2,024,865, declared and paid in the year 1912, but the moneys out of which that dividend was paid arose out of the sale by the J. M. Guffey Petroleum Company to the Gulf Refining Company (another subsidiary of the plaintiff company) of certain ships owned by it and was merely the carrying out of a change of ownership of the property from one subsidiary to another.

"(18) That the said J. M. Guffey Petroleum Company, Gulf Pipe Line Company, Gulf Pipe Line Company of Oklahoma, Indiana Oil & Gas Company, and Gulf Commissary Company were all corporations subject to the payment of the excise tax imposed by the act of Congress of August 5, 1909 (36 Stat. 11-112), and that all of said companies had in fact paid all of the taxes imposed upon them under the provisions of the said act, including such taxes on the earnings from which said dividends were declared."

We may summarize the facts as follows: For a number of years the Corporation has owned all the stock (except directors' shares)

of the five subsidiaries named; and it owned this stock while the subsidiaries were accumulating the earnings that were afterward transferred to the Corporation in the form of dividends. With exceptions not now material, none of the subsidiaries had declared a dividend before December 31, 1912; the previous earnings had been used from time to time in carrying on, extending, and developing the several enterprises in which they were engaged, and the earnings were properly employed for these purposes. In January, 1913, the Corporation decided to have these earnings transferred to itself, and thereupon the subsidiaries took the following steps: On February 7, 1913, the Guffey Petroleum Company, the Gulf Pipe Line Company, and the Gulf Pipe Line Company of Oklahoma, each declared a dividend, payable immediately, out of the surplus and earnings that had accumulated before January 1, 1913; and on April 11, the corporation received on this account from the Guffey Company $3,749,750, from the Gulf Pipe Line Company $4,724,055, and from the Gulf Pipe Line Company of Oklahoma $2,597,660. The Indiana Oil & Gas Company declared two dividends out of similar surplus and earnings, one on January 8, 1913, from which the Corporation received on the same day $338,000, and one on February 24, 1913, from which on February 25 the Corporation received $10,000. Out of similar earnings and surplus, the Gulf Commissary Company declared a dividend on December 17, 1912, from which on January 4, 1913, the Corporation received $4,975. The respective dividends were not declared in cash; the earnings, as and when produced, had been employed in the several enterprises, and had thus been invested in different kinds of property. They had not always been used to promote the particular business that had earned them, but had been sometimes used to aid another branch; the subsidiaries keeping a debtor and creditor account among themselves. In this situation, the Corporation made a return to the government of its income for 1913, certifying that the return did not include the dividends referred to, and giving as a reason that they had been declared and paid out of earnings and surplus that had accrued before January 1, 1913. The collector, however, demanded a total tax of $114,244.40 from the Corporation for the year 1913, basing the assessment solely on the receipt of these dividends. This was in part a franchise tax, and in part an income tax. After various proceedings—claim for abatement, protest, payment, petition for repayment, and the Commissioner's refusal—the controversy reached the District Court in the suit now before us. The subsidiaries had all been subject to the excise or franchise tax under the act of August 5, 1909, and they had all paid the amounts imposed thereunder. The sum now in dispute was not charged against the subsidiaries, but against the Corporation alone, and is made up of a franchise tax for the first two months of 1913 and of an income tax for the remaining ten months. The opinion of the District Judge sets forth the argument that led him to decide that the taxes were unlawfully imposed—the position being that the dividends had been declared out of surplus earnings that had accumulated during several years and had accrued to the Corporation (at least in equitable owner-

ship) before January 1, 1913. We are unable to assent to this proposition for the following reasons:

[1] It is first to be observed (and this should be borne distinctly in mind) that the government's levy was not upon the subsidiaries, but upon one of their stockholders, namely, upon the Gulf Oil Corporation. We do not understand the Corporation to lay stress upon a supposed identity of the five subsidiaries with itself, but in any event the facts in proof would furnish a sufficient answer to such a position. No doubt all the companies are engaged together in a common enterprise, but the enterprise has several branches, and each subsidiary attends to its own branch, while the Corporation does the like. Perhaps the Corporation may be more accurately described as uniting and regulating its subsidiaries; but each of the companies, whether holding or subsidiary, is a distinct entity, and is to be so treated. The several companies are not in such relations to each other that the property and obligations and liabilities of one can be regarded as the property and obligations and liabilities of any other. Each owns its own assets, carries on its own business, owes its own debts, pays its own taxes, and enjoys its own income. Under the Excise Act of 1909, each was separately taxed in respect of its own business, and under that act the Corporation certainly did not include in its own return the proceeds of the business done by the subsidiaries.

[2] Now, if the Corporation had been an individual, and had received the property in question by the method of transfer described in the findings of fact, the contention would hardly be made that no dividend had in fact been declared or received; for, although no actual money might have passed, each company would have transferred the ownership of valuable property to one of its stockholders, who could thenceforth deal with it as he pleased, and could convert it into cash whenever he might desire. The fact that the stockholder happens to be incorporated can make no difference. The central question is, Has a dividend been declared? If the Corporation has received a "dividend," this dividend has been declared by the act to be "income"; and, as income, Congress has directed it to be used in measuring both the taxes now in dispute. That the money (or property) handed over to the Corporation was a dividend we entertain no doubt. All the property transferred had been derived from earnings; none of it had become capital; it had been accumulated like cash, having been gained in the course of each subsidiary's business, and it awaited the pleasure of the respective boards of directors. These boards did not carry it to capital account; they did not issue stock to represent its value; they did not retain it for future use in their respective businesses; they decided to distribute it formally to their stockholders as a dividend, just as if it had been money; and they did in fact distribute it. No doubt one of the stockholders received almost all of it; but this did not change the character of the directors' act, which continued to be the declaration of a dividend, judged by the accepted tests. Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525. It can make no difference in the character of the directors' act that the stockholder in question is a corporation and not an individual. Whether a distribu-

tion of corporate property is to be regarded as a dividend or not does not depend on the status of the person that receives a share, but on what is done by the distributor. In the first instance, the money or property is owned by the distributor, and as owner he has the power to decide what is to become of it. After the stockholder receives it, he may use it as he likes; but it comes into his hands as a dividend, whether he be an individual or a chartered company. We conclude, therefore, that the Gulf Oil Corporation received the property in question in the character of a separate stockholder in the subsidiaries and received it as a dividend.

Being a dividend, the Corporation received it after March 1, 1913, and the remaining question is whether taxes have been laid upon it, and, if so, to what extent and in what manner? In thus speaking of a tax being laid upon property, we use the customary phrase; in strictness, taxes like the sum in question are not upon the property itself, but are exacted from the taxpayer because of his relation to the property. The owner pays, and the property measures the amount of the exaction. This is emphasized in the case before us, where two taxes are levied upon the same taxpayer; each tax is levied in respect of a different subject of taxation, but the amount of each is ascertained by the same measure, namely, by the taxpayer's income. For the year 1913, the Corporation was called upon to pay two taxes—one, an excise or a franchise tax for January and February; and the other, an income tax for the remaining 10 months. But the amount of the excise tax was measured by the Corporation's income, and the amount of the tax in respect of the income itself was determined by the same measure. Before February 25, 1913, Congress could not tax the Corporation's income directly, but it *could* value its franchise according to its income, and could impose the tax on that basis. Maine v. Railway Co., 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994. After the adoption of the Income Tax Amendment, Congress could tax the income directly, and for the remainder of the year it did tax the income in this manner. Each tax being computed by the same method, both were collected in one sum for convenience, but each depends for its validity on separate provisions. And we may add that Congress was not bound to go into a minute inquiry concerning the source of earnings that might be divided, or concerning the method by which they had been accumulated. For we have to do with a situation where the property divided is concededly earnings, and our decision is confined to the facts before us.

The foregoing is the course of reasoning that commends itself to our minds. and we may briefly restate the conclusions. As levied by the act of 1913, both taxes are constitutional, and each was distinctly laid on a separate subject of taxation. The excise or franchise tax was limited to the first two months of the year, and the value of the franchise was lawfully ascertained by using the Corporation's income as a measure; the income tax was for the remainder of the year, and was lawfully ascertained by using the same measure. In computing the Corporation's income, the government lawfully took into account the valuable property over which the Corporation had acquired the com-

plete ownership by virtue of its stock in the several subsidiaries; this ownership having been transferred to it by the formal declaration of a dividend. In exact terms the facts present the conditions laid down by the act of Congress, and therefore (as no question is made concerning the regularity of the government's procedure) the amount of the two taxes was lawfully levied and collected.

The case of Lynch, Collector, v. Turrish (C. C. A. 8) 236 Fed. 653, 149 C. C. A. 649, on which the Corporation relies with much confidence, does not seem to be in point. The facts were these: Turrish was a stockholder in the Payette Lumber Company, whose capital stock, $1,500,000, was invested in timber lands. The company did no business and earned no money, but the value of its lands increased gradually until, on March 1, 1913, it had grown to be $3,000,000. In 1914 the company sold the lands—that is, all its capital—for $3,000,000 and divided this sum among its stockholders. The share of Turrish was taxed as income received during 1914, and the Court of Appeals decided that he was not liable:

"Because no income, gains, or profits accrued to the plaintiff during the year 1914, or after March 1, 1913, but during that time his property remained of the same value, and because the sale of the property of the Payette Company in 1914 and the distribution of its proceeds by a dividend to its stockholders was but a change of the form, without any increase of the value, of the property he owned before the Income Tax Law of 1913 took effect."

The case did not involve the question of an ordinary dividend from accumulated earnings, but decided that a sale of capital property and a distribution of the proceeds did not constitute the division of "income, gains, or profits" within the meaning of the act of 1913. No such facts are before us now. We may add that the decision is to be reviewed by the Supreme Court.

A situation more like the case in hand is found in Southern Pacific Co. v. Lowe (D. C.) 238 Fed. 847, where Judge Manton delivered an opinion that discusses the general subject satisfactorily. We shall not take up other citations in the briefs of counsel; most of them may be distinguished on their facts, and in any event the question here, if we have outlined it correctly, seems to suggest an answer that is reasonably plain. Moreover, the two cases just referred to cite and consider nearly all the cases to which our attention has been called.

One or two minor questions have been raised, but they do not require attention. The important points have been stated, briefly, but we hope adequately, and, if they have been correctly decided, we see no need for a more elaborate discussion.

The judgment is reversed, with instructions to the District Court to enter a judgment in favor of the collector.

VINEYARD LAND & STOCK CO. v. TWIN FALLS SALMON RIVER LAND & WATER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2885.

1. WATERS AND WATER COURSES ⊂=247(1)—PRIOR APPROPRIATIONS—EVIDENCE—WEIGHT.

That surveys and estimates of plaintiffs claiming under the Carey Act (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]) were made three years earlier than those of defendant renders plaintiffs' testimony as to the amount of water appropriated the more reliable, because speaking of a time much nearer the time of plaintiffs' appropriation.

2. WATERS AND WATER COURSES ⊂=247(1)—PRIOR APPROPRIATION—EVIDENCE—SUFFICIENCY.

In a suit between appropriators of water from an interstate stream, under the Carey Act, evidence *held* to support the court's estimate that 5,500 acres comprised all the lands which defendant had under irrigation at the time of plaintiffs' appropriation.

3. WATERS AND WATER COURSES ⊂=240—APPROPRIATION—MODE.

An appropriation of water from a public stream, under the Carey Act, may be initiated by notice or by actual diversion from the stream, either process being evidentiary of the intent on the part of the person giving the notice to make an appropriation.

4. WATERS AND WATER COURSES ⊂=240—APPROPRIATION—EXTENT.

In the appropriation of water from a public stream by notice, the notice would indicate the amount of the intended appropriation, while in appropriation by diversion the capacity of the ditch used for the purpose would indicate the appropriator's thought as to the amount designed for use.

5. WATERS AND WATER COURSES ⊂=249—APPROPRIATION—BENEFICIAL USE—DILIGENCE.

After initiating an appropriation, an appropriator must use due diligence in applying the water for a beneficial use or he will be deemed to have abandoned his rights as to appropriations by others in the meantime.

6. WATERS AND WATER COURSES ⊂=249—APPROPRIATION—BENEFICIAL USE—"DILIGENCE."

Whether an appropriator of water from a public stream has used due diligence to utilize the water for a beneficial use must be determined upon the facts in the particular case, "diligence," as employed in such case, being largely a relative term.

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

7. WATERS AND WATER COURSES ⊂=249—APPROPRIATION—DILIGENCE—EVIDENCE—SUFFICIENCY.

The want of diligence of defendant and his predecessor in constructing the high-line ditch, and the application of the water through it to a beneficial use, *held*, under the evidence, to deprive defendant of its initiatory rights in so far as affecting plaintiffs' appropriations.

8. WATERS AND WATER COURSES ⊂=249—APPROPRIATION—AMOUNT NECESSARY.

An appropriator can claim no more water than is necessary for the purpose of the appropriation, and when he has that he cannot prevent others from using the surplus.

9. WATERS AND WATER COURSES ⊂=254—APPROPRIATION—AMOUNT NECESSARY—EVIDENCE—SUFFICIENCY.

In suit between appropriators of a public stream, *held*, under the evidence, that the court properly concluded that 12,500 acre-feet was sufficient to answer the needs of defendant under its appropriations.

10. WATERS AND WATER COURSES ⊂=254—APPROPRIATION—BENEFICIAL USE—AMOUNT.
In a suit to determine conflicting rights to the waters of a public stream, 3 acre-feet per acre for hay and grain land, and 1½ acre-feet for pasture land, *held* a reasonable allowance to defendant, whose land was only slightly above the water in the streams.

11. WATERS AND WATER COURSES ⊂=247(1)—RIGHTS AS BETWEEN STATES—PARTIES.
The rights, as between states, to share in the waters of an interstate stream, is a matter for adjustment between the states, and individual users cannot raise a question about the use of such water in another state out of the territorial jurisdiction of the court.

12. WATERS AND WATER COURSES ⊂=247(1)—PRIOR APPROPRIATIONS—NATURE OF SUIT.
A suit to determine rights to the waters of a public stream between parties claiming by prior appropriation is essentially one to quiet title to real property and is local and not transitory.

13. COURTS ⊂=29—POWERS—PROPERTY OUTSIDE OF JURISDICTION.
The rem may not be affected by the direct operation of the decree where it is beyond the territorial jurisdiction of the court, but the court may, acting in personam, coerce action respecting such property.

14. WATERS AND WATER COURSES ⊂=240—USE—RESTRICTIONS.
Ordinarily one having obtained the right to use a given quantity of water from a public stream may change the place or character of its use and the point of diversion.

15. WATERS AND WATER COURSES ⊂=247(1)—REGULATION OF USE—TERRITORY BEYOND JURISDICTION OF COURT.
The United States District Court of Idaho had the power, in a proceeding in personam, to restrict defendant's use of the water to a circumscribed locality in Nevada, where a change in territory would result in less water flowing back into the stream, resulting in loss to plaintiffs.

16. WATERS AND WATER COURSES ⊂=247(1)—REGULATION OF USE—TERRITORY BEYOND JURISDICTION OF COURT.
It was also proper to impose upon defendant the obligation of installing measuring devices and keep a record of the amount of water diverted, etc., and provide that plaintiffs should have the right of inspection.

17. WATERS AND WATER COURSES ⊂=240—CAREY ACT—PERFECTING APPROPRIATION—TIME.
In a project, under the Carey Act of Congress, to impound all waters of the Salmon river, in Idaho, plaintiffs had 10 years within which to make diversion, and proof thereof, for a beneficial use, in view of Laws Idaho 1915, c. 94.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Twin Falls Salmon River Land & Water Company, a corporation, and another, against the Vineyard Land & Stock Company, a corporation. From the decree entered, defendant appeals. Affirmed.

Frank K. Nebeker, of Salt Lake City, Utah, C. A. Boyd, of Ogden, Utah, Edwin Snow, of Boise, Idaho, and C. B. Henderson, of Elko, Nev. (Howat, Marshall, Macmillan & Nebeker, of Salt Lake City, Utah, of counsel), for appellant.

Richards & Haga and J. L. Eberle, all of Boise, Idaho, for appellees.

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

WOLVERTON, District Judge. This suit was instituted to determine the conflicting water rights alleged by the parties, respectively, to have been acquired by prior appropriation. The defendant, appellant here, is engaged in raising and husbanding stock upon the ranges, consisting in most part, but not entirely, of lands it has acquired and now owns. It is alleged that these appropriations of water are from Salmon river and its tributaries. The river extends for many miles in the state of Nevada, running in a general northerly direction, crosses the northern boundary line into the state of Idaho, and continues in that state down to where its waters are captured by plaintiffs, who are the appellees here. The plaintiffs are the owners of a project devised and constructed under the provisions of the Carey Act of Congress (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), whereby is impounded all the water coming down Salmon river, by means of a dam of unusual dimensions, forming a reservoir in the stream. The dam being completed, water was first turned into it about May 1, 1911, and its use for irrigation began in June of that year. The appropriation was acquired under three permits issued by the state engineer of the state of Idaho. These permits are: (1) No. 2,659, for 1,500 cubic feet per second, with a priority as of December 29, 1906; (2) No. 3,267, for 500 cubic feet, with a priority as of August 22, 1907; and (3) No. 5,519, for 1,000 cubic feet, as of September 7, 1909. It was intended by the project to reclaim 150,000 acres of land, but, because of the limited water supply, the system was reduced to reclaim approximately 100,000 acres only. Water rights have been actually sold aggregating about 73,000 acres. The entire water flow, however, never reached the dimensions of the first permit, and, generally, but a small proportion thereof. That these appropriations were regularly made and acquired there is no dispute; the sole controversy being as to what appropriations the defendant has that are prior in time and superior in right to the plaintiffs' appropriations. The principal ranches for which appropriations are claimed by the defendant are the Hubbard ranch, lying mainly in township 43, range 63 east, a small portion only extending into township 44; the Vineyard ranch, in township 44, range 63; the San Jacinto ranch, extending from the center line of section 21, township 45, range 64, to about the south line of section 23, in township 47, range 64, being comprised by townships 45, 46, and 47, range 64 east; and the Bridge ranch, on the Shoshone creek, a tributary to Salmon river, in township 47, ranges 64 and 65. Other small appropriations are claimed from other tributaries to Salmon river, which will be mentioned specifically.

The trial court decreed that defendant is entitled to 12,500 acre-feet of water to satisfy the rights which may be said to be prior to those of the plaintiffs. This comprises all appropriations upon all the ranches designated, as well as those to be specifically mentioned. The decree specifically describes the lands to which the appropriations are appurtenant, and defendant's counsel claim that these aggregate approximately 11,660 acres, which a cursory estimate from the record confirms, but say there are in fact something over 3,000 acres of unirrigated lands described in the decree. The trial court, however, in

its opinion, indicated that a prior right should be recognized in the defendant for the irrigation of 3,000 acres of hay land and 2,500 acres of pasture, aggregating 5,500 acres. Its basis for the duty of water was approximately 3 acre-feet for hay and grain land and 1½ acre-feet for pasture.

The testimony on the part of the defendant relating to the diversions of water upon the lands claimed to have been irrigated, the dates diversions were made, the amount diverted, the specific lands to which the use was applied, and the seasonal application, is quite voluminous, and, as it covers many years, depending very largely upon the memory of witnesses, it is wanting in that specific and exact detail that one would wish to make it altogether dependable and reliable. Such a state of the record requires, therefore, the application of the greatest care and diligence in resolving the ultimate facts upon which to pass the decree.

The defendant's stock ranges, located along Salmon river and its tributaries in both Idaho and Nevada, are at an elevation ranging from 5,200 feet to 5,700 feet above sea level. The growing season for crops of grains and grasses is consequently short as compared with lower levels. That such crops may be satisfactorily and profitably produced cannot be questioned; but as to grains and alfalfa, it may be conceded that they cannot be produced in such great abundance as on the lower levels. For instance, but two crops of alfalfa can be produced during the season, while the usual croppings in the lower levels are three. The testimony in the record shows that, during the whole time these ranges have been occupied down to the time that this controversy arose, there were but about 21 acres of wheat and 27 acres of oats grown on the entire ranges. This is evidentiary in a way of the adaptability, or want of adaptability rather, of such lands for profitably producing such crops. The inference is that such crops were not economically profitable for the stock industry, or the lands were not profitably adaptable for growing the same, taking into consideration, along with the quality of the soil, the short seasons and the convenience or inconvenience of marketing owing to the distance from marketing centers. These lands up to this time have not been generally occupied for residential or home purposes, and but few cabins have been maintained upon the ranches, and those only for the habitation of range riders or caretakers of stock, while the stock was being provided with feed in the late fall or winter season.

In a general sense, the manner of irrigating the lands was by the flooding system; that is, depending in a measure on the flood waters that came down along about the month of June in such quantities as to overflow the banks of the streams, but more generally upon the construction of dams and barriers in the streams, by rude and unscientific methods, to throw the water out in such quantity as to cover the lands, and allow it to remain thereon a considerable length of time. The waters thus thrown out upon the land are controlled more or less by the construction of ditches and conduits for carrying them upon lands that they would not ordinarily reach in the usual course when thrown out of the natural channel. The ditches, most of them, until

later years, were of primitive construction, and in many instances were so laid as to make use of the sloughs and swales for conducting water to places of advantage. Latterly some of the ditches were built with greater attention to scientific construction, the most conspicuous of which is the Harrell ditch, which will be especially treated of later. Generally the water was used for producing the natural grasses indigenous to those localities, including the rye grass, a very nutritious article of food for stock. In considerable measure the native grasses were produced in such quantities as to be cut for hay, and were so cut and fed to stock as occasion demanded; but by far the larger proportion of the area thus irrigated was utilized for pasturage only. This pasture land generally lies contiguous to the streams and the natural runways for the water. Much of it is grown over with willows in greater or less density, and other parts are occupied by sloughs and swales, where to some extent a coarse grass grows upon which the stock browse. In the more recent years water has been thrown over considerable areas of land covered with sagebrush, for the purpose, it is claimed, of promoting the growth of the natural grasses found there for pasturage purposes. This is upon the higher levels, and at best the grass found there is insignificant in quantity. By reason of the water table being near the surface, and the natural percolation that takes place in the soil, and considering also the overflooding, this method of irrigation results in the lower levels in returning very large quantities of water to the natural streams.

Having made these general observations, which apply practically without question, we will proceed to a consideration of the testimony.

We can best get at the most satisfactory results by a comparison of maps which have been introduced in evidence as exhibits, considering along with them the testimony giving statistics as the result of witnesses' observations.

The witness L. W. Beason made measurements and surveys of defendant's property in 1914, and was engaged in the work, he and his subordinates, about eight months. This, it must be observed, was some seven or eight years after plaintiffs made their first appropriation. After relating what ditches he found, giving their measurements and capacities, the witness produced a map, defendant's Exhibit No. 11, covering the Hubbard and Vineyard ranches, which shows by the coloring the hay and pasture lands; the total acreage being, hay land 866.7 acres, and pasturage 1,728.3 acres. He also produced defendant's Exhibit 12, a map which covers the Salmon river or San Jacinto ranch, extending from Bird's Nest to Boar's Nest, with different colorings indicating the different kinds of lands, such as first-class pasture lands, second-class pasture lands, etc. He gives the area of each class, all claimed to be under irrigation, as follows:

First-class pasture land	2,501.2	acres.
Second-class pasture land	1,073.7	"
Hay land	1,766.2	"
Grain land	1,481.7	"
Seeded to timothy	242.6	"
Total	7,065.4	"

This, with the lands of the Hubbard and Vineyard ranches added, makes a grand total of 9,660.4 acres.

The witness relates that there are none of the lands marked meadowlands, or first or second class pasture lands, that have not received the benefits of irrigation. Other plowlands were measured, not shown on the exhibit, of which there are 1,205.4 acres, all under the Big ditch. This latter must be excluded, as will appear from a consideration of the Harrell or High Line ditch. Witness also produced a map, defendant's Exhibit No. 13, covering the Bridge ranch. This shows:

Pasture land	428.0	acres.
Hay land	124.8	"
Grain land	27.3	"
Total	580.1	"

Making a grand total, comprising all these ranches, of 10,240.5 acres.

On the other hand, the plaintiffs produced one E. B. Darlington, also a civil engineer, who made observations and estimates in 1911, three years earlier than those made by Beason, and yet four or five years later than the date of plaintiffs' first appropriation. He produced maps covering the Vineyard ranch and all above that, including the Bridge ranch. These are plaintiffs' Exhibits 11 and 18. The former shows by different colorings the different lands under irrigation in that year, and the latter designates by various colors additional lands that defendant claims are under and subject to irrigation. On the Vineyard ranch the maps show:

Hay land, irrigated	429.6	acres.
Pasture land, irrigated	18.3	"
Pasture land, not irrigated	83.8	"
Total, irrigated land	447.9	"
" not irrigated	83.8	"

As to the San Jacinto ranch, not including the Bridge ranch, these maps show:

Hay land, irrigated	1,033.4	acres.
Pasture land, irrigated	788.6	"
Alfalfa land, irrigated	140.2	"
Wheat	21.0	"
Total	1,983.2	"

On the Bridge ranch:

Hay land, irrigated	150.7	acres.
Pasture, irrigated	57.6	"
Pasture, irrigable	157.2	"
Total	365.5	"

—and a small acreage of wheat.

Aside from these, there is a tract shown of 414.0 acres, designated as hay not irrigated, and another tract of 1,117.4 acres, designated as pasture not irrigated.

To recapitulate, this shows:

Hay and pasture land, irrigated	2,639.4	acres.
Hay and pasture land, not irrigated	241.0	"
The two tracts last mentioned	1,531.4	"
Making a grand total of	4,411.8	"

This witness has not included in his maps nor in his testimony the Hubbard ranch. In making a résumé of the irrigated lands, he says:

"The total area watered from Salmon river was 2,265 acres; from Shoshone creek (Bridge ranch), 160 acres; from Jake's creek, 143 acres."

For comparison, we should add to this estimate the Hubbard lands, comprising, as shown by defendant's Exhibit 11, by a calculation of the subdivisions alleged to be irrigated, 920 acres, making a total of 5,331.8 acres. If this amount be deducted from defendant's estimate of 10,240.5, it shows a discrepancy between the figures of the parties of 4,908.7 acres.

E. C. McClellan, testifying in rebuttal for defendant, shows that the total acreage under irrigation in the year 1889 from Bird's Nest to Boar's Nest was 4,178.4 acres, and on the Vineyard ranch 814.4 acres, aggregating 4,992.8 acres, and that the total irrigation in 1904 amounted to 5,981.2 acres. These statements are discredited by certain maps which the witness himself prepared, namely, defendant's Exhibit 4, purporting to show the area under irrigation on the Vineyard ranch, and plaintiffs' Exhibit 32, exhibiting the lands under irrigation extending from Bird's Nest to Boar's Nest. The coloring on these maps shows an irrigation in solido of all lands within the delineations. The representation as to the latter district is disproved by Beason's map, defendant's Exhibit 12, and as to the former is plainly disputed by other testimony in the case.

Pursuing the inquiry further, relating to lands under irrigation elsewhere, according to Beason's testimony, defendant's Exhibit 7 covers lands on Trout creek, which are, as estimated, 50 acres of hay and 170 acres of pasture; defendant's Exhibit 14, being of the Nall ranch, shows hay 53.4 acres, and pasture 104.3 acres; defendant's Exhibit 15, Shoshone Basin ranch, 127.0 acres of hay, and pasture 914.7 acres—a total of 1,419.4 acres. This enlarges the discrepancy to 6,328.1 acres, for the plaintiffs' testimony takes no note of these lands.

Resting the deduction here for the present, particular reference will be made to the testimony of Darlington given in rebuttal, he having produced a composite map, plaintiffs' Exhibit 33, on which irrigated lands are designated in red and lands not irrigated in green. Speaking from the map, he says:

"On that part of plaintiffs' Exhibit 33 showing the Vineyard ranch, colored in green, the land was very largely in sagebrush, rye grass and partly incrusted with alkali. We could find no evidences of irrigation. We searched for it. A strip on the east side of Jake's creek and running down the west boundary of the tract was covered with sagebrush. It is the tract lying between the field colored red and the Tunnel ditch. It is the land shown on defendant's Exhibit No. 4 as being irrigated. * * * Where it is hatched in red has since been cleared."

Referring to a photograph taken near the crossing of the Tunnel ditch and Jake's creek, the witness continues:

"The sagebrush land in the foreground of this picture shows the land that was excluded. That land didn't bear any evidences of having been irrigated. I didn't find any ditches on it. I walked over it, just observing general conditions. I didn't make any special search for ditches at that time. I made observations with the view of finding any sources of irrigation and the land that was being irrigated. The land at the north and east of the field in red on plaintiffs' Exhibit 33 down the river and which is colored in green on that exhibit, was grown up to willows and is not irrigated so far as I could find. There are no evidences of any irrigation or ditch lines. The land from the northerly limit of what is colored green on plaintiffs' Exhibit 33, as part of the Vineyard ranch, and the little strip of green which appears at the southern line of section 20, 45 north, is a narrow canyon overgrown with willows in the bottom. There are no ditches along there. The land in sections 20 and 21, 45 north, and 17 and 16, 46 north, colored in green on plaintiffs' Exhibit 33, is overgrown with willows and cut up with sloughs. There was no evidence of artificial irrigation. There is evidence of overflow by the river during high water season. The land in township 45 north, at the east of the strip colored red on plaintiffs' Exhibit 33, and colored green on that exhibit, claimed by the defendant to be irrigated, is overgrown with willows and cut up with sloughs. I could discover no evidences of any ditches there. A large part of it would overflow during high water of the river. There are sloughs through it, which in 1911 were overgrown with willows and sagebrush. I could see no signs of any systematic use of them for irrigation. By systematic I mean artificial use, where water had been directed and controlled. I think those lands have not been cut over; they are covered with sagebrush and willows. The land in section 34, between the two fields colored red on plaintiffs' Exhibit 33, colored in green on that exhibit, is overgrown with willows and other brush, and cut up by sloughs. The land in sections 22, 23, and 14, township 46 north, colored in green on plaintiffs' Exhibit 33, is very largely in willows, rabbit brush, and some sagebrush. I couldn't find any that had been irrigated. The island south of the lane is largely sand bars and gravel bars. The lane is represented by the white strip not colored, extending through section 14. South of that was sand and gravel bars and sagebrush. The island north of the lane, colored in red, is cut up by sloughs and willows; not so much sagebrush north of the lane. On the entire ranch from Bird's Nest to Boar's Nest, I would say there are between 500 and 1,000 acres covered with willows. In some places they widen out into wide strips and in other places there is just a fringe along the bank. The river bank throughout this entire ranch from Bird's Nest to Boar's Nest is low relative to the surrounding country. The river overflows and floods a large part of it at certain times of the year. It would overflow a considerable part of it without dams in the river. The land I have colored green and hatched in red represents land that has not been either cleared or in cultivation since the extension of the High Line ditch beyond the lane. The explanation I have made as to the condition of the land that is colored green and not included as irrigable land, extends to other parts of the map and to which my attention has not been particularly called."

C. B. Stocking, another witness adduced for the plaintiffs, testifies referring to plaintiffs' Exhibit 33:

"Taking the land north of the lane between the border of the red line and the east line of the river, there is a strip of land north of the lane, and partly south of the lane, of 1,117.4 acres; it extends north about a mile. I have included that as pasturage not irrigated. It evidently is inundated in high water, but the main part of it is covered with sagebrush and willows. The willows are very thick in places and very wide in places; at the upper end they cover practically the entire strip from the east channel of the river over to the boundary of the irrigated land. North of that I have an area of 414 acres, classified as hay, not irrigated, on the island. There

were willows lining the banks of the stream and scattering willows across the island. There were no ditches at that time. I looked the island over quite carefully and found no indications that there had been any ditches. The river in high water evidently overflowed. The land that is east of the east fork of the river, which would now lie under the Big ditch as constructed, was at that time entirely covered with sagebrush. It was not under any ditch that was then carrying water, and the acreage was computed as lands that could be brought under the ditch. Going south of the San Jacinto lane, up as far as Middle Stacks, is an area which was included in this 1,117.4 acres as pasturage not irrigated. The land that is south of the San Jacinto lane, included between the branches of the river, is land that is covered with sagebrush, gravel bars and willows. Over towards the west fork of the river there are large gravel bars and in sections down in the bottom the sagebrush is very thick, making walking difficult. On the land south of the lane and east of the west branch of the river, marked or corrugated on plaintiffs' Exhibit 33, is sagebrush and rabbit brush. There was no grass that I could find in the sagebrush, with the exception of right along the river bank. There was a strip probably 300 feet wide of rye grass that was quite tall in places; it grew in bunches. From the looks of it, it had not been cut that year, because it interfered with the sights of our transits. Between the Upper Middle Stack and what is known as the Big ditch, I have marked a strip designated as brush, containing 57 acres. I could find nothing in it but brush; no grass whatever; practically bare. In the strip that is green going from the Lower Middle Stack to the Upper Middle Stack, and the strip in green composed of the river and willows, I could see nothing that had been irrigated; nothing but brush, no rye grass to speak of. That is the condition all the way up through the Upper Middle Stack. I traversed the west side of the river, and the southern part is included in pasture designated as being irrigated, but which is more than 50 per cent. covered with sagebrush. It is very rough and some rye grass grows down towards the river banks. On the east side of the river there was nothing that I could find but sagebrush, and no more grass than would ordinarily grow in the sagebrush. From the head of the Bird's Nest ditch, going over to the east branch of the river, there is a mass of willows that is almost impenetrable. We had to keep watch of the boys going through to see that they did not get lost. That is the condition to Contact and above. At the place marked green here the river is in a narrow, rocky bottom, with willows on the bottom and I think a little grass between the clumps, such as you would ordinarily see down on the river bottom. At the upper end of the Vineyard ranch, going up towards the mouth of what we call the old Vineyard ditch, is a strip of green of 42.3 acres, marked as pasture not irrigated. That lies down below the bluffs right next to the river and is fringed with willow clumps scattered through it, used as pasture, and in my judgment would be overflowed when the river got to a little lower than its highest mark. There are no ditches there. The section lying north of the Vineyard and between the boundaries of the Tunnel ditch, was grown up to sagebrush and rye grass. On the east side of this border of grass is sagebrush and rabbit brush and rye grass scattered through. From the appearance of it it had not been cut. It was in bunches and where you find bunches you will find rye grass up probably two or three feet high. The north end of the Vineyard is what is known as Starvation field. There was no grass to be found. It was willows, sagebrush and bare ground. It is alkalied. Down below Starvation field, as far as it is colored, is simply willows. Sagebrush comes down to the willows. The willows bordered the river for a distance on each side, and there was no grass."

[1] Now, it must be admitted that there is a wide difference between these estimates on the part of plaintiffs and defendant; but if the real facts were known as of the time of plaintiffs' appropriation, it is believed that the difference would be, in great measure, reconciled. Plaintiffs' surveys and estimates were made three years earlier than those of the defendant, and the space of time intervening would, if

the facts were absolutely known, in all probability account for much of it. It at least renders plaintiffs' testimony the more reliable, because the plaintiffs are speaking of a time much nearer the time of plaintiffs' appropriations. Furthermore, the testimony above specially alluded to goes very strongly to the discredit of defendant's estimates, so that one cannot say that they are in a reasonable measure reliable. We are impelled, therefore, considering also the entire testimony, to give the greater credit to the plaintiffs' estimates. In final conclusion on this phase of the case, taking the plaintiffs' estimates, there are included the two tracts of 414 and 1,117.4 acres respectively. Stocking says the former tract consists of wild hay irrigated; that "this is low-lying land along the river. The river flows on both sides of it, and it is covered with willows and wild grass. I never found any irrigating ditches on it." The latter tract, which he mentions as containing 1,117.4 acres, he says is wild land; that "this is grown up with sagebrush and wild rye grass and willows and has never been irrigated." If the aggregate of these tracts be deducted from the total of 5,361.8 acres, there would remain 3,830.4 acres. Or if the latter tract only be deducted, there would remain 4,244.4 acres. In one aspect or the other, these figures represent lands irrigated from the Bridge ranch to the Hubbard ranch, inclusive. This gives credit for the entire amount that defendant's maps show was irrigated on the Hubbard ranch, namely, 920 acres. Deducting these figures from the trial court's estimate of 5,500 acres, there is left in the one case 1,669.6 acres, and in the other 1,255.6 acres. This latter figure is in all probability quite sufficient to cover all irrigated lands comprised by the outside ranches.

[2] We concur with the trial court's estimate of 5,500 acres, as comprising all the lands which were under irrigation at the time of plaintiffs' appropriations.

The foregoing conclusion, it will readily be seen, is in anticipation of the inquiry as to the extent to which the appropriation of water by means of the Harrell or Big ditch is prior to the plaintiffs' appropriation. In reality, the two subjects are distinct one from the other, and require separate discussion and treatment.

The first construction of the Harrell ditch was to take the water out of Salmon river in the northeast quarter of section 9, township 45 north, range 64 east, and run it into Roland East Side slough, which was but a short distance. The next was to capture the water from Roland slough, in the southeast quarter of the northwest quarter of section 34, in township 64. "It extended along the east side of the bottom," says McClellan, "and up to 1904 had been carried about three miles in length, to a point opposite the San Jacinto lane, and for another quarter of a mile was partly constructed." The present location of the ditch was made in 1892, after which McClellan relates he ran a line for the Harrell ditch throughout its entire length. This was done in September, 1897, and construction commenced immediately afterwards. That, he relates further, is the ditch which was constructed entirely down to the San Jacinto lane, and perhaps a little below, in 1904. On cross-examination of McClellan, it appears that the Harrell

ditch was constructed from the river to the Roland East Side slough in the fall of 1893. The next spring the slough was enlarged for a distance of perhaps a mile. Moore did some work on the ditch in 1894. In 1897 the ditch was started from the Roland slough. It was laid out 77 chains in length, and nearly, if not all, constructed that fall. That work carried it to a point "a good three miles and a half above the San Jacinto lane." The next September (1898) the extension of the ditch was laid out to a point opposite the San Jacinto lane, 330 chains in all. The terminus of the Harrell ditch in 1909 was the same as in 1904. The witness laid out some work in 1909. He surveyed from a point a quarter of a mile north of the San Jacinto lane to the point of crossing Trout creek, since which time he has had nothing to do with the ditch.

Darlington first saw the Harrell ditch in 1910. It then had been built to a point about 300 yards below the road in section 13. There was a strip of sagebrush land all along the canal until it got up near the head, and then wild hay meadows along the river. In 1911 most of the land on the San Jacinto ranch between the river and the Harrell ditch was still in sagebrush. At that time some land had been irrigated from the Roland slough, and a little strip from the Harrell ditch. During the year 1911 the Harrell ditch was built to a point probably a mile and a half further north, and somewhat east into section 7, and since that time has been extended almost to Shoshone creek. About 5,000 acres were brought in under the new construction.

Hugh McGuire relates that he did some work on the Harrell ditch in 1901, namely, extending the ditch from the lane to the old work, and that the first extension after that was in 1904, when it was constructed across the land about a quarter of a mile. That part was not used for irrigation while he was there, and it was in that condition to the end of 1906, when he left.

Adam Patterson testifies that he took charge of the defendant's properties November 1, 1908, and that they built the Harrell ditch from San Jacinto lane to a point north of where the ditch makes a big bend. This extension was made in the latter part of May or the first of June, 1909. McClellan had laid out the line. The big bend that the witness alludes to, probably, is in section 1, township 47, range 65.

Thomas R. Beason testifies that he went upon the defendant's property in 1910. At that time the Big or Harrell ditch was not completed; the upper end of it was used for irrigating land above the lane. There was work done on the Big ditch in 1910, 1911, and 1912, and it was completed to the present terminus in 1912. In 1911 they cleared 500 or 600 acres, and put a couple of hundred acres in grain in 1912. In 1913 the total cleared and broken was 1,700 acres, and in 1914 about that area was sowed to oats, and they broke up 1,200 acres additional. On November 28, 1892, the Sparks-Harrell Company filed notice of location and claim of water to be diverted from Salmon river sufficient to irrigate some 4,000 acres, which relates to the intended appropriation by the Harrell ditch, and on June 12, 1899, filed an amended notice claiming an appropriation of 200 cubic feet of water, and specifying more particularly the lands to be irrigated. The construction

and diversion subsequently made are claimed to have been in pursuance of those notices.

To recapitulate: The notices for the appropriation of water from Salmon river by construction of the Harrell ditch were filed, the first in 1892, and the second in 1899. In 1897 McClellan ran the survey for the ditch throughout its entire length. The first construction was to build a ditch from the river to the Roland slough. The next construction was to capture the water from the slough some distance below by means of the ditch, which was extended 77 chains in the fall of 1897. The next extension was to the San Jacinto lane. This was in the main completed in 1904. It was related that the terminus of the ditch was the same in 1909 as in 1904, and further that there was a strip of sagebrush land all along the canal, extending up to near its head. This was the case still in 1911. There was an extension in 1909 to the big bend, and in 1910, 1911, and 1912 the ditch was extended to its present terminus. In 1911, 1912, 1913, and 1914, large areas under the ditch were reduced to cultivation, and presumably water was applied thereto from the ditch.

The inquiry is, to what extent was there an appropriation of water prior to the plaintiffs' appropriations, the first of which was made in 1906?

There can be no doubt that, if all this extension of the High Line canal had been made and the water applied to the lands under the canal prior to plaintiffs' appropriations, defendant would have had the better right. The defendant and its predecessor, however, have been dilatory in maturing their appropriation, and, if they have not acquired a superior right, it is because of their lack of diligence in applying the water to the soil. Five years elapsed before the construction of the ditch for any considerable distance, after the project was entered upon by filing the notice of location and making survey of the line, and 7 years additional elapsed before its extension to the San Jacinto lane. No further extension was made until five years later, when the ditch was partially constructed to the big bend, and it was not finally completed until two years beyond that time. No considerable effort was made to apply the water to irrigation purposes on the sagebrush land lying under the ditch until 1911, which was about 19 years after the project was entered upon.

[3, 4] An appropriation of water from a public stream may be initiated by notice, now required to be given by law in some, if not all, of the arid states, or by actual diversion from the stream. Either process is evidentiary of the intent on the part of the person giving the notice to make an appropriation. In the former case, the notice would indicate the amount of the intended appropriation; in the latter, the capacity of the ditch or conduit by which the diversion is actually made would be indicative of the appropriator's thought as to the amount of water designed for use. These methods are only initiatory of the appropriation. Other steps must be taken before the appropriator's purpose can ripen into a completed appropriation. These first steps, however, will enable the appropriator to claim his right as

against subsequent appropriations until his scheme has been completed. It has been said that:

"The diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use." Hewitt v. Story, 64 Fed. 510, 12 C. C. A. 250, 30 L. R. A. 265; Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692; Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777.

See, also, Wiel on Water Rights in the Western States (3d Ed.) § 478.

[5] It is a principle of law, recognized by authorities, that an appropriator must exercise reasonable diligence, after he has initiated an appropriation, in applying the water to a beneficial use. If he fails in this, he will be held to have abandoned or forfeited his right, as it may affect appropriations acquired in the meantime. He cannot play the dog-in-the-manger act, and expect for all time to deprive other intended users of the benefits to be derived from appropriations regularly and legally instituted or made. The Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550.

[6] "Diligence," as here employed, is largely a relative term, and its proper application is to be determined by the facts in each particular case as they are made to appear. What would be accounted diligence under a particular state of facts might not be so accounted under different circumstances. Thus a person making an appropriation for the irrigation of a small tract of open land ready for the plow would be expected to apply the water to the beneficial use intended in a much shorter time than one making a diversion for application upon a large tract, where it was necessary to clear the land of brush and shrubbery found thereon before it could be made adaptable to cultivation. And, again, the means that the intending appropriator has at hand, whether meager or ready, has an important bearing upon the situation, and will be taken into account as to whether proper diligence has been employed.

[7] In the light of these observations, we may determine whether the defendant company and its predecessor, the Sparks-Harrell Company, had employed proper diligence in reducing their intended appropriation to a beneficial use prior to the time when the plaintiffs made their appropriations. From the time notice had been given by Sparks-Harrell Company of its intention of making its appropriation, namely, November 28, 1892, to the time of plaintiffs' appropriation, more than 14 years had elapsed, and yet the Big ditch had not been constructed from a point a quarter of a mile north of the San Jacinto lane. Some progress had been made before that time from the head of the ditch at its junction with the Roland East Side slough, but the ditch had been constructed only to the San Jacinto lane in 1904, which was 12 years after the notice was given, and 7 years after McClellan made his survey of the proposed High Line ditch. In the meantime, from 1904 up to the date of plaintiffs' appropriation, no attempt had been made to reduce the sagebrush land under the ditch to cultivation, although the water had been thrown out upon it for the purpose of producing in greater abundance the native grasses found among the sagebrush. The grasses there found were scanty and sparse; nor did irrigation serve largely to promote their growth. The employment

of water for this purpose can scarcely, in this day of agricultural progress in the arid states, be classed as a beneficial use. Further, it does not appear but that the defendant's predecessors had means at their command for constructing this ditch and applying the water to the lands under the ditch in a very much shorter time. Indeed, when the present company once entered upon the work in earnest, it appears that it not only constructed the High Line ditch to its terminus, but reduced the greater part of the lands under it to cultivation in the space of 4 years, from 1911 to 1914.

We conclude, therefore, that because of the want of diligence on the part of the defendant and its predecessor in constructing the High Line ditch and the application of the water through it to a beneficial use, defendant has lost whatever initiatory rights it may have acquired to an appropriation, in so far as it affects the plaintiffs' appropriations, and must be relegated to their superior and paramount rights.

[8] We come now to the subject of the duty of water. The law in Nevada respecting the same seems to be fairly well settled:

"No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. * * * It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual." Barnes v. Sabron, 10 Nev. 217, 243, 244.

An appropriation does not extend in a legal sense to any water except such as is used beneficially. Dick v. Caldwell, 14 Nev. 167.

An appropriator is entitled only to the amount of water he needs, economically and reasonably used, and when he has that he cannot prevent others from using the surplus. Roeder v. Stein, 23 Nev. 92, 42 Pac. 867, 868.

"The law is that an appropriator is only entitled to so much water, economically used, within his appropriation, as is necessary to irrigate his land. The necessary amount of water varies with the seasons." Gotelli et al. v. Cardelli et al., 26 Nev. 382, 69 Pac. 8.

"Cutting wild grass produced by the overflow of the river, or, as expressed by the witnesses, by the water of Reese river coming down and spreading over the land, was not an appropriation of that water, within the meaning of that term. Neither was the grazing of the land an appropriation of the water, under the facts." Walsh v. Wallace, supra.

See, also, Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 73.

The statutes of the state on water rights and irrigation promulgate a like policy, and are in harmony with these views.

Other states have adopted the same principle. The Supreme Court of Idaho has this to say on the subject:

"In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor, simply because his land is not adequately prepared for the economical application of the water." Farmers' Co-operative Ditch Co. v. Riverside Irrigation Dist., 16 Idaho, 525, 102 Pac. 481.

Of like effect is Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083.

[9] The trial court, by a careful analysis, having in mind, no doubt, the Herrington report, which was not introduced in evidence but referred to by counsel and stipulated that it might be considered, has concluded that 12,500 acre-feet was sufficient to answer the needs of the defendant under its appropriations, which seems to us to be a fair and equitable estimate. It is unnecessary to follow the reasoning here. Some observations pertinent to the inquiry may be indulged in, however.

[10] The court has allowed practically 3 acre-feet for 3,000 acres, and 1½ acre-feet for 2,500 acres. Practically all the land to which the appropriations were applicable is low and nearly level, and lies at only a slight altitude above the water as it flows in the streams, and by reason of percolation from the streams and the sloughs which traverse the territory in some sections, and the nearness of the water table to the surface of the soil, must receive considerable subirrigation, the amount of which, of course, is not readily ascertainable. Such land, as reason suggests, does not require the same amount of surface irrigation as land lying at a higher level, or table-land, where its only source of irrigation is from the surface. It is argued that the measurements of water taken in 1914, which form the basis of the Herrington report, do not include the Hubbard, Nall creek, Upper Trout creek, Big creek, and the Shoshone Basin territory. True, that is the case. But in that year defendant was absolutely free to use all the water it cared to, and probably used it upon all the lands that it now claims were subject to irrigation in that year, on the Vineyard, San Jacinto, and Bridge ranches, which comprised a larger area than that which we now find, from a consideration of all the diversions upon all the ranches, the defendant is entitled to irrigate with prior right to that of plaintiffs. Further than this, the hay land claimed to be irrigated in 1914 on these ranches is small in area in proportion to the pasture land.

It is urged also that the irrigation season commences April 1st, and not May 1st as found by the court, and that the estimate of water suited to the needs of defendant should be increased proportionately by reason thereof. The witnesses who have spoken on the subject agree that irrigation in previous years began on defendant's ranches about April 1st, and to this there seems to be no contradiction. The system in that time of the year was evidently by simply flooding these hay and grass lands. The witnesses also seemed to think that kind of use was beneficial in producing an increased amount of hay and grass, but it is certainly not the highest use to which it may be devoted, at any rate as it respects the irrigation of pasture.

Mr. Bark, who has made a study of irrigation, says:

"Up to a certain point the more water the more pasture, and it will require fully twice as much as for grains. I don't think I ever found the point in the pasture lands after which the application of more water would result in no increase, or an actual decrease, of the crop, because we never put water enough on. We have put about 4½ acre-feet on upland pastures and we still got more pasture."

The witness does not claim to have any scientific information as to the amount of water it would require for producing wild hay and pasture under conditions existing with respect to defendant's lands, where irrigation has been previously applied. He says, however:

"Under those conditions I think there is no method by which the amount of water so diverted upon the land could be measured, because it gets a lot of it by capillary attraction, subirrigation laterally."

A table was produced showing the duty of water for alfalfa. It was put in evidence, and shows a constantly increasing yield, as the water was applied in six divisions, beginning with 1.18 acre-feet and ending with 3.78 acre-feet to the acre. It will be observed in the fourth division, with the application of 2.61 acre-feet, there was produced 5.6 tons to the acre, with 2.14 tons to the acre-foot. The fifth division shows the application of 2.99 practically 3 acre-feet, with a production of 6.59 tons to the acre, or 2.20 tons per acre-foot. The sixth application was of 3.78 acre-feet, with a product of 6.8 tons per acre, and 1.8 tons per acre-foot. There was a constantly increasing soil moisture left at the close of the season, running from 10.08 to 19.44 per cent., except that in the fourth division there was 17.12 per cent. against 16.92 per cent. in division 5. Thus it is shown that there is a point where the economic application reaches its maximum utility. It appears by the fifth division that, by the application of approximately 3 acre-feet, 6.59 tons were produced to the acre, being 2.20 tons to the acre-foot; while the sixth division shows an increase in tonnage per acre, there is a substantial decrease per acre-foot. We may test the economic utility by supposing the grower was buying the water with which to irrigate his land. Would he pay for the increased supply and take the larger yield, and the less percentage of yield per acre-foot, or would he be contented with the smaller yield, as indicated by division 5, and pay more than proportionately less for the water? He would probably do the latter, since the larger yield is only about $^{2}/_{10}$ of a ton per acre above the smaller, while the increase of his water purchase would be about $^{78}/_{100}$ of an acre-foot to the acre. This demonstrates that the allowance of 3 acre-feet to the acre for alfalfa is as much, probably, as could be economically applied.

The witness Bark says that the water required for the irrigation of hay is about the same as for alfalfa. The experiment whereby the table was produced was evidently on upland. He says further, in effect, that if you keep putting more water into the soil and leaving more thereon at the end of the season, unless you have excellent drainage, you will water-log your land in a short time, and render it valueless.

Following the witness further, he is of the opinion that pasture needs about 10 light irrigations per year, extending from about April 1st to September 30th, or possibly into October. He explains that pasture is of shallow-rooted grass, and there is no need to soak it deep, but that a light irrigation should be oftener applied. A light irrigation, he further explains, is about 3 acre-inches, which, if reduced to acre-feet, there being 10 irrigations per season, would amount to 2½ acre-feet for that time.

"That method is adopted," says the witness, "on pastures that are grazed continuously during the summertime so as to keep up the growth of grass. I don't think it would require as much water, although I don't pose as an expert in that particular line, to produce a growth that was to be grazed off after the summer range has been exhausted, as it would if you had stock on it all the time. * * * It usually takes a little less water where the altitude is higher; there isn't so much evaporation, cooler nights, and the season is shorter."

Considering further, then, what is to be found in the discussion by this witness, as has been previously remarked, from the fact that defendant's hay and pasture lands lie low and approximately level, with the water table near the surface and the percolation from the streams and sloughs considerable, we are persuaded that 1½ acre-feet to the acre for the pasture lands, as allowed by the court, is quite sufficient for the economic irrigation of such lands.

There is another condition to be considered; that is, as the evidence seems to indicate, there is a time in June or early in July of each year when the water rises to such an extent that much of the land is flooded, notwithstanding the streams may be kept free from obstructions. These flood waters go to the benefit of defendant. The decree furthermore fixes no limitations upon the time of rise. So that defendant may use the water early or late, as it is disposed, so that it does not use more than the quantity prescribed during the season.

The findings of the court, as to the quantity of water to which the defendant is entitled prior in right to the plaintiffs, are therefore approved.

The defendant challenges the jurisdiction of the court to make provision in its decree as follows:

(a) That defendant must use the waters constituting its prior right only upon certain lands irrigated prior to 1907; (b) that it must install in its canals and ditches automatic measuring devices and refrain from the use of any water for the irrigation of its lands without the use of such devices; (c) that such measuring devices shall at all times be subject to the inspection of the plaintiffs, who shall have the right perpetually to go upon and over defendant's lands in Nevada for the purpose of such inspection; and (d) that the court retain jurisdiction to make rules touching the manner of diverting, measuring, and distributing the waters belonging to defendant in Nevada, and for directing that defendant "keep accurate and detailed records of the amounts of water diverted and to require reports to be filed from time to time of the amounts so diverted, and generally to make such orders as may be found reasonably necessary to give effect to the decree, and to appoint commissioners or watermasters to make distribution in accordance with its terms."

[11] The question is presented as to the extent to which the judgment and decree of a court exercising jurisdiction in one state may become operative in another. And, incidentally, it is urged that, as to the waters of streams which are interstate in character, their benefits should be equitably distributed between the states through which they flow. The thought comes from the suggestion of the court, in Kansas v. Colorado, 206 U. S. 46, 117, 27 Sup. Ct. 655, 51 L. Ed. 956, that

there might come a time when such a distribution would have to be made of the waters of the Arkansas river. A sufficient answer to the contention is that the pleadings and evidence in this case disclose no such condition as to require an equitable distribution of benefits of the waters of Salmon river and its tributaries between the states of Idaho and Nevada; and besides, the matter is one for adjustment between the states; it is not for individual users to raise a controversy about the use of such water in another state, out of the territorial jurisdiction of the court.

[12] As to the main question, this court has determined, by the case of Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11, 81 C. C. A. 207, that a suit of the nature here maintained is essentially one to quiet title to real property, and that it is local and not transitory. The Rickey Land & Cattle Company, in that case, set up certain rights in California that it claimed to the waters of the stream, and we held that its cross-complaint setting up such rights could not operate to defeat complainant's cause, but only defensively, "and not to give the defendant a right to have its title also quieted in the state of California." Hawley, District Judge, in the same case, on the trial in the District Court, had this to say:

"It [the court] cannot, by any decree which it may make in this suit, directly reach the dams, reservoirs, or ditches belonging to the defendant located entirely within the state of California." Miller & Lux v. Rickey [C. C.] 127 Fed. 573, 575.

In this expression of the law we concur. But has the plaintiff no remedy where a defendant has been personally served and appears in the court, and is enjoined forever from doing certain things in another state to the detriment of plaintiff's rights? The authorities are clear that he has. Such a remedy was sustained in the Rickey Land & Cattle Co. Case, supra.

But it is insisted here that the decree goes beyond the jurisdiction of the court to adjudge and provide. A court of chancery is without jurisdiction to give compensation for a nuisance or tort to real property lying in another jurisdiction or state, nor can it enjoin or restrain the continuance of such a nuisance. Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233, 14 L. Ed. 674; Mississippi & Missouri R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311. Nor is it within the power of such a court to declare a deed to lands in another state null and void. Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640.

[13] The reason assigned for the latter holding is that, while a court of equity may in a proper case compel a party to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant. That is to say, the rem may not be affected by the direct operation of the decree where it is beyond the territorial jurisdiction of the court, but the court may, acting in personam, coerce action respecting it.

Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181, is illustrative as well as declarative of a like principle. The case was instituted in a Ken-

tucky court for the purpose of obtaining a conveyance of land in Ohio. Objection was made to the jurisdiction of the court to give the relief desired. Chief Justice Marshall, after premising that there was much reason for considering the action local in character and for confining it to the court sitting in the state where the lands lay, says:

"Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

After citing cases, among which was Penn v. Lord Baltimore, 1 Vez. 444, where the Chancellor of England decreed the specific performance of a contract respecting lands lying in North America, the distinguished jurist deduces the principle that:

"In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

The principle is rather more broadly stated in Phelps v. McDonald, 99 U. S. 298, 308 (25 L. Ed. 473), as follows:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitæ, which he could do voluntarily, to give full effect to the decree against him."

The principle, in its more comprehensive statement, was applied in Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538, which was a suit by a citizen of Massachusetts to enjoin a defendant, a resident of the same state, from prosecuting an attachment and garnishment in the state of New York involving the property of complainant.

The principle was also applied by this court in Rickey Land & Cattle Co. v. Miller & Lux, supra, and was later applied in the Salton Sea Cases, 172 Fed. 792, 820, 97 C. C. A. 214. The latter cases were instituted in the superior court of California, and removed into the Circuit Court of the United States for the Southern Division of the Southern District of California, to restrain in one phase of the controversy the diversion of water in Mexico, which was beyond the territorial jurisdiction of the court. Among others, the decree contained the following provisions:

"That defendant be perpetually enjoined and restrained from diverting from the Colorado river any of the waters thereof, in excess of the substantial needs of the people dependent upon the canal, described in complainant's bill of complaint, for water supply for domestic and irrigation uses and purposes, and such other lawful purposes as the same may be applied to. * * *

"That the said water so diverted, whatever may be the amount, shall be so controlled and used that the same shall not flow upon the lands of the complainant described in the bill of complaint. * * *

"That the defendant be required to regulate the flow of any water that may be diverted by it so that there shall be no waste water flowing therefrom as the result of such diversion upon or over the lands of complainant, above-described.

"That said defendant be restrained from turning out of its canals any waste water at any point whence the same will naturally flow upon or over the lands of complainant, or flow into the lake now covering the Salton Sink, and thereby substantially increase the amount of water therein, or maintain the amount of water therein, or prevent the decrease thereof by natural causes."

By the second and last of the Salton Sea Cases, which was in the nature of a proceeding for contempt for violating these provisions of the decree, the provisions were themselves in effect approved, although they were designed to be effective in Mexico outside of the territorial jurisdiction of the court. The object of the cases was to prevent the continuation of a nuisance being perpetrated in Mexico as well as in California, causing damage to the complainant's properties in California.

[14] Now, turning to the case in hand, the decree complained of goes but little further, if any, than that part of the decree above set out in the Salton Sea Cases. It is true that the trial court has confined the use of the water to be diverted by defendant, to which it has a right superior to that of the plaintiffs, to such lands as were irrigated prior to 1907. This is setting bounds to the territorial use of the water. Ordinarily, one having obtained the right to prior use of a given quantity of water is not restricted as it respects the place of its use, and may change it to a different locality from that where first applied. He may also change the point of diversion and the character of its use if the rights of others be not affected thereby. Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 73, 115.

[15] In the case at bar there is a special reason for confining the use of defendant's prior right to the lands irrigated prior to 1907. By the estimate of the trial court, in which we concur, if the 12,500 acre-feet of water is used upon such lands, by reason of percolation 8,500 acre-feet would find its way back into the stream, and the loss to the plaintiffs would amount to about 4,000 acre-feet only. If, however, the whole of the 12,500 acre-feet was carried away to another locality, where it would all be absorbed and none of it would reach the channel of the river again, the loss to the plaintiffs would be that much greater. The real condition is, when the plaintiffs' rights are consulted, that the defendant's absolute appropriation prior in time to that of plaintiffs is the 4,000 acre-feet only, because the remainder of the 12,500 feet is returned to the stream after use. So that, if the defendant is to have the use of 12,500 acre-feet of water superior in right to that of plaintiffs, in justice and equity its use should be confined to that particular locality where it was being used when plaintiffs acquired their appropriation.

Now, if the court has not the power, proceeding in personam, to restrict the defendant's use of the water to a circumscribed locality,

it would be practically powerless to do justice between the parties litigant. We are convinced, however, from the authorities above considered, that it has such power in ample scope to protect the plaintiffs from the diversion of the water to any locality where it would conduce to their injury. It will be noted that the decree does not attempt to describe the exact metes and bounds of the lands to which defendant's appropriation was first applied, or was being applied at the time of plaintiffs' appropriation, but declares only that the same is included within certain legal subdivisions which embrace a very much enlarged territory as compared with that upon which appropriations were actually made, the purpose being to confine the use of the water to certain definite delimitations, with a view to preventing its being carried away to localities where the result would be to lessen the flow in the stream, to the detriment of plaintiffs. There is no attempt by the decree to quiet the defendant's title to its appropriations, but only to determine what they were and to what lands applicable, with a view to doing justice between the parties.

[16] It is furthermore necessary, to protect the plaintiffs against the encroachments of defendant, that the water be measured. The proper measurement is a duty personal to the defendant. It was altogether appropriate, therefore, that the court impose upon the defendant the obligation of installing automatic measuring devices, and, for the protection of the plaintiffs, these should be subject to their inspection. So it is respecting rules regulating the manner of diverting, measuring, and distributing the water and the keeping of records of the amount of water diverted, etc. These were all directions of the court operating in personam, and not directly upon the res, and were and are within the court's equitable jurisdiction to determine and declare.

[17] It is also assigned as error that the court quieted title in plaintiffs to more than 45,000 acre-feet of the waters of Salmon river. This feature of the controversy is regulated by the laws of Idaho. Sess. Laws 1915, p. 216. Under a project like this, 10 years is allowed within which to make the diversion and proof thereof for a beneficial use. The appropriation is contingent upon the use, of course, but in the larger projects the appropriation speaks as of the date of the license, though if not applied to a beneficial use within 10 years, it lapses. In the meantime no one will be deprived of the use of the water not reduced to a beneficial use under the project.

Another assignment of error relates to the refusal of the court to admit certain testimony. We have carefully examined the matter, and find no merit in the assignment.

The decree will be affirmed.

VINEYARD LAND & STOCK CO. et al. v. TWIN FALLS OAKLEY LAND & WATER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2886.

1. WATERS AND WATER COURSES ⟸247(1)—PRIOR APPROPRIATION—EVIDENCE—SUFFICIENCY.

In a suit to determine the rights to the waters of an interstate stream claimed under the Carey Act (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), evidence *held* sufficient to establish the older rights in plaintiffs.

2. STIPULATIONS ⟸14(1)—CONSTRUCTION—WATER RIGHTS.

A stipulation by defendant that "we are the owners of whatever rights we have on our side, and that you are the owners of whatever rights those people [referring to the early-day settlers] may have had on your side," was not a waiver of primary proofs showing acquirements of the rights of plaintiffs' predecessors to use the waters of the stream.

3. WATERS AND WATER COURSES ⟸240—APPROPRIATION—RIGHTS OF SUCCESSORS.

Defendants would be precluded by prior appropriations of water from the stream by plaintiffs' predecessors adequately established by the evidence.

4. APPEAL AND ERROR ⟸1008(1)—FINDINGS OF TRIAL COURT—REVIEW.

An appellate court will not disturb the findings of the trial court on questions of fact unless it be made to appear that the latter court is clearly in error in its conclusions.

5. WATERS AND WATER COURSES ⟸254—DUTY OF WATER—DETERMINATION.

Defendants could not complain that the duty of water was not measured by the old flooding system, they not being entitled to more water than they were able to apply to a reasonable and economical use.

6. WATERS AND WATER COURSES ⟸240—PRIOR APPROPRIATION—AMOUNT.

Whoever is first in time is entitled to sufficient water from a public stream for his reasonable needs.

7. WATERS AND WATER COURSES ⟸254—APPROPRIATION—ALLOWANCE—SUFFICIENCY.

In a suit to determine conflicting rights to the waters of a public stream, an allowance to defendant of three acre-feet per acre for hay and grain lands, and two acre-feet for grazing lands, *held* amply sufficient for defendants' needs, considering the acreage subject to irrigation and the dates of the appropriations.

8. WATERS AND WATER COURSES ⟸247(1)—APPROPRIATION—ALLOWANCE—SUFFICIENCY.

In a suit between defendant stock company and plaintiff, who had entered upon a project under the Carey Act of Congress (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), for impounding waters from a public stream for distribution to users, an award to plaintiff of 2¾ acre-feet per acre of the land under the project *held* reasonable.

9. WATERS AND WATER COURSES ⟸247(1)—UNITED STATES DISTRICT COURT—WATER RIGHTS—JURISDICTION.

The suit being for the purpose of quieting plaintiffs' water rights in Idaho, the court was without jurisdiction to settle water rights in Nevada.

10. WATERS AND WATER COURSES ⟸247(1)—DEFECTS OF PARTIES DEFENDANT

Where no complaint is made that others than defendants are attempting to interfere with plaintiffs' water rights within the court's jurisdiction, there was no defect of parties defendant.

11. CORPORATIONS ⟨⟹506—PARTIES—DEFENDANTS.
The owner of a large proportion of the stock of defendant land company, in a position to control its action, was a proper party defendant to a suit against the land company.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Twin Falls Oakley Land & Water Company, a corporation, and another, against the Vineyard Land & Stock Company, a corporation, and another. From the decree, defendants appeal. Affirmed.

Frank K. Nebeker, of Salt Lake City, Utah, C. A. Boyd, of Ogden, Utah, Edwin Snow, of Boise, Idaho, and C. B. Henderson, of Elko, Nev. (Howat, Marshall, McMillan & Nebeker, of Salt Lake City, Utah, of counsel), for appellants.

Samuel H. Hays and P. B. Carter, both of Boise, Idaho, for appellees.

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

WOLVERTON, District Judge. The defendants below are appealing. The Land & Water Company heretofore entered upon a project, under the Carey Act of Congress (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1916, § 4685]), for acquiring and impounding water from Goose creek and its tributaries, and distributing it to users. Goose creek takes its rise in the state of Nevada, and crosses the state line into Idaho, and by the project the water is impounded in the latter state. In support of their water rights, the plaintiffs claim that they purchased certain rights from various users of the waters of Goose creek, which they assert are prior and superior to the rights of all other persons taking water from the stream; also that they acquired the right to the use of 500 second-feet under permit from the state, of date March 27, 1908, and an additional amount of 1,000 second-feet under permit of date March 10, 1909, which rights are prior and superior to all rights acquired subsequently to the respective dates of their appropriations.

The defendant Vineyard Land & Stock Company, by its answer, claims, on the other hand, that, long prior to any such appropriations of water from Goose creek or its tributaries, its predecessors in interest appropriated water therefrom for the irrigation of approximately 2,000 acres, with a diversion of about 40 second-feet, and that at the present time it has under irrigation about 4,000 acres, with a diversion of approximately 80 second-feet.

This presents the issues of fact. The questions of law are much the same as were in controversy in the case of Vineyard Land & Stock Co., Appellant, v. Twin Falls Salmon River Land & Water Co. and Salmon River Canal Co., Limited, Appellees, 245 Fed. 9, —— C. C. A. ——, No. 2885 on this docket, decided contemporaneously with this case. One additional question is presented here by an amendment to the answer, namely, that there is a defect of parties, in that there are numer-

ous persons in Nevada, Utah, and Idaho who have, or claim to have, rights and interests in and to the waters of Goose creek and its tributaries, who are not made parties defendant to this suit.

[1, 2] The first question for discussion is brought into the record by the contention of counsel for defendants that plaintiffs have not established the older rights to the waters of Goose creek, being such rights as are claimed by them as of prior origin to those claimed under permits from the state of Idaho. It is asserted, in effect, that plaintiffs' case as to these rights is wanting in primary proofs of the acquirement thereof by the early settlers to whom the plaintiffs claim to be the successors. Counsel for appellees seem to think that the necessity of such proofs was waived by stipulation of opposing counsel, and cite the statement of Mr. Boyd, as follows:

"In other words, that we are the owners of whatever rights we have on our side, and that you are the owners of whatever rights those people [referring to the early-day settlers] may have had on your side."

We do not understand that this stipulation is a waiver of such primary proofs. But, considering the nature of the rights to be established and the great lapse of time that has intervened, we are satisfied that the proofs made are quite sufficient upon which to deduce their acquirement by the early-day settlers. Certain decrees of the District Court of the Third Judicial District of the Territory of Idaho, two in number, were offered and received in evidence. The first of these bears date September 10, 1886, and the second March 19, 1892. These decrees purport to settle certain water rights between the parties litigant, there being a large number of them. These water rights are the same as the early-day settlers are supposed to have acquired by diversion from Goose creek. The defendants in this case were not parties to either of such causes.

Benjamin Howells, who was produced as a witness for plaintiffs, relates that he first went to the vicinity of Oakley in 1878, and was there in 1880, 1881, and 1888, and distributed the waters of Goose creek as watermaster. Referring to a map (Plaintiffs' Exhibit 12), he was able to recognize the several canals and ditches taken out of Goose creek, and to locate the lands upon which the water was used. He says:

"In 1888 I distributed the waters on Goose creek over most all of the country shown in green on Plaintiffs' Exhibit 12. I would approximate the acreage at 6,000 to 6,500 acres; perhaps not all irrigated that year, but as much as could be with the supply of water we had."

Then he goes on to state the number of acres irrigated in 1878, 1879, 1880, and so on. He says, further:

"People were coming into the country and developing it, in small tracts at first, and then increasing, and along as the settlement grew older more people came in. * * * The waters of Goose creek and its tributaries were used by these farmers from year to year. In 1888 and subsequent years many of the ditches were able to carry much more water than we had for them. * * * There was about 6,500 acres effectively cultivated. * * * Prior to the construction of the reservoir system the people began irrigation as soon as possible in order to get their hay lands, alfalfa lands, and so on irrigated up as early as possible in the spring."

The testimony of the witness Sol. Worthington has an important bearing upon the same subject.

By the decrees one is enabled to ascertain the names of the users, where diversion was made, and the amount of water claimed, so that but little remains to conjecture. When we consider that water rights are acquired by diversion and use, here is ample evidence of diversion and use which continued for a considerable space of time, and, while there is no one to say that he on such a date opened a ditch, and took out a certain quantity of water, and applied it to a certain tract of arid land for producing crops, the fact does appear, to the satisfaction of any candid mind, that the water was diverted by settlers and devoted to a useful purpose, and these settlers claimed water rights by reason thereof, and plaintiffs are their successors in right and interest. The decrees make that specific which otherwise would remain indefinite and uncertain.

[3] True, defendants were not parties to the suits giving rise to these decrees, and are not precluded by their findings; yet they are precluded by the appropriations of these early-day settlers, which we hold to be adequately established by the evidence alluded to, considered with such other evidence in the case as bears upon the subject.

It is further insisted that the court erred in its findings touching the quantities of water granted in pursuance of these early settlers' rights, and the dates of the inception of such rights. The evidence respecting these matters is voluminous, and a discussion of it in detail cannot well be embodied in an opinion of reasonable length. Suffice it to say, therefore, that we have carefully examined the whole of such testimony, and fully concur in the findings of the trial court. The same conclusion has been reached as to the quantities of water awarded the defendant Vineyard Land & Stock Company, and the dates of the inception of the rights to which they pertain.

[4] An appellate court will not disturb the findings of the trial court on questions of fact unless it be made to appear that the latter court is clearly in error in its conclusions. Not only is there no such error apparent here, but we quite agree that the trial court's findings are wholly sustained by the testimony.

[5-7] Much is said about the duty of water. The lower court has awarded to the plaintiffs 2¾ acre-feet per acre of the lands under their project, and to the defendant Vineyard Land & Stock Company at the rate of 3 acre-feet per acre for its hay and grain lands, and 2 acre-feet for its grazing lands. Much testimony has been adduced also, not a little of it of a scientific nature, on this subject, which it would require much space in the opinion to analyze. The Land & Stock Company insists that the duty of water should still be measured by the old method of irrigation of pasture and the native grasses for the production of hay, which was by the flooding system, that allowed the water to cover the surface of the soil, and actually to remain thereon for considerable periods of time. This method is being disapproved of in more recent years as wasteful and not an economical use. No person is entitled to more water than he is able to apply to a reasonable and economical use. True, it may be that good results are obtainable

from the former method, but that does not augur that just as good results may not be secured by a much more moderate use, which would leave a large quantity of water for others, who need it as much as the Land & Stock Company. Whoever is first in time, however, is entitled to sufficient for his reasonable needs. We are impressed that the award made this defendant is amply sufficient for its needs, considering the acreage subject to irrigation and the dates of its several appropriations. In the Twin Falls Salmon River Case, 245 Fed. 9, — C. C. A. — (No. 2885), which we are deciding with this, we are approving an award of 3 acre-feet for the irrigation of hay and grain land, and 1½ acre-feet for pasture lands, and, for a further discussion of the subject, reference is made thereto.

[8] Defendant Land & Stock Company also excepts to the allowance by the court to plaintiffs of any quantity of water in excess of 30,000 acre-feet, upon the basis that there were under irrigation in 1915 but 20,000 acres, and that the duty of water for this acreage is 1½ acre-feet per acre as prescribed by the new plan of the Twin Falls Oakley project. Defendants also complain of the allowance to plaintiffs at the rate of 2¾ acre-feet per acre in view of the duty of water assigned under the new plan. Account must be taken of the fact that the 1½ acre-feet under the new plan is to be delivered at a point within one half-mile of the place of intended use, which, of course, leaves out of view seepage from the reservoir and canals, and evaporation. Inquiry relative to this latter subject, plaintiffs' counsel say, was not gone into because of the "obvious insufficiency of the water supply to cover the entire tract for which the works were built." The fact appears from the record that the total discharge from Goose creek and its tributaries into the reservoir was: For 1911, 49,170 acre-feet; for 1912, 74,000 acre-feet; for 1913, 50,915 acre-feet; for 1914, 64,740 acre-feet.

All this water was regularly used on the area which was then in cultivation under the project. So that no water has been allowed to go to waste, and there has at no time been any surplus water which the Land & Stock Company would be entitled to for use by reason of its deferred appropriation.

The plaintiffs' project contemplates the irrigation of 50,000 acres, and they are entitled to their appropriations sufficient for the purpose. The court, however, has dealt with a theory, and not a condition, and this presumably because of the fact that all the waters of Goose creek and its tributaries were being employed for a useful purpose. Nor can it be anticipated that the quantity to be had from the source specified will ever be sufficient to supply the reasonable needs of plaintiffs under their project, even at the rate of 1½ acre-feet to the acre. But, as we say in case No. 2885:

"Under a project like this, ten years is allowed within which to make the diversion and proof thereof for a beneficial use. The appropriation is contingent upon the use, of course, but in the larger projects the appropriation speaks as of the date of the license, though, if not applied to a beneficial use within ten years, it lapses. In the meantime no one will be deprived of the use of the water not reduced to a beneficial use under the project."

See Idaho Sess. Laws 1915, p. 216.

We find no reason for modifying the decree in pursuance of the exception.

The next error assigned is in respect to the provisions of the decree "intended to operate upon property and rights and to regulate the internal affairs of appellant in a foreign state." This subject has been fully treated of in case No. 2885, and what is said there has pertinent application here.

[9, 10] The question pertaining to interstate waters is also disposed of in case No. 2885. This has direct bearing on the controversy presented by the amendment to the answer, that there is a defect of parties. The purpose of the suit is to quiet title to plaintiffs' water rights in Idaho. The court is without jurisdiction to settle water rights in Nevada. No complaint is made that parties other than the defendants are attempting to interfere with plaintiffs' acquired water rights in Idaho, and there can be no cause for injunction against others than the defendants until attempted interference is shown. If there are any others who have rights superior to plaintiffs' not parties to the suit, of course their rights cannot be precluded by the decree herein. They may yet assert such rights, but they are not necessary parties to this suit, not having attempted to assert them to the impairment of plaintiffs' contention.

[11] Another assignment is that the cause should be dismissed as to the Utah Construction Company. It appears that such company is the owner of a large proportion of the stock of the Land & Stock Company, and is in a position to control its action, and might attempt to do so. For this reason, it is at least a proper party to the suit.

Decree affirmed.

McPHERSON et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

No. 2867.

1. APPEAL AND ERROR ⟸4—PROPER MODE OF REVIEW.
   An order entered in a suit in equity brought by a receiver, vacating a previous order made on settlement of a compromise decree allowing fees to counsel for the receiver, *held* properly reviewable by appeal.
2. RECEIVERS ⟸96—APPOINTMENT OF COUNSEL—RECEIVER FOR COLLECTION OF ASSETS.
   The general rule that a receiver should not employ counsel of either party is limited to cases of adverse interest, and has no application to a case in which a receiver is appointed, in accordance with the prayer of the bill, to recover property fraudulently conveyed by the defendant.
3. RECEIVERS ⟸96—UNITED STATES ATTORNEY—APPOINTMENT AS COUNSEL FOR RECEIVER.
   The United States brought a suit in equity against a corporation, alleging that it had defrauded the government of internal revenue taxes, that it was insolvent, that its assets had been converted by stockholders, and praying for a receiver to recover such assets, and such receiver was appointed. *Held*, that there was no impropriety in the appointment by

the court of the district attorney and assistant district attorney, who had brought the suit as counsel for the receiver, to bring suits against the stockholders.

4. DISTRICT AND PROSECUTING ATTORNEYS ⟸6(1)—UNITED STATES ATTORNEY —RIGHT TO ACCEPT PRIVATE COMPENSATION—"CIVIL ACTIONS IN WHICH THE UNITED STATES ARE CONCERNED."

In a suit by the United States against a corporation, charged with having defrauded the government of internal revenue taxes, a receiver was appointed to recover money alleged to have been fraudulently converted by stockholders, and the district attorney and his assistant were appointed as his counsel. A suit was brought by the receiver against the stockholders, which was compromised and settled, the costs to be paid by defendants. On entry of the decree the court allowed a counsel fee to the receiver's attorneys, which was paid by the defendants. Criminal prosecutions for the fraud were also pending against certain of the defendants. *Held*, that the receiver's suit was ancillary to the main suit, and within Rev. St. § 771 (Comp. St. 1916, § 1296), which makes it the duty of the district attorney to prosecute "all civil actions in which the United States are concerned," and that it would have been the official duty of the district attorney to conduct the suit, if requested by the Attorney General; that the fact that the appointment was made by the court without such request was immaterial, as it was known to the Attorney General, and the district attorney and his assistant were treated by him and the court throughout as representing the government, as they in fact did; and that it was contrary to public policy to permit them to receive private compensation, although paid by defendants for the performance of an official duty, at least without the consent of the Attorney General, and especially in view of the pending criminal prosecutions.

In Error to, and Appeal from, the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Ancillary suit by Edward L. Taylor, Jr., as receiver, against Dennis Kelly and others. Sherman T. McPherson and Harley E. Burns appeal from an order entered on motion of the Attorney General of the United States. Affirmed.

Lawrence Maxwell and Edward P. Moulinier, both of Cincinnati, Ohio, for plaintiffs in error and appellants.

Stuart R. Bolin, U. S. Atty., of Columbus, Ohio, for defendants in error and appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On April 10, 1915, the United States filed its amended bill in equity in the court below, alleging that the Capital City Dairy Company, of Columbus, Ohio, had defrauded the government out of large sums of money in connection with the manufacture and sale of artificially colored oleomargarine, through the payment of a tax of only one-quarter of a cent per pound applicable to the uncolored product, instead of 10 cents per pound to which artificially colored oleomargarine was subject; further alleging due estimate, assessment, and levy against the Dairy Company of a tax of more than $2,000,000 on account of those frauds, and the lien of the United States thereunder on all the Dairy Company's property, the sale under the levy of all that company's tangible property (leaving more than

$1,800,000 still unpaid), the conversion by stockholders of the company's assets through the receipt of dividends not paid out of profits, the company's abandonment of its business, its insolvency, and its lack of assets except the sums misappropriated by stockholders; and praying for the appointment of a receiver, with authority to collect from stockholders the sums so misappropriated, and to apply the same toward the payment of the remaining lien of the United States. (The original bill had been filed February 5, 1915.)

The appellants McPherson and Burns, who were then respectively United States Attorney and Assistant United States Attorney for the Southern district of Ohio, signed the bill as solicitors for plaintiff. Nine days later Edward L. Taylor, Jr., was duly appointed receiver of the Dairy Company's assets, with authority to recover all property interests of the Dairy Company, and Messrs. McPherson and Burns were, on the court's own motion, designated as counsel for the receiver, "on account of the knowledge possessed by [them] of the matters affecting the defendant, its officers and stockholders." Two days later the receiver, under special leave granted, filed through appellants, as his solicitors and counsel, his bill against several stockholders of the Dairy Company, including Dennis Kelly, as well as representatives of the estates of two deceased stockholders and the wife of Dennis Kelly, to recover (and apply to the debt of the United States) corporate moneys fraudulently misappropriated and concealed.

In September, previous to the filing of the original bill for receivership, several of the defendants had been indicted in the District Court below on account of the frauds involved in the receivership suit. The indictments were still pending, and appellants were actively connected with the prosecutions, under direction of a special assistant to the Attorney General, and expected to take part in the trials which were soon to occur.

On April 28, 1915, seven days after the receiver's bill against the stockholders was filed, an offer of $400,000, made by the defendants other than the Pirrung estate, in settlement of the civil liability of all defendants except that estate, was accepted by the Attorney General, the defendants in that connection to pay the costs. This offer and this settlement were made and discussed at a conference in the office of the Commissioner of Internal Revenue, at which were present the Commissioner, his solicitor, the collector of internal revenue for the Southern district of Ohio, the receiver of the Dairy Company, Mr. Herron of the Attorney General's staff, the appellant McPherson, United States Attorney and solicitor for the receiver, and two counsel for the compromising defendants, as well as another official representing the government. Nine days after this conference and compromise, the various defendants involved filed a formal answer to the receiver's bill, and on the same day the receiver reported to the court and recommended the acceptance of the offer of "$400,000, and costs herein to this date, taxable against the last above named defendants, said costs to include such compensation for the receiver herein and fees for his attorneys as this court may order and direct to be paid." The receiver's recommendation was approved by the court, and on the following day

(May 8th) the court fixed the receiver's compensation at $20,000, and that of the appellants, as attorneys for the receiver, at $20,000 in the aggregate. These two items of compensation were immediately paid by the defendants, in connection with the payment of the first installment of the compromise payment.

On June 1st the Attorney General moved to vacate the allowance to both the receiver and his counsel, whereupon each of the three persons concerned placed in the hands of the court the amount of the fee awarded and paid him, and expressed in writing his willingness that the court reconsider its allowance of fees and make such order as the facts might warrant.

The principal grounds of the Attorney General's motion (so far as counsel fees are concerned) were that appellants' service in question was an official service in an action to enforce a civil liability to the United States, for which compensation other than the official salary is forbidden; that the settlement involved the compromise of an alleged violation of the internal revenue laws, for which United States attorneys are forbidden to receive compensation; that appellants' relations to the pending criminal cases made such payment of counsel fees improper; that the order for payment was made without previous notice to the United States; and that the compensation allowed appellants was grossly excessive. The Attorney General also asked the annulment of the original designation of appellants as counsel for the receiver, for the reason that the action in which the receiver was appointed was begun by appellants as attorneys for the United States as plaintiffs, and that accordingly their appointment as attorneys for the receiver was improper.

[1] Hearing was at once had upon the Attorney General's motion, and resulted in an opinion by the District Judge that appellants were, in the prosecution of the receiver's suit, acting in their official capacity as United States Attorney and Assistant United States Attorney respectively, and so were not entitled to receive compensation other than their official salaries; also that the Attorney General had not consented to the payment of such compensation. The United States thereupon disclaiming right to the $20,000 paid appellants, and Daniel Kelly then applying for the same, the amount was returned to him, on his giving bond to pay appellants so much of the $20,000 as might thereafter be allowed to one or both of them. The question of the receiver's compensation was reserved by the court. Its order denying compensation to Messrs. McPherson and Burns is before us for review, both on appeal and writ of error. We think appeal the proper remedy, and the writ of error will be dismissed.

A further statement of facts will assist in an understanding of the controversy: On April 20, 1915, the day before the receiver's bill was actually filed, the Commissioner of Internal Revenue and the Attorney General were advised by appellant McPherson of the appointment of himself and appellant Burns as attorneys for the receiver; it appears that at the compromise conference in the Commissioner's office, when appellant McPherson stated that he would leave his fees to the court, Mr. Herron said that he (McPherson) "could not get anything for what

he had done prior to his appointment as attorney for the receiver"; that Mr. McPherson replied, "Of course not," and that Mr. Herron then said, "Oh, well then, why talk about that?" and in his affidavit he states:

"Undoubtedly I gave the impression to the attorneys for the defendants that in the settlement the matter of attorney's fees were not an item to be seriously considered, and undoubtedly Mr. Taylor, in his statement as to the court's fixing his fee, left the same impression on the minds of those present."

Mr. Herron, appellant McPherson, and Receiver Taylor, after the compromise was arrived at, went to the office of Assistant Attorney General Wallace, to whom the proposition was presented. Mr. Wallace then went to Attorney General Gregory, and received his approval of the compromise, which was reported back by Mr. Wallace to Messrs. Herron, McPherson, and Taylor. Mr. McPherson says expressly (and Mr. Taylor by apparently permissible implication) that Assistant Attorney General Wallace was informed of the agreement respecting fees of receiver's counsel. Mr. Wallace expressly denies this, and Mr. Herron says he has no recollection of anything being said at either conference with Mr. Wallace about receiver's fees or attorney's fees, and is "confident they were not mentioned." Without questioning the good faith of Messrs. Taylor and McPherson, we cannot doubt that Mr. Wallace did not understand that feature of the situation, and had no idea that appellants were to receive any compensation for their services, except as included in their official salaries, and that had he so understood, he would not have assented to it; and it is clear that Attorney General Gregory was not advised of that feature. From what was said, however, at the conference first mentioned, and from the subsequent announcement of the compromise offer, we are convinced that appellants and the receiver, as well as defendants' counsel, understood (though, as it turned out, mistakenly) that the Department of Justice had consented that the costs to be paid should include the receiver's compensation as well as that of his counsel for services rendered after, but not before, the receiver was appointed, to be fixed by the court; and Mr. Herron's statement confirms the naturalness of such understanding.[1] Acting on this understanding, the attorneys for defendants, together with the receiver and appellants, agreed between themselves that none of them should make any suggestion to the court as to the amount of either receiver's or attorney's fees; and in the order which was drafted by the participation of all the counsel concerned blanks for the items of compensation were left to be

[1] Mr. Herron's affidavit states that it was understood that "the receiver was to be allowed by the court what his services justified, and that Mr. McPherson should receive the ordinary pay of an attorney for what he had done since his appointment as attorney for the receiver, but I did not think the matter was worth mentioning, and I am sure that no one spoke of it. I had given no thought to the impropriety of Mr. McPherson getting any compensation at all, feeling that he had done a great deal of valuable and unique work for the government, was a great factor in making the settlement, and therefore might well have an extra allowance made to him. I understood, however, that that allowance must be based on what he had done since he was appointed attorney for the receiver."

filled in by the court. It is conceded on all hands that defendants' attorneys, as well as Messrs. McPherson and Taylor, observed that agreement. It appears, however, that appellant Burns, on being applied to by a person supposedly in Kelly's interest for information (in connection with the raising of the money required to carry out the compromise) as to the amount of the receiver's compensation, attorney's fees, and costs which Kelly would probably be called upon to pay, stated that it would be impossible for him to give an idea upon that subject, but that, if the court asked for suggestions as to the amount of such fees, he would say that "a fair and reasonable fee would be 5 per cent. of the amount agreed upon in settlement to the attorneys and 5 per cent, to the receiver." Appellant Burns disclosed to Judge Sater the fact of this interview. Judge Sater, in his opinion, states in substance that in appointing appellants as counsel for the receiver he did not expect that they would receive compensation, other than their regular salaries, unless they should be continued as attorneys after their terms of office expired, and then only for services thereafter rendered, and that "trustworthy persons inform me, and the evidence conclusively shows, that it was announced by me at one of the hearings that he was not otherwise to be paid";[2] that appellant Burns, in relating his conversation with Kelly's representative, stated that the latter said that the amount suggested (5 per cent. to the attorneys and 5 per cent. to the receiver) "was about right and would be satisfactory"; and that appellants' compensation was fixed in the belief that the Attorney General had assented to the payment of compensation and that the defendants were satisfied with the amount which the court fixed. The compensation was fixed by filling in the blanks in the order drafted by counsel.

It is undisputed that appellant McPherson, as well as the receiver and defendants' counsel, were ignorant of Burns' statement to the court. It should be said that Burns made his disclosure to the District Judge on being told that the "court could not act intelligently without information," and that he denies telling Judge Sater that defendants or their counsel had expressed themselves as satisfied to pay the attorneys $20,000. The fact, however, that Kelly's supposed representative made no objection to Burns' statement of his attitude, would naturally tend to raise at least an inference of his acquiescence. There is no doubt that the sum allowed was highly extravagant compensation for services rendered, at least after the appointment of the receiver.

1. Appellants challenge the right of the United States to intervene by motion to vacate the award of compensation. We have no doubt,

[2] The affidavit of one of defendants' counsel states that in the conference between appellants, the receiver and defendants' counsel, in connection with the settling of the entry of appointment, Judge Sater said, in substance: "Of course Mr. McPherson and Mr. Burns will not be entitled to receive any compensation while they occupy their present positions, they shall continue as counsel for the receiver while they occupy their present official positions, but my intention is that, if this litigation be pending when they cease to occupy their present positions, they shall continue as counsel for the receiver, and, in that event, they would be entitled to reasonable compensation for services rendered by them after that time." This statement was not, upon the hearing below (so far as shown by the record), denied by any one. The brief of counsel in this court, however, contains such denial.

however, that the Department of Justice, which represents the government of the United States, has a very proper interest in seeing to it that the rights of litigants in cases to which the government is a party are in every way respected, and that the officers of the department are not remiss in their duty, and is especially interested in those regards when criminal proceedings are pending, as here. We see no element of estoppel against the United States to complain. But, more than this, the court which appointed the receiver and his counsel, and awarded compensation, clearly had the right, upon its own motion or at the instance of a party to the suit, to reconsider its action in that regard. However, all question of jurisdiction to so reconsider is foreclosed by appellants' consent thereto.

The important and meritorious questions are: First, whether appellants were eligible to appointment as counsel for the receiver; and, second, whether they could lawfully receive any compensation whatever as such counsel.[8]

[2, 3] 2. Questions of compensation apart, the mere fact that appellants were counsel for the United States in the original suit filed in its name did not make their appointment as counsel for the receiver necessarily improper. The general rule that a receiver should not employ counsel of either party is limited to cases of adverse interest (In re Smith [C. C. A. 6] 203 Fed. 369, 372, 121 C. C. A. 485; Alderson on Receivers, § 233), and has no application to proceedings, such as taken here, to recover property fraudulently conveyed. Appellants' representation of the receiver in the ancillary suit involved no necessary conflict of interest between the United States and the receiver (High on Receivers [4th Ed.] § 217, pp. 259, 260; Daniel v. Insurance Co. 149 Mich. 626, 629, 113 N. W. 17). Should counsel's duty to the United States and to the receiver be in actual experience found to conflict, the receiver should, of course, employ other counsel. Nor (still apart from questions of compensation) did the fact that appellants were respectively United States Attorney and Assistant United States Attorney disqualify them from acting as counsel for the receiver in the prosecution of the suit to recover from stockholders. The receiver's action in that regard was merely ancillary to, and in effect a continuation of, the original suit for the appointment of a receiver. The United States was the party beneficially interested; and there was, in our opinion, no more impropriety in appellants representing the receiver, so far as concerns the prosecution of the suit to reach specific assets for the benefit of the United States, than in filing the original bill for the receivership had for the purpose of such suit. Indeed, as we shall see, it was appellants' duty, as between themselves and the United States, to represent the interests of the United States therein, so far as the government should request.

[4] 3. The more important question concerns appellants' right to compensation for the services rendered. As we have already said, we have no doubt that it would have been the duty of appellants to repre-

[8] It is assumed by all parties that, if appellants are entitled to any compensation, the case will be remanded to the District Court for hearing as to amount.

sent the United States in the receiver's suit, if requested by the government, and without compensation other than their official salaries. The original bill was in effect as well as in name that of the United States, and showed on its face that it was filed by direction of the Attorney General, and by authority and sanction of the Commissioner of Internal Revenue. The United States Attorneys represented the plaintiff therein, as was made their duty, not only by section 838 of the Revised Statutes (Comp. St. 1916, § 1297), which relates to revenue fraud cases, but by section 771 (section 1296), which makes it the duty of every district attorney to prosecute in his district "all civil actions in which the United States are concerned." The receiver's bill was, as already said, purely an ancillary or dependent proceeding,[4] throughout which the United States was treated as the sole beneficiary, as in fact it turned out to be. It is unnecessary to decide whether this ancillary proceeding should be classified as a revenue fraud case, under section 838, for we think it clear that it was a "civil action in which the United States are concerned," within the meaning of section 771, which is not limited to cases in which the United States is a party of record. In Smith v. United States, 158 U. S. 346, 353, 15 Sup. Ct. 846, 848, 39 L. Ed. 1011, it is said:

"By section 771 it is not only the duty of the district attorney to prosecute all delinquents for crimes and offenses against the federal laws, but 'all civil actions in which the United States are concerned,' and there is a finding that the claimant was not only directed by the Attorney General to appear, but that the government was interested either in the prosecution or defense of such suits, *although the direct nature of such interests does not fully appear.*"

And again (158 U. S. 355, 15 Sup. Ct. 849, 39 L. Ed. 1011):

"It can hardly be supposed that Congress could have intended that the Attorney General should not be at liberty to call upon the official representative of the United States in each district to defend, as a part of his official duty, the interests of the government, in *any suit in which it was interested.*" (Italics ours.)

In Hillborn v. United States, 163 U. S. 342, 345, 16 Sup. Ct. 1017, 1018, 41 L. Ed. 183, the doctrine of Smith v. United States was reaffirmed, to the extent that the words—

"'prosecute all civil actions' were not to be interpreted in any technical sense, but should be construed as covering any case in which the district attorneys are employed to prosecute the interests of the government, whether such interests be the subject of attack or defense."

In United States v. Ady (C. C. A. 8) 76 Fed. 359, 22 C. C. A. 223, a district attorney was held not entitled to extra compensation for services rendered by direction of the Attorney General for defending officers of the army in suits against them for acts done in the line of their duties.

While appellants were not directed by the Attorney General to appear in the receiver's suit as attorneys for that officer, and while it

[4] See White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Compton v. Jesup (C. C. A. 6) 68 Fed. 263, 279, 15 C. C. A. 397, and cases cited; Robertson v. Conway (C. C. A. 6) 188 Fed. 579, 584, 110 C. C. A. 377; Cobb v. Sertic (C. C. A. 6) 218 Fed. 320, 134 C. C. A. 116, and cases cited.

would have been entirely competent for the receiver to employ wholly disinterested counsel, we think appellants were throughout the litigation recognized by the court, the receiver and the Department of Justice as representing the United States. The department was, at the time the bill was filed, notified that the court had appointed appellants as attorneys for the receiver; it continuously treated appellants, both by correspondence and by personal interviews with appellant McPherson, as representing the interests of the United States in that suit. The dominating character of appellants' relations toward the receiver's suit and its compromise was that of attorneys for the United States. As was well said by Judge Sater:

"The receiver was appointed to collect, if possible, the government's claim. The circumstances were such that the district attorney could not aid the receiver without acting for the United States. In the performance of his duty he could of course avail himself of the services of his assistants, but the purpose in his appointment was, as heretofore stated, to secure as far as possible his individual attention to the case."

Both appellants had, in December preceding the filing of the government's original bill, attended a conference in the office of the Commissioner of Internal Revenue, in which procedure for recovery from stockholders was considered. Such proceeding was naturally a part of the government's plan when its bill was filed, and one or both of appellants had presumably been actively considering the subject prior to their appointment as counsel for the receiver. The arrangements for the compromise conference, including appellant McPherson's call to Washington for the purpose, were official in form. The Attorney General alone, on the part of the plaintiff in that suit, determined whether the proposition of compromise should be accepted. The order confirming the compromise directed the payment to the collector of internal revenue of the entire sum of $400,000 recovered, and the receiver paid directly to that officer the cash paid down on the compromise, as well as the avails of the note maturing June 1st thereafter.

Without deciding that the district attorney may not properly receive compensation for representing a receiver in the prosecution of a creditors' suit in which there are substantial beneficiaries aside from the United States, or that an attorney for the United States, as counsel for a receiver in a suit in which the United States is interested, may in no case, even by express consent of the government, receive from a defendant, under a compromise of litigation, compensation for special and unusual services, although rendered to the United States as the sole party beneficially interested (on which questions we express no opinion), it is plain to our minds that under the circumstances existing here such recovery was not permissible, at least in the absence of such consent. It is immaterial that the fees in question were paid by defendants, rather than out of the fund recovered. Recovery of such fees from a defendant, if had without the government's consent, would naturally belong to the United States. As said by the late Judge Thayer:

"The law does not allow an attorney to stipulate with an opposing party for the payment of his fees, in whole or in part, unless he acts with the knowledge and consent of his client." Bliss v. United States (C. C.) 37 Fed. 191, 195.

And, as said by Judge (later Mr. Justice) Brewer, in affirming the judgment in that case:

"Public policy requires the strictest adherence to the rule that when a counsel receives from the defendant in a case in which he is prosecuting money above the fees which by law he is entitled to, the money which is received belongs to his client." Bliss v. United States (C. C.) 38 Fed. 230.

The principles so stated apply with equal force under the existing statute, which provides salaries to the United States Attorneys for the district in question in full for official services. Act May 28, 1896, c. 252, §§ 6, 7, 29 Stat. 179, 180 (Comp. St. 1916, §§ 1418, 1419). We think recovery by appellants for services in effect rendered the United States forbidden by sound public policy, under the circumstances presented here, including the facts that the United States were the only beneficiaries, the reason for appellants' appointment as already stated, the intention of the court (whether communicated or not) that appellants should receive no compensation while holding their official positions, the actual relations between appellants and the government toward the litigation and in the effecting of the compromise, the fact of the pendency of the criminal cases and appellants' relations thereto, lack of authoritative consent on the part of the United States to such recovery, and the fact that the United States were not represented in the making of the actual order allowing compensation.

We think public policy, as declared by the statutes and the decisions of the courts of the United States, opposed generally to the receipt by United States Attorneys of private compensation for the performance of statutory duties. Previous to the act of 1896 (29 Stat. 179, supra), providing a salary in full for official services, the Supreme Court, in Gibson v. Peters, 150 U. S. 342, 347, 14 Sup. Ct. 134, 136, 37 L. Ed. 1104, in denying recovery by a United States district attorney for services rendered to the receiver of a national bank, said:

"Nor can the expenses of the receivership be held to include compensation to the district attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by a district attorney of all the duties imposed upon him by law, without any other remuneration than that coming from his salary, from compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of the services named."

This proposition was reaffirmed in United States v. Johnson, 173 U. S. 363, 372, 19 Sup. Ct. 427, 43 L. Ed. 731 et seq. And see Garter v. United States, 31 Ct. Cl. 344. The force of these decisions is strengthened, rather than impaired, by the act of 1896. Except as indicating the policy of the law, we attach no special importance to section 3170 of the Revised Statutes (Comp. St. 1916, § 5893), which makes it an offense for a district attorney to receive anything for compromising a violation of the internal revenue laws (assuming that the compromise in question was a revenue law violation) or to section 18 of the act of

1896, just cited (Comp. St. 1916, § 1430), which penalizes the acceptance by United States Attorneys of illegal fees. The fees in question were paid under judicial order allowing compensation, obtained in the evident belief that the government and all parties concerned had assented thereto. But as indicating the spirit of the laws the sections referred to are pertinent.

State statutes fixing compensation for the official services of a public prosecutor have been held to forbid the recovery of additional compensation for services which it was his official duty to perform—not only from third persons, and in pursuance of express contract therefor (Coggeshall v. Conner, 31 Okl. 113, 120 Pac. 559, 39 L. R. A. [N. S.] 81, Ann. Cas. 1913D, 577), but from the county, even where the services were rendered under express agreement to pay therefor (McHenderson v. Anderson County, 105 Tenn. 591, 59 S. W. 1016; Money v. Beard, 136 Ky. 219, 124 S. W. 282). In the Coggeshall Case it was said (31 Okl. 115, 120 Pac. 560, 39 L. R. A. [N. S.] 81, Ann. Cas. 1913D, 577):

"It is against public policy for a public officer to be allowed private compensation for the performance of any duty as a public officer."

In the Anderson County Case it was said:

"It cannot alter the rule of law as to either of these officials that the value of their services was far beyond the compensation provided by statute. * * * Public office is taken and held with the emoluments and burdens which the law imposes, and the burdens are or may be far beyond the compensation allowed in many cases. But this gives no valid claim for additional compensation."

In Wilson v. Otoe County, 71 Neb. 435, 98 N. W. 1050, the prohibition against recovery of extra compensation is held to extend even to extraofficial services. And see Railroad Co. v. Lee, 37 Ohio St. 479.

The pendency of the criminal cases, and appellants' relations toward them, to our minds give special emphasis to the rule of public policy invoked.

In our opinion United States v. Mormon Church, 6 Utah, 9, 44, 21 Pac. 503, 524, et seq., is distinguished from the instant case, not only because of the later statute of 1896, providing for compensation by salary alone, but because of the prominent features of this case not found in the Church Case.

It follows that, at least in the absence of the consent of the United States, appellants could not lawfully retain the compensation in question; and it was at least incumbent upon them to show that such consent was given. This burden has not been sustained, for not only is there no direct proof that Mr. Herron was authorized to agree on the terms of the compromise, but the implications from the testimony are the other way. The order setting aside the award of compensation for services rendered in the prosecution of the receiver's suit was therefore rightly made.

No question of appellants' right to compensation for services rendered the receiver personally, as distinguished from services rendered for the benefit of the United States, is presented; for it does not appear

that appellants rendered any substantial services to the receiver unless as incidental to, or involved in, the services rendered the United States.

The order vacating the award of compensation is accordingly affirmed.

JESSON et al. v. NOYES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2528.

1. EQUITY ⊕148(1)—JOINDER OF CAUSES OF ACTION.
The court, under Alaska statute as to joinder of causes of action, had discretion to permit the joinder of causes of action for diminishing the assets of the bank by permitting subscribers to surrender stock and for declaring an illegal dividend.

2. BANKS AND BANKING ⊕77(6)—UNLAWFUL ACTS OF OFFICERS—COMPLAINT.
In a suit by the receiver of an insolvent bank against former directors and officers to recover assets illegally diverted, a complaint alleging that the dividend was wrongfully, unlawfully, and fraudulently declared and paid, setting forth facts to sustain the allegation, and alleging facts to show that the money paid out for the surrender of stock certificates was fraudulently and illegally paid out of the capital of the corporation, stated a cause of action at common law.

3. EVIDENCE ⊕35—JUDICIAL NOTICE—STATE STATUTE.
The District Court of Alaska may take judicial notice of the statutes of a state.

4. BANKS AND BANKING ⊕91—PURCHASE OF CAPITAL STOCK BY BANK.
Under Corporation Act of Nevada (Laws 1903, c. 88) § 68, Rev. Laws, § 1169, providing that it shall not be lawful for the trustees or directors to divide or withdraw, or in any way pay to the stockholders, any part of the capital stock of the company, nor reduce the capital stock, unless in the manner prescribed, it was illegal for the bank to purchase at par value its stock from stockholders, and pay therefor out of the capital, and not the surplus, of the bank.

5. BANKS AND BANKING ⊕77(6)—ILLEGAL PURCHASE OF STOCK—ASSETS—SUFFICIENCY.
In a suit to hold the directors of a bank liable for an illegal purchase for the bank of its stock, evidence *held* to support a finding that the directors had knowledge of the purchase.

6. BANKS AND BANKING ⊕77(4)—ILLEGAL TRANSACTIONS—RECOVERY—SUBSEQUENT CREDITORS.
Where, contrary to statute and not in good faith, the directors of a bank declared dividends out of its capital, and purchased for the bank its stock, the diverted funds may be recovered for subsequent creditors of the bank, in a suit against the directors and the sellers of the stock.

7. ACCORD AND SATISFACTION ⊕26(3)—EVIDENCE—SUFFICIENCY.
In a suit against former directors and officers of a bank, evidence *held* insufficient to show that certain deeds were accepted by the receiver from an ex-president in accord and satisfaction of the claims against the president, or any of the defendants.

8. ACCORD AND SATISFACTION ⊕1—ELEMENTS.
Accord and satisfaction requires an agreement, and must finally and definitely close the matter covered by it.

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; F. E. Fuller, District Judge.

Suit by F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, against John A. Jesson and others. Decree for complainant, and defendants appeal. No error. Decree affirmed.

The appellee, as receiver of an insolvent bank, brought suit against the appellants, who had been the directors and officers of the bank, charging them with wrongful and negligent acts and conduct whereby the bank had been injured and its assets wasted, so that it became unable to pay its creditors, praying that an accounting be had and judgments rendered against the appellants for the amounts found to be due from them respectively. On January 21, 1908, the Fairbanks Banking Company, a corporation organized under the laws of the state of Nevada, began business at Fairbanks, Alaska. On September 14, 1910, the name of the corporation was changed to Washington-Alaska Bank. On January 5, 1911, receivers were appointed to take over the assets of the corporation and wind up its business. The court below found that certain of the appellants unlawfully diminished the assets and capital stock of the corporation, by permitting subscribers to surrender stock certificates which had been issued to them, and paying them the amount of their subscriptions, and that on April 12, 1910, the appellants Wood, McGinn, Brumbaugh, and Jesson declared a dividend upon the outstanding capital stock, at a time when the corporation had no undivided profits or surplus in excess of its liabilities, but was insolvent.

The findings of the court as to the surrender of the stock are in substance as follows: That, when stock was taken back by the corporation, the amount paid therefor was either paid in cash, or the notes held by the bank therefor were canceled and surrendered to the stockholders; that the bank had no surplus or undivided profits against which the same could be charged; that the taking back of said stock and such payment therefor was illegal and wrongful, and in violation of the laws of the state of Nevada, under which the corporation was organized; and that said stock surrenders were acquiesced in by said directors and in some instances were made under their direction and with their express approval.

As to the unlawful declaring of the dividend, the court found in substance as follows: That on April 12, 1910, the Fairbanks Banking Company, by its board of directors, declared a dividend of 20 per cent. on its then outstanding capital stock of $168,600, which dividend amounted to $33,720, and was paid to the stockholders of the bank, either in cash or by crediting the amount thereof upon notes due by the stockholders to the bank; that at that time the said Fairbanks Banking Company had no surplus or undivided profits out of which the dividend could be declared and paid, and said dividend was declared and paid in violation of the laws of the state of Nevada, and also in violation of the by-laws of the corporation, and was wrongful and illegal; that at the time when the dividend was declared and paid the appellants Wood, McGinn, Brumbaugh, and Jesson were members of the board of directors of said Fairbanks Banking Company, and gave their consent thereto.

By the decree it was adjudged that the appellee recover of and from the appellants Wood, McGinn, Brumbaugh, and Jesson, jointly and severally, the sum of $33,720; that he recover from the appellant J. A. Jesson the further sum of $13,400, by reason of the surrender of shares of capital stock made between July 13, 1908, and September 12, 1908; that he recover from the appellants Jesson and Hill, jointly and severally, the further sum of $1,500, by reason of the surrender of shares of capital stock between September 13, 1908, and October 13, 1908; that he recover from the appellants Jesson, Hill, and Peoples, jointly and severally, the further sum of $1,100, by reason of the surrender of shares of capital stock made between October 14, 1908, and March 13, 1909; that he recover from the appellants Jesson, Hill, and Brumbaugh, jointly and severally, the further sum of $1,000, by reason of the surrender of shares of capital stock made between March 14, 1909, and September 12, 1909; that he recover from the appellants Jesson, Brumbaugh, and McGinn, jointly and severally, the further sum of $3,000, by reason of the surrender of the capital stock made between September 13, 1909, and October 12, 1909; and that he recover from the appellants Jesson, McGinn, and Brumbaugh,

jointly and severally, the further sum of $1,000, by reason of the surrender of shares of the capital stock made between October 13, 1909, and January 18, 1910.

McGowan & Clark, A. R. Heilig, and John L. McGinn, all of Fairbanks, Alaska (Metson, Drew & Mackenzie, Curtis Hillyer, and Charles J. Heggerty, all of San Francisco, Cal., of counsel), for appellants.

O. L. Rider, of St. Louis, Mo., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is assigned as error that the court below overruled the demurrers which the appellants interposed to the amended complaint, on the ground that several causes of action had been improperly united therein. The statute of Alaska, concerning the joinder of causes of action, is identical with and is taken from the statute of Oregon, and before it was adopted for Alaska it had been construed by the Supreme Court of Oregon in Benson v. Keller, 37 Or. 120, 60 Pac. 918. In that case it was the opinion of the court that much must be left to the discretion of the court in determining whether a bill is multifarious. The court said that the objection of multifariousness—

"does not go to the merits of the cause,' but relates more nearly to a question of convenience in conducting the suit; and, in large measure, it simply calls for an exercise of discretion in deciding whether both or all the causes of suit set forth in the bill shall be tried in a single suit, or be split up, and the parties be relegated to the bringing of two or more suits for the accomplishment of their purposes, or whether the defendant who is a necessary party in respect of one or more matters suggested by the complaint has a sufficient interest in or connection with the other matters involved to make him a proper party in respect to such other matters."

The court considered that the object of the rule against multifariousness is to protect the defendant from unnecessary expense; that the demurrer for multifariousness does not go to the merits of the controversy. but calls upon the plaintiff to go out of court and split up his demands and begin anew; and the court quoted from Lehigh Val. R. R. Co. v. McFarlan, 31 N. J. Eq. 706, 758:

"The rule with regard to multifariousness, whether arising from the misjoinder of causes of action or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and unnecessary expenses on the other."

The object of the suit in Benson v. Keller was to cancel several duebills alleged to have been fraudulently procured from the plaintiff by one of the defendants, and thereafter transferred by him to others of the defendants severally. The court sustained the joinder, notwithstanding that it appeared that some of the defendants were put to additional expense by reason of the fact that the cause was tried away from their home counties. The plaintiff, in bringing the present suit, had in view but the single purpose of recovering the funds of the bank, which he alleged had been wasted by the directors. All the appellants had been directors. Jesson was director from March 12, 1908, to January 4, 1911; Peoples was director from October 14, 1908, to

April 24, 1909; Wood from November 13, 1909, to May 1, 1910; Brumbaugh from March 13, 1909, to September 12, 1910; Hill from September 12, 1908, to October 1, 1909; and McGinn from September 14, 1909, to May 1, 1910.

The appellants rely upon Emerson v. Gaither, 103 Md. 664, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, a case in which were joined 17 directors, who had held their offices each for a short period in 12 different directorates, some of whom were charged with having declared illegal dividends, and others were charged with having made improper loans. It appeared that the defendants who were charged with making the improper loans were not directors at the time when the illegal dividends were declared. The court said:

"Are all of the defendants to be thus subjected to inconvenience, loss of time, fees of counsel, and possibly expert accountants, court costs incurred concerning matters in which they are not connected, simply because at some time they happened to be directors of the same bank?"

But the court also said:

"There is no rule on the subject of universal application, and much is left to the discretion of the court, to be determined by the facts of each particular case."

It was in view of the confusion and the difficulty of apportioning costs that the court, in that case, held that the bill was multifarious. This it doubtless had the discretion to do. But we think it clear that in the present case the court below had the discretion to permit, as it did, the joinder of the causes of action, and that in so ruling there was no error.

[2, 3] It is contended that the complaint fails to state a cause of action, in that it omits to plead the statute of the state of Nevada. This objection was not presented to the court below, and it is not suggested in the assignments of error. Nor was any objection made in the court below to the introduction in evidence of the Nevada statute. There are two reasons why the contention cannot be sustained. In the first place, the complaint did not lack necessary averments to constitute a cause of action. It alleged that the dividend was wrongfully and unlawfully and fraudulently declared and paid, with the knowledge, consent, and approval of the defendants, and set forth facts to sustain the allegation, and also alleged facts to show that the money paid out for the surrender of stock certificates was fraudulently and illegally paid out of the capital of the corporation. Those allegations were sufficient to constitute a cause of action at common law. 7 C. J. 562, § 168; Brinckerhoff v. Bostwick, 88 N. Y. 52. Again, it is our opinion that the court below was authorized to take judicial cognizance of the law of Nevada. In Mills v. Green, 159 U. S. 651, 657, 16 Sup. Ct. 132, 134 (40 L. Ed. 293), the rule is thus stated:

"The lower courts of the United States, and this court on appeal from their decisions, take judicial notice of the Constitution and public laws of each state of the Union."

The District Court of the territory of Alaska is, we think, one of the "lower courts of the United States" to which the rule should apply, and, while we find no adjudication to that precise effect, it is significant

that in Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604, the court held the rule to be applicable to the courts of the District of Columbia.

[4] It is contended that the purchase of the corporate stock by the appellants was not in violation of the law of Nevada. Section 68 of the Corporation Act of Nevada (Rev. Laws 1912, § 1169) provides that it shall not be lawful for the trustees or directors—

"to divide or withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock unless in the manner prescribed in this act, or in accordance with the provisions of the certificate or articles of incorporation, and in case of any violation of this section, the directors or trustees under whose administration the same may have happened * * * shall in their individual and private capacities, be jointly and severally liable to the corporation, and [to] the creditors thereof, to the full amount so divided, withdrawn, or reduced, or paid out."

To pay to the stockholders the par value of their capital stock, as the court below found that the appellants did in exchange for the certificates of stock, is prohibited by the act when the payment is made out of the capital of the corporation and not out of its surplus. While it may not be said that the act prohibits the purchase of the shares of its stock by a corporation, it does prohibit the payment of any part of the capital for that purpose. A similar statute of the state of New York was under consideration in In re Castle Braid Co. (D. C.) 145 Fed. 224. The court held that the law did not broadly forbid the purchase by the corporation of its shares of stock held by its directors, and that such purchase was permissible if the transaction was fair and honest, and in the interest of the corporation and not of the selling directors. The court said of the statute:

"By implication it may forbid the purchase of any property of any description from the stockholders, and the payment therefor from the capital of the corporation; that is, from any funds except the surplus."

So in In re Tichenor-Grand Co. (D. C.) 203 Fed. 720, it was held that the New York statute, which prohibits a corporation from purchasing its own stock except out of the surplus, renders invalid a contract by a corporation with a subscriber to its stock, where the stock is issued and paid for, to repurchase the same after a stated time on notice of the subscriber's election. Other cases in point are Coleman v. Tepel, 230 Fed. 63, 144 C. C. A. 361; Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 Fed. 392; Md. Trust Co. v. Mechanics Bank, 102 Md. 608, 63 Atl. 70; Tait v. Pigott, 32 Wash. 344, 73 Pac. 364; Tait v. Pigott, 38 Wash. 59, 80 Pac. 172; Martin v. Zellerbach, 38 Cal. 309, 99 Am. Dec. 365.

[5] The contention that the purchase of the stock was without the knowledge and against the instructions of the directors cannot be sustained. There was conflict in the testimony, and the court below found the facts against the appellants. The court in so finding was largely influenced by the fact that at each monthly meeting of the directors a statement of the financial condition of the corporation was presented and considered, and the fact that the records show that the directors expressly authorized in some instances the purchases of the stock, and that in other instances they approved purchases that had been made.

The whole tendency of the testimony is to show that the directors had knowledge of all the stock transactions.

[6] The appellants contend that the appellee cannot recover in this suit funds to pay creditors who were not such at the time when the dividend was declared and the stock was purchased, and cite cases such as Atlanta & Walworth B. & C. Ass'n v. Smith, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42. In that case it was held that the trust fund doctrine, that under all circumstances assets of a corporation constitute a trust fund for creditors, does not prevail in Wisconsin, and that as a general rule, unless plainly prohibited by statute, or its organic act, a corporation may buy its own stock, using its assets therefor, so long as it acts in good faith, pursuant to authorization of its governing body, and that this is true both as to past and future creditors. But in the case at bar the acts of the directors, as we have seen, were prohibted by statute, and were not performed in good faith. In Cook on Corporations (6th Ed.) § 548, it is said:

"Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when the dividend was declared, or becoming such at any subsequent time, may, to the extent of their claims, if such claims are not otherwise paid, compel the stockholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock."

In Coleman v. Tepel, 230 Fed. 63, 144 C. C. A. 361, it was held that where a corporation was rendered insolvent by purchasing its own stock, and giving a mortgage for the indebtedness thereby created, the transaction was void as to subsequent, as well as to prior, creditors, although there was no fraudulent intent. The court said:

"It has been urged that, if the transaction is void, it is void only as to existing creditors, and not as to those with whom the corporation subsequently incurred obligations, upon the ground that, to avoid a transfer of property in fraud of future creditors, there must be present actual intent to defraud. * * * We are inclined to hold, upon the reasoning of well-considered authorities, that the void character of such a transaction as to future creditors does not depend upon fraudulent intent, and that when a stockholder, with the knowledge he has, or with that with which he is charged, concerning the financial condition of the corporation, engages in a transaction which results in a depletion for his advantage of corporate assets below the subscribed capital, or below existing liabilities, as the law may be, and becomes a party to the solvent appearance of a business that is intended to be continued, he is bound by his act, both to existing and future creditors, when its direct object or immediate consequence is the insolvency of the corporation and injury to creditors."

In Coleman v. Booth, 268 Mo. 64, 186 S. W. 1021, the Supreme Court of Missouri held that the trustee in bankruptcy of a corporation may recover the amount received by a director through transactions with the corporation which resulted in wrongful depletion of its capital stock, even though all claims of creditors occurred subsequent to such transaction. Said the court:

"It makes no difference, in respect to this matter, whether the debts represented by the trustee were contracted before or after the illegal acts complained of."

To the same effect is North v. Union Savings & Loan Ass'n, 59 Or. 483, 117 Pac. 822; and in Atlanta & Walworth B. & C. Ass'n v. Smith, so cited by appellants, the court said:

"We are not unmindful that the rule, in general, as to avoidance of a transfer of property in fraud of future creditors, applies only in case of actual intent to defraud them. * * * It is too restrictive, as generally stated, to apply to the situation we have here, and should, it is thought, be extended to include it, upon the theory that the duty of the stockholder not to deplete for his advantage corporate assets below the subscribed capital, and become a party to a continuance of solvent appearance, supplies the need for actual intent to defraud, where the natural and probable effect is to prejudice persons subsequently dealing with the corporation as solvent."

These decisions suggest the reason why recovery on behalf of subsequent creditors is permissible—the reason which is pointed out by Lord Watson in Trevor v. Whitworth, 12 App. Cas. 409, that persons dealing with a corporation—

"are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business."

[7] One of the defenses pleaded by the appellants was accord and satisfaction, arising out of the following facts: On March 13, 1911, E. T. Barnette, who had been the president of the corporation, presented to the court below a petition, referring to the condition of the bank, the receivership, and the petitioner's desire to pay the money due and owing to depositors, and offering as security for that purpose the conveyance of certain real estate to the receivers. On March 20, 1911, the receivers applied to the court for instructions, expressing their opinion that, if the deeds were accepted, it would be impracticable to proceed as contemplated to fix liability against Barnette in favor of the creditors of the bank. On March 29, 1911, the judge of the court below made an order to the effect that the receivers accept the property on the conditions expressed in Barnette's petition. One of those conditions was that, after the payment of the balance of the claims and demands of the depositors and owners of unpaid drafts, the remainder of the property, if any, be returned to the petitioner. The amount realized from the rents and sale of said property up to May 1, 1914, was $30,905.65.

The contention of the appellants is that the acceptance of the property by the receivers was satisfaction and extinguishment of all liability of Barnette, and that thereby all persons jointly liable with him were released, or at least that the acceptance of the property by the receivers was a covenant not to sue Barnette, and that it operated to extinguish the causes of action against the appellants, and constituted a compromise of a tort. To this it is to be said that there is nothing in the record to show that Barnette stipulated for release from liability for his own acts, or for the acts of his associates, in the management of the bank. He stipulated in one of his deeds that the receivers were not to take possession of the property conveyed, nor the rents, issues, and profits thereof, nor have any right to the possession or use thereof, at any time prior to November 18, 1914. In the other deed it was provided that the grantees might at any time in their discretion sell the

property therein described and apply the proceeds to the payment of depositors and the owners of unpaid drafts, and there was coupled with it the further provision that the grantees might so sell and dispose of the proceeds if on November 18, 1914, the demands of depositors and owners of unpaid drafts had not been fully paid and satisfied. By the terms of both deeds all creditors were excluded from the benefit thereof save depositors and owners of unpaid drafts. The receivers considered that their acceptance of the conveyances obligated them not to sue Barnette before November 18, 1914, and the appellee so pleaded their effect in the reply.

Again, the property was not all surrendered absolutely for the payment of the depositors and holders of unpaid drafts, but a portion thereof was surrendered only for the payment of a deficit to be thereafter ascertained as between the amounts due depositors and owners of unpaid drafts and the amount realized by the receivers out of the property and assets of the bank. None of the proceeds of the property so surrendered by Barnette in the first deed can be applied to payment of depositors and holders of unpaid drafts until all the property and assets of the bank shall have been realized on and devoted to liquidation. There was imposed upon the receivers, by their acceptance of the conveyances, the obligation to pursue all available remedies to recover the assets, including, we think, the assets which may be recovered in the present suit. While it is true that the deeds to the receivers recited that the receivers are about to commence an action on behalf of creditors against Barnette to recover from him the amount of any deficit that may be ascertained between the claims of creditors and the amount realized out of the property and assets of the bank, said action to be based on the liability of Barnette to said creditors "arising out of his management of the affairs thereof," there is nothing in the evidence to show that the deeds were accepted in accord and satisfaction of the claims of the corporation against Barnette or any of the appellants. The court below was of this opinion, and said that the transfer—

"did not operate to release any of the defendants, and was not accepted by the receiver in satisfaction of the claims of the corporation or its creditors against any of the defendants, but such transaction was in effect an agreement not to sue Barnette prior to the expiration of the trust agreement, and instead of preventing the receiver from proceeding against these defendants, it rather rendered it necessary for him to take all proper steps to recover whatever possible upon the liabilities of any other person to the corporation or its creditors."

[8] "Accord and satisfaction requires an agreement, an aggregatio mentium, and it must finally and definitely close the matter covered by it. Nothing of or pertaining to that matter must be left unsettled, or open to further question or arrangement." 1 C. J. 527, § 12. "To constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such conditions." 1 Cyc. 332.

We find no error. The decree is affirmed.

GLOBE S. S. CO. v. MOSS.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

No. 2966.

1. SEAMEN ⟸3—INJURY IN SERVICE—LAW GOVERNING LIABILITY.
A suit in admiralty by a seaman to recover for an injury alleged to have been caused by defective machinery or appliances on the ship is governed by the admiralty law.

2. SEAMEN ⟸29(2)—PERSONAL INJURY—DEFECTIVE MACHINERY OR APPLIANCES.
A shipowner owes to his seamen a positive and nondelegable duty to see that the ship is seaworthy and her equipment in safe condition for use when she starts on a voyage, and a seaman, injured through failure to perform this duty, is entitled to compensation.

3. SEAMEN ⟸29(2)—PERSONAL INJURIES—DEFECTIVE MACHINERY.
Libelant was assistant engineer on respondent's steamer. Soon after starting on a trip, the feed pump stopped and libelant attempted to start it, as had been done before, by forcing a piston back into the cylinder with a pinchbar; but it immediately flew back, causing the pinchbar to strike and injure libelant's head. Shortly after the injury the cylinders were opened, and the piston was found to be broken in two or three pieces. The pump had not worked well for two years, and it had frequently been necessary to start it when it stopped by external means; but during that time the cylinders had not been opened to ascertain the trouble. *Held*, that the evidence, while it did not show definitely the defect which caused the piston to fly back, was sufficient to support a finding by the trial court that the defect existed at the time the ship left port, rendering her unseaworthy, and that respondent was negligent in not ascertaining and remedying it, and was liable for libelant's injury.

4. SEAMEN ⟸29(5)—SUIT FOR PERSONAL INJURY—EVIDENCE.
In determining the negligence of respondent in maintaining the pump in an unsafe condition, the fact and nature of the accident might properly be taken into account, in connection with all other circumstances of the case.

5. SEAMEN ⟸29(4)—PERSONAL INJURY—ASSUMPTION OF RISK.
The risk of injury from the flying back of the piston, when forced into the cylinder, was not one assumed by libelant, who had a right to assume that the owner would keep the pump in a safe condition.

6. SEAMEN ⟸29(4)—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.
In the absence of knowledge that the piston was likely to fly back, libelant was not chargeable with contributory negligence in taking a customary method of forcing it into the cylinder.

7. ADMIRALTY ⟸118—REVIEW ON APPEAL—FINDINGS OF TRIAL COURT.
A finding on a question of fact by an admiralty court, which heard the witnesses, will be accepted by the appellate court, unless the evidence greatly preponderates against it.

8. SEAMEN ⟸29(1)—PERSONAL INJURY—LIABILITY OF OWNER.
A shipowner, whose negligence contributed to the injury of a seaman, is liable therefor, notwithstanding the concurring negligence of another.

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

In Admiralty. Suit by Henry Moss against the Globe Steamship Company, owner of the steamer Frank C. Ball. Decree for libelant, and respondent appeals. Affirmed.

Thos. H. Garry, of Cleveland, Ohio, and Sherwin A. Hill, of Detroit, Mich., for appellant.

Frederick L. Leckie, of Cleveland, Ohio, for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The appellee, while in the performance of his duties as assistant engineer of the ship Frank C. Ball, owned by appellant, and while on a voyage from Lorain, Ohio, to Duluth, Minn., was seriously injured in an attempt to start a defective feed pump used for supplying water to the boilers. To recover the damages suffered appellee filed libel in admiralty against the ship; the appellant giving bond to answer the decree. Upon hearing in open court, decree passed for libelant, from which this appeal is taken.

The ground on which the right to recovery is rested is that the pump was so defective as to render the ship unseaworthy as respects appellee, and to amount to a negligent failure of duty to supply and keep in order the proper appliances appurtenant to the ship—a duty analogous to the ordinary duty of a master to furnish his servant a safe place to work and safe appliances to work with.

[1, 2] The case is governed by the admiralty law. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086; Tropical Fruit S. S. Co. v. Towle (C. C. A. 5) 222 Fed. 867, 868, 138 C. C. A. 293. The rule in admiralty is well settled that a ship owner owes to his seamen a positive and nondelegable duty to see that the ship is seaworthy and her equipment in safe condition for use when she starts on a voyage, and that a seaman injured through failure to perform this duty is entitled to compensation. The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760; Thompson Towing, etc., Ass'n v. McGregor (C. C. A. 6) 207 Fed. 209, 211, 124 C. C. A. 479, and cases cited.

[3] The feed pump, as fastened to the floor of the engine room, was about 20 feet long; it was duplex in that it had two sides which, when not in use, were independent of each other; it was compound in that each side had both a high-pressure and a low-pressure cylinder, the steam first passing through the high-pressure cylinder and then into the low-pressure; the pistons of the high and low pressure being connected to a common piston rod, which in turn connected with a crosshead on which was bolted a plunger operating in one end of the water cylinder; another crosshead (suitably connected with the first) held another plunger. In operation the plungers alternately extended forward out of the water chambers. The feed pump was started when the boat left Lorain, which was about noon; it did not work well, and finally stopped, leaving one plunger within the chamber, the other extending out the full length of the stroke, which was about 12 inches. To start the pump appellee took an iron pinchbar, 6 or 7 feet long and weighing about 25 pounds, fulcrumed its lower end against the angle iron edge of the oil pan, which was fastened to the floor and pushed against the crosshead; the plunger was thus finally forced into the cylinder, but immediately flew back, causing the pinchbar to strike

appellant upon the forehead, knocking him backward and causing his head to strike a metal pipe.

The refusal of the pump to start when the steam valves were opened, and the sticking of the plungers, were not a new experience; it had frequently occurred for two years before the accident. The chief engineer, who was a witness for appellant, testified that it usually happened three times out of ten when the ship left port. On such occasions the pump was started either by using a pinchbar in the way used by appellee as before described, or by the use of a chain fall—a chain in the nature of block and tackle—to pull out the plunger which was within the cylinder, or by a blow from a heavy iron sledge with all the force a man could muster against the nut on the end of one of the guide rods, a usage which had considerably battered up the nut. The chief engineer had taken part in all three of these methods of starting the pump. Sometimes after being so started it would stop and require restarting by the same process two or more times. There was testimony of credible witnesses that trouble in starting this kind of a pump was not unusual; but we agree with Judge Tuttle that:

"A fair interpretation of their testimony is that the troubles to which they refer are not of the kind shown to have occurred with this pump. Nearly all of them speak of pumps that require a *little force* to start them. This pump frequently stuck in a way that required a *great deal of force* to start it. It seems plain from this record that this was a poor pump, did not work well, and never was in proper working order at any time during the period covered by the testimony in this case; that is, two years preceding the accident." (Italics ours.)

None of the witnesses seem to have ever known a pump which gave so much trouble as this; to some of the witnesses for appellant the use of chain fall and sledge seems to have been unheard of, and by one or more, at least impliedly, condemned. The most prominent of the suggested causes for such sticking of the plunger were air in the suction pipe, dryness of the cylinders, too tight packing, and leaking valves. We think it a fair deduction from the testimony that the experience had with this pump was such that the difficulty could be satisfactorily accounted for by neither nor all of these causes.

We are satisfied that there was something vitally and radically wrong with the pump at the time the ship left Lorain on the voyage in question. We think this indicated by the experience up to that time, and corroborated by what developed later.

Following the accident no attempt was made to operate the feed pump, nor does it seem to have been examined until the ship arrived (about midnight) at Detroit, where it picked up the chief engineer, and, after putting off appellee at the dock and sending him in an ambulance to the Marine Hospital, the ship was anchored in the river. The chief engineer then opened up the cylinders and found the piston in the high-pressure cylinder broken in two or three pieces. If this piston was broken, or even seriously cracked, before the boat left Lorain the ship was unseaworthy. One of defendant's witnesses presents the theory that the piston was broken after leaving Lorain, but before the accident; others, that the flying back of the plunger when appellee

was hit caused the break. It is possible that the break occurred in either of the two ways suggested, but the question must be considered in the light of the evident fact that appellant has not given the court all the aid possible to be furnished. The piston was not presented in court, and seems not to have been preserved. Its production might well disclose valuable evidence on the question of its condition prior to the accident, including the evidence or lack of evidence of old cracks or breaks. The fact neither of the accident nor of the docking at Detroit was entered upon the permanent log, although it is said such record is required, and although the captain is confident he entered the facts upon the scratch log (which was lost or thrown away), and although the fact of the accident was so well in mind during the voyage that the ship was met at Duluth by its representative, who took the written statements of its seamen regarding the accident. This suppression of the record was a foolish and vain thing; but we can see no other reason for it than that suggested by the District Judge, viz.:

"So that if the owner or boat got in a lawsuit any kind of a theory could be advanced, when there was plenty of time for interested parties to think the matter over."

While, as already said, it is possible that the piston was broken by its flying back as stated, at the time of the accident, it would seem more probable that it was broken before that time. Indeed, the treatment to which the pump had been subjected for so long a time in the use not only of pinchbar and chain fall, but especially of iron sledge, would tend to injure the internal mechanism of the pump, if not the piston itself. And it seems the more reasonable conclusion, to say the least, that the application of steam would not have broken the piston, unless it were previously injured, or unless there was already some radical infirmity in the internal structure of the pump; and that it would not have failed, after 30 minutes' effort, to continue to run unless radically wrong. The suggestion that the oiler broke the piston when he started the pump on leaving Lorain seems little, if anything, more than a surmise, and is opposed to the belief of the oiler, and to his testimony that:

"She was jumping from one end to the other when I turned the steam on [and he says he "started it slow"]; then it made a sort of jump."

There is credible testimony that the pump could have run for some little time, even with the broken piston. But whether or not there was a broken piston previous to the ship's leaving Lorain (which we think the more reasonable conclusion), we are convinced that the condition of the pump at that time was so radically defective as to make reasonably probable and as to cause the accident which did happen.

Under these circumstances, an affirmative and definite showing of the precise defect which caused the plunger to fly back is not essential to liability. It is enough, as against the charge of speculation, that the conclusion that the action was due to a radical defect in the interior condition of the pump, previous to leaving Lorain, seems more reasonably probable than any other.

We agree with the conclusion of the District Judge that appellant did not use due care with respect to ascertaining and remedying the

actual defects in the pump. The experience had during the two years preceding the accident called for a thorough examination of its internal structure. During the year preceding the year of the accident a piston rod had been broken and repaired; but, aside from this, no internal examination seems to have been had, although external means were frequently taken to relieve the difficulty, never with more than temporary success, and although the machinery would naturally be overhauled during the winter preceding the accident, and although some grinding of valves had been done at Buffalo just before the trip to Lorain, during which trip the pump seems to have worked fairly well. Whether or not the chief engineer represented the ship owner in the care of the ship, and the duty, as between the ship owner and appellee, to keep the engine-room machinery in safe condition, we think, to say the least, that due care and inquiry on the part of the fleet engineer, who had general oversight of all the boats in appellant's fleet, including the overhauling at the end of the season, would have led to the discovery of the defective condition of the pump, which every one connected with its operation during the preceding two years well knew; and it is reasonable to believe that a thorough internal examination would have disclosed the existence of radical fault and thus have led to its remedy.

[4] In reaching the conclusion that appellant was negligent in maintaining the pump in unsafe condition we may properly take into account the fact and nature of the accident, in connection with all the other circumstances in the case, notwithstanding negligence is not ordinarily assumed from the mere fact of accident. La Fernier v. Soo River Co., 129 Mich. 596, 89 N. W. 353; Byers v. Carnegie Steel Co. (C. C. A. 6) 159 Fed. 347, 351, et seq., 86 C. C. A. 347, 16 L. R. A. (N. S.) 214.

[5] In our opinion, appellant has not sustained the burden of showing that appellee assumed the risk of starting the pump. The risk of what actually happened was not assumed merely by accepting and continuing the employment. It is not enough that appellee knew the pump was defective. The plunger had never before been known to fly back; and we cannot say that appellee had reason to expect it would do so. The actual risk was thus not appreciated nor consciously assumed. C., N. O. & T. P. Ry. v. Thompson (C. C. A. 6) 236 Fed. 1, 10, et seq., 149 C. C. A. 211, and cases cited. Appellee had the right to assume, in the absence of notice to the contrary, that the ship owner would make due inspection of the pump and keep it in safe condition. C., O. & G. Ry. v. McDade, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; C. & O. Ry. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102. He had no right to undertake this duty himself; to have done so would probably have cost him his job.

Nor did he assume the risk by starting on the voyage from Lorain. The chief engineer had, without the knowledge of the ship owner, left the ship at Lorain, and gone to Detroit by rail, leaving the engine room in charge of appellee, whose license papers were insufficient for a ship of the size of the Ball. As a practical proposition, he had to take charge of the engine and its appurtenant machinery. It is immaterial

to the question of assumption of risk that this undermanning of the ship was without the owner's knowledge.

Nor did the appellee assume the risk by starting the feed pump, instead of using either the injectors or the service pump. The injectors were used only in harbors, and not when the ship was at sea; the service pump was devoted to a variety of uses, including fire service, and was auxiliary only to the feed pump with respect to supplying the boilers. Moreover, the feed pump supplied hot water to the boilers, while the service pump gave only cold water; the accident occurred in December. The defect in the feed pump was discovered while at sea. Under all these circumstances, due observance of duty demanded that appellee try to start the pump, as had always been done under and by the direction of the chief engineer. The case does not fall within the general rule invoked by appellant, that an employé engaged in repair work assumes the risks necessarily incident thereto. No repair of the pump was being had or attempted; nothing that appellee did or could do would repair the defects; he was only trying to start the pump, and his employment at the time was no more in the nature of repair than would be the throwing of an engine off the center. It is also urged that appellee was guilty of contributory negligence, and so could not recover full compensation.

[6] We assume, for the purposes of this opinion, that there is in admiralty a defense of contributory negligence analogous in principle to that prevailing in common law actions. It is surely no more favorable to a shipowner than to an ordinary employer.

The burden of proof is upon appellant, and again we are satisfied that the burden has not been sustained. In the absence of knowledge that the plunger was likely to fly back, appellee was not negligent in standing in front of the pump and pushing upon the bar, instead of pulling from behind. He took the course always followed on the ship, and which enabled greater purchase than did the other way.

[7, 8] But there was testimony of several witnesses that the plunger could not fly back unless live steam was turned on or unless the bleeders (through which the water of condensation is discharged) were closed; and it is assumed that appellee either turned on the steam or closed the bleeders, or both. But this contention is not sustained by the testimony. Appellee testified that he had already tried unsuccessfully to keep the pump going by turning on the steam after using the pinchbar, and that the steam was turned off when the bar was used the previous time. This is undisputed. There is no testimony that he closed the bleeders, except that of the oiler, and he had previously given a written statement that the bleeders were not closed. The District Judge, who heard his testimony in connection with the other testimony in the case, refused to believe it, and refused to believe that appellee either turned on the steam, or knew it was turned on, or failed to open the bleeders, or after they had been opened closed them. The evidence does not preponderate against this conclusion, and we accept it as correct. City of Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; Monongahela, etc., Co. v. Hurst (C. C. A. 6) 200 Fed. 711, 119 C. C. A. 127; Pugh v. Snodgrass (C. C. A. 6) 209

Fed. 325, 126 C. C. A. 251; Erie, etc., Co. v. Dunseith (C. C. A. 6) 239 Fed. 814, 816, — C. C. A. —. Assuming what the District Judge says was plain to him, that "the steam must have been on, or the valves were defective in such a way that the steam rushed in, or that being shut off it was turned on," it does not follow that appellee turned on the steam. When the accident occurred he was at the water end of the pump, about 14 or 15 feet from the steam valve. If the steam was turned on, it is fully as likely that the oiler did it, and if the negligence of the ship owner, in failing to keep the pump safe and seaworthy, contributed to the injury, the shipowner is liable, notwithstanding the concurring negligence of the oiler. See by analogy Kreigh v. Westinghouse Co., 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984 and cases cited; American Shipbuilding Co. v. Lorenski (C. C. A. 6) 204 Fed. 39, 44, 122 C. C. A. 353; Meers v. Childers (C. C. A. 6) 228 Fed. 640, 643, 143 C. C. A. 162.

Whether or not appellant was at fault in not taking appellee back to Lorain for earlier treatment, instead of going through to Detroit (The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955), we need not consider, for the reason, if for no other, that the damages awarded were agreed upon by both sides as full compensatory damages; and there is nothing to indicate that the element of delay entered into the ascertainment of the amount of damages.

It results from these views that appellee was entitled to full compensation, and was not limited to relief by way of maintenance and cure, as for mere negligence in operation of the ship.

The decree of the District Court is affirmed.

MINNEAPOLIS & ST. L. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 21, 1917. Dissenting Opinion August 9, 1917.)

No. 4880.

MASTER AND SERVANT ⊂=13—HOURS OF SERVICE ACT—CONTINUOUS SERVICE.

Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), provides that a railroad train employé shall not be required or permitted to remain on duty for a longer period than 16 consecutive hours, that when he has been on duty continuously for 16 hours he shall not be permitted to again go on duty until he has had at least 10 consecutive hours off duty, and that when he has been on duty for 16 hours in the aggregate in any 24-hour period he shall not be permitted to again go on duty until he shall have had at least 8 consecutive hours off duty. *Held* that, in view of the purpose of the act to keep up the efficiency of the men charged with the running of trains, where freight train crews made round trips, covering from start to return between 17 and 18 hours, the giving to such crews of an absolute release from duty of from 2 to 2½ hours at the other end of the run did not break the continuity of the service, which exceeded the statutory limit of 16 hours.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action at law by the United States against the Minneapolis & St. Louis Railroad Company. Judgment for the United States, and defendant brings error. Affirmed.

For opinion below, see 236 Fed. 414.

R. B. Alberson, of Des Moines, Iowa (F. M. Miner, of Minneapolis, Minn., Crom. Bowen, of Des Moines, Iowa, and W. H. Bremner, of Minneapolis, Minn., on the brief), for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Claude R. Porter, U. S. Atty., of Centerville, Iowa, on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This was an action by the United States to recover penalties from the railroad company for having permitted certain of its employés to be or remain on duty for a longer period than 16 consecutive hours. Section 2, c. 2939, 34 Stat. 1416. There were 19 counts in the complaint, upon each of which judgment was rendered in favor of the plaintiff. The action was tried to the court, and special findings of fact were made. The only question before us is: Do the facts found support the judgment?

The different employés of the railroad company are divided by the findings of fact into four groups.

Group 1 includes J. D. Haggin, an engineer, and H. C. Hoyer, a fireman. These employés were operating an extra helper engine between Marshalltown and Abbott, Iowa. On December 10, 1914, said engineer and fireman began service at 9:40 o'clock p. m., and continued service until 3:30 o'clock p. m. on December 11, 1914, a period which, if consecutive, is 17 hours and 40 minutes. They returned from a trip to Abbott at 4:35 a. m. December 11th, at which time they were absolutely released from service until 6:55 o'clock a. m., a period of 2 hours and 20 minutes. During said period the engine was left at the water tank. The engineer went to the roundhouse, about a block away, and registered. He then went from there to a restaurant and had breakfast, which occupied about 30 minutes. Then he returned to the roundhouse, spending about 15 minutes upon his way visiting and talking. He remained at the roundhouse until 6:55 a. m., which was the termination of the period of release. He then took charge of his engine. The engineer lived in Marshalltown, about six blocks from where the engine was left; but he did not go to his home, because he did not want to awaken his wife. There were no facilities for rest in the roundhouse, except some wooden benches; but he laid down upon one of those and slept a little for half an hour or more. He did not remove his clothes or retire for rest, except as aforesaid. The engineer registered in at Marshalltown at 4:35 a. m., after he got off his engine and walked down to the roundhouse, a block away. He registered out at 6:55 on the same morning. Hoyer, the fireman, carried a lunch with him on the engine, and generally ate a little every time the engine stopped. He left the engine at the same

time as the engineer, did not have to register, but went direct to the restaurant, which was about two blocks from the engine, and had his breakfast; had a regular place for sleeping, about eight blocks from the yards, but did not go there to sleep, and did not sleep at all, "fooled around" until about starting time, and played some pool at the restaurant.

Group 2 includes J. P. Boyce and J. W. Gibson, engineers; B. McDonough and V. Miller, firemen; C. Vandraska, conductor; C. A. Benson and M. C. Satchell, brakemen. These men constituted a crew operating a freight train with two engines from Grinnell to Oskaloosa, Iowa, and return. They entered service at 6:30 a. m., December 27, 1914, and terminated service at 11:45 p. m. on December 27, 1914, a period which, if consecutive, is 17 hours and 15 minutes. They were absolutely released from service at Oskaloosa from 5 p. m. to 7 o'clock p. m., a period of 2 hours. What this crew was doing during the period of release does not appear.

Group 3 includes J. T. Elder, engineer; E. L. Howell, fireman; S. S. Walton, conductor; W. G. Risney and T. E. Young, brakemen. They composed a crew operating freight trains from Oskaloosa to Marshalltown, Iowa. They entered upon service at 8:45 a. m. January 20, 1914, and continued service until 2 a. m. January 21st, which, if consecutive, amounted to 17 hours and 15 minutes. There was a period of absolute release of 2 hours at Marshalltown, Iowa, from 3:35 p. m. to 5:35 p. m. on January 20th. The crew again entered service at 8:45 a. m., but waited until 9:40 a. m. before the train was ready to start. At Marshalltown the engine was left at the roundhouse, about a half block from the depot. The engineer went to the roundhouse and reported, and then went to a restaurant, about two blocks away, and ate his supper, which took 20 or 30 minutes. There was no place specially provided for sleeping. There were some pillows and bedding in the caboose, furnished by the trainmen and conductor for their own use, and they could sleep upon the cushion seats extending lengthwise; and this courtesy was extended to the firemen and engineer, if requested. Howell, the fireman, left the engine at the same time as the engineer, and went to the restaurant and had supper. Neither the fireman nor engineer had any home or place to sleep in Marshalltown, except as aforesaid, and except as to the benches that were present in the roundhouse. Walton, the conductor, also went to the restaurant; had no place for sleeping in Marshalltown, except as aforesaid; and it does not appear that he slept any at that point. What the brakeman did does not appear.

Group 4 includes B. F. Rinehart, engineer; W. F. Lewis, fireman; E. Hearne, conductor; A. C. Miller and John Donner, brakemen. They were a crew operating a freight train from Oskaloosa to Marshalltown, Iowa. They entered service on January 28, 1915, at 6:15 p. m., and terminated service at 12:10 p. m. January 29th, a period which, if consecutive, is 17 hours and 55 minutes. There was a 2-hour period of absolute release from 4:50 a. m. to 6:50 a. m. on January 29th, at Marshalltown. Rinehart lived at Oskaloosa; had no special place to sleep in Marshalltown; ate his breakfast three or four blocks from where he left his engine. There were places where workmen could

sleep within a block or half block of the yards at Marshalltown. The fireman had breakfast about the same time; did not go to sleep; no sleeping place in Marshalltown. There was bedding in the caboose, and Hearne, the conductor, went to the caboose and went to sleep for awhile. The accommodations in the caboose were cushion seats lengthwise of the car, about 2½ feet wide and about 34 feet long. There were seats on both sides. Miller and Donner had the privilege of sleeping there. The periods of release mentioned in the four groups were absolute, and so understood by the employés.

None of the employés did any work, during the periods of release mentioned, about engines, cars, or equipments of the railroad company, or any other work in connection with their employment. Marshalltown, Iowa, is a terminal of defendant company, and a city of 16,000 or 18,000 inhabitants. Oskaloosa is a city of 8,000 or 9,000 inhabitants.

The question presented by these findings of fact is: Were the periods of release, taking into consideration the purposes of the law, periods of rest or off duty which the law requires? If they were, then there was not in any case a longer period of service or on duty than 16 consecutive hours. If, on the contrary, these periods were of such length, or at such a time and place, or in connection with such service, that, although absolutely relieved from duty, the employés did not receive that rest which it was the policy of the law to secure, then the periods of release did not prevent the hours of service from being consecutive and the law was violated. In United States v. Atchison, Topeka & Santa Fé Railroad Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, it was decided that under section 2 a telegraph operator employed for 6 hours, and then after an interval for 3 hours, is not employed for a longer period than 9 consecutive hours. By section 2 it is also provided that, where an employé of a common carrier has been continuously on duty for 16 hours, he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty, and no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty. We are of the opinion that, under the law and the decision of the Supreme Court in the case cited, the period of 16 hours may be divided; but the law in regard to employés other than operators, train dispatchers, or those engaged in similar service is not the same as the law in regard to operators. The law does not say that an employé shall not be permitted to be or remain on duty for a longer period than 16 consecutive hours in any 24-hour period, and the hours of service for operators is much less than those for employés in general.

In regard to employés in general the law provides that, after an employé shall have been continuously on duty for 16 hours, he shall be relieved, and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty. This would make a total period of 26 hours. It then provides that, if an employé has been permitted to be or remain on duty 16 hours in the aggregate in any 24-hour period, said employé shall not be required or permitted

to continue or again go on duty without having had at least 8 consecutive hours off duty; the intention of Congress being apparently that, if the 16 hours of service is divided, then the period of release affects the time which the employé is entitled to remain off duty at the end of his service. We make this statement for the purpose of showing that the time of release must be for all intents and purposes of the same character, except as to length of time as the period which the employé is permitted to be and remain off duty after the end of the period of service. It will be seen, whether we consider the period of 8 hours applicable to employés who have been permitted to be and remain on duty in the aggregate for 16 hours or the period of 10 hours applicable to employés who have been on duty for 16 consecutive hours, that the period of rest is much less than is given to operators and train dispatchers or employés engaged in like service, so that it would be impossible to divide up the 16-hour period to the same extent as may be done with the last-named class of employés. The intent and purposes of the law must not be lost sight of in attempting to divide the 16 hours of service. The object and purpose of the Hours of Service Act has been often stated by the courts, and has again been recently stated in the case of Atchison, Topeka & Santa Fé Railway Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175 (June 4, 1917), in the following language:

"Considering these opposing contentions, it must be remembered that the purpose of the act was to prevent the dangers which must necessarily arise to the employé and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those intrusted to their care. It is common knowledge that the enactment of this legislation was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men, whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions."

That an employé is absolutely relieved from service is not of controlling importance, if the time is so short or the opportunities for rest are so meager that for all practical purposes an employé does not have the opportunity for rest which the law requires. It was decided in Southern Pacific Co. v. United States (Circuit Court of Appeals, 9th Cir.) 222 Fed. 46, 137 C. C. A. 584, that whether the break or intermission in the hours of service are such as the law will recognize depends upon their character as periods of substantial rest, and that the question as to whether the periods of release gave opportunity for substantial periods of rest was for the jury, under the evidence in each case. In United States v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 624, and United States v. Denver & R. G. R. Co. (D. C.) 197 Fed. 629, cited with approval by the Supreme Court in Missouri, K. & T. Ry. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144, it was decided that not every release from duty was such as the law contemplated, but that each release must be determined according to the facts in the particular case. There may be cases, undoubtedly, where the release is for such a time and under such circumstances that the court may say as matter of law that the release

was or was not such as to be within the requirement of the law; but in the present case the parties waived a jury, and submitted the facts and all legitimate inferences to be drawn therefrom to the trial court for decision. That court found that the periods of release under the circumstances did not break the consecutive character of the hours of service, and entered judgment accordingly.

We are of the opinion that the periods of release were periods of waiting which gave no proper opportunity for rest. The service was what is termed a "turn-around" service. If the train crew can be given an absolute dismissal for the time which elapses at any particular terminal before the return trip is made, with only the opportunity for rest which is shown by the evidence in this case, and such time is held to break the consecutive hours of service, then the purpose of the law will be largely defeated, and the employés permitted to remain on duty for a longer period than is lawful.

We are therefore of the opinion that the judgment should be affirmed; and it is so ordered.

SANBORN, Circuit Judge (dissenting). The statute forbids any common carrier to permit an employé to be or remain on duty "for a longer period than 16 *consecutive* hours" and provides that when he has been on duty *continuously* for 16 hours he shall not be permitted to go on duty again until he has had "at least *10 consecutive* hours off duty," and when he has been on duty "16 hours in the aggregate" he shall not be permitted to continue or go on duty without having at least *8 consecutive* hours off duty. The italics are mine, and are used to challenge attention to the fact that it is a continuous service, without break or intermission, for a long period of consecutive hours, against which the portion of the law here invoked is especially leveled, and to the fact that the term "consecutive hours" is used three times in the section, once to describe the term of continuous service permitted, 16 consecutive hours, and twice to describe terms off duty, at least "10 consecutive hours" in one case, and "at least 8 consecutive hours" in the other.

The record in this case discloses the fact that each of the employés whose service is the occasion of this action was absolutely released from duty by the employer for a definite period of at least 2 consecutive hours during a term of service which, if this intermission is counted as a part of it, did not amount to quite 18 hours, and that each employé was made fully aware of the fact of his freedom from service before this intermission therein commenced. Moreover, these releases were at terminals of the trips of the employés, or at terminals of the runs of their trains where the employés could obtain the accommodations of railroad stations, restaurants, and houses, and could be and were relieved of the mental tension as well as the manual labor of their service, and could be and were free from all care of their engines, or anything connected with the property of their employer. The law does not require the employer to compel its employés to sleep, or to rest, or to play, or to work during the intermission when they are off duty. It requires simply that they shall be relieved from continuous service

during consecutive hours. A service of 8 hours, an intermission of 2 hours in which the employé is relieved of all duty and is free from service, followed immediately by a service of 8 consecutive hours, cannot be a service of 16 consecutive hours. If it is, then under the following provision of the statute an employé who, after serving for 16 consecutive hours, has 5 hours off duty, then 2 hours on duty, followed immediately by 5 hours off duty, has at least 10 consecutive hours off duty, and one who, after serving 16 hours in the aggregate in 24 hours, has 4 hours off duty, then 2 hours on duty, immediately followed by 4 hours off duty, has at least 8 consecutive hours off duty. This does not seem to me to be a permissible construction of the statute. The words "consecutive" and "continuously" in this statute seem to me to be not only significant, but controlling. It is common knowledge that continuous service for 16 consecutive hours exhausts, wearies, and weakens men, and tends to render them inattentive to duty, or incapable of discharging their duties, far more than an aggregate service of 16 hours in two periods of 5 hours and 11 hours each, with an intermission between them of 2 hours off duty—2 hours of absolute relief from the strain, care, tension, and labor of their duties. And it was against this exhaustion of continuous service for more than 16 consecutive hours that this statute was leveled. This is made plain by the express provision in the section under consideration that 10 consecutive hours off duty are required where the employé has been on duty for 16 consecutive hours, while only 8 consecutive hours off duty are required when he has been on duty 16 hours in the aggregate, but not 16 consecutive hours, in any 24-hour period. Judge Pollock in United States v. Atchison, Topeka & Santa Fé Ry. Co. (D. C.) 232 Fed. 196, 197, well remarked:

"Having in mind the purpose of Congress in the enactment of the law, that purpose is better subserved by permitting an operator to work 9 hours out of 10, with one hour absolutely his own, except in cases of emergency, that he might take his meals, relax, and have recreation, than would be the case where he is permitted to work 9 * * * consecutive hours."

And in United States v. Atchison, Topeka & Santa Fé Ry. Co., 220 U. S. 37, 44, 31 Sup. Ct. 362, 55 L. Ed. 361, where a telegraph operator was employed from half past 6 o'clock in the morning until 12, and again from 3 p. m. to half past 6, or 9 hours in all, with an intermission of 3 hours, the Supreme Court declared that:

"A man employed for 6 hours and then, after an interval, for 3, in the same 24 hours is not employed for a longer period than 9 consecutive hours."

Because each of the employés whose service was the occasion of this action was fully released from duty, and from all care, tension, and labor for his employer, and knew that fact before the commencement of the intermission, for a definite period of more than 2 consecutive hours during the time, which was less than 18 hours, that it is claimed that he was on duty, because the company was not required under the law to make him sleep or rest or recreate, nor was the company required to do more than to relieve him from duty, so that he could have an opportunity to rest his mind and his body, and relax from the strain

and tension of continuous thought and action for his employer, because the main purpose of the provision of this law under which this action is brought was not to forbid, but to permit, service for 16 hours in the aggregate within 24 hours, where, as in this case, there is an intermission of a substantial length of time, such as 2 hours between the hours of actual service constituting that aggregate, because that provision of the law is leveled at continuous service for more than 16 consecutive hours, and its object is to relieve the weariness and exhaustion resulting from continuous mental strain and physical labor without intermission for relaxation, because employés on duty 6 hours, then off duty 2 hours, and then on duty 10 hours, are not on duty 16 consecutive hours, and because while the employés in this case were on duty, if the intermission be counted, a little more than 16 hours in the aggregate, I am unable to bring my mind to assent to the view that these men, who rendered less than 16 hours of actual discharge of duty, broken in each case by an interval or intermission of more than 2 consecutive hours, during which they were free from all duty, were on duty more than 16 consecutive hours, I am unable to resist the conclusion that the company was not liable for a violation of this law.

QUICKSILVER MINING CO. v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917.)

No. 2941.

1. CORPORATIONS ⊂⊃432(12)—OFFICERS—SCOPE OF EMPLOYMENT.
   In an action against a mining company to recover for services rendered in connection with the organization of a corporation for building of an electric railroad leading from the mine to a central point, and procuring of rights of way, etc., evidence *held* to warrant a finding that the president of the corporation who engaged plaintiff was acting within the scope of his authority.

2. CORPORATIONS ⊂⊃388(1)—ACTIONS—LIABILITY—AUTHORITY.
   The president of a mining company, having suggested that the acquisition of transportation facilities would make the operation of the mine more profitable, was authorized to make a detailed report to the directors. He engaged plaintiff, who procured rights of way, obtained subscriptions, and organized a corporation for the building of an electric road from the mine to another point. The road in fact was never built. *Held* that, the president being authorized, the mining company could not defeat plaintiff's recovery on the ground that the building of the road was beyond its charter powers.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Benj. F. Bledsoe, Judge.

Action by C. P. Anderson against the Quicksilver Mining Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

A. H. Jarman, of San Francisco, Cal., for plaintiff in error.
C. A. Herrington, of San Jose, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The defendant in error recovered in the court below judgment for services alleged to have been rendered by him for the plaintiff in error under employment by its president. No question is here made regarding the fact of the performance of the services, nor concerning the value of them. The defense to the action in the court below was, and the basis of the contentions in this court is, that the enterprises in and about which the defendant in error was employed were beyond the scope of the powers conferred on the plaintiff in error by its charter, and, further, that they were not within the usual and ordinary business of the corporation, and therefore that its president was without authority to employ the defendant in error to render the services for which he sued and recovered.

The record shows that the plaintiff in error was incorporated by act of the Legislature of the state of New York April 10, 1866 (Laws 1866, c. 470), "by the name, style, and title of 'the Quicksilver Mining Company,' and by such name and title," the act provides, "shall have perpetual succession, and shall be capable of suing and being sued, impleading and being impleaded, and of granting and receiving, in its corporate name, property, real, personal and mixed, and of holding and improving lands in California or elsewhere, and to obtain therefrom any and all minerals and other valuable substances, whether by working or mining, leasing or disposing of privileges to work or mine such lands, or any part thereof, and to erect houses and such other buildings and works as may properly appertain to said business, and to use, let, lease or work the same, and to dispose of the products of all such lands, mines and works as they may deem proper." The act also, among other things, conferred upon the company power to make such by-laws as it should deem proper to enable it to carry out the objects of the corporation, and to alter, amend, add to, or repeal the same, provided that such by-laws should not be contrary to the Constitution of the state or of the provisions of the act of incorporation. The act also authorized the persons therein named as a body politic to elect persons to serve as directors of the corporation, a majority of whom should constitute a quorum for the transaction of business, and to hold their offices until their successors shall have been elected in accordance with the by-laws. It also declared it "lawful for said company to establish the necessary offices for the business of the company wherein their business is located, and to have their principal office in the United States, in such place as they may deem expedient, at which place it shall be lawful to hold all meetings for the transaction of the business of the company."

It appears from the record that the chief property of the company is that known as the New Almaden quicksilver mine, situate in Santa Clara county, Cal., the productive record of which, according to the brief of the plaintiff in error, is more than $150,000,000. It has been operated by the plaintiff in error for more than 40 years. The by-laws of the company provide, among other things, that "the corporate

powers of the company shall be exercised by a board of directors, and such officers and agents as they shall appoint," and that the directors shall hold "stated, special, or adjourned meetings at such times and places as they may deem most convenient and consistent with the interests of the company," and that "the directors shall have power to delegate, from time to time, such authority as they may deem necessary to the officers of the company or to any one or more members acting as a committee in order that the business of the company may at all times be transacted with promptness and dispatch." The office of the company was established in New York City, where it has always remained.

From June, 1909, until some time in June, 1913, C. A. Nones, a resident of New York, was a member of the board of directors and president of the company, and Miss M. A. Bowe, also of New York, was likewise a member of the board, and its secretary. In February, 1910, J. T. Tatham, who was at the time bookkeeper and cashier of the company at the mine, was by Nones appointed its general manager at a salary fixed by him. In June, 1911, Tatham was elected a director and treasurer of the company, and remained such until both he and Nones were removed from their respective offices by the board of directors in June, 1913.

The property of the company is situated about 12 miles southwesterly of the city of San Jose, upon the eastern foothills of the Coast Range, being connected with the city by a boulevard known as the Almaden road. Running through it for about three miles is a creek, called Almaden creek, fed by the waters from the Los Alamedes watershed. The property embraced about 8,500 acres, a large part of which consists of agricultural land. During Nones' presidency of the company he was much of the time at the mine, and certainly its directing head in so far as concerned its usual and ordinary business. While the main business of the company was undoubtedly the mining of quicksilver, which included the use of power developed from the waters upon its land, the record leaves no room for doubt that it also included the management and disposition of the by-products of its ores and of its extensive land holdings and waters and water rights. One of the by-products was paint; and it appears from the evidence without dispute that Nones, while in charge of the property as president, concluded that it was to the interest of the company to build a paint mill, and that upon his recommendation a resolution was adopted by its board of directors authorizing the construction of such a mill, not to exceed a cost of $8,000, and directing such steps to be taken "as may be necessary under the advice of our counsel for the formation of a company to conduct such business, with the understanding that all of the stock is the property of the Quicksilver Mining Company." Payment for the services performed in the procuring of the necessary information upon which that recommendation was made by the president of the company was manifestly just as much obligatory upon it, had the recommendation not been approved, as it was upon its approval.

In precisely the same way, as shown by the record, Nones, as president of the company, concluded, while in charge of the property, that

the waters of the creek that flowed through the company's land, and the value of its water rights, could and would be enhanced by procuring certain options on neighboring lands, and that by an addition to the then existing dam in the creek, or the building of another dam, the company would be enabled to develop more power for its own uses, and would thereby be enabled to use and dispose of the waters to better advantage, and further concluded, while so in charge of the property of the company, that a large saving in the expense of hauling the company's ores to its reduction works by teams (a distance of about four miles), and in the expense of hauling its supplies from San Jose to the mine (a distance of about twelve miles), could be effected by the building of an electric road from the mine to San Jose by way of the reduction works and through a growing community, which was anxious for the construction of such a road, and would contribute, not only rights of way therefor, but give a substantial bonus besides. These matters, it appears from the minutes of the company introduced in evidence, were reported to its directors by its president in detail, with the reasons which formed the basis of his recommendations.

Respecting the water the president in his report stated, among other things, that "owing to the contract which we have with the county, it undoubtedly has to lease all pipes for a term of 50 years from the date we elect to lease same, subject to a donation of 100,000 gallons of water per day to the county. I recommend that as soon as these pipes are properly installed that this company notify the county of its intention to lease said pipes, and this company should then transfer to the water company which is now in existence all of the water rights, receiving in payment therefor all the stock of the water company," and among the reasons stated by the president for that recommendation were, in substance, that the company could increase its supply of water, could earn some revenue from its sale to water users along its line of pipes after the water should be first passed over the service wheels, and thereby transferred into power, and that, if a dam of sufficient depth was constructed upon the company's property, "it would store up sufficient water to supply 10,000,000 gallons of water per day; that they (the San Jose Water Company) would then rather buy our rights at more than a fair price, allowing us to retain the power privileges, than to run the chance of our becoming competitors against them in the water supply business." The minutes of the company show that, acting on that report and recommendation, on motion of Director Whicher, duly seconded:

"It was resolved that the officers of the company be authorized to transfer to the California Power Company all the water rights owned by the Quicksilver Mining Company, together with the lease of the pipes of the county of Santa Clara, said lease being for a term of 50 years, and in exchange therefor to receive all stock and other securities of the California Power Company."

The minutes further show that at the same meeting, on motion of Director Whicher, duly seconded, this resolution was adopted:

"The president is therefore authorized to sell and transfer these securities at a price of not less than $150,000 in cash or its equivalent, reserving, how-

ever, to the Quicksilver Mining Company the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day."

The foregoing resolutions were adopted at a meeting held September 20, 1911. At a subsequent meeting of the board of directors, held March 18, 1912, the resolution of September 20, 1911, regarding the sale of the company's water rights, was rescinded, and in lieu thereof this resolution adopted:

"Resolved, that the officers of the company be authorized to transfer to the Senonac Power Company all the water rights owned by the Quicksilver Mining Company, together with the lease of the pipes of the county of Santa Clara, said lease being for the term of 50 years, and in exchange therefor to receive all stock and other securities of the Senonac Power Company, and the president is therefore authorized to sell and transfer these securities at a price of not less than $200,000 in cash or its equivalent, reserving, however, to the Quicksilver Mining Company the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day."

The report of the president made to the board of directors at its meeting of September 20, 1911, regarding the proposed electric road, contained the following:

"Our maximum transportation tonnage has a daily capacity of not in excess of 20 tons, which we haul 7½ miles at cost of 60.2 cents per ton. For this service we were paying last year $1.25 per ton, and this saving has been effected by ownership of our teams. All of which has been paid for. In the near future we will have to consider the handling of not less than 60 tons daily and possibly 100 tons. We have reduced the cost of transportation as low as can be done, so that an increased tonnage will force us to purchase additional teams and will permit of no saving. Our calculations of hauling is based on 6 horses for every 8 tons. Only hauling 60 tons daily would cost us about $37, or about $12,000 per year. In addition to this amount we are constantly paying for the hauling of our groceries from San Jose to the mine, and we haul about 25 tons monthly, at a cost of about $4 per ton. Our entire hauling charges and feed bills amount to over $15,000 per year. I submit the proposition to the board regarding an electric road to be built from San Jose to the furnaces. There have been several meetings on this matter with the residents of the valley, who are unanimously in favor of this undertaking, and have so far subscribed in cash about $10,000; this being a donation for which they will receive neither stock nor bonds of the proposed road. I believe that this donation will amount to $15,000 before the road is built. Besides there has been granted to me personally, for about three-fourths of the distance of a private right of way of 20 feet width, and also sufficient land for turnouts and stations. The balance of the right of way necessary will have to be acquired from the county, and will cost a few hundred dollars. I am of the opinion that, if a company were formed to operate and build this line, the line could be built by a certain contractor with whom I have talked in San Jose upon the following terms: Original cost of road would not exceed $110,000, to which would be added 10 per cent. for profit, and for this the contractor would receive 6 per cent. bonds of this railroad company, less amount of cash donated by residents. Said bonds to be guaranteed principal and interest by the Quicksilver Mining Company. The cost of hauling our own freight over this line this way would be very small. A 40-ton car as a trailer could be attached to any regular passenger car without further charge, and in addition to our saving for transportation, which will be in the neighborhood of over $15,000 per year, we would also be able to carry passengers and haul freight and express packages for residents along the line. A close calculation of the population between San Jose and Almaden, gauging the same for a distance of a mile east and west along the proposed line,

shows about 5,000 people; also three schools, with a daily attendance of 150 scholars. Also beg to call your attention to the benefits accruing to us from this electric road. Our acreage along the proposed lines is composed mostly of hills, which are nothing but grazing lands and worth not over $20 per acre. Should this line be built, these hills would be desirable building sites; we retaining our mineral rights, as has been the case in similar localities, to wit, Los Gatos and Saratoga, two places which are situated from 6 to 7 miles of our property. We also own 128 acres of land along the proposed line, which we could not sell for $48 per acre for agricultural purposes last year. This land is finely situated for a town site, and, although we have sold 10 acres at $110 per acre, we still have sufficient left to warrant setting out this land in one-half acre plots which would be sold easily at $150 per one-half acre plot. This proposition is worthy of the most serious consideration. I have devoted several months to it, and have obtained the approval of the majority of the property owners whose lands are along the proposed line of railway."

Regarding the foregoing report of the president with reference to the electric road, at the meeting at which it was presented it was, on motion:

"Resolved, that before taking action on an electric road to be built from San Jose to the mine, that the president furnish a complete specification, showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the board."

Preceding the meeting at which the foregoing resolutions of the company were adopted, at a meeting of its board of directors held June 5, 1911, on motion of Director Swayne, duly seconded:

"The president was authorized to have Mr. Aaron, the company's counsel, prepare a resolution re California Power Company, to be submitted to the directors at the next meeting."

And in the deposition of Mr. Swayne, who was himself a lawyer of New York, appears, among other things, the following:

"Q. Do you know anything about the water rights belonging to the defendant company? A. Only what I have heard discussed from time to time among the directors. Q. At board meetings? A. Yes; I have never seen the property. Q. Did you ever hear discussed in a directors' meeting the proposition to construct an electric railway to extend from San Jose to New Almaden, where the works of the defendant company are located? A. Yes. Q. You also heard discussed in directors' meetings the development of the water rights and water powers owned by the company? A. Yes. Q. And the object and purpose in the development of the company's water rights and power was to enable the company both to use its power to greater advantage and to sell power, wasn't it? A. That was the plan. Q. You knew that the project of an electric railway line to connect the works with the city of San Jose was a project initiated for the benefit of the defendant company, didn't you? A. I knew that that plan was discussed; it was never authorized. Q. Was it ever objected to? A. Yes; seriously. Q. By whom? A. By Mr. O'Brien, Mr. Stern, and myself."

The record shows that the Senonac Power Company was incorporated, with a capital stock of 5,000 shares, 4,995 of which were issued to the Quicksilver Mining Company March 22, 1912, and 1 each to its president, Nones, its general manager and director, Tatham, and its attorney, Burnett, and Anderson and Brassy. Respecting the Senonac Power Company Mr. Swayne in his deposition says:

"That company was merely a subsidiary of the Quicksilver Mining Company. I believe it was organized and the transfer made, and subsequently it was dissolved."

Preceding which dissolution it appears the Senonac Power Company reconveyed the water and water rights to the Quicksilver Mining Company. It was, according to the record, in connection with the waters and water rights, so dealt with by the plaintiff in error, that a part of the services rendered by the defendant in error were performed under the employment of the president of the plaintiff in error. The other portions so performed were rendered in connection with the proposed building of the electric road. It appears from the record that along the Almaden road, between San Jose and the mine, is a thickly settled fruit-producing community, and that the defendant in error was employed by the president of the company to secure the necessary rights of way and franchises for the road; that at the suggestion of Nones the defendant in error arranged for a public meeting which Nones, as well as Tatham, the general manager of the company, attended, and at which meeting Nones explained, among other things, that the Quicksilver Mining Company needed better transportation, and that he supposed they did; that the mining company would pay for the building of the road and would take all of the stock, but that if any of the residents living along the line wanted any of the stock they could have it; that a committee was thereupon appointed to work with the defendant in error regarding a right of way for the road—Nones asking for a free right of way from San Jose to New Almaden. Nones subsequently appointed a civil engineer named Herrmann to make a survey in connection with the defendant in error of the right of way for the proposed road, and on the 6th day of September, 1911, he wrote a letter to the chairman of the committee, in which he said, among other things:

"I take pleasure in submitting to you my proposition for the consideration of the committee, namely: That your committee obtain and collect the contemplated subscriptions, and accept all rights of way subject to the provisions hereinafter set forth; that the commencement of the building of the railroad will not be later than December 6, 1911, and the completion of the building of the railroad will be within fifteen months thereafter; that the committee make such arrangements with me that upon the final completion of the building of the railroad they will deliver to me the cash collected upon subscriptions in a sum not less than $4,500 and convey to me or my assigns the right of way that may have been gratuitously offered or donated; the said cash and the conveyances for the rights of way last mentioned shall be delivered to two trustees consisting of Mr. J. F. Tatham and another person to be selected by the committee before the 6th day of December, 1911, to be held by such trustees, and to be delivered by them to me or my assigns on the completion of the building of the railroad; that I or my assigns will furnish the money requisite to pay for the rights of way where present options call for money payment after the receipt by me or my representative of all public franchises for running on such parts of the public highway as may be applied for."

The proposition so submitted having been accepted, the defendant in error proceeded to collect numerous subscriptions from the residents along the proposed line, and to secure rights of way therefor from such residents, as also franchises from the county of Santa Clara over roads of the county, following which the road was incorporated, to wit, October 19, 1911, under the laws of California under the name "San Jose & Almaden Railroad Company," with a

capital stock of $120,000, divided into 1,200 shares, of the par value of $100 each—the original subscribers being the defendant in error 1 share; Tatham, general manager of the mining company, 1 share; Burnett, attorney for the mining company, 1 share; Nones, president of the mining company, 117 shares; those issued to the defendant in error, Tatham and Burnett being indorsed in blank by them respectively. Tatham testified, among other things, as follows:

"I was vice president and treasurer of the San Jose & Almaden Railroad Company. The stock of this railroad company belonged to the Quicksilver Mining Company. About $5,000 was expended for the promotion of the preliminary work of this railroad company. The money paid out belonged to the Quicksilver Mining Company. I paid it out. A portion of it came from the office at New Almaden, and a portion came from the New York office; $3,000, I think, came from New York, and $2,000 from the office at the mine. A little work was done, cutting down a bluff to the entrance of the hacienda. It was done by the Quicksilver Mining Company and paid for by it. Surveys were made and paid for by the mining company. Abstracts were also secured, amounting to $225. The survey cost in the neighborhood of $500. These bills were paid for by the mining company."

Tatham also testified that, when the stock in the electric road company was issued to Nones, the latter said it was so issued in trust for the Quicksilver Mining Company—a fact which the whole record plainly shows. Indeed, in view of the facts disclosed by the record, we think it idle to contend that the court below was in error in concluding that the president of the plaintiff in error had at least implied authority to employ the defendant in error to perform the services for the value of which he sued and recovered. It is true that it appears that, about the time the defendant in error concluded his employment, he received in the office of the local attorney of the company the following instrument:

"New Almaden, Cal., March 5, 1912.

"C. P. Anderson, Esq., San Jose, Cal.—Dear Sir: For services rendered and to be rendered on the line of San Jose & Almaden R. R., I hereby agree to pay you the sum of forty-five hundred ($4,500) dollars, payable on completion of the road.

"Yours truly, Charles A. Nones."

And it is also true that in at least one place in the testimony of Nones he states that the defendant in error was employed, not for the Quicksilver Mining Company, but by himself individually. That statement of the witness is not only in conflict with other portions of his testimony, but in positive conflict with his report to the directors of the mining company respecting the building of the road, and in obvious conflict with this sworn statement made by him respecting the obligation so given to the defendant in error, made in his schedules filed in his bankruptcy proceedings, which subsequently occurred:

"Names of creditors: C. P. Anderson.

"Residences: San Jose, California.

"When and where contracted: San Jose, California, January, 1911.

"Nature and consideration of debt and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contract as partner or joint contractor with any other person; and, if so, with whom; guarantee of payment for work done for Quicksilver Mining Company.

"Amount: $4,500."

[1, 2] It is nowhere pretended that Nones had any personal business anywhere in Santa Clara county. His sole business there, so far as appears, was as the representative and head of the mining company; his employment of the defendant in error in connection with the increase of the waters appertaining to the company's lands and the increase of power therefrom was plainly for and in the interest of the company which placed him in charge of the property; and so in respect to the employment of the defendant in error for the procuring of rights of way, franchises, and subscriptions for the proposed electric road, designed, as the president of the company expressly informed its board of directors, to reduce the expenses of the company in the matter of hauling its ores and supplies, and at the same time to earn for it money out of passenger traffic. Whether or not the construction of the road for such purposes was beyond the powers conferred upon the mining company is a question that does not arise in this case. As a matter of fact, as shown by the record, the road was not built, and the plaintiff in error proceeded no further than the organization of a corporation looking to its construction, and the payment of all the costs and expenses of the undertaking, so far as appears, except the fair worth of the services rendered in that behalf by the defendant in error under the employment of its president, in the circumstances that have been stated.

We see no merit whatever in any of the contentions of the plaintiff in error, and accordingly the judgment is affirmed.

GILL v. WATERHOUSE.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2903.

1. GUARANTY ⊂⊃91—PAYMENT OF GUARANTEED ACCOUNT—EVIDENCE.
   Evidence *held* to show that plaintiff did not buy a guaranteed account but, at the request of one of the guarantors, paid it.
2. GUARANTY ⊂⊃64, 65—PAYMENT OF GUARANTEED ACCOUNT—EFFECT.
   A guaranteed account being not bought but paid by plaintiff at request of one of the guarantors, it and the guaranty are thereby satisfied.
3. GUARANTY ⊂⊃64, 65—PAYMENT OF ACCOUNT—REVIVAL.
   A guaranteed account, with the guaranty satisfied by payment thereof by plaintiff at request of one of the guarantors, is not revived by subsequent assignment thereof to him.
4. TRIAL ⊂⊃139(1)—TAKING CASE FROM JURY—INSUFFICIENT EVIDENCE.
   A case is properly taken from the jury and dismissed where the evidence, conceding all the inferences which the jury can justifiably draw from it, is insufficient to warrant a verdict.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by John Gill, for whom has been substituted Maurice McMicken, his administrator with the will annexed, against Frank Water-

house. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

It appears by the complaint herein that the Commercial Bank of Scotland, Limited, with its principal place of business at Edinburgh, Scotland, agreed to make to Frank Waterhouse, Limited, a corporation doing business in London, certain further advances upon being guaranteed by the defendant Frank Waterhouse the payment of such advances as had theretofore been made, as well as such as should thereafter be made, not to exceed £21,000, and that thereupon the defendant executed the following guaranty:

"To The Commercial Bank of Scotland, Limited. I, Frank Waterhouse, Tacoma, Washington, United States, America, hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, of one hundred and forty-seven Cannon street, London, whether on an account or accounts kept in their name in your books and operated on for them by checks or drafts signed by two of their directors and their secretary, all for the time, or on bills, promissory notes or other obligations, are or may be liable to you, but the amount for which I shall be liable under this guaranty shall not exceed twenty-one thousand pounds sterling with interest from the date or dates at which the said Frank Waterhouse, Limited, have become or shall become indebted to you; and I declare (1) that you shall be entitled to require from me whenever you think fit, a payment or payments to account of my liability; (2) that you may grant to the said Frank Waterhouse, Limited, or to the obligants in any bills of exchange or promissory notes, or other writings received by you from them, or in which they may be liable to you, time or other indulgence, and compound with them or such obligants, and may give up any securities which you now have or may hereafter have belonging to the said Frank Waterhouse, Limited, or to others, all without consulting me, and without affecting my obligation to you; (3) that I shall not be entitled to rank on the estate of the said Frank Waterhouse, Limited, in respect to any payment or payments to account as aforesaid, nor to have the benefit of any securities such as aforesaid until your whole claims against them are satisfied; and (4) that this guaranty is a continuing obligation and can be recalled by me only by writing and shall remain in force notwithstanding my death until recalled in writing, and shall apply to all sums for which the said Frank Waterhouse, Limited, shall become indebted to you prior to such recall."

It then further appears that the bank advanced large sums to Frank Waterhouse, Limited, and, that concern having failed to repay the same, that demand was made upon the defendant, on October 31, 1906, for payment under his guaranty, which was refused, and that the bank, prior to the commencement of this action, assigned the demand to plaintiff's testator.

The defendant pleads payment of the demand prior to any assignment of the letter of guaranty, and avers that, at the time of the execution and delivery thereof, other letters of guaranty of like import were executed, for the same purpose and to secure the same indebtedness, and delivered to the bank, all of which letters, including that of the defendant, were accepted by the bank; and that the bank, subsequent thereto, released all the other guarantors from liability.

At the close of plaintiff's testimony the defendant moved for a dismissal of the cause on the ground that the testimony adduced was insufficient to warrant a verdict in favor of plaintiff. The motion was allowed, and judgment rendered accordingly.

Otto B. Rupp and Hughes, McMicken, Dovell & Ramsey, all of Seattle, Wash., for plaintiff in error.

Harold Preston, Bogle, Graves, Merritt & Bogle, and O. B. Thorgrimson, all of Seattle, Wash., for defendant in error.

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

WOLVERTON, District Judge. This brings into the record the sole question of the sufficiency of the testimony to justify the sending of the case to the jury.

The first question presented is whether it was essential that notice should have been given to the defendant by the Commercial Bank of Scotland of the bank's acceptance of the guaranty; no such notice having been proven. This we will waive, as we deem the testimony insufficient to show that the plaintiff is the owner of the demand of the bank against Frank Waterhouse, Limited, or any part of it, together with the guaranty of the defendant, or is in a position to enforce the guaranty. The testimony having any relation whatever to the subject is brief, and may be noted shortly.

John Gill, the plaintiff's testator, at the request of Alexander McNab, one of the persons who executed and delivered to the bank guaranties like that of the defendant, and at the same time paid to the bank, on February 15, 1907, the amount guaranteed. At that time no assignment was made by the bank to Gill, either of its demand against Frank Waterhouse, Limited, or of the guaranty, nor does it appear what agreement was made between the bank and Gill respecting the transaction of payment of the bank's demand by Gill. James Gill, a grandnephew of John Gill, produced what he termed an assignment of the letter of guaranty by the bank to John Gill, which bears date October 8, 1907, and includes as well the claim of the bank against Frank Waterhouse under the guaranty. On cross-examination the witness says:

"I have no direct personal knowledge of the initiation of the transaction between the late John Gill and the Commercial Bank of Scotland, Limited, but my understanding is that the bank were desirous that the debt due by Frank Waterhouse, Limited, should be repaid, and that Mr. Alexander McNab, who was one of the guarantors and who was not, I understand, in a position to meet the guaranty if it were enforced against him, approached the late John Gill as a friend, and asked him to take over the debt; that the late John Gill agreed to do so, and paid off the debt, which amounted to £22,897. 16. 5, and obtained the assignation before mentioned by the Commercial Bank of Scotland, Limited, in favor of himself as an individual. in consideration of said payment by him to the bank, and that the payment was made by check or checks by the late John Gill. I have not been able to find the check or checks among the late John Gill's papers."

Later the witness says:

"I have found among the trust papers certain documents relating to the assignation by the bank and to the present suit, but these did not contain any record of any transaction with Mr. McNab in relation thereto. * * * I have no knowledge of any agreement, written or verbal, between the late John Gill and Alexander McNab or any other person of the nature referred to in this interrogatory," namely (quoting from the interrogatory), "whereby said McNab was entitled to or obligated to repay to John Gill any moneys advanced or paid by John Gill to the Commercial Bank of Scotland, Limited, on this transaction, or under which Alexander McNab was or is entitled to share in the proceeds of this suit, or of any collection made from said letter of guaranty of said Frank Waterhouse, defendant, or to repay to or indemnify John Gill against any losses he might sustain by reason of any moneys he paid or advanced to the Commercial Bank of Scotland, Limited, on said letter of guaranty, or in the purchase thereof?"

James Lawson Anderson, secretary of the Commercial Bank of Scotland, Limited, testifies:

"The amount due to the bank by Frank Waterhouse, Limited, on the said accounts was paid to the bank by John Gill, solicitor Supreme Courts, Edinburgh, and the bank granted an assignation in his favor of the amount so paid and of the guaranty by Frank Waterhouse in favor of the bank. The assignation was granted on 8th October, 1907. * * * The bank also held letters of guaranty by Alexander McNab, John McNab, R. B. Archibald, Marshall McEwen & Co., and the partners thereof, and John M. Mitchell. These guaranties have not been assigned or transferred by this bank, but on payment being made by John Gill they were sent to him. John McNab is dead. * * * The payment of £22,897. 16. 5 was made to the bank by the said John Gill in exchange for the assignation in his favor. The payment was made by a check of his own, I understand. I have not the particulars of the check. * * * I did not participate in the negotiations leading up to the execution of the assignation to the said John Gill, and have no knowledge of any understanding, agreement, or contract, written or verbal, between the defendant, John Gill, and Alexander McNab, or between John Gill and Alexander McNab. There was no understanding, agreement, or contract, written or verbal, in regard to this matter between the bank and Alexander McNab. * * * I do not know what interest John Gill had in paying up the advance and taking an assignation of the said guaranty. He did not ask for an assignation of the other guaranties, so far as I am aware."

William McEwen testifies:

"Subsequently I wrote to the Commercial Bank of Scotland, Limited, intimating my appointment and asking them to send me a certified statement of their claims in the liquidation. They informed me that the company's indebtedness to them has been settled by Mr. John Gill, S. S. C., Edinburgh, and that they had assigned their claim to him. Mr. Gill subsequently rendered his claim to me as liquidator of the company (Frank Waterhouse, Limited), and I admitted the claim. I have paid to the said John Gill, and after his death to his executors, dividends in respect of Mr. Gill's claim in the liquidation. The sums which I have paid to him and them to date amount to £2924. 17. 4."

William Bamford Lang, an assistant agent in the Commercial Bank of Scotland, Limited, testifies:

"I had no negotiation with any party regarding the assignation of the claim by the bank. This was all arranged by the head office in Edinburgh, and at the time I was in the London office. The advances were repaid by the late Mr. John Gill, S. S. C., Edinburgh."

The foregoing excerpts from the testimony contain all there is in the record which has any material bearing upon the transaction between Gill and the bank in making payment of the Frank Waterhouse, Limited, indebtedness. It may be stated further, however, that the record does show that Alexander McNab, Frank Waterhouse, and John M. Mitchell were original shareholders in Frank Waterhouse, Limited, and that John Marshall, John McNab, and Bruce Archibald became shareholders on March 31, 1898. It further appears that on October 6, 1900, Frank Waterhouse and Frank Waterhouse, Limited, entered into an agreement whereby Waterhouse agreed to form an American company, and that said company should purchase the assets of Frank Waterhouse, Limited, subject to charges affecting the same, and should pay therefor $230,000, and, in addition to the price to be paid, that the American company should assume and pay all the indebtedness of Frank Water-

house, Limited, in the state of Washington, the said Frank Waterhouse, Limited, agreeing to discharge all of its London indebtedness with the purchase money, except to Trinder, Anderson & Co., London. The articles of incorporation of Frank Waterhouse & Co. are also in evidence, showing a compliance, to that extent at least, by Waterhouse with his agreement.

The primary debt was the obligation of Frank Waterhouse, Limited, to the bank. Waterhouse's guaranty stood as a surety for that debt in the amount named in the guaranty. When John Gill paid the money at the bank, he paid the indebtedness of Frank Waterhouse, Limited. This, the evidence indicates, he did at the request of Alexander McNab. McNab was held to the bank under a like guaranty as Frank Waterhouse. This implies an agreement on the part of McNab to repay Gill. But what of any agreement between Gill and the bank? The assignation, it is true, shows a very specific agreement; but that paper was executed nearly eight months after the transaction of payment took place. James Gill relates that Alexander McNab approached Gill and asked him "to take over the debt," and that Gill "agreed to do so." The witness, however, frankly stated in the beginning that he had no personal knowledge of the initiation of the transaction between Gill and the bank. Further than this, he does not give the source of his understanding, who told him, nor how he came by it. So that his testimony on the subject stands as the sheerest kind of hearsay. Anderson, the secretary of the bank, says: "The payment of £22,897. 16. 5 was made to the bank by the said John Gill in exchange for the assignation in his favor." He says further, however, that he did not participate in the negotiations leading up to the execution of the assignation to Gill. It is quite apparent that what he said about the "exchange for the assignation" was from the paper itself, and not from any personal knowledge of the initial or subsequent transaction in paying the money or taking the assignation. So his testimony is worthy of no greater weight than that of James Gill. What the witnesses say, therefore, proves nothing as to any agreement entered into by Gill with the bank at the time of payment.

We might assume that an inference is deducible that the assignation correctly recites the agreement as actually entered into at the time of payment from the fact that it was subsequently executed and delivered, but the counter inferences are so strong as to repel that assumption. Gill was himself a solicitor of long standing, and must have understood well the legal effect of what he did. The bank was undoubtedly well versed respecting banking methods and the legal formalities necessary for transferring title to a claim or demand. Furthermore, the request of McNab shows that what Gill did was for his accommodation. The bank made no assignment to Gill of McNab's guaranty; nor did it of the guaranty of any of the other persons who stood in the same relation to the bank, as it respects the Waterhouse, Limited, account, as did Frank Waterhouse. It is scarcely probable that a person of Gill's learning, sagacity, and experience in legal affairs would have purchased a demand of the kind of the bank, without taking with it all the securities for its payment that the bank held.

This he would have done at once when the money was paid. Furthermore, no agent or employé of the bank has been called to testify concerning the initial agreement; nor have the persons who executed the assignation for the bank, nor the witnesses thereto. Beyond even this, the agreement between Frank Waterhouse and Frank Waterhouse, Limited, in which company McNab was interested as a stockholder, has some bearing. By that agreement, the London indebtedness was to be taken care of, to the relief of the defendant. McNab was undoubtedly cognizant of this, and hence the direct inducement on his part to request Gill to pay the Frank Waterhouse, Limited, demand at the bank.

[1-3] In the light of all the circumstances and conditions attending the transactions, there can scarcely remain two opinions relative to whether Gill purchased the account of Frank Waterhouse, Limited, or so much of it as the Frank Waterhouse guaranty would pay, from the bank, or simply made payment to that amount upon the account. The most natural thing for men of business affairs to have done, if it were a purchase of the account, was to take an assignment of it at once, together with all the guaranties, and if it were not a purchase, simply to do as they did, pay the money, and let it be applied on the account, as was done. When, therefore, the money was paid, the account was satisfied to the extent of the payment, and a subsequent assignment by the bank could not revive it; and, of course, the account being satisfied, the guaranty was satisfied also, and Gill has his recourse only against McNab, at whose request he made the payment. The conclusion thus reached is borne out by the following analogous cases: Lee v. Field, 9 N. M. 435, 54 Pac. 873; Penwell v. Flickinger, 46 Mont. 526, 129 Pac. 323; Moran v. Abbey, 63 Cal. 56; Day v. Humphrey et al., 79 Ill. 452.

[4] But it is urged that the court should have submitted the case to the jury. If the court is satisfied, conceding all the inferences which the jury can justifiably draw from the testimony, that the evidence is insufficient to warrant a verdict, it is the duty of the court to withhold the case from them. Sloss Iron & Steel Co. v. South Carolina & G. R. Co., 85 Fed. 133, 29 C. C. A. 50.

The proposition has been stated in another way: That where the evidence as to material facts is contradictory, or where the facts are admitted or undisputed and are such that reasonable men can fairly draw opposite conclusions from them, the question is for the jury; but where there is no dispute about the facts, and they are such that but one conclusion can be fairly drawn from them by reasonable men, then the question is not for the jury. Northwestern Fuel Co. v. Danielson, 57 Fed. 915, 6 C. C. A. 636.

But the most common way of stating the proposition is that adopted by the Court of Appeals in this circuit, namely, that "the trial court may direct a verdict in any case where the evidence is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." Shoup v. Marks, 128 Fed. 32, 62 C. C. A. 540. See, also, Pat-

ton v. Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

We think that, applying the rule under either statement, the trial court properly refused to submit the cause to the jury, and was right in directing a dismissal.

Exception was taken to the allowance of objections to the introduction of certain testimony on the ground that it was hearsay. This testimony is in line with certain of that upon which we have commented. In the view we have taken, it can have no practical effect whether the testimony objected to is in or out. The result must be the same in either event. It only emphasizes the state of mind of the trial court upon the subject, in which we concur. If it be conceded that there was error in rejecting the testimony, it was, in the light of the record, harmless.

Another assignment of error relates to the introduction of the agreement between Frank Waterhouse and Frank Waterhouse, Limited, touching the formation of the American company. This document was attached to cross-interrogatory No. 5 propounded to the witness McEwen, and was marked as an exhibit thereto, and went in as such. Although objection was made to the introduction of the paper, there was no ruling by the court, and no exceptions were saved.

The next assignments of error insisted upon relate to the rejection of a copy of the accounts between Frank Waterhouse, Limited, and the bank. Again, under the view which we have taken of the case, these accounts are rendered wholly immaterial; and, if error was committed in rejecting them, it was harmless.

Judgment affirmed.

KNUDSEN et al. v. FIRST TRUST & SAVINGS BANK et al.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2878.

1. COURTS ⟸493(1)—JURISDICTION—CONCURRENT JURISDICTION.
   Where the controversy is the same in actions pending in courts of concurrent jurisdiction and the parties are the same, ordinarily that court first acquiring jurisdiction will retain it to the exclusion of the other, though possession of the res is not taken through a receiver or otherwise.
2. COURTS ⟸493(3)—JURISDICTION—FEDERAL COURTS.
   Pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction.
3. COURTS ⟸493(3)—JURISDICTION—FEDERAL COURT.
   Appellants, who purchased land from an irrigation company, filed in the state court an action wherein it was alleged that the irrigation company was the owner of large quantities of land; that as an inducement to purchasers it represented to appellants and others that an irrigation system was to be formed; that water would be supplied and the rights maintained in perpetuity for an annual payment; that it collected the payment, but had not been paying the water charge for a large acreage; that it dissipated the funds arising from such payment, so that there was an immediate demand for the expenditure of a large sum of money

for the restoration of the system; and that therefore appellants and other purchasers had a first and prior lien on all of the assets of the company. Subsequently the company filed a voluntary petition in bankruptcy, and a trustee was appointed. Thereafter respondents filed a bill in the federal court to foreclose a trust deed given by the irrigation company, and a receiver was appointed. *Held*, that as the federal court first acquired possession of the irrigation company's property, it would, even though the state court had co-ordinate jurisdiction and appellants' suit therein was the first filed, retain jurisdiction.

4. COURTS ⊂⊃493(3)—JURISDICTION—FEDERAL COURT.

As the issues in the two suits were different, that one in the federal court being the foreclosure of a trust deed, while the one in the state court was evidently designed for the maintenance of the irrigation company as a going concern and to require some sort of a readjustment so that purchasers of land might reap the benefits of their purchase, the federal court will retain jurisdiction, despite the prior institution of proceedings in the state court.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit by the First Trust & Savings Bank and another, trustees, against the Bitter Root Valley Irrigation Company and Hans B. Knudsen and another. From an order sustaining plaintiffs' motion to strike a defense (237 Fed. 733), the last-named defendants appeal. Affirmed.

The appellees, who were the complainants below, on April 8, 1916, instituted a suit to foreclose a trust deed given by the Bitter Root Valley Irrigation Company upon its property, both then held and subsequently to be acquired, to secure the payment of a large amount of bonds.

The defendants and appellants here, Hans B. Knudsen and Caroline Knudsen, appearing made answer to the bill, in effect, that on June 24, 1915, they commenced an action in the District Court for the Fourth Judicial District of the state of Montana, county of Ravalli, against the Bitter Root Valley Irrigation Company, the First Trust and Savings Bank, and other persons and corporations interested in the affairs and property of the irrigation company, wherein it was alleged in effect that the irrigation company was the owner of large quantities of real property; that it had assumed the construction and operation of an irrigation district, comprising such real property; that as an inducement to purchase such lands from the company it had represented to plaintiffs therein and others that an irrigation system of 40,000 acres was to be formed, and that water therefor would be supplied and the rights therein maintained in perpetuity for the sum of $1.25 per acre, payable annually; and that, to the accomplishment of that end, it proposed to assess the irrigable lands the sum of $1.25 per acre, the money to be so realized to be used only for the upkeep of the system; and wherein it was further alleged that the irrigation company had contracted for the sale of 22,000 acres of said lands to a large number of persons and had been collecting from such purchasers for a number of years $1.25 per acre, but had not been paying the water charge for a large acreage that the company itself had been using and cultivating, nor had it been paying the water charge as it pertained to the unsold lands; that the said irrigation company had squandered and dissipated the funds arising from the $1.25 assessment, had failed to acquire water rights sufficient for the performance of its covenants to the purchasers, and had failed to maintain the system in proper condition for the service contemplated, and that, by reason thereof, there was an immediate demand for the expenditure of large sums of money for the restoration of the system, and for completing the same as originally contemplated by the scheme; that it was further alleged in said action that the irrigation company was insolvent, and unable to pay its obligations or to make needed repairs, or to complete the system, or to

replenish the wasted and squandered funds, "which constituted a trust fund for the maintenance and upkeep of said system"; that it did not intend to carry out or perform further any of its covenants and obligations; that the plaintiff in said action, and others similarly situated, "had by virtue of the premises and by operation of law and equity a first and prior lien and claim upon all of the assets of every kind, character, and description of the Bitter Root Valley Irrigation Company," and that the lien created by the deed of trust of the bank and Boisot, trustee, is inferior in point of time and right to the lien claimed by the plaintiffs in said action; that it was alleged that it was necessary that said irrigation system be completed as contemplated, and that, to that end and to secure the enforcement of the lien claimed by the plaintiffs thereon, it was requisite that a receiver of the properties and assets of the company be appointed, and that receiver's certificates be issued, and that the assets of the company be marshaled and placed in the custody of the court for the purpose of completing the irrigation system. And it was further alleged by the answer that it appears from the complaint filed in that action that "it is probable or possible that at some stage of the litigation therein the appointment of a receiver will be necessary to accomplish the execution of the judgment and decree of said state court, and that the receiver so to be appointed must be one of the selection of said state court and subject alone to its jurisdiction;" that on January 3, 1916, the irrigation company filed its voluntary petition in bankruptcy, and on February 23 F. C. Webster was appointed trustee.

This same trustee in bankruptcy was appointed receiver by the District Court of the United States on the filing of the bill to foreclose complainants' deed of trust. The possession of the property went into the hands of the trustee, and is now held by the receiver.

The prayer of the answer was that the federal court proceed no further, but permit the suit pending therein to remain in statu quo, or that it proceed so far only as to determine the rights of the complainants against the irrigation company, but not with reference to any of the claimed rights of the answering defendants, and that the trustee in bankruptcy be required to enter an appearance in the suit in the state court.

A motion was interposed to strike the affirmative answer. This was allowed, and the defendants appeal.

R. F. Gaines, of Butte, Mont., D. S. Wegg, of Chicago, Ill., and Geo. T. Baggs, of Stevensville, Mont., for appellants.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., and Henry C. Stiff, of Missoula, Mont. (Silas H. Strawn, Garrard B. Winston, and R. S. Tuthill, Jr., all of Chicago, Ill., of counsel), for appellees.

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

WOLVERTON, District Judge (after stating the facts as above). The central question presented by this appeal is whether, by the rules of law relating to conflicting jurisdiction of courts or by reason of the comity existing between the federal and state courts, the District Court of the United States ought to entertain and maintain jurisdiction through its receiver of the res, which is the property subject to the trust deed of complainants.

[1] Where the controversy is the same in actions pending in courts of concurrent jurisdiction, and the parties are the same, the general rule, supported by the weight of authority, seems to be that the court first acquiring jurisdiction of the controversy will retain it to the exclusion of the other, though possession of the res be not taken,

through a receiver or otherwise. In re Lasserot, 240 Fed. 325, — C. C. A. —; Gluck & Becker on Receivers, 67, 68 (2d Ed. 89, 91), cited in Empire Trust Co. v. Brooks, 232 Fed. 641, 646, 146 C. C. A. 567.

[2] Nevertheless it is true that the pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction. McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762.

[3] The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and this to the exclusion of other courts of co-ordinate jurisdiction assuming to exercise like power. Farmers' Loan, etc., Co. v. Lake St. Rd. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435.

"Nor," says the court in the Farmers' Loan Company Case, supra, "is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts."

In this case the Farmers' Loan & Trust Company commenced its suit to foreclose in the federal court, on January 30, 1896, at 10:35 a. m. On the same day, but shortly after the bill had been filed, the Lake Street Elevated Railroad Company filed its bill to restrain and enjoin the loan company from prosecuting any suit to foreclose, and a writ of injunction was forthwith issued and served. It was held that the federal court first obtained jurisdiction of the res by reason of the filing of its bill, notwithstanding the injunction in the state court was first issued and served, the court saying:

"The bill filed in the federal court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company."

The Palmer Case was a proceeding in the state court of Texas to forfeit a permit of the oil company to do business in that state. The receiver had been appointed and qualified, and process served, although he had not taken actual possession of the property, and it was held that the state court had acquired constructive possession of the res as against the propriety of the federal court assuming possession through a receiver appointed by it.

These cases are illustrative of the application of the doctrine stated in the above-quoted paragraph.

A case also quite apposite for illustration of the principle is McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226. The state of Kansas, through its Attorney General, instituted quo warranto proceedings against a group of gas companies, with prayer for ouster and the appointment of receivers to take charge of the property and business. The cause was tried in the state court, and taken under advisement.

While it was in this condition suits were instituted in the federal court, one alleging insolvency and praying appointment of a receiver, and the other to foreclose, and a receiver was accordingly appointed before any was appointed by the state court. The jurisdiction of the federal court of the res was denied, the court saying:

"That actual seizure or possession is not essential, but that jurisdiction may be acquired by acts which according to established procedure, stand for dominion and in effect subject the property to judicial control."

[4] There is another principle enunciated by the courts and text-writers, namely, that where the controversy is not the same, that is, where the issues in one suit are different from those involved in another, and the subject-matter is not identical, there can be no infringement of jurisdiction as between the courts maintaining cognizance of the cases. This, it is maintained, rests on the ground that in such a case there is no conflict of jurisdiction as to the question or cause. In such cases, the first acquisition of the possession of the res dominates the authority to retain the same. Empire Trust Co. v. Brooks, 232 Fed. 641, 146 C. C. A. 567; Compton v. Jesup, 68 Fed. 263, 283, 15 C. C. A. 397; De La Vergne Refrig. Mach. Co. v. Palmetto Brewing Co. (C. C.) 72 Fed. 579; Gluck & Becker on Receivers, supra. The application of the principle is very well enunciated by Simonton, Circuit Judge, in Machinery Co. v. Brewing Co., supra, as follows:

"In view, therefore, of the fact that the controversy in the suit in this court is entirely distinct from that in the state court, and that the scope and purpose of the proceedings in the state court are not those of the proceedings in this court, connected with the fact that the receiver heretofore appointed in the main cause is in actual, peaceable possession of the property, and that the complainant holds a legal lien on the property, entitling it to its possession through a receiver, the mortgagor being insolvent, and that this court has been asked by it not to exercise an act of discretion, but to give effect to a right secured to it by the Constitution and laws of the United States, the prayer of the petition cannot be granted; and it is so ordered."

These principles, in either aspect, we think determine the case against appellants. That the controversies involved by the two suits are not the same is perfectly manifest. It is a little difficult to say just what the purpose of the suit in the state court was. It is manifestly not a suit to wind out the business of the concern, dispose of its assets, and distribute its proceeds among those entitled thereto. On the other hand, it was evidently designed that the irrigation company should be maintained as a going concern, and that the system which it had promoted should be repaired and completed. It is shown that the company had squandered its funds, which are denominated trust funds, to which the purchasers were entitled for the repair, maintenance, and upkeep of the system, and in this connection it is alleged that the plaintiffs in said action and others similarly situated "had by virtue of the premises and by operation of law and equity a first and prior lien and claim upon all of the assets of every kind, character, and description" of the irrigation company, and that the lien of the trust deed of the complainants in the foreclosure suit was inferior in rank to theirs. But there is not a semblance of a purpose shown to enforce such purchasers' liens as such. At most, the suit could be

construed only as one for the rehabilitation and reorganization of the irrigation company, and the readjustment of its affairs in that way so that the purchasers might reap the benefits of their purchases in pursuance of the original scheme for promoting and maintaining the irrigation system.

Now, it cannot be said that the suit in the state court is either an action in rem, suited to a disposal of the irrigation company's property, or one to enforce a lien, with the subjection of its property to the satisfaction thereof. Nor is it a suit to marshal assets for distribution among those entitled thereto, for such a thing was not contemplated. The only apparent object was that the affairs of the company might be administered for the time being under the supervision of the court for accomplishing the purposes of rehabilitation and reorganization. It is not such a suit that the full accomplishment of its purposes requires dominion and control over the res; so that, whether we apply the one principle or the other above ascertained, the trial court was right in maintaining possession of the res under its receivership.

We have not made mention of the bankruptcy matter, because it does not affect the result. The fact that a trustee in bankruptcy had been appointed and had taken possession of the res does not aid the complainants' possession in the foreclosure suit. It is only because the receiver in the federal court first obtained possession of the res that the court is entitled to maintain its jurisdiction respecting the same.

Affirmed.

GREAT NORTHERN RY. CO. v. REID.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2896.

1. RELEASE ⊂=34—SCOPE—CONSTRUCTION.
   A release for personal injuries resulting from an accident will not cover personal injuries not in contemplation of the parties and then unknown to each, despite the greatest generality in language.
2. RELEASE ⊂=57(2)—IMPEACHMENT—EVIDENCE.
   Where claim for personal injuries is released on settlement, the release cannot be impeached or set aside for fraud or mistake, except upon clear and convincing proofs.
3. RELEASE ⊂=57(2)—EVIDENCE—SUFFICIENCY.
   In a suit to set aside a release given for personal injuries, evidence *held* to establish that, while there was no fraud in procuring the release, complainant had incurred injuries which were unknown to either of the parties, when the settlement was made, and hence to that extent to require setting aside of the release.
4. RELEASE ⊂=16—VACATION—PARTIAL IMPEACHMENT.
   A release of personal injuries may be partially impeached, as where the injured party suffered injuries which, at the time the release was executed, were unknown to both.
5. RELEASE ⊂=16—ANNULMENT—GROUNDS.
   Where complainant, who was injured, did not know that he had incurred inguinal hernia, but thought that the only serious injury was to his

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

foot, his refusal, when examined by a physician, to remove his coat and exhibit a bruise on his arm and shoulder, does not estop him from impeaching his release on the ground that it did not include a release of claims for the hernia.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit by W. H. Reid against the Great Northern Railway Company. From a decree for complainant, defendant appeals. Affirmed.

The appellee herein, who was complainant below, was, on and prior to May 10, 1915, in the employ of the appellant, the Great Northern Railway Company, as a cook on one of its work trains. While the company was moving the car on which appellee was working about the switch, it was derailed, and he was thrown against the sink in the car. The top cover of the stove fell upon his right foot, and, withal, he received certain physical injuries. To recover damages for such injuries as he received, he instituted an action against the company. The company by its answer pleaded a release of liability executed by appellee. The release is in language following:

"Know all men by these presents, that in consideration of the sum of ten and no/100 dollars to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted, and discharged, and do by these presents release, acquit, and discharge, said railway company, its successors and assigns, of and from any and all liability, causes of action, costs, charges, claims, or demands, of every name and nature, in any manner arising or growing out of, or to arise or grow out of, personal injuries received by me (W. J. Reid) at or near Geyser, in the state of Montana, on or about the 10th day of May, 1915, while acting as a cook, I met with an accident whereby I sustained personal injuries, or arising, or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents. No promise of future employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise."

The back of the release contains an indorsement in appellee's handwriting, namely:

"I have red within Releas before signing and fully understand that the sum of ten dollars is in full settlement of all claim of every kind.

"W. J. Reid."

In addition, appellee signed a voucher which contained substantially this provision:

"For and in consideration of any and all claims, past, present, and prospective, against the Great Northern Railway Company, arising or to grow out of personal injuries received by me at or near Geyser, Montana, on or about May 10, 1915, $10.00."

For the purpose of having the release canceled, this suit was instituted against the company. Among other things, it is alleged, in effect, that appellee suffered the following injuries: A double inguinal hernia, a broken arch of the right foot, a severe wrench of the back, a severe shock to the nervous system, and, as resulting from such injuries, a semi-paralyzed condition of both legs; that on the same day the claim agent of the company took appellee to the office of its physician and surgeon, who, upon a cursory examination of appellee, informed him that his injuries were slight, and amounted to nothing more than a nervous shock and a slightly sprained ankle and instep, that he would be entirely recovered in a day or two, and that the claim agent would give him $10, representing two or three days' work, and would hold open his position for him; that appellee accepted the $10 from the claim agent, for no other purpose than as pay for his time, and signed the papers in question. It is further alleged that, at the time of signing the papers, appellee was not aware that he had broken the arch of his right foot, or had suffered double inguinal hernia, or any other injury which might

cause any disability to his earning power, and that such or any injuries were never taken into consideration by him at the time of signing the documents in question, nor by the claim agent of the company.

The appellee's testimony is quite brief. He says:

"The trucks ran off the rails, and practically mashed the biggest part of the dishes. The top of the stove fell across my foot, and it threw me up bodily against the sink, which was near the side of the car, and it hurt me. I got hurt on my foot, and I was shaken up completely, my nerves, nervous shock, and I have been sick practically ever since. Worked a little off and on. * * * They took me to the doctor's office in an automobile; examined my foot, bound it up, and told me I was badly shaken up, and said, 'You will be all right to work to-morrow, if necessary.' Just examined my foot, that was all. * * * And after the doctor examined me the claim agent took me right up to his office. He asked me to sign some papers. I don't know what they was. I was too confused. I can't remember one thing I signed, or anything. Q. State what he said to you. A. Why, he said it was necessary to send these back to St. Paul. That is what he said to me. Q. Did he offer you any money? A. No; he said, 'You better take $10 for to get some liniment,' and something like that—$10 to get some liniment to rub on my feet. Q. Did he say anything to you about your working or anything? A. Yes; he did; said I could just stay around town two days and go back to work whenever I wanted to. I have stated everything that the doctor told me about my condition then. * * * I believed the statements made to me in regard to my condition by the doctor. * * * Q. When did you first know, Mr. Reid, that you had a double hernia? A. I don't know now. The next day; I didn't know what it was. I discovered something down there where it hurt. I had a very small rupture before on the right side, about the size of a marble. I had worn an elastic truss. Q. Had you ever been bothered with it? A. Never; part of the time I would leave it in bed—wouldn't use it. When I went from Geyser to Great Falls, my foot was swollen up, so it hurt me, and I cut my shoe right up there. It swelled up a bit; bandaged it up. I went back to work that same day, because the doctor told me there was nothing the matter with me."

As to the writing, he says he just looked it over; that he could not read very well, and just signed it as it was written, and that it was not read to him. On cross-examination, he testified that he had had a hernia on the right side for three years before the accident, and told how he came by it. As to the hernia on the left side, he said it did not bother him much—it was only a small one.

Dr. Downs, who examined appellee on February 26, 1916, states that Reid was suffering from a right and left inguinal hernia; was in a very nervous condition, and very poorly nourished; had a slight swelling in the right foot, which he found to be a flatfoot. The hernia on the right side was the larger one; the one on the left not so large—about the size of a walnut. The arch on his foot was flattened out and broken down. This condition generally prevailed as to his left foot.

Dr. Longeway, the company's physician, testified that he examined appellee on the day of the accident; that appellee told him he had a bruise about the shoulder and arm; that he examined his foot, and found that it was injured and bruised, and the ankle slightly sprained—and continued as follows: "He was walking on it; walked on it to the office. I asked him about his arm, and he said that didn't amount to anything. I asked him to take off his coat, and he said that didn't amount to anything; his injuries were not bad and he wouldn't take off his coat and let me examine it. He said that he would be all right; he was just bruised about the right arm and shoulder. Consequently he didn't take off his coat, and I didn't examine his arm. He said it didn't amount to anything and would be all right. I bandaged his foot and told him to stay around two or three days and let me watch him. 'No,' he said, 'it is all right.' He wanted to get right back to work, and he left my office, and that was the last I ever saw of him. His right foot then was practically the same as it is now, except it was more swollen around the ankle at that time than it is now. He had a pretty flat foot. * * *

He didn't at that time complain to me about any hernia, or any other injury than these that I have testified to. * * * I didn't make any statement to him that he could go right back to work; that his injuries were slight. * * * I believed he would be all right in a few days."

P. B. Foley, the claim agent, testified that, after appellee had been to the doctor's office, Burton brought him into his office, and then as follows: "I asked him, 'Did the doctor look you over?' He said, 'Yes, sir.' I said, 'What did he tell you?' 'He said my ankle was sprained a little; said he thought it would be all right in a little while, and advised me to stay around a few days.' 'Well,' I said, 'I think you better do that.' I said, 'I think you better stay around here a few days and have the doctor attend you.' He says: 'No; I am anxious to get back to the job. I will be all right; it is a little sprain; I will be all right; I want to get back on the job.' I says, 'All right; suit yourself.' Then I said, 'Well, what do you want us to do for you?' He hesitated a little while, and he says: 'I don't know. I will only lose this day.' Then I says, 'Well, I would like to know what you want us to do for you in settlement, that is in the line of settlement.' He says, 'Well, how will $10 do?' 'Well,' I says, 'if that is what you want,' I says, 'it is all right.'" The release and other papers were then made out and signed. Burton corroborates this statement.

Dr. H. P. Marshall, who made a recent examination, found appellee suffering from arteriosclerosis, double inguinal hernia, and double flatfoot.

Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for appellant.

N. E. Nuzum and R. W. Nuzum, both of Spokane, Wash., Harold N. Nuzum, of Los Angeles, Cal., and Arthur H. Steake, of Spokane, Wash., for appellee.

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

WOLVERTON, District Judge. [1] The question presented for decision is whether the release should be canceled for fraud or mistake. The release itself is as broad as it could be made, acquitting the company of all liability arising on account of the injuries received by appellee, whether then appearing or growing out of the same by development in the future, or arising or to arise out of any and all personal injuries sustained at any time or place while in the employ of the railway company prior to the date of the release. In such a release, however, the general language will be held not to include a particular injury, then unknown to both parties, of a character so serious as clearly to indicate that, if it had been known, the release would not have been signed. This was the conclusion reached in Lumley v. Wabash R. Co. (C. C. A. 6th Circuit) 76 Fed. 66, 22 C. C. A. 60. See, also, Tatman v. Philadelphia, B. & W. R. Co. (Del. Ch.) 85 Atl. 716.

[2, 3] From the testimony, it is perfectly apparent that there was no fraud whatever attending the transaction of giving the release. Considerable concern was manifested by the claim agent that the affair should be speedily closed, but the appellee suffered no disadvantage by reason thereof. The appellee had come to Great Falls, a distance of 40 miles, of his own accord, with a view to getting relief of some sort from the company for his injuries. Having met Burton, he was taken to the office of the company's physician, and, after examination, repaired to the claim agent's office, where the release was

soon signed. That he understood what he was signing, and the nature and purpose thereof, can scarcely be gainsaid. It is evident that he believed he was but slightly hurt, and was seemingly anxious to get back to his work, and, so believing, he was willing to accept $10 and acquit the company of further liability.

Whether he knew and understood the full nature and extent of the real injuries sustained is the vital question for consideration. The proofs fall far short of substantiating the complaint as to the nature and extent of his injuries, and at present, according to the medical experts, his physical afflictions consist of arteriosclerosis, double inguinal hernia, and double flatfoot. It is not at all probable that the first of these conditions was superinduced by the accident. The evidence does not, in any substantial way, indicate that such was the case. The third, namely, double flatfoot, existed prior to the accident, and was not caused thereby, while as to the right foot the condition may have been, and probably was, somewhat aggravated. As to the hernia, he had been so afflicted upon the right side for the space of three years, and thus far the accident has not contributed consequentially to his ailment. The hernia upon his left side had not developed prior to the accident. The first indication that he had of its existence was the next day, when he says he "discovered something down there where it hurt." Later, however, the trouble became well defined, and on February 26, 1916, when he was examined by Dr. Downs, it was about the size of a walnut. It further appears, however, that at the time of the trial appellee's body was poorly nourished, and that his general health and physical condition were far from good. Such was not the case to the same degree at the time of the accident, for he was doing his work, with some inconvenience only in getting about on account of his feet.

The rule unquestionably applies to settlements of the kind here involved that they neither can nor ought to be impeached and set aside for fraud or mistake, except upon clear and convincing proofs. Chicago & N. W. Ry. Co. v. Wilcox, 116 Fed. 913, 54 C. C. A. 147. Has the appellee met the exigency? For upon him was devolved the burden of so impeaching the release.

As we have seen, no conceivable fraud has been established. That appellee did receive a shock from being thrown against the sink, resulting in some distress to himself, can scarcely be questioned. At that time he was not afflicted with an inguinal hernia on his left side. The following day he experienced pain in that region of his person, and later the hernia developed, so that it became well defined. That he was so afflicted on February 26, 1916, is shown by Dr. Downs, who is corroborated in this by Dr. Longeway and Dr. Marshall. So it appears reasonably clear and certain that the development of this particular trouble began at least about the time of the accident, and that he was then afflicted in a way that was not known to him, and which for that reason was not disclosed to the physician, and consequently not taken into consideration when he settled with the claim agent and gave the release. We think that, under the authorities, there is here sufficient to impeach

the settlement in so far as it relates to this phase of the controversy, and to that extent the release should be set aside.

[4] We agree with the court below that it should not be disturbed as it respects the injury to his foot. Lumley v. Wabash R. Co., supra, is authority for the partial impeachment of the release. Upon the general question of annulling such a release, see, further, Great Northern Ry. Co. v. Fowler, 136 Fed. 118, 69 C. C. A. 106, where the authorities are aptly and clearly discussed and distinguished; also Tatman v. Phil., B. & W. R. Co., supra.

[5] Another contention of appellant is that appellee is estopped from urging the annulment of the release on the ground that he refused to remove his clothing, so that the physican might examine his arm and shoulder, which appellee seemed to think were injured somewhat. That particular supposed injury, however, was not taken into account at the time of the settlement, and no question is made of it in this proceeding, and the incident is not of sufficient consequential importance to base an estoppel upon it against inquiry as to the real injuries sustained.

Decree affirmed.

AMERICAN PRESS ASS'N et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Seventh Circuit. August 25, 1917.)

Nos. 2509, 2510.

MONOPOLIES ⊂=12(1)—SELLING LOSING BUSINESS—SHERMAN LAW.

A concern which is going out of business, because it cannot conduct it without loss, may without violation of the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209) sell its plant as a going concern to its only competitor, there being no other prospective purchaser, instead of disposing of it as junk; this not injuring the public, but being to its advantage, as well as that of the seller; the buyer being required to continue fair dealing with the public.

Appeals from the District Court of the United States for the Northern District of Illinois.

Suit by the United States against the American Press Association and others. From decrees dismissing the petition and auxiliary bill of the American Press Association, certain parties appeal. Reversed in part, with direction, and in part dismissed.

Charles E. Hughes, of New York City, for appellants.

Henry S. Mitchell, of Washington, D. C., for appellees.

Before BAKER and ALSCHULER, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge. On August 3, 1912, the United States began a suit against the American Press Association, a corporation, the Western Newspaper Union, a corporation, and others, engaged in furnishing country newspapers with stereotype plates and ready-print service, to enjoin the continuance of acts alleged to be in viola-

tion of the Sherman Anti-Trust Law. A consent decree was entered the same day. Among other prohibitions, the Western Newspaper Union was permanently enjoined:

"(a) From combining or attempting to combine with the American Press Association, either by purchase, stock ownership, or in any other manner: * * * (c) from selling any of its product or services at less than a fair and reasonable profit, or at cost, or less than cost, with the pupose or intent of injuring or destroying the interstate trade and commerce of the American Press Association or of any other competitors."

On May 9, 1917, the American Press Association filed a petition in the original suit, setting forth changes in condition, on account of which it prayed for a modification of provision (a). To this petition all the parties appeared, evidence was heard, and the court found:

"That the facts set forth in the petition and the evidence introduced to support the same are immaterial; that it is contrary to the whole spirit and purpose of the Sherman Law to authorize one competitor to absorb another competitor, regardless of whether such competitor is able to continue in business or not; and that the sale of such assets and business by the American Press Association to the Western Newspaper Union would be in violation of the Sherman Law."

And thereupon the court decreed that the petition be denied. Cause No. 2509 is an appeal from that decree.

Shortly after presenting the above-mentioned petition, the American Press Association filed an "auxiliary bill," setting forth the same facts and asking the same relief. Parties other than the United States appeared and answered; and the United States filed a motion to dismiss, on the ground that it could not be sued by a private party without its consent. Without passing on the motion, the court dismissed the bill, for the same reasons on which the petition was denied. Cause No. 2510 is an appeal from the decree dismissing the auxiliary bill.

Whether under the stated circumstances the United States may be sued, and whether the auxiliary bill was a proper method of invoking relief, are questions that are now moot, we believe, because the identical controversy respecting facts and law, between the identical parties, was fully heard and determined on the petition in the original suit.

Facts pleaded and proved, so far as necessary for a decision, are briefly these: In 1912 the American Press Association had about 5 per cent. of the ready-print business. But it did not furnish advertisements to the country newspapers with its ready-print service, whereas the Western Newspaper Union did. The result, down to January, 1917, was that the Western Newspaper Union could and did supply ready-print at lower rates than the American Press Association could stand without loss; and the ready-print business of the latter has fallen to less than 1 per cent. In 1912 the American Press Association had a large part of the stereotype plate business. But its plate business had to bear substantially all the overhead expenses, while the Western Newspaper Union's ready-print service could carry the overhead and leave its plate business as a profitable by-product. In January, 1917, the Western Newspaper Union reduced its price on miscellaneous plate matter by one-fourth and on serials by one-third. On the American Press Association's complaint that provision (c) of

the injunction was being violated, the Department of Justice investigated and correctly found that there was no violation.

Since the outbreak of the world war there has been an increasing scarcity of print paper, and mounting prices. Few new country newspapers are being started; many have reduced their sizes; quite a number have quit. This condition brought the American Press Association's plate business to a loss of over $3,000 a month, which is progressively increasing, and has also made it impossible for that company to build a ready-print business to help bear the overhead. The directors have decided to wind up the plate business as speedily as possible, whatever may be the outcome of this proceeding. They are continuing it at a loss while the question is being determined whether they must dispose of their plate plant as junk, or whether they may sell it as a going concern to the Western Newspaper Union, for the latter is the only probable bidder. No one now outside the business would be likely to buy a demonstrated loss. But to the Western Newspaper Union the plant may have more than junk value. If the plant is broken up, the newspapers now being served thereby may have to go to the Western Newspaper Union as the only concern left in the business; and it might be more economical for that company to buy an existing plant than to enlarge its own or build a new one. At the same time it is evident that, if the plant is disintegrated, the newspapers now looking to it would suffer inconvenience and loss while arranging to obtain other service.

What is the application of the Sherman Law to these facts? Not every joinder of competing businesses or acquisition of instrumentalities that have been used in competition is an undue restraint of trade or a creation of a monopoly. Each situation must be measured by the rule of reason. And a fundamental test is injury to the public. If it were not for provision (a) of the decree, and the law back of it, these two companies might get together and fix a price that would provide a reasonable profit to the American company and an unreasonable one to the Western. For the newspapers, and through them the public, to pay for the profitable operation of an inefficient concern is an injury. And a combination to that end would be an unreasonable restraint of trade. That course cannot be pursued. And, because it cannot, the American company is forced to go out of the plate business. No decree can stop that. And after the American company quits, if the Western is left alone in the field, the ultimate situation of the country newspapers would be the same whether the plant be scrapped or sold as an integer. Neither the decree nor, in our judgment, the Sherman Law, prevents the Western from buying the scraps piecemeal. If it did buy, it could organize them anew. If it be permitted to buy the integer, it would save the expense of reorganization. If the plant be scrapped, two injuries result: One to the public from the destruction of a usable and useful plant; the other to the stockholders of the American company.

As to the first, a law designed to shield the public from injury should not be construed to compel the public to suffer an injury. As to the second, the Sherman Law, in our opinion, does not require the stock-

holders of a company, even a company that was a self-confessed wrongdoer in 1912, to sustain a loss in 1917 arising without wrongdoing, if that loss can be prevented without injury to the public. Injury can be prevented, we believe, by attaching to the permission to buy the plant as a going concern a condition which should be read in the light of provision (c) of the injunction. Within common knowledge one of the evils at which the Sherman Law was aimed was the acts of monopolizers in killing competitors, by selling at less than cost of production and then mulcting the public for the expense of the campaign with undue profits added. For practices of that kind during and prior to 1912 the Western Newspaper Union was put under the continuing prohibition of provision (c). Since 1912 it has not charged less than cost plus a fair and reasonable profit. On the other hand, the record, at least inferentially, demonstrates that it has not exacted more than cost plus a fair and reasonable profit. If it continues in the same even tenor of fairness, if it refrains from putting up prices that would incite outside capital to unneeded offers of like service and then killing competition by underselling at a loss, to be recouped by fixing unwarranted prices again, we perceive no reason why it should not be permitted to buy the plant as a going concern.

In No. 2509 the decree denying the petition is reversed, with direction to enter a decree, supplemental to the original decree, authorizing the Western Newspaper Union to be a bidder and purchaser at a sale by the American Press Association of its plate plant and business as a going concern, on the condition and under the prohibition that the Western Newspaper Union shall not employ the plant and business so purchased, or use the situation created by such purchase, to charge more for its plate service to newspaper publishers than cost of production plus a fair and reasonable profit, such fair and reasonable profit to be measured relatively by the range of annual profit obtained by the Western Newspaper Union from its plate business since the entry of the original decree of August 3, 1912, without, however, depriving the purchaser of such profits as result from its purchase by reason of the increase of business and the economies in the cost of production following the same; provided that present prices for plate service to newspaper publishers shall not be increased, unless, but not longer than, an increase is warranted by increase in cost factors.

In No. 2510, the appeal is dismissed, without taxation of costs, in favor of appellees.

CITY OF PORT WASHINGTON v. THACHER.

(Circuit Court of Appeals, Seventh Circuit. July 27, 1917.)

No. 2438.

1. CONTRACTS ⟸322(2)—PERFORMANCE—EVIDENCE.

In an action for damages for breach of contract providing for the laying of an intake pipe extending into Lake Michigan 2,800 feet, plaintiff contractor might, where the city claimed that by reason of defects in the pipe water close to the shore entered the pipe, show that the number of bac-

teria in a given quantity of water from the pipe corresponded with the number of bacteria found in that amount of water at a distance of 2,800 feet from the shore, having shown that a greater number of bacteria were found in water close to the shore.

2. EVIDENCE ⟸553(2)—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.
In framing hypothetical questions to expert witnesses, a party may disregard his adversary's theory and apply only his own.

3. CONTRACTS ⟸323(1)—PERFORMANCE—TEST.
Where a municipality engaged a contractor to construct an intake at a considerable distance in a lake for the purpose of obtaining water of unquestioned purity, the fact that some three years after construction, during which time the intake and pipes had been used continuously, leaks appeared in the pipe, does not warrant direction of verdict for defendant, on the ground that the contractor did not comply with the terms of the contract, even though the test prescribed was not followed, there being no agreement by the contractor to make the test, and so the question should be left to the jury.

4. CONTRACTS ⟸323(2)—CONSTRUCTION FOR COURT—QUESTION.
The construction of the contract, where facts were not in dispute, was for the court.

5. CONTRACTS ⟸280(1)—COMPLIANCE—WHAT CONSTITUTES.
Where a contract for the construction of an intake and laying of pipe in a lake, from which the municipality expected to derive a supply of pure water, provided that the pipe should for 800 feet from the shore be buried in the bed of the lake to a depth of 1 foot, the dredging of a trench 12 inches deep, in which the pipe was laid, so that it was even with the bed of the lake, does not show compliance with the contract, warranting recovery for that item.

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

Action by Addison Q. Thacher against the City of Port Washington. There was a judgment for plaintiff, and defendant brings error. Affirmed, on condition that plaintiff enter remittitur; otherwise, reversed and remanded.

Action at law to recover damages arising out of express contract. Verdict and judgment for the plaintiff.

Plaintiff in error, herein called the defendant, entered into a contract with defendant in error, herein called the plaintiff, for the laying of an intake extending into Lake Michigan 2,800 feet, for which the defendant was to pay $10,900, and an additional sum for digging an 800-foot trench as designated, at the rate of $1.37½ per foot. The city engaged a consulting engineer, and employed one Doyle, since deceased, as inspector. Work was begun in April and continued until the fore part of September, 1907. Upon complaint being made, plaintiff returned in October and repaired some defective pipes; the defects consisting of cracks or breaks in certain parts of the pipe. After October, 1907, defendant used the intake continuously, but complained of leaks, and that much sand appeared.

The city made numerous demands upon the plaintiff in 1908 and 1909 to complete the contract according to its terms. In 1900 the city engineer notified plaintiff that the work must be done before August, 1909, or the city would make the repairs itself. Plaintiff insisted that the work was a substantial compliance with the contract. On September 11, 1911, a formal resolution was passed by the defendant, declaring the plaintiff to have abandoned the contract and providing for completion of the work by the city. Shortly thereafter plaintiff appeared with divers to repair any defects, but the city ordered him away. Thereafter the city proceeded to repair the pipe, and found joints disconnected and numerous cracks in the pipe. Its bill for material and services rendered, etc., aggregated $3,873.59.

The specifications contained the following provision: "When the intake has been completely laid, but before the trench has been filled, the pipe shall be tested with compressed air at a pressure of 100 pounds per square inch; during the test all joints shall be examined by a diver, and all found to be leaking shall be repaired, and broken pipes shall be removed and replaced by perfect lengths." No air pressure test was made by the city in 1907, but a water pressure test was attempted, and breaks and cracks were discovered, which plaintiff claims were shortly thereafter remedied. An air pressure test was made by the plaintiff in October, 1907, but there is conflict of testimony as to the results.

The contract provided for extra pay for digging a trench as follows: "And in addition thereto, the sum of $1.37½ per foot for each foot of pipe buried to a depth of one foot beyond the 400 feet specified in said plans and specifications." And again it reads at another place: "* * * And in addition thereto to bury said intake to the depth of one foot for a distance of eight hundred feet." The specifications covering the same subject-matter provided: "Before any pipe is laid, a trench shall be dredged so as to give the pipe a cover of one foot where the water is ten feet deep," etc. A trench in which 800 feet of pipe was laid was dug; the top of the pipe being left level with the lake bottom.

Upon the trial, the court submitted to the jury the issues of substantial compliance and damages. Other statement of facts will appear in the opinion. Plaintiff in error contends the court erred in (a) admitting evidence; (b) in refusing to direct a verdict; and (c) in refusing to grant defendant's motion for judgment notwithstanding the verdict or for a new trial.

Joseph B. Doe, of Milwaukee, Wis., for plaintiff in error.

Albert K. Stebbins, of Milwaukee, Wis., for defendant in error.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] Error is assigned because the court received evidence over defendant's objection showing the number of bacteria found in the water at various places. In order to show the cracks in the pipe, if any, were insignificant or trivial, plaintiff made certain tests. He ascertained the number of bacteria in a given quantity of water 700 feet, 1,400 feet, 2,100 feet, and 2,800 feet from shore. Tests were also made to determine the number of bacteria in the same amount of water at certain places in the city. It appeared that the number of bacteria decreased, the further one went out into the lake. It also appeared that the number of bacteria found in the water in the city corresponded to the number of bacteria found in the same quantity of water 2,800 feet from shore. In support of this testimony it was claimed that, if the pipe was leaking badly, that fact would be disclosed by these experiments; for, if the water entered the pipe 700 feet from shore, it would have a great many more bacteria than if it entered the pipe through the intake 2,800 feet from shore. While not at all conclusive, we think the evidence was relevant and instructive, and bore upon the issue of substantial compliance.

[2] Error is also assigned because of the admission of evidence over defendant's objection, and given in response to hypothetical questions dealing with the length of time ordinarily or reasonably required to do certain work. This evidence bore upon the reasonableness of the amounts claimed by the city to have been necessarily expended in repairing the intake. No error was committed by the learned trial court

in permitting the plaintiff to submit hypothetical questions to his expert witnesses on his own theory. A party is not required, in framing hypothetical questions to adopt his adversary's version of the case. Jones on Evidence, 903.

[3] Error is assigned because the court erred in refusing to direct a verdict for defendant. In support of this motion defendant contended that plaintiff's completed work failed to meet the tests provided in the contract and was not a substantial compliance therewith. Plaintiff in error was seeking to secure a water supply of unquestionable purity, and it was entitled to an intake well-nigh perfect, and one which would meet any test that the parties saw fit to make. Appreciating this purpose, and the necessity of strict compliance with the terms of the contract, the court was justified in examining alleged imperfections with the closest scrutiny.

On the other hand, it must be borne in mind that the pipes were laid in water of considerable depth, and no test in the method designated was made by the city until some three years had elapsed from the date when the city took over the work. It should also be borne in mind that the city had an engineer to supervise the work and a man constantly on the job to see that it was properly done and in accordance with the specifications. While the contract called for the air test, it did not provide that the test should be made by the plaintiff. Defendant was never precluded from making the test called for by the contract. It used the intake continuously from October, 1907, and was at all times in position to determine whether the completed work answered the calls of the contract. A test or examination made some two or three years after the intake was completed, and when imperfections might be traced to causes other than those attributable to the plaintiff, was not conclusive. Upon all the evidence, we are of the opinion that the motion to direct a verdict in defendant's favor was properly denied.

[4, 5] Error is also assigned because the court refused to set aside the verdict and to grant a new trial, because the verdict was excessive. Many of the figures are not in dispute, and, accepting plaintiff's statement of the account, it is impossible to sustain the finding of the jury, except by allowing $1,100 for burying the 800 feet of pipe. In fact, plaintiff in his brief says:

"The jury unquestionably have allowed plaintiff $1,100 for burying the pipe. * * * It is evident, also, that the trial judge considered that it was an item concerning which the jury should find for the plaintiff."

The figures amply support this statement. The amount paid plaintiff while the work was in progress was $5.717.69. The city paid for repairs, etc., $3,873.59. The verdict of the jury was $3,482.31. These three items make a total of $13,073.59. Exclusive of the item of $1,100 for the 800 feet of trench, the amount due plaintiff was $10,900. This would indicate an overpayment on this basis of $2,173.59.

However, plaintiff contends that the item of $3,873.59 should be reduced, because the evidence warranted the jury in finding that a considerable portion of this item was unreasonable. But if we take from this aggregate of sums actually paid out by defendant such sums as the plaintiff contends should be deducted. we are still unable to account

for the difference of $2,173.59. Viewing the figures from every viewpoint, it is impossible to reach any other conclusion than that stated by counsel for plaintiff in his brief and set forth above. The jury allowed plaintiff $1.100 for burying the pipe. This item should never have been left to the jury to determine. The facts are not in dispute, and it was for the court to construe the contract. The trench in which the pipes were laid was 12 inches deep. The contract and specifications called for the pipe being covered one foot. It follows that the allowance of this item of $1,100 was error.

But plaintiff was entitled to recover, and was erroneously denied, interest on $2,382.31 from November 10, 1910, the date fixed in his bill, to the rendition of the judgment. The legal rate being 6 per cent. in Wisconsin, this interest was $771.38. The difference between the $1,-100 erroneously allowed by the jury and the interest item is $328.62.

It is therefore ordered that, if the defendant in error, within 20 days after this opinion is announced, file a remittitur for $328.62 in the office of the clerk of the District Court of the United States for the Eastern District of Wisconsin, and a certified copy thereof in the office of the clerk of this court, the judgment, less the amount so remitted, will be affirmed, with costs of this court to the plaintiff in error; but, if this is not done, judgment will be reversed. with costs to the plaintiff in error. and with directions to grant a new trial.

BANDY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 3, 1917.)

No. 4897.

1. CRIMINAL LAW ⟸1129(2)—APPEAL—ASSIGNMENTS—COMPLIANCE WITH RULE.
   Assignments of error, framed in disregard of the rules of the Circuit Court of Appeals, may be disregarded.
2. CRIMINAL LAW ⟸1129(3)—APPEAL—ASSIGNMENTS OF ERROR.
   An assignment of error, complaining of the admission of evidence, which did not set forth the evidence admitted, presents nothing for review.
3. CRIMINAL LAW ⟸1178—APPEAL—ASSIGNMENTS OF ERROR—WAIVER.
   Assignments of error, not argued, are waived.
4. CRIMINAL LAW ⟸1129(3)—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.
   Assignments of error, complaining of instructions, which did not set forth the instructions complained of, present nothing for review.
5. CRIMINAL LAW ⟸1129(1)—APPEAL—ASSIGNMENTS OF ERROR—EXCEPTIONS.
   An exception to a charge, though not properly assigned as error, may be considered in a case involving personal liberty.
6. CRIMINAL LAW ⟸823(9)—INSTRUCTIONS—BURDEN OF PROOF.
   Where the court correctly charged the jury on the question of reasonable doubt, a charge, in a prosecution for introducing into the state of Oklahoma intoxicating liquor, that if it was a witness who introduced the liquor, and defendant had no interest in or connection therewith, he should be acquitted, is not improper, as placing the burden of proof on defendant.

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

7. COURTS ⟸337—FEDERAL COURTS—PROCEDURE.
Except where Congress has made specific provision, the common law governs the procedure in criminal trials in federal courts; and, no such provision being made, a local state statute as to accomplice testimony is inapplicable to a prosecution in the federal court.

8. CRIMINAL LAW ⟸780(3)—TRIAL—INSTRUCTION—ACCOMPLICE TESTIMONY.
In a prosecution for introducing intoxicating liquors into the state of Oklahoma, the court charged that if, from the testimony of a witness and other testimony, the jury should find that the witness had some interest in introducing the liquor into the state, or in its transportation, and that he was knowingly assisting in violation of the law, so as to become an accomplice, then his testimony should be carefully scrutinized, and should be corroborated, sufficiently protected the rights of accused; Rev. Laws Okl. 1910, § 5884, declaring that a conviction cannot be had on the testimony of an accomplice, unless he be corroborated by other evidence tending to connect defendant with the commission of the offense, and that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances, not applying, the prosecution being governed by the rules of the common law.

9. CRIMINAL LAW ⟸1159(3)—APPEAL—VERDICT.
A conviction on conflicting evidence will not be disturbed on writ of error.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

O. E. Bandy was convicted of introducing and carrying into the state of Oklahoma intoxicating liquor from without the state, and he brings error. Affirmed.

F. E. Kennamer and Charles A. Coakley, both of Madill, Okl., for plaintiff in error.

Archibald Bonds, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

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

CARLAND, Circuit Judge. [1] This is an indictment for introducing and carrying into the state of Oklahoma intoxicating liquor from without said state. The defendant was convicted, and now brings the case here on writ of error. The assignments of error were framed with entire disregard of our rule 24, and for this reason might be disregarded.

[2, 3] Taking up the assignments of error in their order, it may be said that assignment No. 1 presents nothing for review, as the evidence admitted is not set out, and the question attempted to be raised is not argued. Assignments Nos. 2 and 3 present nothing for discussion, as the defendant introduced testimony after the ruling complained of was made, and thereby waived his motion.

[4] The instructions complained of in No. 4 are not set out, and the assignment presents nothing for review. The exceptions that were taken to the charge as given will be hereafter referred to. Assignment No. 5 does not set out the charge requested and refused, and no exceptions were taken to the refusal to give any requested instruction.

Assignments Nos. 6 and 7 alone present questions for consideration. The following are the only exceptions to the charge of the court as given:

"Mr. Coakley: The defendant excepts to that part of the charge following the charge on reasonable doubt, for the reason that the statement as given in the charge throws the burden upon the defendant, instead of placing it upon the government, to prove the case. And further excepts to that part of the charge which predicates the case upon the whisky having been caused to be carried into the Eastern district of Oklahoma.

"The Court: Exceptions noted."

[5, 6] By referring to the charge we can spell out what is meant by the first clause of the above exceptions. The last clause is unintelligible. The exception contained in the first clause is not properly assigned as error, but in a case involving personal liberty we will consider it. The portion of the charge to which exception was taken reads as follows:

"Now, with regard to the evidence of one of the witnesses for the government, the witness Beck: You have heard this witness' testimony. Of course, if you believe, from his testimony and from all the evidence in this case, that it was he who introduced this liquor, and that the defendant Bandy had no interest in or connection with it at all, then, of course, you must find the defendant Bandy not guilty."

It was the theory of the defendant that the witness Beck introduced the liquor. It is therefore claimed that the above excerpt from the charge placed the burden of proof upon the defendant. Taking the whole charge of the court together, however, there is no merit in this contention. The jury was properly instructed upon the question of reasonable doubt.

[7, 8] Counsel for defendant requested the court to charge as follows:

"(5) You are instructed that under the testimony of the witness C. T. Beck he is an accomplice in the crime of introducing liquor charged herein, if such crime was committed, and you cannot convict the defendant upon the testimony of said Beck alone, unless you find his testimony corroborated by other evidence in the case, tending to connect the defendant with the commission of the crime.

"(6) If you find from the evidence that the witnes C. T. Beck was interested in the liquor for which introduction is charged in this case, or was interested in its introduction, then the said C. T. Beck would be an accomplice, and you cannot convict the defendant, O. E. Bandy, upon the testimony of said C. T. Beck, unless you find the testimony of said Beck corroborated by other testimony in the case tending to connect the defendant with the commission of the crime.

"(7) If you find from the evidence that the witness C. T. Beck was aiding and abetting the defendant or any other person in introducing the liquor in question into the Eastern district of Oklahoma, then the said C. T. Beck would be an accomplice, and you cannot convict the defendant upon the testimony of said C. T. Beck, unless you find such testimony corroborated by other testimony in the case tending to connect the defendant with the commission of the crime."

The record shows that these requests were not given as requested, but does not show that they were refused, except by inference, or that any exception was taken to the refusal to give the same, nor is the refusal to give them properly assigned as error; but for reasons stated we

will consider the requests to charge, above mentioned. The court, upon the question of accomplice, charged the jury as follows:

"If from the testimony of the witness Beck, and other testimony in the case, you arrive at a conclusion that Beck had some interest in introducing this liquor, or carrying it from Denison up to Madill, and that he had some knowing guilty connection with it, or some interest in it, was assisting in it in any way, assisting knowingly in this violation of the law, then he would be what is known as an accomplice in this affair; and if the evidence shows him to be such accomplice, then his testimony in regard to the connection of the defendant, Bandy, with the transaction, should be carefully scrutinized by you. And it should also be corroborated in some material point or points connecting Bandy with this offense by other credible evidence in the case, aside from the evidence of the witness Beck himself."

Counsel for defendant complains that the trial court did not charge the law as found in section 5884, Rev. Laws Okl. 1910, which reads as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The law of the state of Oklahoma, however, was not applicable to a criminal case being tried in a federal court. Except so far as Congress has made specific provisions upon the subject, the common law governs the procedure in criminal trials in the courts of the United States. United States v. Reid, 12 How. 361, 13 L. Ed. 1023; United States v. Central Vt. Ry. (C. C.) 157 Fed. 291; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Hanley et al. v. United States, 123 Fed. 849, 59 C. C. A. 153; Diggs et al. v. United States, 220 Fed. 545, 136 C. C. A. 147; Mark Yick Hee v. United States, 223 Fed. 732, 139 C. C. A. 262.

In the case of Hanley et al. v. United States, supra, it was decided that a state statute requiring corroboration of the testimony of an accomplice in a criminal case is not applicable to a prosecution in a federal court, and that a defendant in a criminal case in a federal court cannot complain because the testimony of an accomplice was submitted to the jury, under instructions that it should be received with caution, and carefully scrutinized, and which in effect authorized the jury to give it full credit only in case they found it corroborated as to material facts. The charge as given was as favorable to the accused as he was entitled to under the rule of the common law. As we have said before, there was no exception to the refusal of the court to instruct the jury to find the defendant not guilty; but we have read the evidence in the record, and are satisfied there was no error in refusing to so instruct.

[9] It is claimed that there was no evidence to show that Denison, from which town the intoxicating liquor was alleged to have been carried to Madill, in the state of Oklahoma, was in the state of Texas. Aside from the facts of which the court was entitled to take judicial notice, there was the testimony of Stuart, the train conductor, who testified that on February 11, 1916, he was a conductor, on a Frisco train running from Denison, Tex., to Madill, Okl. It is next claimed that

there was no evidence that the liquor was on this train. But, conceding this fact, it does not destroy the statement of the conductor that the town of Denison was in the state of Texas. It is further claimed that the evidence showed that the witness Beck, rather than Bandy, was the guilty man; but that was, under the evidence, a question for the jury, and they have found that the defendant, Bandy, was the guilty man.

There was evidence to sustain the verdict, and the judgment below is therefore affirmed.

MASSES PUB. CO. v. PATTEN.

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

1. COURTS ⟸405(15)—CIRCUIT COURT OF APPEALS—STAY OF INJUNCTION—AUTHORITY OF COURT.

   Under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1916, § 1121), declaring that where, upon a hearing in equity in a District Court, an injunction shall be continued, refused, or dissolved, an appeal may be taken from such order to the Circuit Court of Appeals, but that the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court or by the appellate court, a judge of the Circuit Court of Appeals may, on appeal from an order granting an injunction pendente lite, stay the operation of the same.

2. INJUNCTION ⟸75—SUBJECT OF RELIEF.

   Equity has jurisdiction to grant an injunction against an order of the Postmaster General excluding a publication from the mails, solely to prevent irreparable pecuniary damage.

3. INJUNCTION ⟸75—ACTIONS—NATURE OF ACTION.

   An action against a postmaster to enjoin him from excluding a publication from the mails, pursuant to the direction of the Postmaster General, is not technically one against the sovereign.

4. COURTS ⟸405(15)—CIRCUIT COURT OF APPEALS—STAY OF INJUNCTION—PROPRIETY.

   Plaintiff sued to prevent defendant postmaster from excluding his publication from the mails, pursuant to the order of the Postmaster General. Before decision was rendered in the District Court, plaintiff requested defendant to return the withheld magazines; other arrangements for distribution having been made. Plaintiff's bill, however, was not withdrawn. *Held* that, on appeal from an order granting an injunction pendente lite restraining defendant from excluding plaintiff's publication from the mails, the operation of the injunction should be stayed on application to a judge of the Circuit Court of Appeals, for plaintiff's bill still sought substantial relief, and, if effect should be given to the injunction, the question would become moot, for the controversy continued only so long as plaintiff's publications were excluded from the mails.

5. INJUNCTION ⟸75—ISSUANCE—RIGHT TO ISSUE.

   The courts will not by injunction interfere, except in the clearest cases, with the action of the great executive departments of the government in interpreting laws affecting the government.

6. POST OFFICE ⟸22—MAILS—CARRIERS.

   In respect to the mails, the United States is not a common carrier, but is pursuing a high governmental duty, and it is at least questionable whether the government can be judicially compelled to assist in the dissemination and distribution of a publication which proclaims itself revolutionary.

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7. APPEAL AND ERROR ⊂⊃458(3)—STAY OF INJUNCTION—EXCLUSION OF MAIL MATTER.

Plaintiff's publication asserted that laws passed by the United States for the creation of military forces, and the prosecution of war violated the fundamental rights of any free people, that conscription is the destruction of youth, democracy, and labor, and the desolation of the family, and that the United States has attempted to ensnare Russia into a continuance of war for purposes prejudicial to true democracy, and that persons who have denied and resisted the laws, having military success as their object, are worthy of admiration and possible emulation. The publication, however, did not urge resistance to the laws. Act June 15, 1917, forbids any one from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military and naval forces of the United States. *Held* that, though plaintiff's publication did not expressly urge resistance to conscription, nevertheless, as it tended in that direction, and articles tending to arouse insubordination and disloyalty in the military and naval forces are unmailable, an order enjoining a postmaster from giving effect to the order of the Postmaster General excluding plaintiff's publication from the mails should be stayed, an appeal having been taken to the Circuit Court of Appeals, for plaintiff, having secured other means of distribution, could be compensated by pecuniary damages, and public interest demands protection against seditious articles.

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

Suit by the Masses Publishing Company against Thomas G. Patten. From an order granting an injunction pendente lite, defendant appeals. On motion to stay injunction. Stay continued.

See, also, 244 Fed. 535.

E. B. Barnes, Asst. U. S. Atty., of New York City, for the motion.

G. E. Roe, of New York City, opposed.

Before HOUGH, Circuit Judge.

HOUGH, Circuit Judge. This motion will be considered under the following heads: I. The practice under the statute. II. The present condition of this litigation as to its object and subject-matter. III. The fact findings of the District Court, and the conclusions there drawn therefrom. IV. The law as suggested to me by those facts. V. The propriety of this motion under the circumstances thus developed, in respect of (1) the rights of parties; (2) the public interests.

[1] I. After considerable experience in appellate practice, and such recent inquiry as I have been able to make, no other instance (under section 129, Judicial Code) of application to a judge of the appellate court to stay an appealed order of this nature is known to me. Such stays, granted by the trial judge, are not uncommon; I have, myself, awarded not a few. They rest on the belief that doubtful questions of law, or difficult contests of fact (or both) are presented by the record, and that the relations of the parties, or exigencies of business are such that (perhaps by the giving of security) no injury will result from letting matters remain in statu quo (except for opinion filed) until decisive action can be had in the Court of Appeals.

There can be no difference in principle, between such an application to the trial judge, and a similar one addressed to a member of the appellate court. Indeed, I think a somewhat stricter rule should justly

apply. The trial judge may and often does feel that his findings of fact reached with travail of conscience, may not be unassailable in the view of others equally capable; yet, having done his best, he expresses no misgivings, though they exist and strongly move him to grant the stay.

But one who did not hear the case fully tried and argued, has, I think, small right to base action on facts. Except in the extremest cases, the facts must be assumed as reported from the lower court, whether through judge or jury. Any other attitude on the part of the judge ad quem, would convert the motion into a species of irregular, and often indecent, new trial. For these reasons, it is held that for present purposes, the propriety of granting the stay asked, rests on a case whose facts are literally as found by the District Court. And by facts, I mean, not only facts physical, phenomena seen or heard, but mental conditions or intents, so far as definitely stated.

[2-4] II. This action relates only to an alleged property right; i. e., the claim of a New York corporation to have certain second-class matter forwarded to destination through the United States mail. Equity is resorted to solely to prevent irreparable pecuniary damage. Defendant justifies under an order of the Postmaster General, and the Department of Justice defends; but all this does not prevent the suit from being one between private parties, in the same sense as that phrase is true of actions against collectors of internal revenue for illegal exaction of taxes. The action is not against the sovereign, technically.

What the bill demanded, therefore, was that the mail aforesaid, viz., sundry copies of the "Masses," should be sent forward; and the District Court so ordered on July 26th. It now appears that on the day before (decision being known) plaintiff requested defendant to give back the withheld magazines, and not forward them; other arrangements for distribution having been made.

This means that plaintiff no longer desires the only avowed object of action; the business foundation of the suit has dropped out. But it remains true that the obligation to distribute this particular issue of the "Masses" has a most important bearing on any postmaster's duty to forward future or similar publications. Therefore, as long as the prayer of the bill is unfulfilled, plaintiff has a legally real subject of litigation, although it further appears that plaintiff is not now exposed to any loss not coverable by damages already liquidated or ascertainable.

Defendant's situation, however, is quite different. The order appealed from, if complied with, fulfills the whole object of suit. If reversed, no restitution or restoration of status quo is possible; and in my judgment the appeal becomes a futility, presenting to the appellate court nothing but an interesting moot point. A court may hold a case sub judice, until it becomes moot. The Supreme Court did so lately, in the well-known habeas corpus taken out by Hon. H. Snowden Marshall. 243 U. S. 521, 37 Sup. Ct. 448, 61 L. Ed. 881. But could it be pretended that the Supreme Court should or could have taken cognizance of that appeal, if brought on for argument after the expiration of the Congress which proceeded against Mr. Marshall? I

think not, and therefore strongly incline to the view that this is the rare instance in which an appeal without a stay is not only futile, but legally impossible; yet the statute gives the absolute right of appeal.

[5-7] III. The facts found may be imperfectly, but sufficiently, summarized thus: Taking certain pictures and articles in this magazine, especially objected to by defendant, and drawing no inferences from the general tone and previous issues of the periodical, the books now lying undelivered in the post office, and the sole subject of this suit, assert that the laws of the United States passed for the creation of military forces and the prosecution of war, violate "the fundamental rights of any free people"; that conscription especially "is the destruction of youth, democracy, and labor, and the desolation of the family"; that the United States has attempted to "ensnare" Russia into "a continuance of war for purposes prejudicial to true democracy"; that persons (naming them) who have defied and resisted the laws having military success as their object, and been duly convicted or otherwise punished for such offenses, are worthy of "admiration" and "possible emulation."

It is further found that these specified writings and pictures "may interfere with the success of the military forces of the United States," because this publication and its 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 usually indifferent)." But all these statements of plaintiff are not "of fact"; they are "within the range of opinion and of criticism; they are all certainly believed to be true by the utterer."

Upon these findings, and the assumption that what is unlawful under the act of June 15, 1917, is unmailable, is based the conclusion of law that the act "forbids any one from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military and naval forces of the United States" and 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." But, "if one stops short of urging upon others that it is their duty or their interest to resist the law, one should not be held to have attempted to cause its violation."

Therefore, because no writing or picture, of those specifically objected to by the defendant on the hearing (without any reference to the rest of the magazine or its history or environment), "directly advocated resistance" to (especially) the Conscription Act, the order appealed from was granted. The foregoing only follows through the findings and conclusion on one subdivision of the act, but that is enough for present purposes.

IV. The Postmaster General had found as a fact (inter alia) that the "Masses" sought to promote a mutinous, disloyal, and insubordinate spirit among troops; I think the District Court did not disagree as to that. But it was held that, because the plaintiff stopped short of urging resistance, the law was not violated. The questions presented, or some of them, are: (1) Is such view of the law correct? (2) Is it so clearly correct that the courts should interfere? For it is admitted that the Postmaster General held that such indirect incitement

to disloyalty, etc., as the court found in the magazine, did amount to resisting and therefore violating the law.

This second query must be first answered, for courts do not interfere, except in the clearest cases, with the action of one of the great executive departments in interpreting law affecting that department. Smith v. Hitchcock, 226 U. S. 58, 33 Sup. Ct. 6, 57 L. Ed. 119. In my opinion it is very difficult to answer this question in the affirmative.

As to the first query, it is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. Oratio obliqua has always been preferred by rhetoricians to oratio recta; the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction "Go thou and do likewise." At all events, it is a point plainly suitable for the attention of an appellate court.

Behind and beyond these questions of statutory construction, and of how far discretionary action (and all injunctions pendente lite are discretionary) by the judicial department may interfere with executive discretion, lies a fundamental inquiry as to the nature of the postal service. In respect of the mails the United States is certainly not a common carrier; it is pursuing a high governmental duty (Searight v. Stokes, 3 How. 169, 11 L. Ed. 537; cf. Re Debs, 158 U. S. 583, 15 Sup. Ct. 900, 39 L. Ed. 1092), and it is at least arguable whether any constitutional government can be judicially compelled to assist in the dissemination and distribution of something which proclaims itself "revolutionary," which exists, not to reform, but to destroy, the rule of any party, clique, or faction that could give even lip service to the Constitution of the United States.

V. (1) So far as the parties are concerned, the present and actual situation is such that any wrong suffered by plaintiff can be wholly redressed by damages, apparently (only) measured by the expense of the different transportation arrangements now confessedly perfected.

(2) So far as the public interest is concerned, enough has already been said, except to point out that the Circuit Court of Appeals for this circuit has not closed its term; it can be convened at any time on the summons of the senior judge.

The existing stay will be continued, on terms specifically set forth in the order filed herewith.

GUFFEY et al. v. SMITH et al.

(Circuit Court of Appeals, Seventh Circuit. August 10, 1917.)

Nos. 2405, 2406.

1. COMPROMISE AND SETTLEMENT ⇐12—CONSTRUCTION—PRESUMPTION.
Complainants, who acquired an oil lease, did no development work thereafter. The lessor granted another lease, and appellees, the lessees, having struck oil, complainants asserted rights prior to their lease. Complainants and appellees thereafter entered into an agreement that they should share equally in the seven-twelfths interest in the lease claimed by appellees, that the money held by an oil company should be divided, but

that appellees should not be liable for seven-twelfths of the amount theretofore paid them and others claiming interest under the second lease. It was discovered that appellees' interest previously had been larger, and they had received payments amounting to more than seven-twelfths of the total sum paid last lessees by the oil company. *Held* that, as the purpose of the agreement was to avoid a lawsuit, it must be presumed that the contract forgave appellees for all payments received; it being their contention that the amounts they had received were devoted to the development work.

2. COMPROMISE AND SETTLEMENT ⊂=12—CONSTRUCTION.

In a suit involving the construction of a compromise entered into between junior and senior lessees of oil lands, *held*, in view of all of the circumstances and a subsequent agreement between the parties making the compromise, that the junior lessees were excused from liability for all payments made them prior to the agreement.

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

Suit by Joseph F. Guffey and others against James A. Smith and others. From the decree, denying complainants relief sought, they appeal. Affirmed.

Isaac H. Mayer, of Chicago, Ill., for appellants.

Walter T. Gunn and George F. Rearick, both of Danville, Ill., for appellees.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. Smith, owner of lands in Illinois, made an oil lease to Guffey and associates. Thereunder no development work was done. Subsequently Smith made a similar lease to Solley and associates. After the junior lessees had struck oil, the seniors began suit for possession and accounting. At this time the junior interests were owned, by Solley and Johnson, seven-twelfths, and by Hennig and Ellis, five-twelfths. Pending a decision in the Supreme Court (237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856), Guffey and associates effected a compromise with Solley and Johnson. During the subsequent accounting hearing against Hennig and Ellis in the District Court, Guffey and associates raised a contention that Solley and Johnson should be made to account for an alleged overpayment by the Ohio Oil Company, which had been purchasing the output of the junior lessees. From a denial of this claim Guffey and associates are appealing.

In the written contract of settlement it was provided:

"Appellants [the Guffeys] and appellees [Solley and Johnson] shall share equally in seven-twelfths of the properties and proceeds thereof; that is to say, appellants shall be entitled to seven twenty-fourths and appellees to seven twenty-fourths in the following moneys and properties:

"(a) The money now held by the Ohio Oil Company, amounting to $42,674.83.

"(b) The net proceeds now or hereafter in the hands of Haskell, receiver."

After paragraphs relating to reciprocal assignments of seven twenty-fourths interests in the leases, filing of stipulations, etc., the contract concluded:

"It is further agreed that the appellees shall not be held liable for seven-twelfths of the $52,330.74 heretofore paid them, Walter Hennig and M. Ellis by the Ohio Oil Company."

Guffeys sent a copy to the attorney of the Ohio Oil Company; he replied that the books of the company showed that Solley and Johnson were entitled to $31,588.92, not $24,893.60, which would be seven-twelfths of the $42,674.83 on hand; and the Guffeys thereupon arranged for a meeting of the widely scattered parties in interest at the office of the Oil Company in Findlay, Ohio.

This controversy respecting the facts of the case is concerned principally with what occurred at Findlay; and the success of the Guffeys' appeal depends upon their ability to establish from the record that they had no knowledge, prior to or at the Findlay meeting, that the Ohio Oil Company had paid to Solley and Johnson before the Guffeys' suit was begun $39,173.85 and not merely the $30,526.23, which was seven-twelfths of the total payments of $52,330.74. From a full examination of the entire evidence, we give a brief summary of the reasons why we find that the master, who heard the witnesses orally, and the District Judge, who overruled the exceptions to the master's report, made no mistake in holding the Guffeys to their stipulation for a dismissal as to Solley and Johnson.

[1] 1. At the time of the compromise Solley and Johnson owned only seven-twelfths of the junior lease. While the record is unsatisfactory as to names, dates, and shares, it is clearly deducible from the record, particularly from exhibits of books of the Oil Company, that various assignments of interests in the junior lease had been made from time to time, and that Solley and Johnson prior to the bringing of the Guffeys' suit and for some time afterwards had owned a larger share than seven-twelfths. To end the lawsuit is the most reasonable motive to ascribe to both parties in making the compromise. As to title, Solley and Johnson then owned seven-twelfths of the junior lease. Against this the Guffeys put seven-twelfths of the senior lease. By division of the two interests the Guffeys obtained half of what Solley and Johnson owned in the junior lease. Viewing clauses (a) and (b) in the light of the above ascribed motive it seems clear to us that the Guffeys intended to take and Solley and Johnson to give one-half of whatever sums were coming from the Oil Company and receiver. It was assumed that, because Solley and Johnson then owned only seven-twelfths of the junior lease, they were entitled to only seven-twelfths of the moneys held up by the Oil Company pending the outcome of the suit. The term "seven-twelfths" was therefore intended to be descriptive of the Solley and Johnson interest in the funds on hand. As to the money that was spent and gone, Solley and Johnson could not divide; but they could go into their pockets to account for half they had received. Against the Guffeys' claim that they should do so, they insisted that nearly all that money had gone into creating the value of the oil leases which were being divided, and that they therefore should not be held to account for the past. Viewing the concluding paragraph in the light in which clauses (a) and (b) have been read, it would seem that Solley and Johnson intended to demand and Guffeys to grant forgiveness of Solley and Johnson's share in the moneys paid by the oil company before suit was instituted. Thus a settlement of the suit, so far as Solley and Johnson were concerned, would be provided for. Other-

wise there would remain to be litigated, not merely whether Solley and Johnson had received more than they were entitled to when the payments were made, but whether they had actually received more than seven-twelfths of the total.

[2] 2. When the attorney of the Oil Company wrote the Guffeys that the books showed $6,695.32 to the credit of Solley and Johnson in excess of seven-twelfths of the total credits, they asked for a meeting at which Solley and Johnson should agree to an interpretation or a correction of the contract so that "seven-twelfths" in clauses (a) and (b) should be taken as descriptive of the actual interest of Solley and Johnson in the funds; and they stated in that letter that the understanding of all parties was that the money paid out by the Oil Company should not be taken into account and that the leases and moneys on hand were to be equally divided. One might reasonably suppose that, in a meeting where the Guffeys were demanding and getting an interpretation or a correction whereby "seven-twelfths" in clauses (a) and (b) meant actual interest, Solley and Johnson would demand and get an interpretation or a correction whereby "seven-twelfths" in the concluding paragraph would mean actual payments. And one might reasonably suppose that, when the Guffeys were acting on notice that Solley and Johnson, though now owning only seven-twelfths, were credited with an excess in the fund accumulated since the lawsuit, they would have inferred that Solley and Johnson might have drawn more than seven-twelfths of the funds distributed before the suit was started.

3. Solley, Johnson, and Hurley (attorney for the Oil Company) are very positive that at the Findlay meeting the correction of "seven-twelfths" in both places in the contract was orally agreed to by all the parties. The Guffeys claim that the correction was made only in their own interest and that the concluding paragraph was not discussed or mentioned. We regard the positive testimony as the more reasonable and more credible. Furthermore, Hurley identified as an exhibit a tabulated statement from the books of the Oil Company, which showed, not only the several credits for the retained moneys, but also the several distributions made before the suit was begun; and he testified that this statement was on the table before the parties and was examined by all. And a copy of this tabulated statement was furnished to Troup, one of the Guffeys' attorneys, more than three months before the compromise agreement was executed.

4. Against the Solley and Johnson version of the Findlay meeting the strongest item is the voucher prepared by Hurley to cover the payment of $15,794.46 then made to the Guffeys. It states that the Guffeys are receiving "the proceeds of one-half of the seven-twelfths working interest oil run from the Smith farms," and are releasing liability for "moneys heretofore paid Solley and Johnson for the seven-twelfths working interest oil run from these farms." But it also states that payment is made in pursuance of the compromise contract and a subsequent understanding thereof, "wherein all matters in difference and litigation between these parties are compromised and settled." And inasmuch as the stated sum, $15,794.46, is greater by $3,347.66 than one-half of seven-twelfths of the money in the hands of the Oil

Company, again it is evident that the parties were using the phrase "seven-twelfths" as descriptive of Solley and Johnson's actual interest, and not as an arithmetical formula for the division of the fund.

The decree is affirmed.

In No. 2406, a companion case, the decree is affirmed.

INTERNATIONAL TRUST CO. v. MYERS et al.

(Circuit Court of Appeals, First Circuit. August 25, 1917.)

No. 1289.

BANKRUPTCY ⊂=467—COMPOSITION—REVIEW—FINDING.

An order of the trial court, confirming the referee's report overruling objections to composition, based on the ground that bankrupt had obtained credit by means of a materially false written statement, will not be disturbed on appeal, where the evidence did not clearly show that the trial court was wrong.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

In the matter of the bankruptcy of Samuel A. Myers and others. Composition was offered, and the International Trust Company, a creditor, objected. The report of the referee, overruling the objections, was sustained by the District Court, and the International Trust Company appeals. Affirmed.

The following is the opinion of Morton, District Judge, on confirmation of composition:

The objections chiefly relied upon in argument are based upon the statement of financial condition made by the alleged bankrupts to the objecting creditor. It was given to the creditor on March 27, 1916, at the latter's request, and purported to state the financial condition of the alleged bankrupts as it appeared on their books on January 1, 1916. The referee finds that there was no borrowing on the strength of the statement until October 2, 1916, and that the statement was a correct abstract of the respondents' books; and these findings are not disputed.

The objecting creditor, in support of the contention that the statement was intentionally false, relies principally upon two matters. The first of these is the omission altogether from it of a note for $3,000, made by the alleged bankrupts and secured by a mortgage on their real estate in Stoughton. The respondents owned real estate in Stoughton and mortgaged it for $3,000 to the Stoughton Trust Company. They did not include this mortgage indebtedness in their statement. Neither did they include the value of the real estate, which appears to have been more than the amount of the mortgage. They apparently supposed that the statement covered only their commercial business, and that the Stoughton real estate was outside of it. If the real estate had been shown as an asset, and the mortgage indebtedness as a liability, the result would have been an increase in the net worth of the respondents.

The other item relied upon by the objecting creditor is the "Accounts Receivable," which are given in the statement as $58,425.06. That the respondents had on their books accounts receivable of that amount is not disputed. At the date of the statement, however, $27,000 of these accounts had been assigned to the Commercial Investment Trust, which had advanced 80 per cent.

of the face value thereof. Further adjustments were to be made between the respondents and the Commercial Investment Trust in respect to the other 20 per cent. The respondents included as assets in their "Accounts Receivable" the $27,000 of accounts so assigned; on the other side they included in their liabilities as debts the sums received on the assigned accounts.

The objecting creditor contends that the accounts in question, having been absolutely assigned, were no longer the property of the respondents, and could not properly be included as assets; that the sums received upon said accounts were payments of the accounts pro tanto, and were not loans to the respondents; that the statement was therefore false; and that, as the respondents knew all the facts, they are fixed with knowledge of the falsity. The facts as found by the referee hardly support this view of the transactions between the respondents and the Commercial Investment Trust; but the case does not, I think, turn upon a close and exact analysis of these transactions.

A false statement of the character here in question (Bankruptcy Act, § 14b (3) [Comp. St. 1916, § 9598]), in order to be a bar to a discharge, must have been made with knowledge that it was false, and with the actual intent to obtain property or credit by means of a false statement. The learned referee has found, in substance, that the respondents did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit. I am asked to disregard his findings, and to hold that he was plainly wrong in his views. I am not prepared to do so. There is no persuasive evidence of dishonesty. It seems to me that the learned referee, who saw the respondents and heard them testify, and was in a much better position than I am to decide correctly whether there was a dishonest purpose or intent, was probably right in his conclusions on this point.

The objecting creditor urges that, if the assignment of almost half of the accounts receivable had been disclosed to it, credit would not have been extended; that there was a duty on the part of the respondents, when called upon for a statement of financial condition, to state the fact of the assignments; and that the statement, not disclosing such fact, was therefore knowingly and intentionally false. The short answer is that, if the objecting creditor considered that point material, it ought to have inquired about it. The statement shows on its face what it is. It ought not to be extended by implication to include recitals which it does not contain, and which were never made by the alleged bankrupts.

The other objections relied on are based upon alleged false statements made by the respondents in the schedules and on their examinations. Both in the original schedules, and on the examinations before the receivers, each respondent stated under oath that all his policies of life insurance were payable to his wife. The facts were that on the life of each respondent was a $20,000 policy payable to the firm. After the examination the schedule was amended to show these facts. Various policies of life insurance owned by the respondents had been assigned to their wives on January 2, 1917. The explanation offered by the respondents for their failure to refer to the $20,000 policies in their schedules and in their examinations was that each of the respondents supposed that his $20,000 policy had been assigned to his wife at the time when his other policies were so assigned. The learned referee accepted the explanation offered, and does not find any intentional concealment or misstatement in respect to these two policies. It cannot be said that in this conclusion he was clearly in error. The other specifications of objection based on the policies of insurance are waived by the objecting creditor.

No sufficient reason appearing for disregarding any of the learned referee's findings, his report stands confirmed.

Offer in composition approved.

John R. Lazenby and Julius Nelson, both of Boston, Mass., for appellant.

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

PER CURIAM. Objections specified by the appellant to an accepted composition were referred to the referee, who reported that he found none of them sustained; whereupon the court, after due hearing, confirmed the composition. The appellant has insisted here, not upon all the objections originally specified, but upon one ground of objection only, viz., that the bankrupts had been guilty of obtaining money on credit upon a materially false statement in writing, made by them to said appellant for the purpose of obtaining credit from it. Bankruptcy Act, §§ 12d (2), 14b (3) (Comp. St. 1916, §§ 9596, 9598).

The evidence before the referee, his report thereon, and a memorandum of the District Judge's reasons for agreeing with the referee are before us. That on March 27, 1916, the appellant received from the bankrupts a signed statement in writing purporting to be "a copy of our financial statement taken from inventory January 1, 1916," is undisputed; also that the appellant, relying thereon, thereafter loaned the bankrupts $20,000 in all, on various dates from October 2 to December 18, 1916, both inclusive.

A consideration of the evidence before the referee and the District Judge has left us unable to say that they were clearly in error in finding it insufficient to prove said statement materially false and made for the purpose of obtaining credit thereby. We accept the reasoning and conclusions of the District Judge thereon.

The order of the District Court, confirming the composition, is therefore affirmed, and the appellees recover their costs of appeal.

CLARK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917.)

No. 2931.

1. WITNESSES ⟸220—PRIVILEGED COMMUNICATIONS—PRELIMINARY QUESTIONS.
   Though the letter be privileged, error cannot be predicated on the overruling of objection on that ground to the preliminary question to defendant whether the signature to the letter shown him was his.

2. POST OFFICE ⟸49—USE OF MAILS—FRAUDULENT SCHEME—EVIDENCE.
   The indictment for using the mails to promote a fraudulent scheme, charging it to be to solicit from physicians the collection of accounts on percentage, and then to convert all the collections, admission in evidence of defendant's advertisement to sell a half interest in a business paying more than a certain amount per month, if tending to show, as it may, that he had made representations in the advertisement which he could make good only by appropriating collections in accordance with the scheme charged, is not reversible error.

3. CRIMINAL LAW ⟸901—MOTION TO DISMISS—WAIVER.
   Defendant's motion, at the conclusion of the prosecution's evidence, to dismiss, was waived by introduction of evidence on his behalf, and by his failure to move for an instructed verdict at the close of the evidence.

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

4. CRIMINAL LAW ⟸1023(13)—APPEAL—REVIEW—DENIAL OF NEW TRIAL.
The Circuit Court of Appeals cannot review denial of defendant's motion for new trial.

5. CRIMINAL LAW ⟸1054(1)—APPEAL—REVIEW—EXCEPTIONS.
Rulings in admitting and refusing to strike evidence cannot be reviewed; exceptions not having been taken thereto.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Marion McMillan Clark, indicted as M. M. Clark, was convicted, and brings error. Affirmed.

Oliver J. Marston and Walter A. Ham, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

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

GILBERT, Circuit Judge. The plaintiff in error was convicted upon an indictment which charged him, under section 215 of the federal Penal Code (Comp. St. 1916, § 10385), with the offense of using the United States mails to promote a scheme to defraud. He, together with two others, had entered into a copartnership known as the Physicians' Protective Association, for the purpose of soliciting from and collecting for physicians, surgeons, and dentists outstanding accounts on a percentage basis, and the indictment charged that the scheme was fraudulent in that, disregarding such agreement with the physicians, surgeons, and dentists to collect upon commission, the purpose and intention of the defendants was to appropriate and convert to their own use all or any part of such collections as they desired.

[1] The plaintiff in error assigns as error that the court below overruled his objection to the question which was asked him:

"I hand you here a letter, and ask you to look at the signature of that letter and say whether or not it is your signature."

The objection was that the letter was a privileged communication between attorney and client. If the assignment were directed to the admission of a letter which was a privileged communication between attorney and client, a question would be presented for our determination. But, as it is, nothing is brought before us except the bare fact that the plaintiff in error was asked whether he had signed a cerain letter. That question was but preliminary, and no error can be predicated upon the ruling of the court in permitting it to be answered.

[2] It is assigned that the court erred in overruling the objection of the plaintiff in error to the admission in evidence of a certain exhibit, to which objection was made that it was irrelevant, incompetent, and immaterial. That exhibit was an advertisement published by the plain-

tiff in error on August 27, 1914, while he was carrying on the business of the Physicians' Protective Association. So far as it is material to the case, it contained the following:

"For Sale.—One-half interest in an exclusive business now paying more than $250 per month. Will pay buyer $75 per month, and divide profits above that amount."

It is contended that the advertisement tended to show that the plaintiff in error had committed an offense other than that with which he was charged in the indictment. There is nothing in the terms of the advertisement itself to show the commission of an offense. It may have tended to show, and probably it was introduced for that purpose, that the plaintiff in error had made representations in his advertisement which he could make good only by appropriating collections, in accordance with the scheme charged in the indictment. If so, its admission was not reversible error.

[3] Error is assigned to the denial of the motion of plaintiff in error to dismiss at the conclusion of the plaintiff's testimony. To this it is sufficient to say that the motion was waived by the introduction of evidence on behalf of the plaintiff in error, and his failure to move for an instructed verdict at the close of the evidence.

[4] The assignment that the court erred in overruling the motion of plaintiff in error for a new trial presents no question that this court can review. That proposition is so well settled as to make the citation of authorities unnecessary.

[5] In the brief of the plaintiff in error, other alleged errors in the admission of evidence, and the refusal of the court to strike evidence from the record, are discussed; but no exceptions were taken to the rulings of the court below, and we cannot consider them.

The judgment is affirmed.

PLAZUELA SUGAR CO. v. PASTORIZA et al.
(two cases).

(Circuit Court of Appeals, First Circuit. August 25, 1917.)

Nos. 1262, 1263.

1. COURTS ⊂=405(1)—CIRCUIT COURT OF APPEALS—DECISIONS APPEALABLE—SCOPE OF REMEDY.
Where plaintiffs' complaint, seeking a judgment enjoining the operation of a railroad constructed upon their lands by defendant and an order directing removal, was dismissed in the district court, but the Supreme Court of Porto Rico, on appeal, reversed the district court's judgment, and entered judgment in accordance with the prayers of the complaint, an appeal to the Circuit Court of Appeals for the First Circuit is an appropriate procedure to review the judgment of the Supreme Court of Porto Rico, and a writ of error to the judgment must be dismissed.

2. RAILROADS ⊂=65—RIGHT OF WAY—RIGHT TO.
Where defendant entered on plaintiffs' land and constructed a railroad, without obtaining any grant of a right of way or paying any consideration, and in reliance solely on plaintiffs' alleged oral permission and their acquiescence, defendant did not establish any right to continue the operation, but at most should be treated as a licensee under a license revocable at pleasure, and on plaintiffs' revocation of the license the railroad may be directed removed.

3. COURTS ⊂=406(1)—SUPREME COURT OF TERRITORY—REVIEW—DETERMINATION OF LOWER COURT.
In reviewing a judgment of the Supreme Court of Porto Rico, in an action where the local law governs, the Circuit Court of Appeals must uphold the decision of the lower court, unless convinced that clear error was committed.

4. ESTOPPEL ⊂=93(4)—EQUITABLE ESTOPPEL—HOW RAISED.
Though plaintiffs gave defendant an oral license to construct a railroad on their lands, and allowed the construction without objection, making no objection to the operation of such road until after it had been continued for over five years, plaintiffs' acquiescence did not, the railroad not being used as a common carrier, but solely for defendant's benefit, ripen into an equitable estoppel, precluding plaintiffs from thereafter requiring the removal of the road.

Appeal from and in Error to the Supreme Court of Porto Rico.

Action by José Maria Torres Pastoriza and others against the Plazuela Sugar Company, begun in the district court for Porto Rico, where the complaint was dismissed. On appeal to the Supreme Court for Porto Rico, there was a judgment for plaintiffs, and defendant appeals and brings error. Judgment appealed from affirmed, and writ of error dismissed.

Joseph B. Jacobs, of Boston, Mass. (Cay. Coll Cuchi, of San Juan, Porto Rico, and Jacobs & Jacobs, of Boston, Mass., on the brief), for appellant and plaintiff in error.

Otto Schoenrich, of New York City (Curtis, Mallet-Prevost & Colt, of New York City, on the brief), for appellees and defendants in error.

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

DODGE, Circuit Judge. Both these proceedings seek the reversal of a judgment rendered by the Porto Rican Supreme Court July 28, 1916. The judgment was rendered in a case originally brought by the appellees and defendants in error here, hereinafter called plaintiffs, in the district court of Arecibo, against the appellant and plaintiff in error, hereinafter called defendant.

There is no dispute that the defendant, a corporation operating a sugar mill in Arecibo, had in 1907 or 1908 built a private railroad, which crossed lands owned by the plaintiffs, and had since operated said railroad by running trains over it, which carried sugar cane to said factory across the plaintiffs' lands. Alleging that they had never "executed any deed of servitude on behalf of the defendant corporation," and had repeatedly requested the defendant to discontinue running said trains and remove said tracks from their lands, the plaintiffs' complaint asked the court of first instance to declare that "no servitude existed on behalf of any estates of the defendant," to enjoin further operation of the railroad upon their lands and to order removal of the tracks therefrom.

[1] From the dismissal of their complaint by said district court, the plaintiffs appealed to the Supreme Court, which reversed the judgment below and entered judgment in accordance with the prayers of the complaint, which is the judgment now before us for review. We see no reason to doubt that it is properly here under the appeal. The assignments of error relied on are the same in both proceedings.

[2, 3] The defendant showed no written grant from the plaintiffs of any right whatever to use their land, nor anything in writing evidencing their consent, either to the original building of the railroad within their premises or to its subsequent maintenance there. The defendant relied solely on alleged oral consent by the plaintiffs to the building of the railroad and their subsequent acquiescence without objection in its operation. It did not appear that the plaintiffs ever requested the building of said railroad or were in any way benefited thereby. The oral consent relied on was given upon a request by the defendant for permission to lay its rails over the premises. No payment or other recompense, either for permission to lay the rails or to maintain them, was ever offered to or received by the plaintiffs, so far as shown. The Supreme Court held that there had been no consideration sufficient to give the defendant the rights which it asserted.

Upon the evidence, we find no reason for differing from the conclusions adopted by the Supreme Court. The plaintiffs, in our opinion, sufficiently established their right to the relief sought. It could not justly be said that the defendant had ever acquired rights against the plaintiffs beyond those of a licensee under a license revokable at their pleasure. The question was, of course, to be determined according to the law of Porto Rico; and, so far as that law is involved, we must uphold the decision of the court below, unless convinced that clear error was committed by it. Cardona v. Quinones, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538. Such conviction is wholly wanting in the present case.

[4] That the plaintiffs became equitably estopped to revoke the license given when the railroad was built by their acquiescence in the defendant's subsequent use of their land, under the circumstances shown, we are entirely unable to believe. No public right or convenience is involved. We cannot hold that the plaintiffs have forfeited any rights belonging to them as owners of their land, merely because they have been accommodating enough to let the defendant use it as above, without pay, for its own benefit, during the six or seven years preceding their institution of this suit.

In No. 1262, the judgment appealed from is affirmed, and the appellees recover their costs of appeal.

In No. 1263, the writ of error is dismissed, without costs.

KANSAS CITY, C. & S. RY. CO. v. SHOEMAKER.*

(Circuit Court of Appeals, Eighth Circuit. September 3, 1917.)

No. 4922.

1. TRIAL ⟸260(8)—INSTRUCTIONS—REQUESTS COVERED BY INSTRUCTIONS GIVEN.

In a railway employé's action for injuries sustained in a collision at a highway crossing between a railway motorcar and an automobile, the court charged that if the operator of the motorcar saw or by the exercise of ordinary care and prudence might have seen and anticipated the approach of the motorcar, and avoided the collision, he was negligent, that the jury must judge whether he saw or might have seen the automobile in time to stop and avoid the accident, and that it was incumbent on him merely to take such observation as would apprise him of the situation that there was or was likely to be impending danger, to such an extent that it would become his duty to exercise ordinary care to avoid it, and that, if he did not exercise such care, he was negligent. *Held*, that this did not cover defendant's requested instruction that the operator was under no obligation to stop because he saw or might have seen the automobile approaching, and that he had a right to assume that the automobile driver would stop, and not attempt to cross the track.

2. MASTER AND SERVANT ⟸137(3), 293(19)—INJURIES TO EMPLOYÉ—OPERATION OF RAILROADS—INSTRUCTION.

The requested charge stated a correct rule of law and should have been given.

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

Action by Harvey H. Shoemaker against the Kansas City, Clinton & Springfield Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

John H. Lucas, of Kansas City, Mo. (William C. Lucas, of Kansas City, Mo., on the brief), for plaintiff in error.

H. M. Langworthy, of Kansas City, Mo. (J. C. Hargus, O. H. Dean, and W. D. McLeod, all of Kansas City, Mo., on the brief), for defendant in error.

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

*Rehearing denied December 19, 1917.

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

CARLAND, Circuit Judge. This is an action by Shoemaker against the railway company to recover damages for a personal injury received by him while riding upon a motorcar of the company, which was being driven by another employé of the company by the name of Green. It is conceded that the action arises under the act of Congress relating to the liability of common carriers by railroads to their employés in certain cases (35 Stat. 65) and the amendments thereto (36 Stat. 291). Comp. St. 1916, §§ 8657–8665.

The injury to Shoemaker was caused by a collision between the motorcar, as it is called in the evidence, with an automobile at a public highway crossing. The negligence alleged in the petition is that of Green, the employé of the railway company in charge of the motorcar, saw or by the exercise of ordinary care could have seen that the automobile was approaching the crossing, and that said motorcar was liable to strike said automobile; that notwithstanding this fact Green continued to operate the motorcar at a high, dangerous, and reckless rate of speed, and failed to exercise ordinary care to reduce the speed of said motorcar, or stop the same, so as to prevent striking said automobile. There was a verdict against the railway company, and it has brought the case here assigning error.

[1] At the close of the evidence counsel for the railway company requested the court to charge the jury as follows:

"The operator of the handcar was under no obligations to stop his car because he saw, or might have seen, the automobile approaching the crossing. He had a right to presume that the driver of the automobile would stop, and not attempt to cross the railroad track; and the mere fact, if it be a fact, that the operator of the car saw the automobile approaching the track is not sufficient to warrant a recovery in this case."

The court refused to give this instruction, for the reason that it was covered by the general charge, to which ruling counsel for the railway company excepted. After the court had charged the jury, the following remarks passed between court and counsel in the presence of the jury:

"The defendant further excepts to the failure of the court to charge the jury that no duty devolved upon the defendant, or its employés, to stop, or attempt to stop, the car until such time as there was peril, and that, under the evidence, there was no peril in the case until the witness Reeding, with his automobile, attempted to cross the tracks.

"The Court: The court thought it had made that clear, but will state that, in going along there, you must judge whether the employé, Green, at the time saw, or by the exercise of ordinary diligence might have seen, the approaching automobile, in such time as, with the instrumentalities at his hand, to have stopped and avoided the accident.

"Mr. Lucas: I think your honor did not get the point. The point of the objection is that the charge is misleading, in that the jury may assume, from the charge, that Green, the witness, was required to take observation of the fact that the automobile was approaching the track. He was under no duty to stop his car, or attempt to stop his car, until such time as the automobile was in such close proximity to the track that he saw, or could have seen, that, if he didn't stop it, there would be a collision.

"The Court: The court intended the jury to understand that it was incumbent upon the defendant merely to take such observation as would apprise him of the situation, that there was, or was likely to be, impending danger there, to such an extent that it would become his duty to exercise ordinary care and caution to avoid it, and that, if you find that, at any point, that was true, and that the defendant, through its employé, with the means at hand, did not exercise all that care and caution that an ordinarily careful and prudent man would to avoid the accident, then, of course, that would be negligence on his part; otherwise, if he did do all he could do under the circumstances."

The language used by the court was in line with the general instruction previously given by the court, which was to the effect that if Green saw or by the exercise of ordinary care and prudence might have seen and anticipated the approach of the motorcar, and with the means and instrumentalities at his command, might have avoided the collision, then he was guilty of negligence. In other words, whether Green was negligent or not was made to depend upon whether he by the exercise of ordinary care might have seen and anticipated the approach of the car. The element that Green had a right to presume that the driver of the automobile would stop, and not attempt to cross the railroad track, which is contained in the requested instruction, was entirely omitted from the general charge.

[2] The charge requested stated a correct rule of law applicable to the evidence, and should have been given. A majority of the court are also of the opinion that the motion for a directed verdict in favor of the railway company should have been given, but all are agreed that, if the case was one for the jury, then the refusal to charge as above requested, was error.

Judgment reversed, and a new trial ordered.

PFEIL v. JAMISON.

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

No. 2238.

APPEAL AND ERROR ⇐1106(4)—DETERMINATION—REVERSAL.

Where an action for damages for false imprisonment was heard on the pleadings, and the questions involving police powers of a large municipality in times of widespread disorder could be far more intelligently disposed of when the evidence had been heard and was before the appellate court, the judgment will be reversed, and the case remanded for disposition on the evidence.

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

Action by Melvin Pfeil, a citizen and resident of the state of Ohio, against Samuel C. Jamison, a citizen and resident of the state of Pennsylvania. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

George J. Shaffer, of Pittsburgh, Pa., for plaintiff in error.

Charles H. Kline and C. A. Waldschmidt, both of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This was an action for damages for false imprisonment. The case was heard in the court below on the pleadings alone, and a judgment was entered thereon in favor of the defendant. The questions involved concern the police powers of a large municipality in times of widespread disorder. Without, at present, expressing any opinion whatever on the important and far-reaching questions discussed by counsel, we are of opinion the case could be far more intelligently and wisely disposed of by this court when the evidence has been heard and is before us.

Without, therefore, indicating any view upon the subject, and solely with a view of having the light of the proofs to hereafter aid us, we reverse this judgment, and remand the cause to the court below for the further procedure indicated; the costs in this court to await the further order of this court on the final disposition of the cause.

VAN CHOATE v. GENERAL ELECTRIC CO.

(District Court, D. Massachusetts. March 13, 1917.)

No. 7.

1. COURTS ⇐363—FEDERAL COURTS—SURVIVAL OF ACTIONS—LAW GOVERNING.

   There being no federal statute defining what causes of action survive, a cause of action arising under the common law or under the statute of a state is governed by the lex loci, and causes of action arising under the laws of the United States by the principles of the common law.

2. ABATEMENT AND REVIVAL ⇐57—SURVIVAL OF ACTIONS—ACTIONS FOR PENALTIES.

   Under Rev. St. § 4919 (Comp. St. 1916, § 9464), providing that damages for the infringement of any patent may be recovered by action on the case, and that the court may enter judgment for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of the verdict, the additional compensation given by the statute has no relation to the infringer's profits, but is based solely on the patentee's damages, and is therefore in the nature of a penalty, and the claim does not survive; causes of actions for penalties not surviving at common law.

3. ABATEMENT AND REVIVAL ⇐57—SURVIVAL OF ACTIONS—STATUTORY ACTIONS.

   A claim for actual damages for the infringement of a patent, under Rev. St. § 4919 (Comp. St. 1916, § 9464), does not survive the death of the patentee.

At Law. Action by one Van Choate against the General Electric Company. On motion by Georgiana C. Van Choate, administratrix, for leave to appear and prosecute the action. Motion disallowed.

S. A. Fuller, W. E. Bowden, Linville H. Wardwell, and Nason & Proctor, all of Boston, Mass., for plaintiff.

Robert T. Herrick, for defendant.

MORTON, District Judge. This is an action of tort to recover damages for infringement of the plaintiff's patent, "together with such additional amount, not exceeding in the whole three times the amount of such actual damage, as to this honorable court may seem meet and just under the circumstances." It is brought under Rev. St. § 4919 (Comp. St. 1916, § 9464), and is an "action on the case" within that statute.

Several motions were made to amend the declaration. One of them was heard and disallowed by Judge Lowell on February 26, 1907. No action appears to have been taken on the others. The case stands on the original declaration, filed on July 22, 1903, and on the original answer, filed December 26, 1907, which begins with a plea of not guilty. On March 29, 1910, the plaintiff died. Georgiana C. Van Choate, representing herself to be his administratrix, has filed a suggestion of his death, and has moved for leave to appear and prosecute the action. The motion is resisted, upon the ground that the cause of action did not survive, and that the action abated on the death of the plaintiff.

[1] There is no United States statute defining what causes of action survive. Rev. St. § 955 (Comp. St. 1916, § 1592), provides only that, "in case the cause of action survives by law," the representative of the deceased party may come in. What those causes are is left to be determined by state statutes when those are applicable, and by common law when they are not.

Where the cause of action arises under the common law or under the statute of a state, its survivorship is governed by the lex loci. Martin v. B. & O. R. R., 151 U. S. 673, 691, 14 Sup. Ct. 533, 38 L. Ed. 311; B. & O. R. R. Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677. In causes of action which arise solely under the laws of the United States, survivorship is determined according to the principles of the common law. Schreiber v. Sharpless, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65. At common law, actions ex delicto did not survive, except in a few instances, in which the injured party had the right to waive the tort and sue in assumpsit. Patton v. Brady, Ex'x, 184 U. S. 608, 614, 22 Sup. Ct. 493, 46 L. Ed. 713; Phillips v. Homfray, 24 Ch. D. 439; U. S. v. Daniels, 6 How. 11, 12 L. Ed. 323. Actions for mere injuries not resulting in profit to the wrongdoer did not survive either his death or that of the injured party. Henshaw v. Miller, 17 How. 212, 219, 222, 15 L. Ed. 222. Penal actions, for obvious reasons, come within the class which are abated by death. Schreiber v. Sharpless, supra.

[2] The additional compensation mentioned by the statute has no relation to profits made by the infringer, but is based solely on damages sustained by the patentee. It may largely exceed any gains which the infringer actually made from his wrongdoing. It is therefore in the nature of a penalty, and the claim for it does not survive. F. Speidel Co. v. Barstow Co. (D. C. R. I.) 232 Fed. 618.

[3] But the plaintiff claims, not only the additional (or penal) compensation referred to, but also actual damages; and the two are evi-

dently separable. If the action for such damages survives, the administratrix ought to be allowed to come in and prosecute, and the motion before me ought to be allowed. I rule that the claim for damages does not survive, and that no cause of action which survives the plaintiff's death is stated in the declaration. Cases supra. I therefore disallow the motion of the administratrix for leave to appear and prosecute.

Motion disallowed.

INTERCONTINENTAL RUBBER CO. v. BOSTON & M. R. R.

(District Court, D. Massachusetts. February 26, 1917.)

No. 744.

1. RAILROADS ⟸206—POWER OF DIRECTORS—PROCEEDINGS FOR RECEIVERSHIP.
The board of directors of a railroad company, with the approval of a majority of the stockholders, has power to initiate proceedings looking to a receivership, by procuring the filing of a bill by a bona fide creditor, the allegations of which are admitted for the company, and there is no impropriety in such proceeding, where the directors act in good faith, solely for the interests of the company, and in view of its duty to the public as a common carrier.

2. RAILROADS ⟸205—"INSOLVENCY"—RECEIVERS.
By "insolvency" of a railroad company is meant inability to meet its obligations as they mature in the ordinary course of business, and at the same time to carry on its business in a proper way, and perform its public duties.

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

In Equity. Suit by the Intercontinental Rubber Company against the Boston & Maine Railroad. On application for appointment of permanent receiver. Granted.

Boyd B. Jones, of Boston, Mass., for plaintiff.

George L. Mayberry, of Boston, Mass., for defendant.

MORTON, District Judge. At the conclusion of the hearing I orally stated my findings of fact substantially as follows:

"There are but two issues which have been heard here. They have been very clearly outlined. The first is whether the receivership was brought about by fraud on the part of the board of directors as at present constituted. That issue was not raised by the interests represented by Mr. French; their contention being, as I understand it, less as to the facts than as to the law. It was raised by the minority interests, represented by Mr. Crooker, who have been allowed to present all relevant evidence upon that question which they desired to offer.

"It seems to me that the long hearing which we have been through has served one useful purpose. It must have satisfied everybody who followed the case that there is not the slightest foundation for the charges of fraud made against the present board of directors. It must be clear to everybody who has followed the evidence that the present board of directors has acted with integrity and ability, for the best interests of the Boston & Maine Railroad as they saw them. There is no necessity for further comment on the evidence on this point. That disposes of the first of the questions raised by the interests represented by Mr. Crooker.

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

"It follows that the answer admitting the allegations of the bill was not, as those petitioners to intervene allege, a fraudulent answer, made in bad faith, and not adequately representing or speaking for the interests of the corporation itself, but that it was an answer filed in good faith for the defendant corporation by its officers honestly acting for it. As such, if the officers acted within their authority, a question which I shall take up later, it is the act of the respondent corporation, and constitutes a sufficient and binding admission of the allegations in the bill of complaint. Those being established, it would follow that a receiver ought to be appointed, if the allegations in the bill are sufficient. They plainly are. Indeed, no question that they are not sufficient, when taken in connection with the answer, has been raised. The receivership ought, therefore, to be continued, and a receiver ought to be appointed for all purposes prayed for in the bill, if the respondent's officers and directors had power and authority to do what they did. The parties represented by Mr. French deny that the officers and directors had such power and authority, and desire to submit briefs. So I will not decide that question of law at present.

"I decide now that there is no evidence warranting any finding of fraud, or bad faith, or any imputation of that sort, against the present board of directors, and that their acts, so far as they had the power and authority, are binding upon the Boston & Maine Railroad.

[2] "As to the other question which has been heard before me, viz. whether the respondent is insolvent, the finding which I have just made, that the answer is valid, establishes the allegations of insolvency in the bill, along with its other allegations. However, as the petitioner Green was allowed to present and did present a great deal of evidence upon this point, I may say that I think it clear that the property of the Boston & Maine Railroad, at a fair valuation, largely exceeds its debts. Indeed, no contention to the contrary is made. Speaking in the bankruptcy sense, the road is plainly not insolvent. But we are not dealing with insolvency here in that sense. What we mean by "insolvency" in this proceeding is the road's inability to meet its obligations as they mature in the ordinary course of business, and at the same time to carry on its business in a proper way and perform its public duties. This involves an examination of its salable assets (meaning those which could be sold without impairing its ability to carry on its business) and its borrowing power. The salable assets were by no means sufficient to provide for its maturing indebtedness. That could have been done only by borrowing.

"The evidence discloses differences of opinion about the respondent's borrowing capacity. As to whether the notes could have been again extended by a united effort, I think there is fair ground for difference of opinion. We have, however, the unanimous, deliberate judgment of the board of directors, concurred in by such financial men as they consulted, that it was not possible for the road to renew the notes in any satisfactory way, and that, if it did renew them, it would be simply temporizing with a situation which needed permanent relief. Upon that question I think that the honest judgment of the men in charge of the property is entitled to greater weight than the contrary opinion, expressed by persons not charged with any responsibility to make their forecast good. I think—and I find—that the allegations of insolvency in the bill are established, not only by the admission in the answer, but by the decided weight of the evidence.

"I will hold the case upon this question of law, whether the directors had the right and authority to do what they did in bringing about the receivership, which, as I understand it, is the question on which Mr. French desires to be heard. Upon that question the effect of the ratification by the stockholders and any other significant facts will be considered."

Those findings disposed of the disputed questions of fact. In connection with the law questions raised by the petitioners Streeter and Lawrence, certain other facts as to which there was little or no dispute should be stated.

For a period of at least two years preceding the filing of this bill it had been generally recognized that the financial structure of the Boston & Maine was unsound, and its financial position somewhat precarious. A radical reorganization was believed to be necessary by most of the persons in interest. Efforts had been made to obtain legislation for that purpose in the northern New England states and in Massachusetts. During this period the corporation was carrying a large floating debt, evidenced by outstanding notes of comparatively short terms. From time to time various issues of these notes fell due and were extended by the holders at the request of the respondent. Payments on account of the principal were made from the sale or exchange of securities owned by the respondent, transactions which showed a substantial loss to it. An important consideration in obtaining from the note holders the necessary extensions of their notes had been the fact that the management of the Boston & Maine was actively engaged in the effort to reorganize it. Under date of February 11, 1916, the stockholders were informed, in substance, that if the reorganization plans failed a receivership would probably be necessary. In the early summer of 1916 it became certain that the legislation necessary to a reorganization could not be obtained in the immediate future. There had been some difficulty before that in getting extensions on the notes becoming due, and it had been impossible for the management to be certain, much in advance of the dates when the notes actually became payable, whether enough of them would be extended to enable the company to continue.

In order to be ready for emergencies, a bill of complaint, praying for the appointment of receivers, had been prepared by counsel for the company in conference with Hon. Marcus P. Knowlton, the chairman of the federal trustees, and had lain in the files of the company. In August, 1916, this bill was taken from the files, the figures in it were brought up to date, and it was in other ways perfected and made ready for filing in court. The Intercontinental Rubber Company was requested to become complainant in the bill and to file it. It did so, upon the understanding that it would not be put to substantial expense by reason thereof. The request to the complainant was made with the knowledge and assent of the respondent's counsel, but no vote authorizing it was ever passed by the board of directors. The directors believed that a receivership was unavoidable, and those of them who were familiar with legal matters supposed that it would be brought about by a friendly suit filed in this court by a creditor residing outside of Massachusetts. The course taken was similar to that frequently, if not generally, adopted in receivership proceedings. It accords with the "silent practice of the court" (Illinois Central R. R. Co. v. Turrill, 110 U. S. 304, 4 Sup. Ct. 5, 28 L. Ed. 154), and was approved in the Metropolitan Railway Receivership Case, 208 U. S. 90, at page 110, 28 Sup. Ct. 219, 52 L. Ed. 403. It is objected to by the parties represented by Mr. French, but I see nothing to criticize in it. The directors of the respondent company unanimously voted that an answer be filed, admitting the allegations in the bill. The Rubber Company is a bona fide creditor of the respondent, as stated in the bill, upon notes held by it since 1913, which were not acquired

with any view to their use in proceedings of this character. Upon this bill and answer a temporary receiver was appointed on August 29, 1916.

Under date of September 5th a stockholders' meeting was called to see what action the stockholders of the respondent would take with reference to the bill of complaint and the proceedings of the board of directors regarding it, and their action in filing the answer above referred to. The call for the meeting was broad enough to bring the conduct of the directors in reference to the receivership up for action by way either of disaffirmance or ratification. The meeting was held on September 19, 1916. By a vote of 325,000 shares to 8,000, the action of the directors was fully ratified. No sufficient reason has been shown why the stock owned by the Boston Holding Company (i. e., that controlled by the federal trustees, amounting to 225,000 shares) should not be considered on this vote. But, even if it be disregarded, more than 10 times as many shares voted to ratify the action of the directors as voted against such ratification.

[1] From the foregoing statement it is clear that the receivership proceedings were in reality brought about by the respondent itself. Its representatives, in doing so, acted after careful consideration, in entire good faith, and in the belief that a receivership was the best, if not the only, course open to the respondent in the circumstances in which it was placed; and their action was approved by the stockholders. The minority stockholders do not contend that they are being treated differently from the other stockholders. No disadvantages are being imposed on them which are not also imposed on the majority. No advantages are being received by the majority stockholders which are not equally shared by the minority stockholders. There is no suggestion that the owners of the majority stock are profiting in any way at the expense of the minority.

It is said by the objecting minority that one purpose which the directors had in mind in bringing about a receivership was to accomplish a reorganization of the company; that most of the directors have expressed approval of the principle of a certain plan of reorganization; that this plan is grossly unfair to the common stockholders of the respondent; and that a receivership is asked for as a means of coercing them into acceptance of it. There is no dispute that the directors regard a reorganization of the company as essential, nor that the majority of them are in accord with the outlines of a plan for such reorganization, nor that, after the hope of legislation was abandoned, a receivership was sought in part for the purpose of making it easier to accomplish a reorganization. That there was any intent on the part of the directors, or of the majority stockholders, to coerce the minority into such a reorganization through a receivership, is not established. Judge Knowlton, who is strongly opposed to the proposed plan of reorganization and has publicly stated his dissent therefrom, advised receivership and voted for it as a director.

The proposed plan of reorganization is in no sense fraudulent; under it the objecting stockholders are treated exactly like all other common stockholders. They object to it, not because of inequality or

discrimination in the treatment accorded them, but because in their judgment the respondent can go on without a reorganization, and because they fear an unfair reorganization. It is not to be overlooked that under a receivership the affairs of a corporation are, to a considerable extent, under the control of the court; and it is at least probable that the power of the court could be so exercised as to prevent an oppressive and unjust reorganization, if that were attempted. The management of a corporation rests with the owners of the majority of the stock. So long as they act honestly, they are entitled to carry out their judgment on business questions which arise, and in business difficulties to take such course as they deem best. The case presents to my mind nothing but an acute difference of opinion upon a matter of business policy and action between the directors and the owners of an overwhelming majority of the stock on one side and a comparatively small, but contentious, group of minority stockholders on the other, who appear to have resorted to charges of "fraud" or of "breach of duty" in an effort to obscure the exact nature of their real complaint.

The majority of the stockholders were not obliged, as a matter of law, to wait until the corporation was actually in default in the payment of its notes, and its property had perhaps been attached on mesne process for large amounts, nor to make efforts to secure further extensions which they believed it unwise, and perhaps unfair to noteholders, to ask for, before applying for a receiver. They had the right, if not the duty, to consider, not merely the present emergency, but the future conduct of the company's business, and its performance in a proper way of its duties to the public as a common carrier—a point to which the minority interests pay insufficient attention, as it seems to me. Whether the directors alone had power, without express authority from the stockholders, to initiate proceedings looking to the appointment of receivers and to the transfer of the corporation's property from its own hands to those of a receiver, it is not necessary to determine, because what the directors did in that respect was fully and completely ratified by the stockholders.

It is still true that, even if the directors and the majority of the stockholders acted in good faith and, as they believed, for the best interests of the corporation, the court is not absolutely bound to appoint a receiver as prayed for. It might, in the exercise of its discretionary power, refuse to do so, if confident that there was no real necessity for such action, and that the application was improvidently and unwisely made. The facts above stated sufficiently indicate that this is not such a case. Upon the facts as they appear, a receiver for the purposes of the bill ought to be appointed. The complainant may present a decree on due notice to other parties.

INTERCONTINENTAL RUBBER CO. v. BOSTON & M. R. R.

(District Court, D. Massachusetts. April 17, 1917.)

No. 744.

RECEIVERS ⊂=90—TEMPORARY RECEIVERS—PAYMENTS FOR PRESERVATION OF STATUS QUO.

It is the duty of a temporary receiver of a railroad company to preserve the property in statu quo as nearly as practicable, and where the defendant had recognized its obligation under the lease of a leased line to pay interest on notes of the lessor, and the failure to pay maturing interest would raise a serious question of the right of the lessor to forfeit the lease for such nonpayment, the receiver may properly be instructed to advance the money to the lessor to make such payment, reserving the right to a permanent receiver to disaffirm the lease, and to all parties in interest to litigate any question arising out of it in the further progress of the case.

In Equity. Suit by the Intercontinental Rubber Company against the Boston & Maine Railroad. On receiver's petition for instructions. Instructions given.

Boyd B. Jones, of Boston, Mass., for plaintiff.
George L. Mayberry, of Boston, Mass., for defendant.

MORTON, District Judge. The temporary receiver petitions for instructions whether he shall pay interest on certain notes issued by the Connecticut River Railroad Company. At the hearing before me counsel appeared and were heard for the Connecticut River Railroad Company, for the commonwealth of Massachusetts, for the complainant, and for the respondent; and Mr. French, counsel for old and large stockholding interests in the Boston & Maine Railroad, was asked by the court to present his views as an amicus curiæ, and did so.

The facts are substantially as stated in the receiver's petition. The notes in question, amounting to $2,000,000, were issued by the Connecticut River Railroad Company, bearing date of July 1, 1914, payable in one year, to the order of the maker. They were indorsed by it and turned over to the Boston & Maine Railroad, by which they were negotiated. They have been extended from time to time.

The circumstances which led to the issue of the notes were as follows: The Boston & Maine Railroad holds the property of the Connecticut River Railroad Company under a long-term lease, under which it had the right to make improvements and additions, which were to be paid for by the lessor. The Boston & Maine Railroad made improvements, for which it paid about $500,000, and as to the legality and propriety of which no question is now made. It also constructed an extension of the lessor's railroad from Dole, N. H., to Brattleboro, or rather to the Vermont line, near Brattleboro, at a cost of about $1,500,000. By the terms of the lease the lessee was to be paid for such expenditures, assuming them to be proper, by the issue of "stock or bonds" by the lessor. When the lessee called upon the lessor for the repayment of the expenditures referred to, both of them agreed

that it was an inopportune time for the lessor to issue stocks or bonds. They both agreed, therefore, to the issue of short-term notes, which resulted in the indebtedness now before the court. The Boston & Maine Railroad is not a party to these notes, which are an obligation of the Connecticut River Railroad Company alone.

Under the lease the lessee agrees to pay the interest on stock or bonds issued by the lessor in repayment of expenditures by the lessee; and there is a right of immediate forfeiture and re-entry reserved to the lessor for the lessee's failure to make such payments. As to certain other indebtedness of the lessor, arising during the continuance of the lease, and as to the payment of which the lessee is under certain obligations, there is no right of immediate forfeiture for the lessee's failure.

It is contended by the Connecticut River Railroad Company that the notes in question are covered by the word "bonds" in the lease, and that, if the interest on them be not paid, the Connecticut River Railroad Company will have the right to terminate its lease. On the other side, it is contended by the commonwealth, as a large creditor of the Boston & Maine Railroad, and by Mr. French, that railroad bonds stand on a very different footing, under our law, from notes for a term of one year or less, and that when the lessor and lessee agreed to an issue of notes, instead of stock or bonds, they must have understood that no right of forfeiture for nonpayment of interest would exist in favor of the lessor under the lease. This is also the view of the respondent.

Mr. French goes much farther, and suggests that the expenditure of $1,500,000 for the Brattleboro extension was unauthorized by law, and was illegal; that the present notes, having been issued for the purpose of obtaining funds to make an illegal payment, are invalid; and that the receiver ought to be instructed to pay neither interest nor principal on them.

The suggestion seems premature. The petitioner for instructions is only a temporary receiver. As such it is his duty to keep the property along in substantially the same condition as he finds it. To some extent this may require new work in carrying out policies previously entered upon; but, generally speaking, his proper function is to preserve things in statu quo as nearly as practicable. Prior to the receivership the Boston & Maine Railroad had been paying interest on the indebtedness represented by these notes and treating it as a valid obligation. The temporary receiver has been paying, without prejudice to anybody's rights, and without in any way binding the respondent, sums equal to the rentals under the various leases, and to interest or dividends where payments thereof were included as rent under leases.

While the contention that these notes are not "bonds," and that there is no right of forfeiture for failure to pay interest on them, has much to support it, it cannot be said that there are not weighty arguments the other way. It is obviously undesirable to pass on the validity of the notes without having the holders of them in court, so as to be heard and be bound by the decision, if adverse to them. The temporary receiver ought not to take any step which might result in changing the

situation of the respondent in such a vital matter as the cancellation of this lease. As between paying a sum equivalent to rent, which might perhaps be avoided, and refusing to pay it and thereby perhaps forfeiting the lease, the former is, in my opinion, the alternative which should be taken by him.

Without passing on the validity of the notes in question or deciding whether nonpayment of the interest here in question would give the lessor an immediate right of forfeiture and re-entry, and without prejudice to the rights of any party to raise again all questions presented by this petition for instructions, the receiver will be instructed to tender to the Connecticut River Railroad Company a sum equal to the interest on the notes in question. Said sum is to be paid and received under an express agreement that such action by the temporary receiver is not an affirmance or adoption of the lease, and is not to alter or affect any rights either of the respondent, the receiver, or the Connecticut River Railroad Company under or growing out of the lease in question.

In re GEORGALAS BROS.

(District Court, N. D. Ohio, E. D. September 11, 1917.)

No. 6325.

1. LANDLORD AND TENANT ⊂=79(2)—ASSIGNMENT OF LEASE—RIGHTS OF ASSIGNEE.

   Even though an assignment or transfer of a lease by a partnership to one of its members was not a breach of the covenant therein against assignment without the lessor's consent and gave the lessor no right to avoid the lease, the assignee nevertheless took the lease subject to such covenant.

2. LANDLORD AND TENANT ⊂=76(2)—ASSIGNMENT OF LEASE—BREACH OF COVENANTS.

   An adjudication in bankruptcy against a partnership operates as a transfer to the trustee by operation of law of a lease held by one of the partners, within a covenant in the lease authorizing the lessor to avoid the lease and retake possession if the lessee should become bankrupt, or if the lease should pass by transfer, operation of law, or otherwise from the lessee to any other party without the lessor's written consent, even though the partnership alone, and not the members of the firm, was adjudged a bankrupt.

3. LANDLORD AND TENANT ⊂=104—RIGHT TO AVOID LEASE—TRANSFER BY OPERATION OF LAW.

   A lease may be so framed that a transfer by operation of law will avoid it, at the lessor's option.

4. LANDLORD AND TENANT ⊂=112(1)—TRANSFER OF LEASE—WAIVER OF FORFEITURE.

   Where the receiver in bankruptcy of a partnership was in the possession of leased premises from the date of the filing of the petition until possession was taken by the trustee, and the lessor did not assume any position inconsistent with his right to avoid the lease, or do any act which could be construed as waiving such right, but notified the partnership and the members thereof of his election to avoid the lease, and appeared and filed an answer claiming that the lease had been forfeited, and asked for an order surrendering the premises to him, he did not waive his right to avoid the lease under a provision therein authorizing him to avoid

it in case of a transfer by operation of law or otherwise, as he could not avail himself of the right accorded him by the lease to retake possession while the premises were in the possession of the receiver.

In Bankruptcy. In the matter of Georgalas Bros., a partnership, bankrupt. On petition for review of an order of the referee. Reversed, with instructions.

McKain & Ohl, of Youngstown, Ohio, for trustee.
Wilson & Wilson, of Youngstown, Ohio, for petitioner.

WESTENHAVER, District Judge. The controversy here relates to a lease which the trustee claims the right to sell, and which the lessor, the H. L. McElroy Company, claims is void, and the premises covered thereby should be surrendered to it. The lease is dated April 28, 1915, and is for a term of 10 years, commencing May 15, 1915, and the lessor, the H. L. McElroy Company, thereby leases to one Gust Georgalas certain premises, which were afterwards used by the bankrupt partnership in which to conduct a restaurant business. This lease contains the following provision:

"It is mutually covenanted and agreed by and between the parties hereto that if the rent at any time shall be in arrears and unpaid for the space of thirty (30) days, or if there shall be any breach of any of the covenants and agreements herein contained on the part of the lessee, or if the lessee shall be adjudged bankrupt; or shall make an assignment for the benefit of his creditors, or if this lease shall pass by transfer, operation of law, or otherwise from said lessee to any other party without the written consent of the lessor, or if said premises or any part thereof shall be underlet contrary to the terms hereof, the lessor may, without notice to the lessee or other occupant of the premises, and without demand for rent due, avoid this lease and enter into possession of the premises and remove all persons and property therefrom and bring its action for the recovery of rent due at the rate aforesaid up to the time of such entry, or it may bring such action without avoiding this lease, at its election, and no waiver by the lessor of its rights to avoid this lease by reason of any breach of any covenant upon the part of the lessee shall constitute a waiver of its right to avoid the lease on account of any other or further breaches of any such covenants or agreements. Every demand for rent, made after it falls due, shall have the same effect in law as if made at the time it falls due, any law of the land or rule in equity to the contrary notwithstanding."

Gust Georgalas, the lessee, assigned this lease April 20, 1917, to Georgalas Bros., a partnership consisting of Gust, Theodore, and James Georgalas. The lessor did not consent in writing to this assignment, but undoubtedly accepted the assignees as tenants, and waived a breach of the covenants above quoted.

Later, May 26, 1917, Georgalas Bros., by Gust Georgalas, assigned this lease to Theodore Georgalas. The lessor consented to this transfer in writing the same date, indorsed on the lease. Some question is made as to whether this assignment is sufficient, on the facts disclosed in the record, to transfer title from the partnership to the individual partner, thereby making the unexpired term of the lease an asset of the individual partner, rather than of the partnership. I shall assume that the transfer is valid.

At the time of this transfer the lessor took a chattel mortgage on the personal property of the partnership to secure 12 promissory notes,

each for $333.33, payable monthly thereafter. These notes and the chattel mortgage securing the same were for the rent thereafter to become due. On June 1, 1917, the partnership, by Theodore Georgalas, filed a voluntary petition in bankruptcy. On the same date an order was made appointing a receiver, who took possession of all the property of the partnership, including the personal property covered by the chattel mortgage and the leased premises.

Owing to a delay in giving notice to the partners, who did not join in the petition in bankruptcy, an adjudication in bankruptcy was delayed; but on July 2, 1917, the partnership, consisting of Gust, James, and Theodore Georgalas, was duly adjudged bankrupt as a partnership. The individual members of the partnership were not expressly adjudged to be bankrupts.

Later, on July 27, 1917, the trustee in bankruptcy filed a petition to sell the unexpired term of the lease. The lessor appeared, and claims that the lease is forfeited by virtue of the provisions of the lease above quoted, and asks that the trustee be ordered to surrender the same to it. An order was made by the referee, denying the lessor the relief asked, and directing the trustee to sell the unexpired term. It is to this order that the lessor has filed the petition for a review.

The referee, in his opinion, holds that the covenant against assigning or subletting is not broken, because the lessor has both waived and consented thereto, and that the partnership only was adjudged a bankrupt, that Theodore Georgalas, as an individual, was not adjudged a bankrupt, and therefore the covenant against bankruptcy is not broken.

[1] If it be true that the partnership had assigned or transferred the lease to Theodore Georgalas without breaking any covenant, or giving the lessor any right to avoid the lease, nevertheless Theodore took the lease subject to these covenants. The question, then, is whether the lease has passed "by operation of law or otherwise from said lessee to any other person without the written consent of the lessor."

[2] It is not asserted that the lessor had consented, in writing or otherwise, to the transfer of this lease by operation of law to the trustee. The only right of the trustee to sell the lease is by virtue of the transfer thereof by operation of law to him. It is inconsistent to assert title in the trustee by operation of law, and yet to say that the title still remains in Theodore, and that the covenant is not broken. An adjudication in bankruptcy against a partnership, it is settled law in this circuit, operates to transfer by law to the trustee all the property and assets of the individual members of the partnership. Ft. Pitt Coal & Coke Co. v. Diser, 239 Fed. 443, 152 C. C. A. 321, 38 Amer. Bankr. R. 566. It is by virtue of this legal effect of an adjudication of the partnership to be bankrupt that the trustee acquires a right or title to this lease. It is equally effective to operate as a transfer by operation of law of the lease, so as to bring about a violation of this covenant.

[3] It is also settled law that a lease may be so framed that a transfer by operation of law will avoid the same at the option of the lessor. Gazlay v. Williams, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950; In re Frazin, 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745 (2

C. C. A.). The covenants above quoted, when properly interpreted and understood, bring the facts within its terms, and the lessor's right to avoid the same is well established, and is sustained by the authorities above cited.

[4] In oral argument, counsel for the trustee relied on the position that the lessor had not done that which was necessary to avoid this lease according to the covenants above quoted. The lessor notified the partnership and the individual members thereof of his election to avoid the lease. It appeared and filed an answer, claiming that the lease had been forfeited, and asked for an order surrendering the premises. A receiver was in charge of these premises from June 1, 1917, until possession was taken by the trustee. There is no evidence to show that the lessor, after the appointment of the receiver, assumed any position inconsistent with its present claim of its right to avoid this lease, or that it did any act which could be construed as waiving its right so to do. Manifestly, with a receiver in possession, the lessor could not avail itself of the right accorded by the provisions above quoted to enter into possession of the premises and remove all persons and property therefrom. It could do no more than bring its rights in due time to the notice of the bankruptcy court. This it has done. In re Frazin, 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745 (2 C. C. A.) is sufficient authority for the proposition that no waiver arises on these facts against the lessor.

The judgment and order of the referee will be reversed, with instructions to proceed further in conformity to the conclusions herein set forth. An exception may be noted to this ruling.

BROOKLYN HEIGHTS R. CO. v. STRAUS et al.

(District Court, E. D. New York. August 23, 1917.)

1. JUDGMENT ⇐563(2)—RES JUDICATA—QUASHING WRIT.
   Judgment quashing a writ of certiorari to review an order as supported only by allegations constituting conclusions, instead of by the necessary allegations of fact, is not res judicata in suit for relief against the order as illegal.

2. CARRIERS ⇐2—ORDERS OF PUBLIC SERVICE COMMISSION—JUDICIAL REVIEW.
   Public Service Commission Law New York (Consol. Laws, c. 48) is not unconstitutional because not expressly providing for appeal from orders of the commission, the method of review by certiorari under Code Civ. Proc. N. Y., § 2120 et seq., being applicable, and any abuse of discretion in refusing the writ being subject of appeal, and a suit to set aside an order being available.

3. CARRIERS ⇐2—PENALTIES.
   Public Service Commission Law New York, § 56, providing a penalty of $5,000 a day for violation of an order of the commission, does not make the statute unconstitutional on the theory that such an amount may compel obedience even to a confiscatory order; section 24 providing for remission of the penalty during pendency of a suit in good faith to set aside an order.

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4. STATUTES ⟸64(2)—PARTIAL INVALIDITY.
The subject of penalties in Public Service Commission Law New York, being a separable feature, if unconstitutional, would not make the whole act unconstitutional.

5. CARRIERS ⟸21(1)—ORDERS OF COMMISSIONERS—DISOBEDIENCE.
Public Service Commission Law New York, § 56, making guilty of a misdemeanor an officer or agent of a company who procures, aids, or abets it in its failure to obey an order of the commission. contemplates a personal and individual act, and not a mere failure of the company, unless shown to be due to his neglect or fault.

6. CONSTITUTIONAL LAW ⟸318—DUE PROCESS OF LAW.
An order of the Public Service Commission that street car service must be increased, after hearing on proofs, with opportunity to street car company to appear, is not a taking of property without due process of law.

In Equity. Four suits, one by the Brooklyn Heights Railroad Company, one by the Brooklyn, Queens County & Suburban Railroad Company, one by the Coney Island & Brooklyn Railroad Company, and the other by the Nassau Electric Railroad Company, all against Oscar S. Straus and others, the Public Service Commission of the State of New York for the First District, and others. Injunction pendente lite denied.

George D. Yeomans, of Brooklyn, N. Y. (I. R. Oeland and Charles A. Collin, both of New York City, and D. A. Marsh, of Brooklyn, N. Y., of counsel), for complainants.

William L. Ransom, of New York City (William L. Ransom, Godfrey Goldmark, Jacob H. Goetz, and H. M. Chamberlain, all of New York City, of counsel), for Public Service Commission and in person.

Merton E. Lewis, Atty. Gen., by M. S. Schector, Deputy Atty. Gen., for Attorney General of State of New York and for Governor.

Before WARD, Circuit Judge, and VEEDER and AUGUSTUS N. HAND, District Judges.

PER CURIAM. These four cases, being alike, will be disposed of in one opinion. The bills filed ask that an order of the Public Service Commission of the state of New York requiring the complainants, street railroad corporations, to operate additional cars in the city of New York within certain dates, be adjudged to be illegal and void; that the Public Service Commission Law itself be adjudged to be unconstitutional, and that the commissioners, defendants, be enjoined pendente lite from enforcing the order by actions for collection of penalties or by criminal proceedings against the companies' officers. The motion for the preliminary injunction is the subject now to be disposed of as required by section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]).

[1, 2] Before bill filed Judge Ordway in the state court quashed writs of certiorari which had been granted ex parte to review the order in question, and the companies took no appeal from that judgment. The defendants contend that it constitutes res adjudicata in these causes. But the judgment was not upon the merits. The duty

lay upon the companies to allege upon oath facts sufficient to satisfy the court, at least prima facie, that the order complained of was illegal, instead of doing which the judge found that they confined themselves to allegations which were mere conclusions. Such a judgment, although acquiesced in by the companies, no more binds them upon the merits than does the dismissal of an action at law for want of sufficient proof to go to the jury or an order granting or denying a preliminary injunction in a suit in equity. The companies could still apply for another writ upon a fuller statement of sufficient facts upon oath or they could go into the state courts or come into this court for relief if they could prove that the order violated the Constitution of the United States. Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298, 310, 34 Sup. Ct. 48, 58 L. Ed. 229.

The Public Service Law itself is said to be unconstitutional on two grounds:

First. Because it does not expressly provide for an appeal from the orders of the commission. But the state of New York has provided a method of review which does apply to these orders by certiorari (Code of Civil Procedure, § 2120 et seq.). It is true that the granting of the writ is discretionary but the discretion must not be abused and is the subject of appeal. People v. Peck, 73 App. Div. 89, 76 N. Y. Supp. 328; People ex rel. Joline v. Willcox, 129 App. Div. 267, 113 N. Y. Supp. 861. Besides this, the companies had the same right to file a bill in the state courts like the bill filed in this court, to set aside the order as unconstitutional. Wadley Southern Railway Co. v. Georgia, 235 U. S. 651, 660, 35 Sup. Ct. 214, 59 L. Ed. 405. For these reasons we think the companies had quite sufficient means of judicial review.

[3, 4] Second. Because section 56 of the law provides for a penalty of not more than $5,000 a day for every day a violation of the order continues. It is said that this might run up to such an enormous sum as to compel obedience even to a confiscatory order. Section 24, however, corrects this apprehended mischief by providing that, if the defendant in an action to collect such penalties prove that it was "actually and in good faith prosecuting a suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding." Furthermore the companies would not be held subject to penalties until after the order complained of had been held to be valid. Of course, they would be required to proceed seasonably to test its validity, and if they delayed to do so in bad faith they would be subject to penalties. Wadley Southern Railway Co. v. Georgia, 235 U. S. 666 et seq. 35 Sup. Ct. 214, 59 L. Ed. 405. Finally, the subject of penalties, being a separable feature, would not make the whole act unconstitutional if itself unconstitutional. Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 311, 34 Sup. Ct. 48, 58 L. Ed. 229.

[5] Section 56 makes any officer or agent of the company who procures, aids or abets it in its failure to obey guilty of a misdemeanor. This provision plainly contemplates a personal and individual act of the officer or agent, and not the mere failure of the company itself, as

in this case, to provide cars, unless such failure was shown to be due to the neglect or fault of the officer or agent.

[6] As to the last objection which the complainants make, it may be admitted that an order of the commission made without consideration or without any evidence at all or without a hearing, requiring the company to increase its equipment, might amount to a taking of its property without due process of law. But the parties have submitted to us the record before the commission which resulted in the order complained of. We have examined it, not for the purpose of seeing whether we agree with the conclusion reached, but to determine whether that conclusion was the result of a fair hearing upon proofs with a full opportunity to the companies to offer proofs, and we think it was. If the complainants thought, as they now contend, that other and different evidence should have been considered by the commission, it lay upon them to offer it at the hearing.

The prayer for an injunction pendente lite is denied.

In re WIBACK et al.

(District Court, D. Massachusetts. August 13, 1917.)

No. 18311.

BANKRUPTCY ⊂=414(3)—PROCEEDINGS FOR DISCHARGE—WEIGHT AND SUFFICIENCY OF EVIDENCE.

When bankrupts first became embarrassed financially, an attachment was placed on their goods by a friendly creditor, under which business went on as usual, and a common-law assignment was made to such creditor, which, however, was never completed. Afterwards a hostile attachment was placed on the store. About this time witnesses noticed a great depletion in the stock, and a storage cellar was broken into. Though the bankrupts knew of this, and were active around the store, they made no complaint to the police, and took no steps to see whether goods had been stolen, or who had committed the break. The books of the firm showed a shortage in cash or merchandise of from $4,300 to $6,600. *Held*, that the facts showed that the bankrupts removed and concealed property belonging to the estate, justifying the denial of their applications for discharge.

In Bankruptcy. In the matter of Felix Wiback and others, bankrupts. On applications for a discharge. Applications refused.

Taylor & Taylor, of Worcester, Mass., for bankrupts.
Simon G. Friedman, of Worcester, Mass., for creditors.

MORTON, District Judge. The ground of objection to discharge, now principally relied upon, is that the bankrupts knowingly and intentionally concealed and removed assets belonging to the estate.

The bankrupts carried on a retail grocery and provision store, and in connection with it a bottling establishment and a steamship ticket agency. It was a business of substantial size, the gross income having apparently been upwards of $60,000 a year, the greater part of

which came from the groceries and provisions. Beneath the shop was a cellar, which was used for storage purposes and for the bottling business. Access to it was through the store; there were doors leading into it from other parts of the building, but they were permanently fastened.

The bankrupts' serious financial difficulties appear to have begun on May 3d, when an attachment was placed on the goods in the store, followed a few days later by another attachment in favor of Lundborg, who was a friendly creditor. Under his attachment, the prior one having been discharged, the bankrupts' bookkeeper, Honkenen, was appointed keeper, and business went on much as usual. Considerable amounts of money were received by the bookkeeper from cash sales and from payments on outstanding accounts receivable. Substantial sums were handed to Wiback for the purpose of paying running expenses and buying new stock. A common-law assignment was made by the bankrupts to Lundborg; but it was not completed according to the requirements of Massachusetts law, and nothing was done under it. On May 15th another attachment was placed on the store, and the bookkeeper was superseded as keeper by one Stockwell, who continued to act until the receiver in bankruptcy took possession on May 27th.

At the time when the attachments were first placed upon the store, it seems clear that there was a large and complete stock of goods in it and the cellar. Estimates as to the amount of stock vary; Wiback testifies that it was worth over $2,000; the objecting creditor, on incomplete data, figures the amount as over $4,300; Honkenen's estimate is rather indefinite, but falls between the two.

The operation of the store was continued under all the attachments, until bankruptcy proceedings were instituted; and goods were purchased and sold in the ordinary course of business. After Stockwell became keeper, team deliveries were suspended, and the purchases were more restricted.

The accounts from March 1st to May 16th are produced. They are apparently accurate, and appear substantially to balance. They show no depletion of stock. According to them, the stock should have increased in value in that interval about $2,800. The receiver in bankruptcy found only $500 or $600 worth of goods in the store and cellar. On the figures of the objecting creditor, about $6,600 in goods or cash is unaccounted for. Accepting Wiback's estimate of the stock on hand on March 1st ($2,000), and the expert bookkeeper's statement of the merchandise account after that date, the accuracy of which has not been seriously questioned, about $4,300 worth of goods disappeared.

There is testimony from several witnesses that a great depletion of stock was noticed during the last two weeks in May; i. e., after the common-law assignment to Lundberg had failed, and a hostile attachment had been placed on the store, and it had become evident to the applicants that they must go through bankruptcy. Honkenen testifies that on May 1st the store had its full usual stock, and that "there was quite a remarkable depreciation" of it between May 16th and the bankruptcy on May 25th.

While the attachments were in force, Wiback said that the bankrupts expected Lundberg to buy the property, and that they were going to continue the business. After May 16th the storage cellar was broken into. That goods were taken is not explicitly stated in the evidence; but, of course, they were. The doors were not broken down for exercise or amusement. This phase of the case is left somewhat indefinite on account of Stockwell's death before testifying. When the attachments were made, and for some time after that, the cellar contained a substantial amount of stock; there was little or nothing in it when the receiver took possession. The break was called to the attention of the bankrupts; but, according to their own testimony, neither one of them made any complaint to the police about it, or took any steps to see whether goods had been stolen, or made any inquiries or investigations to determine who had committed the break.

There can be no doubt that, between the first attachment and the bankruptcy, a large amount, either of goods or of money received from the sale of goods, disappeared and is unaccounted for. The bankrupts were active around the store all this time. If they were honest, they would naturally be the first to notice such an occurrence and to call attention to it. They never did so. They testify, in effect, that they do not know what became of the goods, if any were taken; but they make no suggestion as to how the loss occurred. In my opinion, the bankrupts knew that the stock was disappearing and kept silent about it. Their conduct with reference to the break in the cellar strongly suggests collusion therein. Why did they display no interest in such an occurrence? Why did they not have the matter brought to the attention of the police? Why did they not endeavor to ascertain whether anything had been stolen? Their counsel suggests, because the store was under attachment and the keeper was responsible; but the bankrupts gave no such reason, and I do not regard the explanation as adequate, if they had offered it.

There is, it seems to me, but one reasonable explanation of the plain facts and of the bankrupts' conduct, viz. that the stock or its proceeds was being taken by them, or with their knowledge and approval.

The learned referee's findings on the fifth specification are set aside. I find that the bankrupts did remove and conceal property belonging to their estate.

Applications for discharge refused.

THE PAMPA.

(District Court, E. D. New York. August 29, 1917.)

ADMIRALTY ⊂⊃5—JURISDICTION—PUBLIC VESSEL OF FOREIGN POWER.

A vessel regularly enrolled as a ship of the Argentine navy, and flying the naval ensign of that republic, whose officers and crew were officers and enlisted men of such navy, was not subject to a libel for damages for a collision, though at the time of the collision carrying a cargo of general merchandise belonging to private persons, especially where the cargo was carried for the benefit of the government, and as an incident

to the vessel's voyage to this country to obtain coal and munitions for the use of that government.

In Admiralty. Libel by John B. Breymann and another, doing business as George H. Breymann & Bros., owners of the scow B. B. No. 19, against the Argentine steamship Pampa and her engines, boilers, tackle, etc. On order to show cause why the vessel should not be released from custody. Decree issued, releasing the vessel.

The Argentine naval transport Pampa was in collision with mud scow B. B. No. 19 on August 11, 1917, off Scotland Lightship. A libel has been filed in this court against the Pampa in rem, and the vessel has been attached by the marshal of this court, pursuant to the prayer of the libel. On August 27, 1917, upon motion of Messrs. Pavey, Wells & Gadrich, appearing specially for the motion, an order to show cause was granted, directing the libelants to show cause why the libel should not be dismissed for want of jurisdiction.

The Pampa is a vessel regularly enrolled as a ship of the Argentine navy, and flies the naval ensign of the Argentine Republic. Her officers all hold commissions from the Argentine government as officers of the navy. Her crew are enlisted men of the Argentine navy. At the time of the collision she was carrying a cargo of general merchandise belonging to private persons. The orders issued to the commander of the Pampa were as follows:

"Department of the Navy, Secretary's Office,

"Buenos Aires, July 14, 1917.

"To the Commander of the Transport Pampa:

"The captain Ismael F. Galindez, Secretary General of the Department of the Navy, advises you that by order of the Secretary of the Navy you are to leave with the ship under your command on the 15th of July, going to New York, U. S. A., port of destination for your cargo, about which you will receive instructions from the Director General of the Administration Department. * * * From ports of call you will get in communication with the Chief of the Argentine Naval Commission in the United States, whose cable address is 'Navalarg,' Washington, announcing the date of your arrival. In arriving at New York (U. S. A.) you will request orders from said Chief, advising him that you are bringing a cargo, and you will receive from him orders as to the cargo you are to bring on your return trip. The cargo you are to bring on your return voyage will be about 4,500 tons of coal. To increase the transporting capacity of your ship, you will discharge all the water not needed for your return voyage. In the United States you will fill your bunkers, and on your return voyage you must call at Porto Rico to replenish coal, etc., etc. * * * There is special interest that the transports should make these voyages in the shortest time possible, and we recommend you to hasten the operations at port to comply with that purpose. * * * It is absolutely prohibited to take passengers on board, or persons not a part of the crew, without express orders of this Department. We enclose herewith copies of reports of former commanders, and also an abstract of an executive order of the Government of the United States as to the defensive maritime areas around its coast. * * * In the outward voyage and also in the homeward voyage you will hoist the national ensign of war.

"[Signed] I. F. Galindez."

After the arrival of the Pampa at New York, her commander received the following telegram:

"Commander Transport Pampa, Cr Henry Kessel, 25 Pearl St., New York, N. Y.:

"By order ministerio de Marina you will take on Pampa naval material from Kessel in New York and four thousand tons of coal and artillery material from Bethlehem in Philadelphia commander Campos Urquiza president Argentine Naval Commission."

The coal and war material which the Pampa was to take on her return voyage had all been contracted for prior to the time when the cargo of general

merchandise was placed on board the vessel at Buenos Aires. The vessel was entered at the custom house, New York City, in the usual manner for merchant vessels, and the cargo discharged at New York. During the discharge, and while the commander of the Pampa was under orders to take on board the war material above mentioned, the vessel was attached by the marshal. The ship's manifest shows that there were about 65 shipments made at the port of loading, and that there were about one-half that number of consignees for the cargo at the port of New York. J. F. Whitney & Co., agents for the cargo at New York, have collected in the neighborhood of $60,000 freight on the cargo, which is ultimately to be turned over to the Argentine naval commission at Washington.

The foregoing facts are stipulated by counsel.

Pavey, Wells & Gadrich, of New York City (F. D. Gadrich and T. Catesby Jones, both of New York City, of counsel), for the motion.

Kirlin, Woolsey & Hickox and R. S. Erskine, all of New York City, opposed.

VEEDER, District Judge (after stating the facts as above). Upon the facts stipulated the uniform course of authority requires the release of this vessel. The Parlement Belge, 5 P. D. 197; The Constitution, 4 P. D. 39; The Exchange, 7 Cranch, 116, 3 L. Ed. 287; Workman v. New York City, 179 U. S. 552, 566–570, 21 Sup. Ct. 212, 45 L. Ed. 314; Tucker v. Alexandroff, 183 U. S. 424, 440–446, 22 Sup. Ct. 195, 46 L. Ed. 264. I adopt as a statement of the controlling principle what was said by the Circuit Court of Appeals for the Fourth Circuit in the recent case of The Attualita, 238 Fed. 909, 911, 152 C. C. A. 43, 45:

"For actions of the public armed ships of a sovereign, and of those, whether armed or not, which are in the actual possession, custody, and control of the nation itself, and are operated by it, the nation would be morally responsible, although without her consent not answerable legally in her own or other courts."

Moreover, it appears that, although this vessel was carrying a general cargo, the cargo was carried for the benefit of the Argentine Republic, and as an incident to her voyage to this country to obtain coal and munitions for the use of the Argentine Republic.

A decree will issue, releasing the vessel from arrest.

In re GOTTLIEB & CO.

(District Court, D. New Jersey. September 17, 1917.)

1. BANKRUPTCY ⊂=212—OBJECTIONS TO JURISDICTION—WAIVER.

The receiver in bankruptcy filed a petition, alleging that the bankrupt had transferred all outstanding book accounts then in existence, and those that might thereafter be created, to a creditor for debts due and to become due, and that the assignment was a preference. The referee made an order restraining the creditor from collecting the accounts, and requiring him to show cause why he should not turn over moneys already collected. The creditor and receiver then agreed that the creditor should collect the accounts without delay, that the proceeds should be deposited in the name of the receiver, pending determination as to who was

entitled thereto, and that the order should be modified to permit such collection. The agreement stated that the creditor did not waive his right to object to the jurisdiction of the referee in determining the disposition of the book accounts. The creditor then filed an affidavit in response to the previous order to show cause, in which he claimed to be an assignee for a valuable consideration, and in possession, and insisted that the bankruptcy court had no jurisdiction to decide in a summary manner to whom the accounts belonged. Thereafter an order of the referee permitting the receiver, who had been appointed a trustee, to amend the petition, was sustained by the District Court. The preamble of such order recited that testimony was taken before the referee on the rule to show cause; but there was no formal order of the referee overruling the creditor's objection, though it appeared from his petition for review that such objection was overruled. *Held*, that the affirmance of the order by the District Court, as it did not deal with the question of adverse claimance, did not necessarily involve consideration of that question, and hence did not preclude the creditor from subsequently urging his objections to the jurisdiction.

2. BANKRUPTCY ⊂⊃212—JURISDICTION—OBJECTIONS.
Where a creditor did not answer to the merits a petition of the referee seeking a recovery of book accounts assigned by the bankrupt until after his objection to the jurisdiction of the bankruptcy court to summarily determine the ownership of the accounts was overruled, the answer to the merits did not waive the objections to the jurisdiction.

3. BANKRUPTCY ⊂⊃114(1)—RECEIVER.
After adjudication, the receiver, before the appointment of a trustee, in addition to his duty to preserve property actually in his possession, is a proper person to carry out any orders that the court might make, under Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 545 (Comp. St. 1916, § 9586), for the enforcement of the provisions of the act and it is the receiver's duty, as well as his privilege, to bring to the court's attention any matters which suggest the advisability of making an order.

4. BANKRUPTCY ⊂⊃212—JURISDICTION—SUMMARY PROCEEDINGS.
Under Bankruptcy Act July 1, 1898, § 23 (Comp. St. 1916, § 9607), declaring that the United States courts shall have jurisdiction of all controversies at law and in equity between trustees and adverse claimants, a referee in bankruptcy does not have summary jurisdiction to determine a creditor's right to collections already made under an assignment of book accounts by the bankrupt; the court of bankruptcy not having jurisdiction of the res.

5. ACCOUNT, ACTION ON ⊂⊃18—BOOK ACCOUNTS—NATURE OF.
Book accounts are but evidence of money due, and are choses in action, as distinguished from choses in possession.

6. ACCOUNT, ACTION ON ⊂⊃17—NATURE OF ACTION.
An action on book accounts is a recognized remedy to recover moneys due for goods sold and delivered; and the books of account, properly approved, are prima facie evidence of a right to recover.

7. BANKRUPTCY ⊂⊃212—COURTS—JURISDICTION.
A bankrupt corporation passed a resolution providing that book accounts due and to become due should be assigned to a stockholder, who agreed to make advances to the bankrupt to enable it to carry on its business. The accounts were to be collected by the bankrupt and the proceeds paid over to the stockholder; the stockholder receiving duplicate statements of accounts. *Held* that, as the resolution contemplated that the accounts were to be collected by the bankrupt, the books of account remaining in the possession of the bankrupt, the trustee of the bankrupt, who obtained possession of the account books, had such possession of the res that the bankruptcy court might in a summary proceeding determine the rights of the parties to uncollected accounts.

8. BANKRUPTCY ⟸160—PREFERENCES—EVIDENCE.
In a proceeding to set aside an assignment of book accounts by a bankrupt on the ground that it effected a preference, evidence *held* to show that the bankrupt was insolvent at the time the assignment was made.

9. BANKRUPTCY ⟸166(3)—PREFERENCES—EVIDENCE.
In a proceeding to set aside an assignment of book accounts on the ground that it effected a preference, evidence *held* to show that the assignee, a stockholder of the bankrupt corporation, who in consideration of the assignment agreed to make advances to the bankrupt, knew of its insolvency.

10. BANKRUPTCY ⟸165(1)—PREFERENCES—KNOWLEDGE.
Where a stockholder in a bankrupt corporation, who was already a creditor, agreed to make further advances in consideration of an assignment to him of book accounts, the assignment will be treated as a preference, the value of the accounts assigned exceeding the amount of the advances and effecting a preferential payment on the debts already due the stockholder.

In Bankruptcy. In the matter of the bankruptcy of Gottlieb & Co. On review of referee's order adjudging that the bankrupt's transfer of book accounts to Adolph M. Rosenberg was void. Order of referee affirmed.

Philip J. Schotland, of Newark, N. J. (Edwin G. Adams, of Newark, N. J., of counsel), for Adolph M. Rosenberg.

Kessler & Kessler, of Newark, N. J. (Samuel I. Kessler, of Newark, N. J., of counsel), for trustee.

RELLSTAB, District Judge. This is a review of a referee's order dated November 10, 1916, which, so far as necessary to be stated, adjudged that a transfer of book accounts, made by Gottlieb & Co. (a New Jersey corporation, hereinafter called the bankrupt) to Adolph M. Rosenberg, on December 7, 1915, was fraudulent, constituted a preference, and was void against the trustee. It also commanded him to deliver to the trustee "all moneys in his possession or under his control which were collected from the said book accounts and which moneys were deposited in the National State Bank according to an agreement heretofore made between the trustee and the said Adolph M. Rosenberg," and that he refrain from making any further collections on said accounts.

The bankrupt was a manufacturer of hats, and was twice in bankruptcy, each time on involuntary petition. In the first proceeding there was no adjudication, but in July, 1915, it composed with its creditors, giving them notes for the full amount of their claims, payable in installments. Rosenberg was a stockholder, under disguise, of the bankrupt, from its organization, and a creditor of it in a large amount when said composition was effected. The present bankruptcy proceedings were begun February 2, 1916, on which date a receiver was appointed by this court. On February 4th, upon filing the company's written waiver of service of the petition and process and consent to an immediate adjudication, the company was adjudicated a bankrupt and the cause was referred. On February 8, 1916, the re-

ceiver filed a petition with the referee, alleging, inter alia, in substance, that on December 7, 1915, the bankrupt had transferred all outstanding book accounts then in existence and those that might thereafter be created to Rosenberg for debts due and to become due to him; that he believed said assignment was made as a preference, and for the purpose of hindering, defrauding, and delaying creditors. On the same day the referee made an order restraining Rosenberg from collecting said accounts, and requiring him to show cause why he should not turn over the moneys collected on said accounts to the receiver or the trustee, when appointed. On February 11th Rosenberg entered into an agreement with the receiver (the agreement referred to in the referee's order) whereby it was declared to be in the interest of the estate and Rosenberg that the accounts be collected without delay, and that an order be made modifying the restraint, so as to permit Rosenberg to collect the accounts upon certain conditions, among which were that the collections should be deposited in said National Bank of Newark in the name of the receiver, later to be changed to the trustee to be elected, and Rosenberg, and that the account should be held intact until it should be finally determined who was entitled thereto.

The referee made an order carrying out said agreement and Rosenberg collected some of the accounts, and deposited the money thus obtained in the bank. It is this deposit, amounting to the sum of $2,719.04, that the order under review directs Rosenberg to deliver to the trustee. In this agreement it was expressly stated that Rosenberg did "not waive his right to object to the jurisdiction of the referee in determining the disposition of the book accounts." On March 1, 1916, Rosenberg filed an affidavit in response to this rule to show cause, in which he claimed to be an assignee of said accounts for a valuable consideration, and in possession thereof, and insisted that the bankruptcy court had no jurisdiction to decide in a summary manner to whom said accounts belonged, and objected to its doing so.

On April 7th the referee made an order permitting the trustee (the receiver in the meantime having been appointed trustee) to amend the petition (presumably the one made by him as receiver), which order was subsequently sustained by Judge Haight of this court on a review instituted by Rosenberg. In the preamble of this order it is recited that testimony was taken before the referee on the rule to show cause, and from Rosenberg's petition asking for said review it would appear that the referee had ruled adversely to Rosenberg's objection to the court's jurisdiction. No formal order by the referee overruling said objection, or one by Judge Haight affirming the referee's order of April 7th appears of record; but counsel are agreed that the order of April 7th was affirmed.

On May 17, 1916, after the review had been disposed of, Rosenberg filed his answer to said petition and rule to show cause, in substance setting up that by a resolution passed on December 7, 1915, the bankrupt had assigned to him all its outstanding accounts then in existance and those that would be created in the future, in consideration of his supplying raw materials to the bankrupt to enable it to con-

duct its business, and as security therefor, and that in reliance on said agreement he had supplied materials which inured to the bankrupt's benefit; that the agreement was not made as a preference, or for the purpose of hindering, defrauding, and delaying creditors, but to benefit creditors, by enabling the bankrupt to conduct its business and to earn profit; that he held the accounts that he might be reimbursed for the materials he had supplied after the assignment; that the accounts assigned to him and collected prior to the bankruptcy proceedings did not equal the amount of the indebtedness of the bankrupt for materials supplied by him in reliance upon the assignment; and that there is still due him for materials supplied, a sum in excess of the amount of the assigned accounts in dispute. This answer contained no objection to the jurisdiction of the court.

After summarizing the testimony taken on the issues thus made up, the referee certified his findings of fact to be:

"That Gottlieb & Co. was insolvent on the 7th day of December, 1915. That Adolph M. Rosenberg was familiar with and knew the financial condition of Gottlieb & Co. at all times, and particularly on the 7th day of December, 1915, and knew on that day that Gottlieb & Co. was insolvent. That there were creditors of Gottlieb & Co. existing at the time of the passing of the resolution whose claims amounted to about $59,000. That Adolph M. Rosenberg procured the transfer of the book accounts in question to himself with full knowledge of all these facts. That Adolph M. Rosenberg knew that the transfer of these book accounts would prefer him to the amount thereof over and above the other creditors of Gottlieb & Co. That the bankrupt intended by this transfer to create a preference in favor of Adolph M. Rosenberg."

He also certified his conclusion of law as follows:

"That the transfer of the book accounts by Gottlieb & Co. was a fraudulent transfer, and was made with the intent and purpose to hinder, delay, and defraud the creditors of the bankrupt, and was received by Adolph M. Rosenberg with full knowledge of the insolvency of the bankrupt and such transfer effected a preference in favor of Adolph M. Rosenberg, and is void as against the trustee, and that the question presented on this review is whether the transfer was fraudulent, and was given with the intention to hinder, delay, and defraud the creditors of the bankrupt, and was received by Adolph M. Rosenberg with full knowledge of the insolvency of the bankrupt, and did create a preference in favor of Adolph M. Rosenberg, and should be declared void as against the trustee, and whether the book accounts or their proceeds should be turned over to the trustee."

Under an arrangement between Rosenberg and the bankrupt, contemporaneous with the composition effected in the first bankruptcy proceedings, he was to loan his credit to the company to enable it to secure the raw materials needed to continue its business. The first installment of the composition notes fell due December 1, 1916. Before this, some time in November of that year, Rosenberg became apprehensive about the credit he was extending to the bankrupt, and a conference with the other stockholders was had, at which the financial condition of the bankrupt was considered. One of the results was an offer to pay to the creditors, on December 1st, 12½ per cent. of their claims, instead of 25 per cent., as agreed in the composition. This was accepted by nearly all the creditors, and paid by the bankrupt

on the date named. Another result was the passage by the company's directors on December 7, 1915, of the following resolution:

"Whereas, owing to the fact that the company has entered into an agreement with all of its creditors whereby it has secured an extension of credit on its past indebtedness, the company has been unable to secure credit on new purchases to any great extent; and

"Whereas, Adolph M. Rosenberg is willing to supply all the raw material that the company needs in the manufacture of its products, provided he is secured against loss:

"Now, therefore, be it, and it is hereby, resolved that in consideration of the said Adolph M. Rosenberg supplying to the company the raw material that it requires in conducting its business, the company to secure him against loss for all moneys that he has heretofore guaranteed the payment of, for the benefit of the company, and against loss for any material he shall hereafter supply to the company, hereby sells, transfers, and assigns all outstanding accounts which the company now has, and all accounts which will in the future be created, as soon as they are created, to the said Adolph M. Rosenberg; and the financial officers are hereby authorized and directed, as soon as they receive any money, or its equivalent, in payment of any account, to draw the company's check for the amount so received to the order of Adolph M. Rosenberg. As soon as the amount received has been deposited and properly credited to the account of the company, and the said Adolph M. Rosenberg to turn over to the financial officers, out of the moneys so received by him, the amount necessary for payroll each week, and at the end of each month, he is to reimburse himself for the amount of material he has supplied to the company, and the balance, if any, he is to return to the treasury of the company, to be used by the company in its business, in the regular manner. For his services in this connection, Mr. Rosenberg is to receive the sum of ten dollars per week.

"Be it further resolved that, as soon as any goods are billed, a duplicate bill should be sent to Mr. Rosenberg, and that the secretary shall, under the seal of the corporation, deliver to Mr. Rosenberg a certified copy of these resolutions, setting forth the contract which the company has made in these resolutions with Mr. Rosenberg, and Mr. Rosenberg, if he accepts same, shall signify it by a writing to that effect on the minute book of the corporation. The contract embodied in these resolutions may be terminated by the company at any time, upon paying Mr. Rosenberg in full for any and all indebtedness the company owes him, and upon securing the release of his liability for any indebtedness that he may have guaranteed for the company. This arrangement may be terminated by Mr. Rosenberg upon 30 days' notice to the company of his desire to terminate it."

There was no formal assignment of any of the book accounts. From that time, however, the bills for goods sold were made in duplicate; one being sent to the purchaser, as theretofore, and the other to Rosenberg. These purchasers, however, were not notified of any assignment of their debts until a few days before the present bankruptcy proceedings were instituted. In the meantime the bankrupt collected the accounts, as theretofore, turning over some of the collections to Rosenberg to reimburse him for cash advanced and merchandise bought by him for the bankrupt's use. The bankrupt's books of account contained no reference to the alleged assignment, and they passed into the hands of the receiver without any indication therein that the open accounts appearing were not the property of the bankrupt. Subsequently the receiver, learning of the passage of said resolution, and that Rosenberg had collected some of the accounts, and was endeavoring to collect the remainder, filed the petition and obtained the rule to show cause of February 8, 1916.

[1] *As to the referee's jurisdiction.* On behalf of the trustee, it is contended that this question was disposed of on review of the referee's order of April 7th. This, however, is not the case. Rosenberg's objection to the referee's jurisdiction, reserved in the agreement of February 11th and distinctly interposed in his said affidavit of March 1st, was undoubtedly overruled by the referee when or before he made the order of April 7th; and while such jurisdictional challenge may have been pressed upon this court when reviewing said order, yet that order did not deal with the question of adverse claimance, and its affirmance did not necessarily involve a consideration of that question. Rosenberg having at the outset unequivocally objected to the referee's jurisdiction, and never having expressly waived it, and the order now under review being the first made by the referee determining the ownership of said accounts, the jurisdictional question is still alive, unless Rosenberg's failure to renew such objection in his answer of May 7th, which went to the merits of the controversy, estops him from raising it now.

[2] In Re Kornit Mfg. Co. (D. C.) 192 Fed. 392, 395, 27 Am. Bankr. Rep. 244, 258, the writer said:

"It is elementary law that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits. When this is done, the court will disregard the objection to the jurisdiction, and put the defendant to his defense."

That proposition has the support of Jones v. Andrews, 10 Wall. (77 U. S.) 327, 19 L. Ed. 935; but, as in the case of Re Kornit Mfg. Co. respondents were held not to be adverse claimants, that statement was obiter. In the present case the answer to the merits was not interposed until after the objection to the jurisdiction was overruled. In such circumstances pleading to the merits is not a waiver of the objections. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237; In re Indiana Transportation Co., Petitioner, 244 U. S. 456, 37 Sup. Ct. 717, 61 L. Ed. 1253; Foster Milburn Co. v. Chinn, 202 Fed. 175, 122 C. C. A. 577.

[3, 4] The receiver's standing to challenge Rosenberg's right to such book accounts was denied before the referee and is questioned here. At the time the receiver's said petition was filed an adjudication had been entered. The proceedings had therefore entered upon the second stage. They were no longer primarily concerned with the status of a person and whether he had committed an act of bankruptcy, but with the administration of a bankrupt's property. Adjudication having taken place, the receiver was no longer merely a custodian of property which might be ordered returned to the alleged bankrupt, but of property which was then in the course of administration. In addition to the duties devolving upon him as a preserver of property actually in his possession, he would be a proper person, pending the appointment of a trustee, to carry out any orders that the court might make for the enforcement of the provisions of the Bankruptcy Act under section 2, subd. 15. It would be his duty, as well as his privilege, to bring to the court's attention any matters which suggested the advisability of making such order.

His petition of February 8th was in line with his duty. It called for no other than summary action. The referee's order to show cause, with ad interim restraint of the same date, was within his power, and in the absence of objection to his jurisdiction, and upon a proper showing, he would have been justified in making an order that the respondent turn over all the collections he had made on such book accounts, whether received before or after the institution of said bankruptcy proceedings. However, Rosenberg's objection called for a preliminary inquiry whether he was an adverse claimant within the meaning of section 23, and, if so, whether the res involved in that controversy was in the possession or control of the bankruptcy court. While the referee's rule covered collections made before the bankruptcy proceedings were begun, his order does not direct the return of such collections. As to those, Rosenberg's possession prevented them from becoming a part of the res which passed into custodia legis with the filing of the petition in bankruptcy. In the absence of consent or waiver, these collections could not be recovered by summary action, the only kind exercised in the proceedings under review. In re Rathman, 183 Fed. 913, 106 C. C. A. 253; 25 Am. Bankr. Rep. 246, and cases cited. The referee properly excluded such collections from the present order.

[5-7] *As to the uncollected accounts.* Whether the referee had summary jurisdiction to determine the right to the uncollected accounts depends upon whether they had become a part of the res, and that is to be determined as of February 2, 1916, the date when the pending bankruptcy proceedings were begun. These accounts appeared on the bankrupt's books of account as a part of its assets. Rosenberg had no possession of, or control over these accounts, other than could be derived from the resolution of December 7th, and his custody of one of the duplicate bills issued after said accounts were created.

Book accounts are but evidence of moneys due. They are choses in action, as distinguished from choses in possession. Bills are but copies of such accounts. An action on book account is one of the recognized remedies in New Jersey to recover the moneys due for goods sold and delivered, and books of account, properly proven, are prima facie evidence of the right to so recover. See 1 N. J. Dig. Ann., pp. 71, 72. The bankrupt's resolution of December 7th did not put Rosenberg in possession of any accounts. If valid, they gave him but the right to the moneys due or to become due on said accounts. This is so as to the accounts in existence at that time; a fortiori, as to those yet to be created.

It is to be noted that, while this resolution purports to assign the bankrupt's accounts, existing and to be created, to secure Rosenberg against loss for all past guaranties and future supplies of materials, yet it contemplated that they were to be collected by the bankrupt. Rosenberg was to be furnished with a duplicate bill of all sales made, but he was not authorized to make any collections. By this resolution, if valid, said accounts, though charged with a lien in favor of Rosenberg, continued in the possession of the bankrupt, and from the filing of the creditors' involuntary petition were in custodia legis, and on ad-

judication were subject to the summary jurisdiction of the bankruptcy court. The physical possession by the receiver of the books of account gave him at least constructive possession of the unpaid accounts therein recorded. He thereby obtained all the indicia of possession that usually accompany the transfer of property of that character from the bankrupt to the trustee.

The possession by Rosenberg of duplicate bills of such accounts before the institution of bankruptcy proceedings did not oust the bankrupt of its possession of, or control over, said accounts; and the institution of such proceedings gave him no greater rights in that respect. In such circumstances, whatever rights Rosenberg had in these accounts, followed them into the bankruptcy court, where, after adjudication, in case of dispute, such rights are to be litigated and determined. O'Dell v. Boyden (C. C. A. 6) 150 Fed. 731, 80 C. C. A. 397, 10 Ann. Cas. 239; 17 Am. Bankr. Rep. 756.

[8] The referee having jurisdiction to summarily determine the right to said uncollected accounts, what of his finding that those covered by said agreement of February 11, 1916, belong to the estate, and that the money collected thereon should be delivered to the trustee? There having been no adjudication in the first bankruptcy proceedings, there is no legal presumption that Gottlieb & Co. was insolvent, within the meaning of the bankruptcy law, at the time such proceedings were brought to an end. As noted, the composition called for payment of the entire indebtedness. That at that time the company was unable to meet its obligations as they matured will be presumed from said composition; but the composition does not prove that the aggregate of the company's property would not, at a fair valuation, be sufficient to pay its debts. That at the institution of the present bankruptcy proceedings, less than seven months after such composition, the company was hopelessly insolvent, is undoubted; but was it so on December 7th, when said resolution was passed? The testimony directly bearing on the fair value of the company's property as of that or an earlier date, while meager, yet, when taken in connection with the bankrupt's then financial difficulties and its hopeless insolvent condition very shortly thereafter, without any evidence of an intervening cause to account for the latter condition, tends to a mental pronouncement that it was insolvent on that date. The referee so found, and his finding has my concurrence.

[9] Did Rosenberg then know it? He bore a very close relationship to the bankrupt. He was a stockholder from the beginning, and at all times familiar with the company's business. This placed him in a different class from ordinary creditors. At the time of such composition the bankrupt was indebted to him in a large amount for merchandise sold to it and for his accommodation indorsements of its commercial paper. His opportunities to ascertain the exact financial condition of the bankrupt during its entire business career were unhampered, and the very largeness of his interest as a creditor would be likely to impel him, as it did, to become conversant with the company's financial needs on and after its resumption of business following the composition. The first payment of the bankrupt's old debts, under the composition, would be due in six months. In the meantime, while relieved of the

pressure of such payment, it would be in need of capital (money or credit) to carry on its business, out of the profits of which it expected to meet the terms of such composition. With knowledge of this, Rosenberg undertook to finance such business. This he did by furnishing to it from time to time the raw materials on his own credit and advancing cash to pay for labor as required.

Seemingly there never was a time after the company resumed business that Rosenberg would not have had reasonable cause to believe that an assignment or pledge to him of the company's book accounts would give him a larger percentage of its assets than other creditors. In November, because of the company's failure to pay for the advances made by him in October, Rosenberg became considerably concerned about the company's finances. Conferences and negotiations then took place, which resulted in the passage of the resolution of December 7th. If at no time before such conference Rosenberg was apprised of the financial condition of the company, he learned it then. The referee found he had knowledge of the company's insolvency at the time said resolution was passed, and I fully agree with him in that conclusion.

[10] Does such knowledge disentitle him to the moneys realized from the book accounts in question? They were intended to secure him, not merely for antecedent debts, but also for advances afterwards to be made, and because of this fact Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339, 31 Am. Bankr. Rep. 407, is relied upon to sustain the contention that said security was valid and that the referee's order should be reversed. The present case, however, is radically different, because, first, in the Dockendorff Case the assignee of the book accounts did not know that the debtor was insolvent; and, second, though advances were made by Rosenberg in cash and goods after the passage of the resolution, the aggregate of the collections paid to Rosenberg from the bankrupt's book accounts and the value of merchandise returned to him or to others for his benefit, between the date of the passage of the resolution and the institution of the bankruptcy proceedings, exceeded the aggregate of the cash and merchandise furnished by him during said period.

National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, 31 Am. Bankr. Rep. 291, distinguished in the Dockendorff Case, is more in point on the question of knowledge of insolvency. The fact that under such security Rosenberg received more than the advances made takes it without the Dockendorff Case, and bars his right to the accounts now under consideration.

The order under review is affirmed.

ALBERT et al. v. BASCOM et al.

(District Court, W. D. Texas, Austin Division. June 14, 1917.)

No. 279.

1. COURTS ⇐268—FEDERAL COURTS—JURISDICTION.
The federal District Court is without jurisdiction solely on the ground of diversity of citizenship where neither plaintiffs nor defendants are citizens or residents of the forum.

2. COURTS ⇐269—FEDERAL COURTS—JURISDICTION.
A suit to establish a lien upon or claim to property brought under Judicial Code, § 57 (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. 1916, § 1039]), providing that, when in any suit commenced in any District Court to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance on the title to real or personal property within the district, one or more of the defendants shall not be an inhabitant of or found within the district, or shall not voluntarily appear, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, etc., which shall be served on such defendant or defendants if practicable wherever found, or where personal service is not practicable, such order shall be published, may be maintained in the federal District Court for the state where the property is situated, though neither plaintiff nor defendant is a resident thereof.

3. LIENS ⇐3—AGREEMENT—EFFECT.
One tenant in common died, devising her interest to plaintiffs, and nominated another of the tenants in common as trustee to hold the property during the minority of plaintiffs. Without ever having accounted, the trustee died. Plaintiffs then executed partition deeds, the trustee having devised his interest to the other original cotenants. The parties entered into an agreement that the execution of the partition deeds should not waive any right or claim plaintiffs might have against the estate of the deceased trustee, or waive any rights they might have to subject any of the property conveyed to their claim, but that all rights should be preserved as though the deeds had not been executed. *Held*, that the agreement merely preserved the rights that plaintiffs already had, and did not establish in their favor any lien on the lands of the deceased trustee.

4. JUDGMENT ⇐17(2)—PERSONAL JUDGMENT—PROCESS TO SUSTAIN.
The federal District Court is without power to enforce a personal judgment upon citation of publication.

5. EQUITY ⇐363—DISMISSAL OF BILL—PLEADING.
On motion to dismiss a bill for want of jurisdiction, only the averments therein can be considered.

6. TENANCY IN COMMON ⇐18—LIENS—ADJUSTMENT.
Where one tenant in common was trustee for others, the cestuis que trust cannot, by analogy to the equitable liens enforced in partition, establish a lien on the share of the trustee in the common property; even in partition proceedings a specific lien on particular property is denied, and only those liens arising out of the relationship of the parties to the land can be enforced.

7. EXECUTORS AND ADMINISTRATORS ⇐133—LIENS—ENFORCEMENT.
Under Vernon's Sayles' Ann. Civ. St. Tex. 1914, § 3235, the estate of a decedent vests in his devisees subject to payment of his debts, while creditors' claims constitute a lien on all of the property of the estate; and this lien, which is general, can be enforced by means of administration.

8. COURTS ⇐269—FEDERAL COURTS—JURISDICTION—LIEN.
One tenant in common who was trustee of the interest of plaintiffs in the common property and who died without having accounted devised his interest to defendants. Neither plaintiffs nor defendants were residents

of the state in which was located the common property. *Held* that, as a creditor of a decedent has no lien for his debt on any particular property of the deceased, plaintiffs could not, under Judicial Code, § 57, maintain in the federal District Court for the state wherein was located the property a suit to enforce an alleged lien as creditors of deceased trustee.

9. COURTS ⟸269—FEDERAL JURISDICTION—NATURE OF SUIT.
A suit by creditor against heirs holding the lands of decedent debtor to subject lands to payment of claims is one in personam, and not in rem, and hence, where the heirs or devisees of the decedent debtor were not residents of the state in which was located the land, and plaintiffs were also nonresidents, such suit could not be maintained in the federal District Court for the state under Judicial Code, § 57, on the theory that it was one in rem to establish a lien.

10. COURTS ⟸269—FEDERAL COURTS—JURISDICTION.
Under Judicial Code, § 57, authorizing a suit against nonresident defendants to enforce a lien on land, the lien must be a pre-existing one, and not one caused by the institution of the suit itself.

In Equity. Bill by Mary C. Albert and others against Alpheus W. Bascom and others. On motion to dismiss. Motion granted.

V. L. Brooks, of Austin, Tex., for plaintiffs.
Fiset, McClendon & Shelley, of Austin, Tex., for defendants.

WEST, District Judge. The defendants, limiting their appearance solely to contesting jurisdiction, move to dismiss the bill upon grounds specified:

I. That none of the defendants are residents or citizens of the state of Texas, but are residents and citizens of the state of Kentucky.

II. That the action is not to enforce any legal or equitable lien upon or claim to real or personal property within the Western district of Texas.

Concerning objections I and II:

[1, 2] Jurisdiction may obtain, though none of the defendants are residents and citizens of the state of Texas. Diversity of citizenship alone would not suffice where neither plaintiffs nor defendants were residents or citizens of the state of the forum. In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; Foulk v. Gray (C. C.) 120 Fed. 156. But plaintiffs are asserting a lien upon certain real property situated within this judicial district, thus seeking to bring the action within the provisions of section 57 of the Judicial Code, formerly section 8 of Act March 3, 1875, c. 137, 18 Stat. 472. Neither plaintiffs nor defendants are residents or citizens of the state of Texas. The plaintiffs are residents and citizens of the states of Maryland and Idaho, the defendants of the state of Kentucky; the situs of the rem being within this Western Judicial District of the state of Texas.

A suit to establish a lien upon or claim to property under section 57 of the Judicial Code may be maintained in the district of the state where the property is situated, though neither plaintiff nor defendant is a resident thereof. Kentucky Coal L. Co. v. Mineral Devel. Co., 219 Fed. 45; Gillespie v. Pocahontas C. & C. Co. (C. C.) 162 Fed. 742; Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229. So far as objec-

tions I and II are concerned, jurisdiction depends on whether or not the action is one to establish a lien upon the land in question.

Allegations of Plaintiffs' Original Bill.

[3] The plaintiffs, styling themselves creditors, file suit December 8, 1910, against the two Bascoms individually and as joint executors of the estate of S. Clarke Bascom, who died October 17, 1909. Plaintiffs' rights originate by the terms of the will of their mother in 1883. The estate consisted of lands situate in the states of Kentucky and Texas, held in common prior to the death of testatrix, one-fourth each to (1) Mary C. Albert, plaintiffs' mother, (2) S. Clarke Bascom, (3) Alpheus W. Bascom, (4) John R. Bascom, brothers of testatrix, residents of Kentucky. By the terms of the will the one-fourth share or interest in the common estate passed to plaintiffs, then minors, to be held in trust by S. Clarke Bascom until plaintiff Fannie Pleasants reached the age of 21. The trustee was given full power to lease, sell, and convey, to invest and reinvest, holding proceeds subject to the trust. The plaintiff Fannie reached the age of 21 in 1898. No report or accounting of any character is alleged to have been made by the trustee, S. Clarke Bascom, up to the date of his death in October, 1909. His will was probated in the Bath county court, Ky., December, 1909. By its terms all his interest in the common property passed to his brothers, Alpheus and John R., who were named his executors, subject, as alleged by plaintiffs, "to whatever claim they might have against same."

Plaintiffs allege that:

"Upon careful inquiry they are advised, and so charge, that the value of the personal property belonging to the estate of S. Clarke Bascom is inadequate to satisfy their claim, and that there is no personal property of said estate within the jurisdiction of this court belonging to said estate."

Three tracts are described as being in the state of Texas, and alleged to be a part of the original common holding in proportions as hereinbefore set out. The undivided one-fourth part theretofore owned and held by S. Clarke Bascom was by his will devised to the said Alpheus W. and John R. Bascom. The one-fourth part of these three tracts of land were conveyed by plaintiffs and defendants by deeds called partition deeds to the defendants Alpheus W. and John R. Bascom, and contemporaneous therewith, on November 23, 1909, plaintiffs and defendants entered into an agreement in writing (Plaintiffs' Exhibit No. 3), plaintiffs alleging:

"That the legal and equitable effect of said agreement is to give the claimants herein a lien against the interests of the devisees of the late S. Clarke Bascom in the aforesaid tracts, * * * with the right to enforce the sale thereof for the purpose of satisfying their claim."

A careful inspection of Plaintiffs' Exhibit No. 3, being the agreement referred to, does not bear out their claim that a lien was thereby fixed upon the interest in the tracts conveyed with the right to enforce same by sale. The agreement in effect merely negatives any intention on part of the plaintiffs by the execution of the said partition

deeds to waive any rights or claims against the estate of S. Clarke Bascom as follows:

"And do not waive any rights that they have, if any, to subject any of the property conveyed by the above-mentioned partition deeds; * * * that whatever rights they have or ever had to require payment and collection of any such trust funds or property are as well preserved since the execution of said partition deeds as they were before."

No claim of damage or dereliction is alleged against Alpheus W. and John R. Bascom as individual defendants, nor any claim of damage or dereliction against them as executors of the estate of S. Clarke Bascom, other than as being the successors as heirs, devisees, and executors holding right, title, and possession of the tracts of land upon which lien is asserted as general creditors. The prayer is that S. Clarke Bascom's interest in the Texas lands be seized by a receiver of this court, whose appointment is also prayed for, and same sold to pay plaintiffs' claim and those of other creditors who may unite with them. Service by publication on the defendants named is prayed for. The court is without power to enforce a personal judgment upon citation by publication. The action is based upon the assertion of a right to enforce a lien on specific property within the district. All material allegations of the bill bearing upon the question have been carefully stated and considered.

[4] A vital question is whether or not the action is in rem. The bill does not definitely assert any right of lien upon the S. Clarke Bascom interest in the Texas lands, except through the terms of the agreement between parties plaintiff and defendant known as Plaintiffs' Exhibit No. 3. This instrument, as already noted, wholly fails to fix or declare any lien upon any specific property, leaving the parties to such rights as they were in law entitled independent of the agreement. If plaintiffs are relying upon some statutory or implied legal or equitable lien, the bill fails to make any affirmative allegation or prayer to that effect. Only such may be considered.

Plaintiffs' claim of jurisdiction as being an action in rem for the enforcement of a contract lien upon specific property with prayer for foreclosure could at this state very properly be denied, since the agreement exhibited wholly fails in the legal effect claimed by plaintiffs. It does appear, however, from the bill that, independent of obligations imposed on S. Clarke Bascom, deceased, as trustee, the relation of cotenancy as to the lands sought to be subject to lien has existed between plaintiffs and defendants and their privies since 1883. It also appears that the bill is brought by plaintiffs as general creditors of the estate of S. Clarke Bascom, and the question arises whether, as cotenant creditor or general creditor, plaintiffs are by law given a specific lien upon specific property.

[5] Plaintiffs are not seeking recovery of S. Clarke Bascom's estate because of any default of obligation on his part as cotenant. In the casting of accounts sought no claim of indebtedness or damage to them is alleged against him as cotenant. Without pleading to support such a claim, even though pressed in argument, it must be disregarded as an element affecting the jurisdiction of the court. The gist of complain-

ants' bill is for recovery against their trustee for failure to account for moneys received by him from sales, leases, rentals, incomes, etc., all arising out of the trust relation; the assertion of a lien as existing against certain lands of his estate in Texas; for possession, appointment of receiver, and foreclosure.

[6] In partition, which is not sought here, the law is that equities which may be adjusted and enforced in a suit for partition are such only as arise out of the relation of the parties to the common property; ordinary instances of the equitable lien thus arising are where one tenant in common has discharged incumbrances, paid taxes, purchased claims, and paid part of purchase price. Freeman, Cotenancy and Partition, §§ 506 and 512; Niday v. Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027. In Hume v. Howard (Tex. Civ. App.) 48 S. W. 202, Justice Key holds that even a contract by tenants in common to pay a cotenant their share of expense of procuring their share in an estate does not create a lien on the property awarded. Being a disbursement for account of the common good to the common property, it would occupy a higher plane than the claim of a general creditor who is proceeding independently against specific property, as in this case.

Even in partition proceedings the specific lien on particular property is denied. The question is settled by the Supreme Court of this state in Kalteyer v. Wipff, 92 Tex. 673, 52 S. W. 63, which holds that a tenant in common has no lien upon the share of his cotenant for rents received by the latter without his share, in such sense as to entitle him to maintain a simple action for debt and foreclosure therefor. The present action is not one of cotenant seeking recovery or relief against cotenant as such, but one of cestuis que trustent, as creditors against the decedent trustee's heirs and executors, for debt and accounting.

[7, 8] What character of lien does the law give plaintiffs, general creditors, upon specific property of decedent debtor's estate? On the death of S. Clarke Bascom his estate vested in his devisees subject to the payment of his debts. Vernon's Sayles' Ann. Texas Statutes, vol. 2, § 3235. Plaintiffs' claims against decedent Bascom constitute a lien upon all of the property of his estate subject to the payment of debts, and this lien may be enforced by the creditors by means of administration. A general lien in favor of all creditors upon all of the estate exists, although no general creditor has a lien for his debt on a particular piece of property. Moore v. Moore, 89 Tex. 33, 33 S. W. 217. The general charge or lien of creditors against a decedent's estate in favor of creditors should be enforced by administration. Sometimes this result is accomplished through a suit for partition having the heirs and creditors before the court. Freeman on Partition, §§ 506–512; Kalteyer v. Wipff, 92 Tex. 673, 52 S. W. 63. The suit at bar is neither an "administration" nor one for partition, but that of general creditors seeking to enforce a specific lien for their debt on a particular piece of property, which lien, as such, the court in Moore v. Moore declares does not exist.

[9] Is the action in rem or in personam? Suits by creditors against heirs holding lands of a decedent debtor to subject the lands to payment

of claims are frequent. One of the early leading cases is Webster v. Willis, 56 Tex. 472. The action is identical in some respects to the one under consideration. Willis, creditor, in an action for debt, holding a note of Sanderson, decedent, sues unknown heirs and asserts the general lien as existing on a particular tract of land, prays for seizure, foreclosure of lien, etc. Service was had by publication. The court says:

"This proceeding is not based upon any specific lien upon the land which was decreed to be sold; the cause of action * * * rested upon a supposed cause of action in personam against the heirs of Mrs. Sanderson"—citing State v. Lewellyn, 25 Tex. 797; Yancy v. Batte, 48 Tex. 59.

The court declares on page 476 that:

"A charge or lien upon the property in the hands of an heir seems to be general and in favor of all creditors alike, but not giving a specified lien to any particular creditor and on any specified property."

In reversing and remanding a decree of the lower court awarding foreclosing of creditor's lien on particular property, the court on page 477 says:

"The law contemplates a personal judgment. The judgment in this case does not conform to this view of the statute; it is framed upon the theory that the proceeding is wholly in rem, and the decree in effect is a condemnation of the land as upon proceedings to foreclose a mortgage or other specific lien."

Referring to the effect of this decision and approving same, Justice Brown, in Moore v. Moore, 89 Tex. 33, 33 S. W. 218, says:

"Under our decisions it is held that, when property is distributed among the heirs and a debt against the ancestor remains unpaid, the creditor may sue the heir and recover a personal judgment against him for the debt, to the amount of the value of the property received by the heirs from the estate, but that a judgment cannot be entered foreclosing a lien upon that property."

Approving Webster v. Willis and State v. Lewellyn, Chief Justice Willie, in a suit where a general creditor obtained judgment subjecting property of decedent debtor in possession of heirs to foreclosure of general statutory lien (Mayes v. Jones, 62 Tex. 365), reversing the judgment, says:

"We think that the court also erred in foreclosing a lien upon the Wilson county land and in decreeing its sale in satisfaction of the judgment. Our statute does not give any creditor a lien upon any specific piece of property of the deceased debtor by reason of its descent to his heirs. The entire creditors of the deceased have the right to subject such property to the payment of their debts; and to that end they, or any one of them, may sue the heirs for the debt, and obtain judgment to the extent of the property received by the heirs from their deceased ancestor. The suit is in personam, and the heir may show in defense that he has received no assets by descent, and prevent any recovery whatever against himself, or limit the recovery to the amount so received. The judgment when recovered is conclusive of the fact that the heir has received assets to the amount for which it is rendered, and an execution issues upon it as in case of any other judgment in personam."

The effect of these decisions conclusively show that the plaintiffs' right of action as general creditors having claims against property of a decedent debtor invoking the general statutory lien is one in personam, and not in rem. This court cannot entertain jurisdiction under the provisions of section 57 of the Judicial Code unless the suit is one

in rem, because, as before stated, independent of the provisions of the Code, no personal judgment could be rendered by this court upon service by publication; none of the defendants being residents or citizens of Texas.

[10] The lien must have existed anterior to the suit. Circuit Justice Lowell in Dormitzer v. Illinois Bridge Co. (C. C. Mass. 1881) 6 Fed. 218, defining the character of lien or claim to property referred to in the then recent act of March, 1875, now section 57 of the Judicial Code, in a case of attachment of property of an absent defendant, on demurrer to jurisdiction, sustaining same, says:

"A recent statute gives these courts jurisdiction to enforce a lien upon or claim to, or remove an incumbrance or lien or cloud upon the title to, real or personal property within the district, though the defendants, or some of them, may not be either inhabitants thereof or found therein, first giving notice to the absent defendants. St. 1875, c. 137, par. 8; 18 St. 472. But this means a lien or title existing anterior to the suit, and not one caused by the institution of the suit itself."

This early interpretation of the meaning of the act has been sustained and approved in the following cases: Morris v. Graham (C. C.) 51 Fed. 56; Jones v. Gould (C. C.) 141 Fed. 700; Shainwald v. Lewis (D. C.) 5 Fed. 510; Jones v. Gould, 149 Fed. 154, 80 C. C. A. 1; W. U. Teleg. Co. v. L. & N. Ry. (D. C.) 201 Fed. 944; Bucyrus Co. v. McArthur (D. C.) 219 Fed. 268; Wabash R. Co. v. West Side Belt Co. (D. C.) 235 Fed. 647; Scott v. Neely, 140 U. S. 113, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804.

The action is not one to enforce a specific lien upon specific property existing prior to the suit as contemplated by the statute.

For the reasons stated, it appears that defendants' grounds of objection to the jurisdiction are well taken. Their motion to dismiss plaintiffs' bill should be sustained; and it is so ordered.

KEATING v. PENNSYLVANIA CO.

(District Court, N. D. Ohio, E. D. September 11, 1917.)

No. 9526.

1. REMOVAL OF CAUSES ⟸12—RIGHT TO REMOVE—ACTIONS BETWEEN CITIZENS.

An action between citizens of different states cannot be removed to the federal court, under Judicial Code (Act March 3, 1911, c. 231) § 28. 36 Stat. 1094 (Comp. St. 1916, § 1010), unless the court to which removal is sought would have had jurisdiction, under section 51 (section 1033), had the action been instituted therein.

2. REMOVAL OF CAUSES ⟸106—JURISDICTION—WAIVER.

Where an action between citizens of different states is removed to a federal court, which would not have had jurisdiction under Judicial Code, § 51, the objection to the court's want of jurisdiction is waived, whenever the party objecting to removal appears for any purpose, except to object to the jurisdiction over his person.

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3. COURTS ⟸90(4)—PRECEDENTS—JUDICIAL CODE.
While those sections of the Judiciary Act of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552), as amended in 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433), relating to the jurisdiction of federal courts, removal of causes and venue have been to some extent changed in phraseology, the act having been divided into numerous sections by the Judicial Code, the scope of the act was not changed, and decisions under the Judiciary Act have the same effect as if decided under the Judicial Code.

4. REMOVAL OF CAUSES ⟸102—RIGHT OF REMOVAL—JURISDICTION OF FEDERAL COURT—"INHABITANT."
Judicial Code, § 24 (Comp. St. 1916, § 991), declares that District Courts shall have original jurisdiction of suits between citizens of different states, and between citizens of a state and foreign states, citizens, or subjects. Section 28 declares any suits of which the District Courts are given jurisdiction by the Code may be removed by the defendant or defendants therein, being nonresidents of the state where instituted. Section 51 declares 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 diversity of citizenship suit may be brought in the district of the residence of either plaintiff or defendant. An alien sued defendant, a foreign corporation, in the courts of a state other than that of its domicile. On petition of defendant the cause was removed to the federal District Court. *Held* that, as plaintiff was an alien, he was not an inhabitant of the state in which suit was instituted, for the word "inhabitant," as used in section 51, is synonymous with "citizen" or "resident," and in its application to corporations refers to the state in which they were chartered, and hence the motion to remand must be denied, though the District Court cannot, in an action between citizens of different states, entertain jurisdiction under petition to remove, where suit could not originally have been brought therein, for suit in this case might have been brought in District Court to which the action was removed; the restrictions not applying because of plaintiff's alienage.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inhabitant.]

At Law. Action by Patrick J. Keating against the Pennsylvania Company, begun in the state court and removed to federal court. On motion to remand. Motion denied.

S. V. McMahon, F. W. Zimmerman, and C. W. Dille, all of Cleveland, Ohio, for plaintiff.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. The plaintiff is an alien subject of the king of Great Britain, and the defendant is a corporation organized and existing under the laws of the state of Pennsylvania, and having its principal office in that state. The defendant is, therefore, a citizen and resident of the state of Pennsylvania. This action was brought in the court of common pleas of Cuyahoga county, Ohio, and on application of the defendant, made in due time, was removed to this court. The plaintiff now appears specially, and moves to remand on the ground that, on the facts above stated, this action could not originally have been brought in this court, and cannot, therefore, be removed here.

The question of law thus raised is one respecting which much difference of opinion exists in the several United States District Courts.

In this forum it has been held, on exactly similar facts, that the action was not removable, and granted a motion to remand. Ivanoff v. Mechanical Rubber Co. (D. C.) 232 Fed. 173.

In other districts decisions have been rendered, holding on these facts that actions cannot be removed to this court. Mahopoulus v. Chicago, etc., Ry. Co. (C. C.) 167 Fed. 165, by District Judge Pollock; Odhner v. Northern Pacific Ry. Co. (C. C.) 188 Fed. 507, by Circuit Judge Coxe, holding the District Court; Sagara v. Chicago, etc., Ry. Co. (C. C.) 189 Fed. 220. by District Judge Lewis. In Louisville & N. R. Co. v. Western Union Tele. Co. (D. C.) 218 Fed. 91, Cochran, District Judge, expresses the opinion that the reasoning of these cases is sound, if Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, on which they were based, is still the law. But he denied the order to remand, because, in his opinion, Ex parte Wisner was decided wrong in the first place, and its authority has since been so far impaired that it is not to be regarded as controlling.

In other districts decisions have been rendered, holding on the same state of facts that such actions are removable. Barlow v. Chicago & N. W. Ry. Co. (C. C.) 164 Fed. 765, by District Judge Reed; also see same case on rehearing by District Judge Reed (C. C.) 172 Fed. 513; Bagenas v. Southern Pac. Co. (C. C.) 180 Fed. 887, by Van Fleet, District Judge; Rones v. Katalla Co. (C. C.) 182 Fed. 946, by Donworth, District Judge; Decker v. Southern Ry. Co. (C. C.) 189 Fed. 225, by Grubb, District Judge; Smellie v. Southern Pac. Co. (D. C.) 197 Fed. 641, by Van Fleet, District Judge.

The conflict between these decisions is irreconcilable. The several judges, rendering the opinions, have answered the same question in two different ways. The reasons supporting the holding that such an action is not removable are best stated in Sagara v. Chicago, etc., Ry. Co., supra. The reasons holding that such an action is removable are best stated in Barlow v. Chicago, etc., Ry. Co., supra, and in Decker v. Southern Ry. Co., supra. Counsel are referred to those cases for a more extended statement of the reasons supporting the different sides of the controversy. After mature reflection, I have reached the conclusion that this action is removable, and my holding will be in accord with the second group of cases above cited, which in my opinion is based on better reasoning.

[1, 2] This conflict of opinion is due to the different views entertained touching the force and effect of Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. Prior to that decision, the accepted opinion was that the venue section of the Judicial Code (section 51) did not limit or restrict the right of removal conferred by section 28, but that any action of which a federal court might take jurisdiction under section 24 of the Judicial Code, or under the Judiciary Act of 1887, as amended in 1888, might be removed to the federal courts, even though under the venue section or provisions it might not originally have been brought in the federal court of that district against timely objection of the defendant. Dillon on Removal of Causes, 96; Moon on Removal of Causes, § 65. See, also, Judge Cochran's statement of the prior holdings in 218 Fed. 95. In other words, the venue

provisions of the Judiciary Act of 1887, as amended in 1888, prescribing the district within which a suit might be brought, were not regarded as conferring or withholding jurisdiction, but as conferring on the defendant a privilege respecting only the particular United States court in which he might be required to answer. This limitation was regarded like similar limitations in state Codes, applicable to the county within which a defendant might be served or required to answer.

Under the Judiciary Act of 1887–88, prior to Ex parte Wisner, supra, as under the state Codes, the view entertained and followed was that an appearance, or any act of a defendant thus sued in the wrong forum, other than to appear specially to claim the exemption accorded him, would waive his right to object; but the jurisdiction of the court itself over the subject-matter and cause of action was ample and beyond question. In this apparent state of the law Ex parte Wisner, supra, was decided. This state of the law was developed, it is true, prior to the Judiciary Act of 1887–88. Many decisions had been rendered prior thereto, holding that the act of 1887–88 had as one of its important purposes the limiting of the jurisdiction of the United States courts, but the exact point presented in Ex parte Wisner had not been previously considered by the United States Supreme Court.

This case holds, in brief, that the limitation of the venue provisions of the act of 1887–88, respecting the particular court within which an action must be brought, is jurisdictional in the same sense as the provisions defining the subject-matter of the jurisdiction of the United States courts, and that, therefore, if the action could not, in the first instance, have been brought in the federal court of the particular district to which it was removed, it could not be removed to that court. Mr. Chief Justice Fuller, delivering the opinion, also says that consent of parties could not waive this defect in jurisdiction. The facts were that Wisner, a citizen of Michigan, sued in a state court of Missouri a citizen of Louisiana, and the defendant, by timely application, removed the action to the United States court for the Eastern district of Missouri. The plaintiff thereupon, appearing specially for the purpose, moved to remand, which motion was overruled. An application was thereupon made to the United States Supreme Court for a writ of mandamus to compel the lower court to remand the case, and it was adjudged, as already stated, that the action was not removable, and that it should be remanded.

In the later case of In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164, the same facts were present, except that, after removal from the state court to the United States court, the plaintiff had appeared and filed an amended petition before making his motion to remand. It was held that he had, by this action, waived his privilege of objecting to the further exercise of jurisdiction by the United States court. Ex parte Wisner, in which the opinion had been expressed that the limitations of the venue provisions were jurisdictional in the strict sense and could not be waived, was overruled to this extent.

Several cases had been previously decided, holding that a party might waive the objection that the suit was brought in the wrong district,

and several cases in conformity to In re Moore have since been decided. See Central Trust Company v. McGeorge, 151 U. S. 129, 132, 14 Sup. Ct. 286, 38 L. Ed. 98; Interior Construction Co. v. Gibney, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401; Western Loan Co. v. Butte Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Kreigh v. Westinghouse & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984. This is now undoubtedly the settled law.

As a result, however, of Ex parte Wisner and In re Moore, and numerous decisions of subordinate United States courts, following and applying the same, it seems to be settled law that an action brought in a state court may not be removed to a United States court, unless it could, in the first instance, have been brought in that court, despite the timely objection of a nonconsenting party, even though, by failure to object after removal, the right so to do is waived, and the United States court may, as a result of such waiver, acquire ample jurisdiction to proceed to final judgment.

[3] In a case in which an alien is a plaintiff or defendant, a different question of law is involved, which is not settled or controlled by the same rules. The Judicial Code does not differ from the Judiciary Act of 1887, as amended in 1888, in the provisions pertinent to a determination of this question. Some changes have been made in the phraseology, and the three sections of the Judiciary Act have been divided into numerous sections in the Judicial Code. For practical purposes, however, it does not seem to me that any change of law was intended, and cases decided under the act of 1887–88 have the same weight as authority as those decided under the Judicial Code. I shall therefore make use only of the sections of the Judicial Code.

[4] Section 24 of the Judicial Code, so far as pertinent to this question, provides, in substance, that District Courts shall have original jurisdiction of all suits (1) between citizens of different states; (2) between citizens of a state and foreign states, citizens, or subjects. The first, therefore, deals with controversies to which citizens of different states of the United States are parties. The second deals with controversies to which citizens of the several states of the United States and citizens or subjects of foreign states, or, in other words, aliens, are parties. Section 28, so far as pertinent to this question, provides, in substance, that any suits of which the District Courts of the United States are given jurisdiction by this title, may be removed by the defendant or defendants therein being nonresidents of the state. The words "this title" relate to the title of the act known as the Judicial Code. Section 51 provides in part as follows:

"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 defendant." Comp. St. 1916, § 1033.

The first clause of the section above quoted requires an action to be brought in the district of which the defendant is an inhabitant. This applies to all actions not based on diversity of citizenship. This privi-

lege of being sued in the district of which he is an inhabitant is one, as we have already seen, which may be waived by the defendant, and is waived whenever, being sued, he appears for any purpose other than to object to jurisdiction over his person. It has also been held, under this part of the section, that "inhabitant" is used synonymously with "citizen" and "resident," in the remainder of the section, and that a corporation is equally an inhabitant and citizen only of the state and district in which it has been incorporated. McCormick v. Walthers, 134 U. S. 41, 43, 10 Sup. Ct. 485, 33 L. Ed. 833; Shaw v. Quincy Mining Co., 145 U. S. 445, 12 Sup. Ct. 935, 36 L. Ed. 768; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Galveston, etc., R. R. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248.

An alien, however, is not a citizen of any state. He is not, therefore, within the language of the section above quoted. The latter part of the quotation obviously does not apply to him, because he is not a citizen of any state. The first part does not apply to him, because the word "inhabitant," as used therein, is held to be synonymous with the words "citizen of a state," as used in the latter part. If he were an inhabitant of a district, as those words are used in the first part of the section, he would fall within the rule announced in Ex parte Wisner, and this case would be in the same class as all the cases in which it is held that a citizen of another state cannot be brought into a United States court by removal, when he could not originally have been sued in that court, but, not being included within the meaning of this section, he is not entitled to avail himself of the exemption allowed in Ex parte Wisner. This seems to me to be the only logical deduction from the authorities yet to be reviewed.

In Galveston, etc., R. R. Co. v. Gonzales, supra, an alien sued a corporation defendant in a district of which the defendant was not a citizen or an inhabitant. Upon timely objection it was held that the corporation defendant could not be required to answer in the district of which it was not an inhabitant. It was further held that an alien was not within the language of the latter part of the section above quoted, providing that an action might be brought in the district of the residence of the plaintiff. Logically it follows that an alien is not an inhabitant or a resident of any district. The holding, therefore, of Galveston, etc., R. R. Co. v. Gonzales, does not apply when the parties are reversed, and for a like reason Ex parte Wisner has no application. The exact question is: In what district may an alien be sued, for, if the alien plaintiff might have been sued in this court by the nonresident defendant company, then the action is one which might, in the first instance, have been brought here, and may therefore be removed to this court.

This question, it seems to me, is answered by the following cases: In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Wind River Lumber Co. v. Frankfort Marine Ins. Co. (9 C. C. A.) 196 Fed. 340, 116 C. C. A. 160. All these cases explicitly hold that an alien is without the language and purpose of section 51 above quoted, and that he may be sued in any district in which he can be served with

process. This being so, the defendant company might have sued the plaintiff in this court, had it been able to serve him with process in this district. The plaintiff, having brought himself into the district by beginning his action in it, has placed himself in a situation in which process can be served on him. The removal proceedings have the same force and effect as the service of process on him. He does not, therefore, enjoy any privilege of exemption from suit in any other district than that whereof he is an inhabitant. He has no right to claim exemption from being sued in this district. He has no privilege attaching to him, after the removal of this action here, of objecting to the jurisdiction of this court, which belonged to the plaintiff in Ex parte Wisner, supra, and which it has been held, in that and later cases, can be taken from him only by waiver or consent. I am therefore of opinion that this action might have been brought in this court, and may therefore be removed to this court.

Counsel for defendant have cited and rely on In re Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, and In re Nicola, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203. In the first case, an alien plaintiff sued a defendant corporation in a district of which the defendant was not an inhabitant, and after removal to the United States court a motion to remand was made, which was denied. An application to the Supreme Court of the United States for a writ of mandamus was thereupon made, which was also denied. It is contended that this is a controlling authority, supporting the conclusion to which I have come. On the other hand, the group of judges who have come to the other conclusion insist, with much plausibility, that the writ of mandamus was denied because, as was afterwards held in Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, mandamus was not an appropriate remedy, because an order refusing to remand a case may be reviewed by writ of error or appeal.

It is difficult to draw any certain inference as to the ground on which In re Tobin was decided. It is, however, worthy of note that In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873, in which a writ of mandamus was granted, ordering a case to be remanded, was decided approximately at the same date as was In re Tobin, and that In re Nicola, supra, was decided later on the authority of In re Tobin. It is, it seems to me, not a strained inference that the doubt as to the propriety of mandamus as a remedy did not arise until after the decision of In re Tobin, and that it is not, therefore, without some weight making in favor of my conclusion.

LLOYD v. ROYAL UNION MUT. LIFE INS. CO.

(District Court, N. D. Iowa, Cedar Rapids Division. October 3, 1917.)

No. 90.

1. WITNESSES ⟸52(5)—COMPETENCY—HUSBAND AND WIFE.
   Code Iowa, 1897, § 4607, providing that neither husband nor wife can be examined in any case as to any communication by the one to the other, does not prevent either testifying to transfer of a claim by one to the other.
2. INSURANCE ⟸585(3)—LIFE INSURANCE—BENEFICIARY—DIVORCE.
   Right of beneficiary under life policy on her husband's life is not defeated by divorce.
3. INSURANCE ⟸585(1)—LIFE INSURANCE—BENEFICIARY—VESTED INTEREST.
   Beneficiary under a policy of a company organized under the life insurance laws, as distinguished from a fraternal or mutual benefit association, takes a vested interest, which cannot be impaired by act of assured and the company without her assent.
4. INSURANCE ⟸587—LIFE INSURANCE—ACTION—DEFENSE—DUPLICATE POLICY WITH NEW BENEFICIARY.
   It is no defense to beneficiary's action on life policy, providing that under certain conditions insured may designate a new beneficiary, by filing written request, "together with this policy, such change to take effect on the indorsement thereof on the policy by the company," that, while the policy was in the named beneficiary's hands, it accepted from assured his affidavit that the policy was lost, and his indemnity agreement, and issued in lieu of the policy a duplicate, on which it indorsed the name of another as beneficiary.

At Law. Action by Anzonetta M. Lloyd against the Royal Union Mutual Life Insurance Company. Judgment for plaintiff.

The plaintiff, Anzonetta M. Lloyd, a citizen of Illinois, brings this suit to recover from the defendant, Royal Union Mutual Life Insurance Company, an Iowa corporation, the sum of $5,000 and interest thereon, alleged to be due her upon a policy of insurance issued by the defendant March 4, 1912, upon the life of Edwin A. R. Lloyd, who was then the plaintiff's husband, in which plaintiff is named as the beneficiary entitled to receive the amount of such insurance upon the death of said Lloyd, a copy of which policy is attached to the petition as an exhibit. The plaintiff also alleges that, about March 18, 1912, Lloyd delivered to her said policy of insurance under an oral agreement with her that she should pay the annual premiums thereon from her own separate funds, during the lifetime of said Lloyd and receive the amount of such insurance upon his death; that thereafter she furnished the money to Lloyd from her own funds to pay such premiums until his death, which occurred December 25, 1915; that she has made due proofs to the defendant of such death, and demanded of it the amount due upon such policy, which it has refused to pay, and she asks judgment therefor.

The defendant's answer is in two counts or divisions, in the first of which it admits the issuance of the policy payable to the plaintiff as beneficiary, the payment of the annual premiums thereon, the death of Lloyd, and that said policy was in full force at the time of his death; and further alleges that it has neither knowledge nor information sufficient to form a belief as to whether or not the plaintiff paid the annual premiums upon said policy, or that said Lloyd ever transferred or delivered said policy to the plaintiff, and denies that plaintiff is entitled to recover either as beneficiary or as assignee or owner of said policy.

In the second division of its answer the defendant alleges as a further and equitable defense: That on or about February 4, 1915, and during the lifetime

of the insured, he filed with the defendant company his affidavit, stating that said policy had been lost and requesting the issuance of a duplicate thereof. That, relying upon the truth of said affidavit, the defendant did issue and deliver to said Edwin A. R. Lloyd a duplicate of said policy, and thereafter at his request and the presentation of said duplicate to its home office it did on February 8, 1915, indorse such duplicate as follows: "In accordance with the application of the insured the beneficiary under this policy is hereby changed from Anzonetta Lloyd, wife, to Della L. Kirk, mother of the insured. [Signed] Royal Union Mutual Life Insurance Company, Snyder A. Foster, Secretary." That thereby the said beneficiary was changed, and said Della L. Kirk became the beneficiary under said policy. That shortly after the death of the insured said Della L. Kirk filed written proofs of his death claiming to be the beneficiary under said policy, and thereafter on March 29, 1916, commenced suit in the district court of Cerro Gordo county upon said duplicate policy against this defendant; and such proceedings were had in said cause that on November ——, 1916, judgment was rendered in favor of said Della L. Kirk against this defendant for full amount thereof and costs. It further alleges that no written assignment or transfer of said policy was ever made by said Lloyd to the plaintiff, as required by the terms of said policy, and it prays that said alleged assignment and transfer of said policy to plaintiff be canceled and held for naught, that said policy in the hands of plaintiff be surrendered to the defendant or to the clerk of this court for the defendant, that plaintiff's petition be dismissed at her costs, and that defendant have judgment for such and further relief as it may be entitled to.

The policy contains the following clauses: "If the right of revocation has been reserved, or in case of the death of the designated beneficiary, the insured may at any time while the policy is in force, and subject to any existing assignment of the policy, designate a new beneficiary (with or without the right of revocation) by filing written request therefor at the home office, together with this policy; such change to take effect on the indorsement thereof on the policy by the company." "No assignment hereof shall be binding upon the company unless a duplicate original thereof shall have been filed at the home office. Assignment blanks will be furnished upon application. Proof of interest may be required when the policy becomes payable, or when any settlement thereof or thereunder is demanded. The company does not guarantee the validity of any assignment."

For reply to the second division of defendant's answer the plaintiff says: That at about the time of the issuance of the policy it was orally agreed between the insured, Edwin A. R. Lloyd, and the plaintiff, that, in consideration of the plaintiff paying said insured the premiums to become due on said policy, the said policy should be and remain the property of the plaintiff, and plaintiff entitled to the proceeds thereof upon his death; that said policy was by said insured delivered to the plaintiff in pursuance of said oral agreement, and has ever since remained in her possession up to the time of his death; that, relying on said agreement, she paid to the insured the annual premiums on said policy as they became due, the total sum so paid being about $600; that plaintiff had no knowledge of the alleged application for the issuance of a duplicate policy, or the issuance of one, and had never consented to the making or indorsing of said alleged change of beneficiary upon the policy until after the death of Lloyd; that said original policy was never at any time lost, but was at all times up to the time of the death of said insured in the possession of this plaintiff as owner thereof. Plaintiff further alleges that defendant received from said insured and now holds an indemnity agreement protecting defendant from loss by reason of issuing said duplicate policy; that the estate of said insured is solvent, and said indemnity agreement affords the defendant full protection against loss by reason of any judgment in favor of Della L. Kirk, as alleged in defendant's said answer. Plaintiff further avers that said insured had, as against this plaintiff, no right to change, and did not in fact change in accordance with the provisions of said policy, the beneficiary originally named therein, and said attempted change is void and of no effect as against this plaintiff.

The parties thereupon stipulated in writing that the cause should be transferred to the equity side of the court and tried to the court without a jury.

Neither party has challenged the sufficiency of the pleading, but the defendant, before answering, filed a motion asking that the plaintiff be required to bring in as a party to the suit the said Della L. Kirk, that her rights in or to said policy might be determined, alleging that the insured, prior to his death, designated her as beneficiary in the policy instead of the plaintiff; but such motion was never called to the attention of the court prior to the hearing, and was never ruled upon.

Leslie H. Whipp, of Chicago, Ill., and Crosby & Fordyce, of Cedar Rapids, Iowa, for plaintiff.

Dawley, Jordan & Dawley, of Cedar Rapids, Iowa, for defendant.

REED, District Judge (after stating the facts as above). But two questions are presented for determination:

First. Did the insured, shortly after the policy was issued, deliver the same to the plaintiff upon an oral agreement with her that she was to pay from her own funds the annual premiums thereon as they matured, and receive the amount of the insurance upon his death? And

Second. Did the insured prior to his death change the beneficiary named originally in the policy from his wife, the plaintiff, to his mother, Mrs. Kirk, in accordance with the terms prescribed in the policy?

[1] As to the first of these questions, it is the contention of the defendant (1) that the alleged oral assignment of the policy is not proven; or (2) if proven, that the policy under its terms can only be assigned in writing. The first of these contentions is that plaintiff, under section 4607, Code of Iowa (1897), is not a competent witness. That section provides:

"Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted."

This section does not forbid either the husband or wife from testifying to the transfer of a claim by one to the other. Hanks v. Van Garder, 59 Iowa, 179, 13 N. W. 103; Sexton v. Sexton, 129 Iowa, 487, 491, 492, 105 N. W. 314, 2 L. R. A. (N. S.) 708; Wigmore on Evidence, § 2226, and note.

(2) But the policy does not forbid its assignment. It only provides that no assignment thereof shall be binding upon the company unless a duplicate thereof shall have been filed at the home office. Section 3046 of the Iowa Code (1897) provides:

"When by the terms of an instrument its assignment is prohibited, an assignment thereof shall nevertheless be valid, but the maker may avail himself of any defense or counterclaim against the assignee which he may have against any assignor thereof before notice of such assignment is given to him in writing."

Under this section an assignment of a policy of insurance, by the terms of which an assignment is expressly prohibited, is permitted, and the assignee may sue thereon in his own name. Mershon v. National Ins. Co., 34 Iowa, 87; Farmers' & Traders' Bank v. Johnson, 118 Iowa, 282, 286, 91 N. W. 1074.

[2, 3] As to the sufficiency of the testimony to establish the oral transfer of the policy, I find as a fact from the evidence that the policy,

shortly after it was made, was delivered by the insured to the plaintiff, as claimed by her, under an oral agreement that she was to pay from her own funds the annual premiums upon the policy, and at the death of the insured she was to receive the amount of the insurance, either as owner of the policy or as the beneficiary named therein, and that she fully performed her part of this agreement. The fact that plaintiff was afterwards divorced from the insured does not defeat her right to the insurance. White v. Brotherhood of Yeoman, 124 Iowa, 293, 295, 99 N. W. 1071, 66 L. R. A. 164, 104 Am. St. Rep. 323; Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457–462, 24 L. Ed. 251.

The defendant is a life insurance company organized under the laws of Iowa, and is therein conducting such an insurance business, and is not a fraternal or mutual benefit association. This distinction between these two classes of insurance is fundamental, and should be observed in the determination of these questions. In Carpenter v. Knapp, 101 Iowa, 712, at page 724, 70 N. W. 764, at page 766, 38 L. R. A. 128, this distinction and the rule in Iowa are clearly stated as follows:

"It is the general rule that a beneficiary under an ordinary life policy takes a vested interest therein at the moment the policy is executed and delivered, which cannot be impaired or defeated by any act of the assured, or of the assured and the company, to which said beneficiary does not assent" (citing many authorities).

To the same effect are Bliss on Life Insurance (2d Ed.) § 517; Wilmaser, Ex'r, v. Continental Life Ins. Co., 66 Iowa, 417, 23 N. W. 903, 55 Am. Rep. 277; Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Central Bank v. Hume, 128 U. S. 195, 206, 9 Sup. Ct. 41, 32 L. Ed. 370; Indiana National Life Ins. Co. v. McGinnis, 180 Ind. 9, 101 N. E. 289, 293, 45 L. R. A. (N. S.) 192; 3 A. & E. Enc. Law (2d Ed.) 980; Washington Life Ins. Co. v. Berwald, 97 Tex. 111, 76 S. W. 443, 1 Ann. Cas. 682, and note; Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283; Thomas v. Thomas, 131 N. Y. 205, 30 N. E. 61, 27 Am. St. Rep. 582; Strong v. Supreme Lodge, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941; Perry v. Tweedy, 128 Ga. 402, 57 S. E. 50, 119 Am. St. Rep. 393, 11 Ann. Cas. 46; Savage v. Modern Woodmen of America, 84 Kan. 63, 113 Pac. 802, 33 L. R. A. (N. S.) 773; 25 Cyc. 889–894.

And it follows that such policies are assignable, unless that be forbidden by statute, the company's charter, or the terms of the policy itself. Carpenter v. Knapp, above. The only exceptions to this rule are some early cases in Wisconsin, Clark v. Durand, 12 Wis. 223, which seems to have been modified in Ellison v. Straw, 116 Wis. 207, 92 N. W. 1094, and some later cases. 25 Cyc. 890. But as to mutual benefit associations the rule is different, and it is generally held in such cases, wherever the question has arisen, that the member may change the beneficiary named in the certificate or policy, unless the contract itself, its charter, or the statute provides to the contrary. Carpenter v. Knapp, above, and the authorities there cited. But this must be done in strict compliance with the contract, where that prescribes how the change shall be made. Wendt v. Iowa Legion of Honor, 72

Iowa, 682, 34 N. W. 470; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Shuman v. A. O. U. W., 110 Iowa, 642, 82 N. W. 331; Modern Woodmen v. Little, 114 Iowa, 109, 86 N. W. 216; and see Wandell v. Mystic Toilers, 130 Iowa, 639, 105 N. W. 448; also Bauer v. Samson Lodge, 102 Ind. 262, 1 N. E. 571; Assurance Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Freund v. Freund, 218 Ill. 189, 75 N. E. 925; American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Grand Lodge v. Connolly, 58 N. J. Eq. 180, 43 Atl. 286.

Many other authorities may be cited to the same effect, and it may be admitted that authorities to the contrary might be cited. But the authorities to the contrary are mostly based upon, or assumed to be, certificates issued by mutual benefit or fraternal associations. Thus in Wandell v. Mystic Toilers, 130 Iowa, 639, 105 N. W. 448, above, the contract in suit was upon a benefit certificate issued by the Mystic Toilers, a purely fraternal association, to a Mrs. Wandell, payable to the plaintiff who was her husband as beneficiary. The association made no defense, but the father of Mrs. Wandell intervened, and claimed the right to the insurance upon the ground that his daughter, the insured, prior to her death had changed the beneficiary from her husband to her father. The only question for determination was whether or not the change was effected in the manner prescribed in the certificate. Some members of the court were of opinion that the change had been so effected, and that the intervener was entitled to recover upon that ground. Others of the court were of opinion that the recovery should be upon the principles of equity. The previous cases in Iowa are reviewed, and Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470, Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19, Modern Woodmen v. Little, 114 Iowa, 109, 86 N. W. 216, and Carpenter v. Knapp, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128, are approved.

In Central Bank v. Hume, 128 U. S. 195, at page 206, 9 Sup. Ct. 41, at page 44, 32 L. Ed. 370 (1915), there is a full review of the authorities, and it is said by Mr. Chief Justice Fuller:

"It is indeed the general rule that a policy of insurance (ordinary life) and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named without his or their consent" (citing authorities, including Ricker v. Charter Oak Ins. Co., 27 Minn. 193, 6 N. W. 771 [38 Am. Rep. 289], and other cases before cited).

In Modern Woodmen v. Little, 114 Iowa, 109, 86 N. W. 216, where it was contended that a change of beneficiary (in a fraternal association) by the insured in a manner other than as provided in the policy effected such change, the Supreme Court said:

"We cannot agree with the reasoning or the conclusions in these cases. Surely it is not correct to say that the provisions of the contract as to the mode in which beneficiaries may be changed are solely for the benefit of the insurer. They are for the benefit of all concerned, to the end that it may at all times be certain who is the beneficiary. * * * We think it entirely clear, upon reason and authority, that where the parties have agreed upon a mode by which a change of beneficiaries may be effected the change can only be made in that mode, unless by subsequent agreement * * * a different mode is agreed upon."

To the same effect are Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470; Hainer v. Legion of Honor, 78 Iowa, 245, 43 N. W. 185; Shuman v. Ancient Order of United Workmen, 110 Iowa, 642, 82 N. W. 331.

The last-named case was a suit by the plaintiff upon a certificate of the Ancient Order of United Workmen, a purely fraternal association, issued to Phillip J. Shuman, in which the plaintiff, his widow, was named as beneficiary. The defendant Gruver filed an answer and cross-petition, in which it was admitted that plaintiff was the beneficiary named in the certificate, but alleged that by written indorsement upon said certificate the insured surrendered the same to the order and directed a new certificate to issue, in which Gruver should be named as beneficiary. The order admitted its liability on the certificate to some one, and paid the amount due thereon into court, to await the final determination of the matter. The trial resulted in a judgment in favor of defendant Gruver. The constitution of the order provided for a change of beneficiary in the following language:

"Any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate in a form prescribed; * * * but no change shall be valid, or have any binding force or effect, until such change shall have been reported to the grand recorder, the old certificate filed with him, and new beneficiary certificate issued thereon: * * * Provided, however, should it be impracticable for the recorder to witness the signature of the brother, attestation of his signature may be made by a notary public, or an officer authorized to acknowledge deeds, and a change made in any other manner shall not be valid."

On the back of the certificate was the following indorsement:

"I, P. J. Shuman, to whom the within certificate was issued, do hereby revoke my former direction as to the payment of the beneficiary fund due at my death, and now authorize and direct such payment to be made to John Wesley Gruver, bearing the relationship to myself of nephew. Witness my hand and seal this 27th day of May, 1897. P. J. Shuman. Witnesses to signature: J. G. Graves, I. W. Scott. Attest: A. Campbell, Recorder."

The recorder, Campbell, was not present when this indorsement was signed by P. J. Shuman, nor did he see Shuman after he signed it and before his death. His attestation was made some time after Shuman died, but on the same day. No fee was paid for the change. Shuman died on the next day, May 28th. The certificate, with the indorsement thereon, was mailed to the grand lodge the same day that Shuman died, and was received at its office in Des Moines the next day; but no new or other certificate was issued by the grand lodge. Judge Sherwin, speaking for the Supreme Court, said:

"That the constitution of the Ancient Order of United Workmen entered into and became a part of the certificate of insurance issued to Phillip J. Shuman cannot be questioned. The constitution gave him the right to change beneficiaries, but explicitly pointed out the manner in which such change should be made. This method was fixed, and was binding upon the assured. It was the method he had agreed to, and he had no absolute legal right to effect a change of beneficiaries in any other manner [citing Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19, Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470, and other cases]. The appellee Gruver contends that this case, having been tried in equity, falls within certain exceptions, which have been recognized by the

courts in some cases involving a change of beneficiaries"—which exceptions are named in Supreme Conclave v. Cappella (C. C.) 41 Fed. 1.

Continuing, Judge Sherwin said:

"This case is not within * * * the exceptions named. The attempted change of beneficiaries was void, under the circumstances, and did not vest any right in John W. Gruver. This conclusion is not in conflict with Supreme Conclave v. Cappella [C. C.] 41 Fed. 1, relied upon by appellee, nor with the other cases cited by him which we have been able to examine. The plaintiff is entitled to the proceeds of the certificate issued by the Ancient Order of United Workmen to Phillip J. Shuman, her husband, and the custodian of said fund is directed to pay the same to her."

The only apparent difference between that case and this is that in this case a duplicate policy of insurance was issued upon the affidavit of the insured that the policy was lost, which was not true, and that the mother of the insured was named upon the duplicate policy as the beneficiary in lieu of the plaintiff; but this difference is deemed immaterial, and not sufficient to warrant a ruling different from that held in the Shuman Case.

The defendant relies upon Townsend v. Fidelity & Casualty Co., 163 Iowa, 713, 144 N. W. 574, L. R. A. 1915A, 109, as sustaining its contention. That was a suit upon two accident insurance policies wherein the insured a single man had named as beneficiaries a brother in one of the policies and a sister in the second. After his injury he made a will, in which he bequeathed to the plaintiff the proceeds of the first of the policies and certain other personal property, and to one Ellis in trust for his creditors, the proceeds of the second policy. Two days after his death, notice thereof, and of the will, and the attempted change of beneficiaries therein was given to the defendant Casualty Company. The company, holding to the view that no change of beneficiaries had been effected, declined to recognize the alleged rights of the legatees under the will, and they brought these actions to recover upon the policies. The person named as beneficiary in each of the policies intervened and asked to be adjudged entitled to receive the fund. The trial resulted in judgments in their favor, from which the plaintiff legatees under the will appealed. The defendant answered, admitting the issuance of the policies, the death of the insured, and that they were in force at the time of his death, but alleged that, according to the terms of the policies, the matter of changing the beneficiaries of such insurance is governed by rules indorsed upon the policies, which are:

"Sec. 20. The consent of the beneficiary shall not be required to the surrender or assignment of this policy, or to the change of beneficiary, or to any other change in the policy. No assignment of interest under this policy shall bind the company, unless the written consent of the company is indorsed hereon by the president, vice president, or one of the secretaries of the company. * * *"

It was held that under these rules there were no restrictions upon the right of the insured to change the beneficiaries in such manner as he might elect, and that such a change was effected by his will; that the assignment of the policy only was restricted, but, as no assignment thereof was attempted, the insured was at liberty to dispose of the pro-

ceeds of the policies in any way that he deemed advisable. That no departure from any prior decisions of the court was intended appears from the fact that Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19, Modern Woodmen v. Little, 114 Iowa, 109, 86 N. W. 216, and some other cases are reaffirmed. The case upon its facts seems inapplicable to any question involved in this controversy.

[4] The policy in suit was prepared by the defendant, and in plain, unambiguous terms provides:

"If the right of revocation has been reserved, or in case of the death of the designated beneficiary, the insured may at any time while the policy is in force, and subject to any existing assignment thereof, designate a new beneficiary (with or without the right of revocation) by filing written request therefor at the home office, together with this policy; such change to take effect on the indorsement thereof on the policy by the company."

These terms, if complied with, would have protected all of the parties to this controversy. The defendant knew that plaintiff was named as beneficiary in the policy, and should have known that upon its issuance and delivery she acquired an interest therein that could only be divested by a strict compliance with the terms it had so written. Instead of such compliance, it accepted from the insured his affidavit that the policy was lost (when in fact it had not been) and his agreement of indemnity therein, and issued in lieu thereof a duplicate, upon which it indorsed the name of his mother as beneficiary, in lieu of the plaintiff, in plain violation of the terms of the policy. If it shall suffer because of such attempted change, it will be because of its own disregard of the contract it had so written.

The conclusion therefore is that the second division of defendant's answer, praying equitable relief against the plaintiff, should be dismissed, for want of equity, at defendant's cost.

Upon plaintiff's petition and the first division of the defendant's answer thereto, a jury trial having been waived, the plaintiff is entitled to judgment against the defendant for $5,000, with interest thereon from the date of the delivery of plaintiff's proofs under the policy upon the defendant, with costs.

It is ordered accordingly.

M. HOHENBERG & CO. v. MOBILE LINERS, Inc.

(District Court, S. D. Alabama. July 24, 1917.)

No. 574.

REMOVAL OF CAUSES ⊂⊃12—RIGHT OF REMOVAL—CONSTRUCTION OF STATUTE.

Where a federal District Court has jurisdiction of a suit by reason of diversity of citizenship and the amount in controversy, and such suit is brought in a state court of a state of which defendant is not a resident, his right to remove the cause into the federal court for that district given by section 28 of Judicial Code (Act March 3, 1911, c. 231, § 28, 36 Stat. 1094 [Comp. St. 1916, § 1010]) is absolute, and cannot be contested by plaintiff on the ground that he could not have brought the suit in that court over defendant's objection.

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

At Law. Action by M. Hohenberg & Co. against Mobile Liners, Incorporated. On motion by plaintiff to remove to state court. Denied.

Stevens, McCorvey & McLeod, of Mobile, Ala., for plaintiff.
Palmer Pillans, of Mobile, Ala., for defendant.

ERVIN, District Judge. This cause comes on to be heard on the motion of plaintiff to remand the cause to the state court. The question depends on the proper construction of the statute as codified in the Judicial Code.

The District Courts are, by section 24 of the Judicial Code (Comp. St. 1916, § 991), given jurisdiction of all suits of a civil nature at common law or in equity where the matter in controversy exceeds $3,000 and is between citizens of different states. Section 51 (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 the plaintiff or defendant. (Italics mine.)

It will be observed that the jurisdiction to determine a controversy between citizens of different states, is conferred by section 24; while section 51 fixes the venue in which *the plaintiff* is authorized to institute suit by *original process or proceeding.* Section 51 prohibits only the institution of original suits, and the words characterizing the beginning of such suits "by any original process or proceeding" certainly intimates that suits may be gotten into this court by some other process.

The statement had already been made that no civil suit shall be brought in any District Court against any person in any other district than that whereof he is an inhabitant. Now, the words "by any original process or proceeding" were absolutely unnecessary to add anything to the previous statement that no civil suit shall be brought in any district other than that of the residence of the defendant. The inclusion of these words "by any original process or proceeding" can, to my mind, have only the effect of qualifying or limiting the statement as to *bringing* of the suit in a district other than that whereof the defendant is an inhabitant, by intimating that the suit might be gotten into such court by some process other than that of the original process or proceeding.

The statement that where the jurisdiction of the court is founded on the fact that the action is between citizens of different states that suit may be brought either in the district of the residence of the plaintiff or the defendant carries to my mind the same statement, namely, that the suit shall not be originally instituted in any district other than that of the residence of the plaintiff or defendant. If, however, the court has jurisdiction of the cause of action because it is between citizens of different states, and this cause of action can be removed into the federal court, under any known provision of the law, such removal would not be *prohibited* by the language of section 51.

Section 28 provides:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought in the 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."

It will be noticed that the provision as to removal is not on its face in any manner limited to removal to a district in which the suit might originally have been brought. It gives the right to remove such suit *of which the District Courts of the United States are given jurisdiction,* and this is the only limitation placed by the removal statute upon the right to remove. The only condition is that the defendant or defendants shall be nonresidents of the state in which the suit is brought.

Now, it seems to me that where the federal court is given jurisdiction of a suit which is instituted in the state court, and petition for removal is filed by a nonresident of such state, and the fact of nonresidence and jurisdiction being shown by the petition, this is all that is required by the removal statute to transfer such cause from the state to the federal court.

A careful reading of the provisions above quoted leads me to conclude:

First. That the jurisdiction is given to the District Court by section 24 where the controversy is between citizens of different states.

Second. That the plaintiff has the right in the first instance, when he and defendant are citizens of different states, to institute it by any original process or proceeding in the District Court of the United States in the district of the residence of either the plaintiff or the defendant.

Third. When the plaintiff has exercised *his* election to *sue* in the court of a state of which defendant is a nonresident, that such defendant is given the *right* under section 28 to remove such suit to the District Court of the United States for such district.

These provisions have never denied to the plaintiff in the first instance the right to sue in the state court, but they have given him the right to elect to sue either in the state court or in the federal court, but, while leaving to the plaintiff such election in the first instance to sue in the state court, it then gives to defendant, being a nonresident of such state, the *right* to remove such suit to the federal court. It then follows that, if such right is given to the defendant, plaintiff cannot complain of its exercise by defendant any more than defendant could have complained of plaintiff instituting such suit in the District Court in the first instance. If this is a proper construction of the act *as written,* I do not see where the court is concerned with the question as to whether Congress intended to constrict or to enlarge the jurisdiction of the court.

Conceding that the purpose of the act of 1888 was to limit the jurisdiction of the United States courts by increasing the amount necessary to give such courts jurisdiction, and was also to limit the right of removal which existed under the act of 1875 so as to give such right only to the defendant, being a nonresident of the state, still the right

given to such defendant by the act of 1888 must be determined by the language used in the act of 1888, where such language is clear and positive. The purpose of this act cannot be controlled or modified beyond the purpose clearly expressed therein, by the general purpose of the act to limit the jurisdiction. If the act of 1888 therefore gives to the defendant, being a nonresident of the state, the right to remove a suit to the federal court of the district in which the suit is brought in the state court, then no general purpose or limitation should control this expressed right so given to the defendant.

Under the act of 1875 either party had the right to remove, while under the act of 1888 the right of removal is given only to the defendant, with the added condition that he is a nonresident of the state; still, when this condition exists, and the jurisdiction of the court exists, the right of removal so given to the defendant by this act cannot be limited any further than the express terms of the act go.

The fact that the act of 1888 takes away from the plaintiff, who has brought his suit in the state court, the right to remove such suit to the federal court, certainly cannot affect the right given by the act to the *defendant*. Certainly the language of section 28, giving the right of removal in the following words:

"Any other suit, of a civil nature, at law or in equity, of which the District Court of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought in any state court, may be removed into the District Court of the United States, for the proper district, by the defendant or defendants therein, being nonresidents of that state"

—is clear and unequivocal. It gives the right of removal absolutely to defendant when the named condition exists, and gives no veto on such right to plaintiff.

Plaintiff having been given by the provisions of section 51, his election to sue in the state or federal court, the defendant by this language is given the absolute right of removal, and there is not one word or intimation anywhere in the act that, where the proper jurisdiction exists in the federal court, and the proper conditions exist for the invocation by defendant of this jurisdiction, such exercise by defendant of his right so given is to be controlled or negatived in any manner by the plaintiff. If plaintiff and defendant are residents of different states, and plaintiff brings his suit in the District Court of a third state, defendant could appear and waive the objection or could object on the ground of venue, and the court would on this ground dismiss the suit, whether plaintiff objected or not. If plaintiff brings suit in a state court in his district, defendant, being a nonresident of such state, can remove such suit because of section 28, whether plaintiff objects or does not object. On what ground can be object? Must he not point to some provision of the original act, or the codification of it, giving him the right to object, and if there be no such provision, on what can he base an objection? If it had been intended by the provisions of this act to allow the plaintiff to negative the effort on the part of defendant to remove the suit, certainly some word or some intimation would have been put in the act to show this right on the part of the plaintiff. The fact that we find no word or intimation anywhere in the act giv-

ing the plaintiff the right to veto any effort on the part of defendant to remove the suit is conclusive, to my mind, that Congress did not intend to give plaintiff any such right. To deny to defendant the right so given to remove the suit is to deny to him a right clearly and expressly given in unequivocal language, and if the courts can deny him this right, then they can deny him any other right which may be given him by Congress.

Construing the provisions of the act as a whole, and giving them what seems to me to be the clear intent of Congress, I find that jurisdiction is given to the federal courts, where there is diversity of citizenship; that on this state of facts plaintiff is given in the first instance the election to sue either in the district of his residence or in the district of the residence of the defendant. If plaintiff elects to sue in the district of his own residence, defendant, being a nonresident, has the absolute right to remove the suit to the federal court of such district.

The provisions of section 51 limiting the bringing of the suit in the first instance are limitations to bind the plaintiff, and do not bind the defendant. The provisions of section 51 expressly so state, and do not in any manner undertake to regulate or control or limit the right given by section 28 to defendant. If plaintiff, being a resident of one state, and defendant of another, bring his suit in a federal court of a third state, defendant can, by appearing generally, waive the objection as to venue, and such court has jurisdiction to try such suit. If therefore, plaintiff brings his suit in a state court, defendant is given by section 28 the right to remove it to this same court, and it has just as much jurisdiction to try such case as if plaintiff had originally brought it there.

I therefore conclude that the motion to remand should be denied.

In re BURG.

(District Court, N. D. Texas, Dallas Division. August 13, 1917.)

No. 1345.

1. BANKRUPTCY ⇐77—FILING PETITION—NUMBER OF CREDITORS.
   Relative to right, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, of a single creditor for $500 to file petition to have the debtor adjudged bankrupt, permissible if there be less than 12 creditors, holders of small claims for household supplies, payable monthly, will be disregarded, under the maxim of de minimis.
2. FRAUD ⇐59(1)—FRAUD OF PRINCIPAL—MEASURE OF DAMAGES.
   The only complaint of one employed to sell as agent on commission a particular machine being that it did not come up to the representations made in the literature sent out by the employer, his measure of damages is not that for breach of contract, but that for deceit, which is the loss sustained, and does not include the profits of which he has been deprived.
3. BANKRUPTCY ⇐91(1)—SOLVENCY—BURDEN OF PROOF.
   On contest of a petition in involuntary bankruptcy based on fraudulent concealment of property, the debtor has, under Bankr. Act, § 3, subd. C (Comp. St. 1916, § 9587), the burden of showing his solvency.

4. BANKRUPTCY ⊂=54—SOLVENCY—ASSETS—CONCEALED PROPERTY.
Funds which the alleged bankrupt has concealed cannot be included in his assets in determining his solvency.

5. BANKRUPTCY ⊂=56—ACT OF BANKRUPTCY—"CONCEALMENT" OF PROPERTY.
It was a concealment of his property, constituting an act of bankruptcy, for the debtor, on demand by a creditor to know what he had done with money, to reply that he had it in a safe place, and that it was available on a settlement, but that he had offsets amounting to more than the creditor's claim.

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

In Bankruptcy. In the matter of C. N. Burg, alleged bankrupt. Bankruptcy adjudged.

Etheridge, McCormick & Bromberg, of Dallas, Tex., for petitioning creditors.

Crane & Crane, of Dallas, Tex., for bankrupt.

JACK, District Judge. The Waterloo Gasoline Engine Company, alleging that it was a creditor of Burg in an amount in excess of $500, and that he had less than 12 creditors, filed petition praying his adjudication as a bankrupt.

Defendant filed answer in which he excepted to the plaintiff's petition, on the ground that he had more than 12 creditors, and, further answering, denied that he was bankrupt, denied that he had committed any act of bankruptcy, and specially denied that he was indebted to the petitioning creditor, against whom he pleaded a claim in offset.

[1] The list filed by defendant showing his creditors at the date of the filing of the petition discloses 24, not including the plaintiff. Only 3 of them were for more than $100, the highest being for $252.56, and 12 of them were for sums under $5. These small claims were current accounts for groceries, drugs, dry goods, milk, gas and oil, telegrams, telephone bills, water, light and gas bills, etc., such as are contracted and paid for from month to month. Such creditors are practically secured, as their bills have to be paid from month to month before further necessities can be obtained. The bankruptcy law is never invoked by any such small creditors, who themselves have adequate remedy for the collection of their accounts by cutting off further supplies. As to these accounts, I think the maxim, "De minimis non curat lex," applies. Such was the holding of Judge Treber in Re Blount (D. C.) 142 Fed. 265. As was well said in that case:

"If the contention of the respondent is to be sustained, the involuntary feature of the Bankruptcy Act would be a dead letter; for any insolvent who desired to prefer some of his creditors, leaving out one or two, could always manage to have as many as 20 creditors by purchasing for his personal use and that of his family small things amounting to sums ranging, as in the case at bar, from 10 cents to $2, and having them charged. By paying them the succeeding month, after he had made some small purchases, to be charged again, it would always leave a number of creditors ready to be used whenever proceedings of this kind are instituted against him. It is hardly reasonable to suppose that creditors of that kind, who feel secure in having their bills promptly paid, would want to incur the risk of losing a good customer in order to join a bona fide creditor to institute proceedings in bankruptcy. All laws

must be given a reasonable construction, and for this reason the claims herein before recited must be disregarded in determining the number of the creditors of Mr. Blount at the time these proceedings were instituted, and if this is done it clearly appears that there were less than 12 creditors."

So in the case at bar, if these small claims are disregarded, there are less than twelve creditors. Accordingly the exception was overruled. However, later, and before the trial of the case on the merits, two other creditors intervened, so that, as finally presented, there were three petitioning creditors.

Briefly stated, the facts out of which plaintiff's claim arose, and on which defendant bases his counterclaim and set-off, are as follows:

Plaintiff is a manufacturer of kerosene and gasoline engines, and a tractor known as the Waterloo Boy, so named for the home city of the company. Burg, who had been working as a clerk in an implement house in Dallas, which handled this tractor, on January 28, 1916, entered into a contract with the plaintiff, under the terms of which he was employed for one year as agent in the state of Texas for the sale of the engines and tractors manufactured by plaintiff. It was agreed that Burg should put at least two men besides himself at work in organizing the territory and pushing the sales, and that he should pay $522.50 net for each tractor shipped from the factory, and $550 net for each tractor shipped from some distributing point in Texas, the plan being that Burg should order the tractor to be shipped to the purchaser secured by him at a price in advance of that named, the difference to be his commission. Payment was to be made by a sight draft by Burg on the purchaser with bill of lading attached, returnable to plaintiff at Waterloo, Iowa, the plaintiff to then give Burg credit for his commission.

It was further agreed that the Waterloo Company should carry at three distributing points a stock of four tractors for the convenience of Burg, and should likewise carry a sufficient stock of gasoline engines at these points to take care of the trade. Gasoline engines were to be sold at prices named by the Waterloo Company, the defendant to receive a commission of 10 per cent. thereon. He was likewise to receive a commission of 15 per cent. on sales of extra parts for repairs. Burg was to be furnished by the company with literature for distribution in his territory.

Operating under this contract, Burg sold a number of tractors for which he did not draw drafts payable to the company, as stipulated in the contract, but himself collected the price and failed to account for same. Repeated demands were made on him by letter for a statement and remittance of the amount collected, but without avail. Finally, in answer to a letter in December threatening to place the matter in the hands of an attorney, Burg wrote, urging that this be not done, and adding:

"There are things in your claim for goods that have been returned to the warehouse by customers and then to you at factory by forwarding company in car that was shipped you some time ago."

Finally Johnson, manager of the company, came to Dallas and checked up his account with Burg. The statement, as made out by

Johnson, was several thousand dollars too much, and, after checking over the books, it was found that there was due the plaintiff $8,295.69, as against which Burg for the first time made claim for damages suffered by reason of the fact that the tractors sold did not come up to representation, claiming that he had for that reason lost in profits more than the amount of the balance due to the Waterloo Company.

On the trial of defendant's claim much evidence was offered as to the merits and demerits of the tractor. I am of the opinion that the tractor was too light for the work required of it in plowing black waxy lands of Texas. The greatest defect perhaps was in the radiator. It held only about 8 gallons of water, when it was represented in plaintiff's literature to hold 12. As a result the water boiled quickly, and the engine became overheated. A fresh supply of water had to be frequently poured into the radiator, and even then the results were not good. Furthermore, the wheels were weak. The ends of the spokes were bent at the rim into the form of an L and riveted on, when they should have been, and later were made, T-shaped at the rim, thus giving a stronger purchase. These defective spokes caused the wheels to give way. There was also much trouble experienced with the valves.

As soon as the company learned of the trouble with the wheels, they notified Burg that they would replace all wheels that gave way with heavier wheels made with the T-spokes, charging the purchasers only the freight. The radiators, however, could not be changed.

There was more or less delay in shipping out the new wheels, owing to the difficulty in buying iron. As a result the tractor was not popular. There were constant complaints coming in from customers, and finally the company sent, at Burg's request, a mechanic who devoted several months of his time to realigning and repairing the tractors which had been sold. His salary was paid by Burg, $1,032.73. A small part of his time, about ten days, was spent in helping Burg demonstrate the tractors. His salary for ten days would amount to about $30, and it is claimed by Burg that the company should pay all of the rest of the mechanic's salary, say $1,000.

The presence of Mahan was made necessary by the defects in the tractor, for which Burg was in no wise to blame, nor for which am I disposed to place too much blame on the Waterloo Company. Tractor engines are still in the experimental stage, and improvements are constantly being made. What might be a good tractor for sandy lands in other states might prove a failure in the black stiff lands of Texas. I think, however, that $1,000 of Mahan's salary should be credited on the account. The company agrees that a further credit of $307.50 should be given him, being commissions on tractors sold direct by the company in his territory after the term of his contract, but while his name was still being published as the agent and representative of the company. Allowing these two credits would leave $6,988.19 due the company, as against which Burg claims damages more than offsetting same.

[2] There has been no violation of the contract entered into by the parties. Burg undertook to sell as agent a particular tractor, and the company undertook to supply such tractors in such quantities as

might be called for at a given price. The company did this. The only complaint is that the tractor did not come up to the representations made in the literature sent out.

The measure of damages in an action for the violation of a contract is the loss which one has suffered and the profits of which he has been deprived as a direct and proximate result of the breach. This, however, is not an action for violation of a contract, the contract having been fulfilled, but is an action based on fraud and deceit and misrepresentation as to the tractor and what it would do.

In cases of deceit and misrepresentation the remedy of the party deceived is to cancel the contract and sue for such actual loss as he may have suffered. George v. Hesse, 100 Tex. 46, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279.

The measure of the recovery to which Burg is entitled is not the profits which he would have made had the tractors been as represented, even were the evidence sufficiently certain to enable the court to arrive at such profits, but it is the loss which he has sustained, and the evidence fails to show any loss other than the amount paid Mahan, for which he should be allowed a credit.

When Burg discovered that the tractors were not as represented in the literature and were not suited for the purpose for which sold in his territory, he did not elect to rescind the contract, as he might have done, but, on the contrary, he continued to sell the tractors, he claims, relying on the promises of the company to make good the defects. Thus, having continued to sell to his customers tractors which he knew to be unsuited to the work expected of them, he is in poor position to complain of the conduct of the Waterloo Company. Not only did he continue to sell the tractors to the farmers in the territory allotted him, but he deliberately put the price in his own pocket instead of remitting to his principal, in order, he says, that he might protect himself against his principal for furnishing such defective tractors, which he, knowing the defects, nevertheless continued to sell his customers.

The utmost good faith is required of an agent in his dealings with his principal, and the continued collection of funds belonging to the principal, without the latter's knowledge, and failure, notwithstanding repeated demands, to account for same, cannot be justified.

The special items sought to be recovered by defendant are for profits he would have made had R. B. George, T. D. Puckett, and other subagents appointed by him sold the number of tractors they undertook by their contract to sell, and which he averred they would have sold had the tractors been as represented. George deposited with Burg as forfeit money the sum of $600, being $25 each on 24 tractors which he agreed to sell, and on which tractors Burg averred he would have made a profit of $1,320 in addition to the deposit had George sold the machines. He alleges similar loss of profits which he would have made from the sale of other tractors by other subagents who, like George, had made similar deposits. It is by no means certain that these subagents would have made the sales even had the machines been

up to representations, but even so, such lost profits would not constitute the measure of damages in actions of this character.

It may be here noted that, although Burg bitterly complains of plaintiff for not furnishing tractors in strict accord with catalogue representations, and although he claims, and I think the evidence shows, that the tractors furnished were unsuited for the purpose for which they were sold, he has not returned to these various subagents their deposits, but, on the contrary, has appropriated such deposits to his own use.

On Question of Solvency and the Act of Bankruptcy.

[3] The burden of proof was on the defendant, Burg, to show his solvency. In re Crenshaw (D. C.) 156 Fed. 638; In re Schenkein (D. C.) 113 Fed. 421; Bankr. Act, § 3, par. C. (Comp. St. 1916, § 9587).

If to the amount due the Waterloo Company $6,988.19 be added the amounts due various creditors shown in defendant's answer, $687, his total indebtedness would be $7,675, not including deposits made by subagents: George, $600; Burnside, $475; Lee & Co., $625; Puckett, $1,000—or a total of $2,700. Several of these subagents bought a few cars which have been credited on their deposits, so that the whole $2,700 is not due them. There is at least, however, due as much as $2,400, which would bring the total indebtedness of Burg up to $10,000, whereas his total assets aggregate only $9,005.11. Burg claims that, if he were agent of the Waterloo Company, these various deposits were obligations of his principal. The deposits, however, were made on contracts of subagency, and the subagents may look to the agent even if they might also look to the principal. As Burg has the money and does not pretend to have turned it over to his principal, and as he asserts the cars were not up to representation, it seems clear that these subagents would have an action against him for the return of their deposits, and that he would be indebted to them in that amount.

[4] It is not necessary, however, to include the indebtedness due the subagents in determining the solvency of defendant. The evidence submitted fails to show to the satisfaction of the court that his assets were worth $9,005.11, as claimed, or more than his indebtedness. The funds belonging to the Waterloo Company he has concealed, and they therefore cannot be included in his assets in determining the question of solvency.

[5] Johnson testified that just prior to filing the bankruptcy petition, when he demanded of Burg to know what he had done with the money collected on tractors sold, he replied that he had it in a safe place and that it was available on a settlement, but that he had offsets amounting to more than petitioner's claim. It had never before been claimed, as now, that the money had been invested in his business, and the court accepts the testimony of Johnson rather than that of Burg as to what the latter told him about the matter. This constituted a concealing of his property and was an act of bankruptcy. In re Shoesmith, 135 Fed. 684, 68 C. C. A. 322; Ziegler v. Ziegler, 68 Hun, 177, 22 N. Y. Supp. 812.

A decree will be entered adjudicating defendant a bankrupt.

UNITED STATES v. CHICAGO, ST. P., M. & O. RY. CO.

(District Court, N. D. Iowa, W. D. September 18, 1917.)

No. 162.

1. CARRIERS ⟸37—CARRIAGE OF LIVE STOCK—ACTION FOR PENALTY—BURDEN OF PROOF.
   Under Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1916, §§ 8651–8654), declaring that no railroad or common carrier other than by water shall knowingly and willfully confine any cattle or other animals for a period longer than 28 consecutive hours without unloading the same for rest, water, and food for a period of at least 5 hours, unless prevented by storm, or by accidental or other unavoidable cause, which could not be anticipated or avoided by due diligence and foresight, but that on written request of the owner or person in custody of a particular shipment the time of confinement might be extended to 36 hours, the government, suing for the penalty prescribed for violation, must show that the carrier knowingly and willfully confined the shipment of live stock beyond the period prescribed; but, having shown the same, it is incumbent on the carrier to show that its failure to unload the live stock was caused by storm, accident, or other unavoidable causes, which could not have been anticipated or avoided by due diligence.

2. CARRIERS ⟸37—LIVE STOCK—TWENTY-EIGHT HOUR LAW.
   In an action against a railroad company for the penalty prescribed for violating the Twenty-Eight Hour Law, a train dispatcher of another railroad company, whose tracks were used by defendant, must be treated as defendant's agent, where the movement of defendant's trains was governed by such dispatcher.

3. CARRIERS ⟸37—LIVE STOCK—TWENTY-EIGHT HOUR LAW.
   A shipper requested that cattle might be confined for a period of 36 hours without being unloaded. The train on which the cattle were shipped proceeded to within 26 miles of the place where the cattle were to be unloaded. The running time for such 26 miles was about 1½ hours. At that time the cattle had been en route less than 32 hours. The last of the run was made over leased tracks, and the train dispatcher of the lessor company, who directed the movements of such trains, directed the conductor of defendant's train to take a siding at a named station and await the passage of another train. The other train was delayed, and finally, defendant's conductor having communicated with the dispatcher by telephone, was directed to take his train on to the point where the cattle were to be unloaded. Owing to weather conditions, the train had to be cut into sections and brought in one at a time, and for that reason the cattle were confined for more than 36 hours. *Held*, that the carrier was not liable for the penalty, no violation of the Twenty-Eight Hour Law appearing; it not being shown that the carrier willfully and knowingly confined the cattle for more than 36 hours, and it being apparent that the excessive confinement resulted from a storm and other causes over which the carrier had no control.

At Law. Action by the United States against the Chicago, St. Paul, Minneapolis & Omaha Railway Company to recover from the defendant railway company the penalty provided for an alleged violation of the Twenty-Eight Hour Law, as amended by Act Cong. June 29, 1906, c. 3594, 34 Stat. 607. Judgment for defendant.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

Sargent, Strong & Struble, of Sioux City, Iowa, for defendant.

REED, District Judge. On January 31, 1916, some 40 head of cattle were loaded into a car at the Union Stockyards in St. Paul, Minn., at 4:30 o'clock p. m. of that day, to be carried by the defendant, a common carrier by railroad, and its connecting carriers, to Moville, in the state of Iowa. By proper written request of the shipper, the cattle during shipment might be confined for a period of 36 hours without being unloaded for rest, food, and water, as provided by said act of Congress. The car in which said cattle were loaded was delivered to defendant shortly thereafter at South St. Paul, Minn., and was carried by it to Le Mars, a station on its line of road in Iowa. The running time of defendant's train from South St. Paul to Le Mars is not shown by the testimony; but the train arrived at Le Mars on February 1, 1916, in time to have left, and did in fact leave, there at 11:45 p. m. of that day, or 31 hours and 15 minutes after the cattle were loaded at St. Paul. In the absence of delays the train could have made the run from Le Mars to Sioux City, on its way to its destination, a distance of about 26 miles, in 1½ hours, but did not arrive there until February 2, 1916, at about 2:15 a. m., and was not delivered by defendant to its connecting carrier at Sioux City until 6:40 a. m., and the stock was not unloaded until 7:25 p. m. of that day, and was therefore confined without unloading for the required food, water, and rest for nearly 39 hours.

The cause was submitted to the court upon a stipulation of facts, from which it appears: That defendant operates all of its trains from St. Paul, Minn., to Sioux City, Iowa, over the line and road of the Illinois Central Railroad Company (which will be called the Central Company) between Le Mars and Sioux City, under the directions and control of the train dispatcher of the Central Company, who is located at Cherokee, on the line of that company, some 30 miles east of Le Mars. Defendant's train carrying the cattle in question (which was No. 217) left Le Mars at 11:45 p. m. February 1, 1916, with orders to meet and pass train No. 242 of the Chicago & Northwestern Railroad Company (which will be called the Northwestern Company), which also runs over the line and road of the Central from Sioux City to Le Mars, at James station, on the line of the Central Company, some 7 miles north of Sioux City, at which station there was no telegraph or other operator at night. That defendant's train No. 217 passed Wren, a station on the line of the Central Company between Le Mars and James, without further orders; thence proceeded to James, and took the siding there to meet and pass the Northwestern train No. 242, north bound, as it was ordered by the Cherokee dispatcher to do. That after defendant's train had passed the station Wren, the dispatcher of the Northwestern Company at Sioux City arbitrarily ordered the engine of train No. 242 to be sent south of Sioux City, on the line of the Northwestern Company, to bring into said city a train on the Northwestern line on which an engine had failed to operate because of weath-

er conditions. That after waiting for a considerable time at James, expecting the arrival of train No. 242 of the Northwestern Company, and being unable to get further orders because of the closed condition of said station, the conductor of defendant's train got into communication by telephone with the dispatcher of the Central Company at Cherokee, and was then for the first time advised of the condition, and was directed by the Cherokee dispatcher to take his train into Sioux City. That the weather on the night in question was cold and foggy, and while defendant's train was awaiting at James the arrival of the Northwestern train No. 242, its engine became more or less frozen, and upon receiving orders to take said train into Sioux City the conductor was unable, on account of the condition of said engine, to take the entire train at one time, and took the first part, or section, of said train as far as Leeds, a point within the city limits of Sioux City, and then returned to James, and brought to Leeds the last section of his said train; the car in question being in the first section brought to Leeds. That said conductor then proceeded with the said first section of his train to the terminal of the defendant company in the yards at Sioux City. That, while said car was being moved by the defendant from its terminals in Sioux City for delivery to the Sioux City Terminal Company to be unloaded, that portion of said train in which the car was being so carried was struck by switch engine No. 248, operated by defendant company, after the same had proceeded but a short distance towards said transfer track, and a further delay incurred by reason of said wreck, which was caused by the condition of the weather on the morning in question; the immediate cause therefor being the inability of the engineer of engine No. 248 to observe the signals given.

Because of the delays thus stated it is contended in behalf of the defendant that it is not liable for the statutory penalty by reason of its delay in unloading the cattle for food, water, and rest within the 36-hour period that it was authorized to detain the cattle without so unloading them. The act of Congress to which reference has been made provides in effect:

> That no railroad, express company, or common carrier, other than by water, shall knowingly and willfully confine any cattle or other animals, transported by them in interstate commerce, for a period longer than 28 consecutive hours without unloading the same for rest, water, and food, for a period of at least 5 consecutive hours, unless prevented by storm, or by accidental or other unavoidable cause, which cannot be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of the particular shipment the time of confinement may be extended to 36 hours; and any common carrier so offending shall be liable for a penalty of not less than $100 nor more than $500 for each such violation, to be recovered by civil action in the name of the United States.

[1] Under this statute it is incumbent upon the government to show by a preponderance of evidence that the defendant "knowingly and willfully" confined this shipment of cattle without unloading them for food, water, and rest for more than 36 consecutive hours after they were loaded in St. Paul (St. Joseph Stockyard Co. v. United States, 187 Fed. 104, 110 C. C. A. 432); and, if the proofs so show, then it

would be incumbent upon the defendant to show by a preponderance of the evidence that its failure to so unload them was caused by storm, or by accidental or other unavoidable causes, which could not have been anticipated and avoided by the exercise of due care and foresight (New York Central & Hudson R. R. Co. v. United States, 165 Fed. 833, 91 C. C. A. 519; United States v. Oregon Short Line Co. [C. C.] 160 Fed. 526). With these rules in mind, the facts stipulated, which are on file with the clerk as part of the record, may be considered.

[2, 3] The running time of defendant's train in which the cattle were carried from St. Paul to Le Mars, is not shown, nor is the time the train was delayed at Le Mars, if delayed at all, shown, or for what purpose; but it does appear that the train left Le Mars for Sioux City, at 11:45 p. m., February 2, 1916, or 31 hours and 15 minutes after the cattle were loaded, and under ordinary conditions would have reached Sioux City, a distance of some 26 miles, in 1 hour and 30 minutes, and could then have been unloaded for the required feeding, water, and rest within the 36-hour period. The delay of the train between Le Mars and Sioux City appears to have been the fault of the Illinois Central train dispatcher at Cherokee, or of the Northwestern dispatcher at Sioux City, or perhaps both of them jointly, and defendant must be held to have known that its train from Le Mars to Sioux City was under the control and direction of the Illinois Central dispatcher at Cherokee, for all of its trains between Le Mars and Sioux City were being operated over the line of the Illinois Central Railroad under some arrangement with that company, and under the direction of its train dispatcher at Cherokee. Whether or not the Chicago & Northwestern Company had knowledge of, or anything to do with, the running of trains over the Illinois Central between Sioux City and Le Mars, does not appear, except that, inasmuch as the Northwestern Company was expecting on this date to run its train No. 242 between Sioux City and Le Mars over the Illinois Central road, and to meet defendant's train at James, a station on the Illinois Central line, the fair inference may be that it knew of the arrangement between the Central Company and the defendant company for the running of the defendant's train over the Illinois Central between Le Mars and Sioux City, for the Cherokee dispatcher had directed the conductor of defendant's train in question to meet and pass the Northwestern train at James, and the fair inference is that the Northwestern Company was in some way informed that defendant's train was to meet its train at James, and when the Northwestern abandoned its train No. 242 from Sioux City to Le Mars for that run informed the Cherokee dispatcher that it had so abandoned the same. In any event, there is nothing in the evidence to indicate that the conductor of defendant's train was misled in any manner by any action of the Northwestern Company, or its employés, in holding his train at James for the arrival of the Northwestern train.

As the train dispatcher at Cherokee was directing the movements of defendant's train, he must be held to be the agent of the defendant company in directing the conductor of its train to meet at James, on its

way to Sioux City, the Northwestern train, and his fault or neglect is the fault or neglect of the defendant company; and inasmuch as it appears that defendant's train was delayed at James from reaching Sioux City until at least 6:40 a. m. of February 2, 1916, or after the expiration of the 36-hour period, the defendant should be held responsible for such delay. But mere neglect on the part of defendant, or of the dispatcher at Cherokee, as the reason for failing to unload the cattle within the 36-hour period is not alone sufficient to warrant a recovery by the government; for it must first show the essential facts to warrant a recovery, and this requires a preponderance of proof in its behalf that the defendant "knowingly and willfully," or intentionally and purposely, failed to unload the cattle within the 36-hour period. Is there such proof in this case? Defendant's train left Le Mars for Sioux City at 11:45 p. m., February 1, 1916, a distance of 26 miles, which ordinarily would have been run in 1 hour and 30 minutes, which would bring the train into Sioux City by 2:15 a. m. of February 2, 1916. It did not arrive, however, until 6:40 a. m., or nearly 4 hours beyond the 36-hour period, and not until after defendant's train reached James did its conductor know that it could not meet the Northwestern train at that place, and was then ordered by the Cherokee dispatcher to take the train into Sioux City, 7 miles from James; and except for its frozen engine, and the wreck in the yards at Sioux City, did he have reason to believe that the cattle could not be unloaded within the 36-hour period.

I am of opinion, therefore, that the "facts stipulated" do not show that the government has proven by the required preponderance of evidence that the defendant's conductor of the train in question, or the defendant itself, "knowingly and willfully," or intentionally and purposely, intended, when the train left Le Mars or James, to not unload the cattle for the required food, rest, and water within the 36-hour period, or that defendant's conductor, when he left Le Mars, and again at James, when he was ordered by the Cherokee dispatcher to then run his train into Sioux City, could by ordinary diligence have avoided the delay in reaching the transfer tracks in Sioux City.

It follows that the judgment must be for the defendant; and it is accordingly so ordered.

THE DANIEL McALLISTER.

(District Court, E. D. New York. July 31, 1917.)

1. COLLISION ⇐95(1)—DRIFTING VESSEL—LIABILITY OF VESSEL ATTEMPTING RESCUE.

   If a drifting boat, which needs rescuing, cannot be stopped and brought to a mooring without involving some damage to other vessels, merely from the force of her momentum, actionable fault cannot be charged to a rescuing boat, which apparently used due care and did the proper thing to prevent greater loss.

2. COLLISION ⇐8—VESSELS LYING AT PIER END—CONSTRUCTION OF STATUTE.

   Under section 879 of the Greater New York Charter (Laws 1901, c. 466), which prohibits boats from lying across pier ends in the North and

East Rivers, and makes them responsible for damages inflicted by boats entering or leaving adjacent slips, the responsibility of a boat so lying outside is just that responsibility which is the result of the place in which it is moored, and its distance in or out, as governed by boats lying between it and the pier end, does not enter into the situation.

3. COLLISION ⊂⊃71(2)—TUG LEAVING SLIP WITH TOW—BOATS MOORED AT END OF PIER.

A barge, when being moved by a tug out from a slip in East River in a strong flood tide, was carried against other boats lying at the end of the pier above, breaking them from their moorings and causing them to drift against other boats further up, one of which, besides the barge in tow, was injured. It was in the daytime, and the position of the boats and condition of the tide were known to the master of the tug. *Held*, that the tug was in fault for failing to make proper allowance for such conditions; that the boats at the end of the pier were not liable, as with proper care on the part of the tug the collision would not have occurred.

4. COLLISION ⊂⊃8—VESSELS LYING AT END OF PIER—CONSTRUCTION OF STATUTE.

The mere presence of a boat lying off the end of a pier, in violation of such provision, is not of itself negligence, creating responsibility for damage to another vessel; but, to be actionable, it must be accompanied by other circumstances, such as darkness, with no lights shown, or the creation of an obstacle in the water needed for navigation by any craft using proper care in its own movements.

In Admiralty. Suits for collision by John D. Lohman, owner of the barge Lohman, and by Charles H. Castle, owner of the steam canal boat Haines, against the steam tug Daniel McAllister. Decrees for libelants.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for libelants.

Hyland & Zabriskie, of New York City, for the Daniel McAllister.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for the Kaaterskill No. 2.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for the Clayton and New York Cent. R. Co.

Charles M. Sheafe, Jr., of New York City, for New York, N. H. & H. R. Co.

Herbert Green, of New York City, for Erie R. Co.

CHATFIELD, District Judge. This action arose from a progressive series of incidents which nearly swept the river front of shipping from the Manhattan Bridge northward on the New York side for a space of 12 to 14 piers. One action is brought by the owner of the Lohman, which was lying in the slip between Piers 31 and 32, and which during the strong flood tide was taken out by the tug McAllister in order to be placed at a berth a short distance up the river. The captain of the McAllister intended to perform this maneuver by snubbing around the outer end of Pier 31, or by holding his tug against the tide until the barge, which was on a short hawser, had swung clear of the pier of the Manhattan Bridge, which stands in the northerly side of this slip and also of the line of piling which stretches down around

the outer side of the bridge pier, and against which boats are moored on the outer or river side. The space inside the bridge pier is used for the anchorage of fishing boats, and a serious dispute has arisen as to whether the Lohman had been lying against the bulkhead or along the north side of Pier 31. But this is entirely immaterial to the case.

Four canal boats had been moored abreast, off the end of Pier 32. The Kaaterskill No. 2 was outside, with the Clayton next to her, the Erie Railroad boat next, and a Lehigh Valley boat on the end of the pier. Four boats were also moored abreast, off Pier 33, with the Sedge outside, the Newark and Niagara (two New York Central boats) next, and a Baltimore & Ohio boat inside. At least two more boats were moored off the end of Pier 36, while the Haines, a steam canal boat, was moored across the end of a car float, which was lying on the upper or north side of Pier 41. This car float projected a little into the river, and on the south side of Pier 41 was another car float, the stern of which was about even with the outer end of the pier.

The captain of the McAllister was unable to execute the maneuver he undertook in just the form he intended, for before the Lohman swung around, so as to lie straight up the river, the tide carried the McAllister upstream, and the Lohman came in contact with one of the barges lying off Pier 32. The testimony indicates that this was the Clayton, or the third boat out from the pier. This collision further hampered the McAllister in controlling the Lohman, and the four barges off Pier 32 were swept away from the pier. At some point the lines between the Clayton and the Erie barge broke loose, and at Pier 33 the four boats off the end of that pier joined the fleet.

While off Pier 36 the two boats there moored were also carried away. The piers from 39 to 42 are used by the New Haven Railroad, and Transfers Nos. 7 and 9, which were lying at the New Haven piers, went out to give assistance and to rescue the boats floating upstream. This was done without damage to the various boats adrift, excepting the Lohman. Most of the boats were placed in at different piers south of Pier 41; but the Clayton and Kaaterskill, still fastened together and with the barge Lohman and the tug McAllister still in collision or close at hand, approached Pier 41 in such a position that Transfer No. 9 attempted to push them in to a point where they could get a line to the docks. According to the captain of the Haines, the Kaaterskill and the Clayton had swung around, so that the Kaaterskill was the inside boat; but these two boats were finally moored at Pier 43, with the Clayton still the inside boat, and the testimony of the witnesses upon the No. 9 is convincing to the effect that it was the Clayton, and not the Kaaterskill, which came in contact with the Haines.

It would appear that, while the No. 9 was getting these boats inshore, the Clayton came in contact with the side of the Haines, and the Lohman got under the bow of the Kaaterskill or Clayton. At just about the same time the McAllister, which had swung alongside the Lohman, attempted to push her ashore against the southeasterly corner of Pier 41 and across the forward corner of the Haines, which was then partly down across the end of Pier 41. The combined weight of the boats caused some damage to the side of the Haines. The Lohman was then pulled forward, so as to be moored to the car float

at the south side of Pier 41, and was later taken back and put in the berth near Pier 34, where she was to go when the occurrence started.

The second action involved has been brought by the owner of the Haines for the injuries received by his boat. He alleges fault on the part of the Daniel McAllister, both as a primary cause for the disaster and also for the way in which the McAllister landed the Lohman, when the Lohman was pushed into the corner of Pier 41. But the captain of the Haines has also brought in the New York, New Haven & Hartford Railroad, charging that it placed the Haines at the point where it received injury, that Transfer No. 9 was unable to check the drift of the boats, and that she was negligent in the way she attempted to land the boats, thus allowing them to bump against the side of the Haines. The owner of the Haines was so positive in his testimony and so certain as to the position of the boats as to throw doubt upon the accuracy of his observation when collision was impending, although there was no question that he was sincere in his statements. The evidence of all the parties bearing on this situation contradicts him, and he makes out no case at all of any negligence on the part of the No. 9.

[1] To charge a boat which is seeking to make a rescue with fault for failure to overcome conditions which she is not strong enough to resist would be to improperly locate the proximate cause of the damage, and merely to penalize the boat which physically was for the moment in charge of those movements which were attempted, as distinguished from the overpowering force of the drifting boats and the question of responsibility for their position.

Nor was there any evidence in the case, so far as the occurrence off Pier 41 is concerned, indicating that the McAllister was guilty of additional negligence in the method which was used to stop the drift of the Lohman and to prevent further destruction. If a drifting boat, that needs rescuing, cannot be stopped and brought to a mooring without involving some damage merely from the force of her momentum, it is impossible to find actionable fault in the efforts of a rescuing boat, which apparently used care and did the proper thing to prevent greater loss. It is a mere coincidence that the McAllister is the same boat against which fault was charged for the beginning of this catastrophe.

The McAllister has sought to bring in the barges lying at the outer end of Pier 32, so as to charge them with responsibility, not only for the injuries to the Lohman, but by alleging that fault in lying off the end of a pier head was the proximate cause of the injuries to the Haines.

The Kaaterskill denies any responsibility on her own part, and alleges the fault to be that of the McAllister or of the New York Central Railroad Company, which was the charterer of the boat Kaaterskill at the time, and had moored her at the place named, through one of its own tugs. The New York Central Railroad Company denies that it was in charge of the boat Kaaterskill, and also denies that it was at fault for the collision because of the presence of either the Kaaterskill or the Clayton during the occurrence which has been described.

The Erie Railroad Company denies any fault, and alleges that the four boats off the end of Pier 32 had been moved down shortly be-

fore this occurrence by a steam lighter, the Graylock, which had to unload at the end of Pier 32. According to this testimony the four boats were at the time of accident partially across the front of the rack outside of the bridge pier, and hence allowing less room for the use of the McAllister in letting the Lohman swing out into the river. The Erie Railroad denies any responsibility for the position in which the boat was left, and maintains that all four boats had been moved to the south through orders of the man in charge of the pier. The Erie Railroad, however, goes on to allege that the entire fault for the collision was that of the McAllister in bringing out the Lohman in the manner described.

A suggestion has been made that the inside boats of the four at the pier end were more liable, or should be held primarily liable, instead of those lying outside, inasmuch as the outside boats could have moved nearer shore, if the inside boats had not been present.

[2] This case involves application of the provision of the city charter (section 879) which forbids boats lying across pier ends in the North and East Rivers, and makes them responsible for damages inflicted by boats entering or leaving adjacent piers or slips. But, even under this provision of the charter, the responsibility of a boat which maintains itself in an outside position is just that responsibility which is the result of the place in which it is moored. Its distance in or out, as governed by boats lying between it and the pier end, does not enter into the situation. Each boat, beginning with the one on the outside, is responsible for remaining moored off the pier end, to just such an extent as the position in which it is moored violates the statute in question. The parties placing and keeping the boat there are the ones to be held in fault, rather than those who, by some other obstruction, may have furnished the reason or motive for the boats assuming this outside position.

It is evident that the Lohman did not come in contact with the two inside boats. Under the provisions of the statute in question, the two inside boats, viz. the Lehigh Valley and Erie canal boats, were not in such a position as to interfere with the movements of the boat entering or coming out of the adjacent slip. Even if they had no right to lie at the end of the pier, and if their position would interfere with a boat closer to Pier 32 than the Lohman came in swinging out, nevertheless in the present case they did not interfere with the movement of the boat Lohman or of the McAllister, which at no time came in contact with either of these barges. If the Clayton and the Kaaterskill were responsible for being moored in the position in which they were found, then the McAllister must look to them alone, and not to the Lehigh Valley and Erie boats, which did no harm to the McAllister, and which merely show the physical situation leading to the mooring of the Clayton and the Kaaterskill in the place complained of.

Nor does it appear from the testimony that the mooring of the four boats off Pier 33 had anything to do with the injuries for which recovery is sought in this case. These boats and those off Pier 36 went adrift and were rescued, but they had been removed from the situation before Transfer No. 9 undertook to place the Clayton and the Kaat-

erskill ashore, and before the Lohman and the McAllister brought up against the Haines.

[3] The issue, therefore, narrows down to a primary finding that the McAllister was negligent in estimating the space which was available for bringing out the Lohman under the conditions of tide and wind which were present. The captain of the McAllister testifies that he knew that the tide was running so strong that he could not buck the tide with the Lohman, and that he intended to merely drop back, so as to drop her in at the pier to which she was destined. He expected to have room to swing the Lohman clear of the barges which he saw were lying off the end of Pier 32. He was guilty of negligent navigation in undertaking the maneuver in too small a space, or in failing to observe proper precautions, so as to protect himself against the force of the tide. The Lohman and the McAllister apparently drifted back immediately as they rounded the end of Pier 31, and thus diminished the space in which the Lohman could swing out into the river, even though that space was wide enough to allow her to make the turn, if the flood tide had been running with less force.

[4] The next question, therefore, is to determine whether the Clayton and the Kaaterskill, or the New York Central Railroad, should be held responsible for violating the section of the city charter and for in effect blocking a slip, so as to cause damage to a boat coming out while receiving no damage themselves. There has been no case cited, and none is known to the court, holding that the mere presence of a boat off the end of a pier head is of itself negligence, creating responsibility for damage to the other vessel, even if its presence constitutes a violation of the charter (section 879).

The obstruction by a boat in this position renders it responsible for damage to itself; but, if it can be seen, its presence must be taken into account by any other boat, which might be injured, or cause injury to a third vessel, by navigation in disregard of evident conditions. The mooring of the boat and its maintenance in the position prohibited must be accompanied by other circumstances, such as darkness, with no lights shown, or the creation of an obstacle in the water needed for navigation by any craft using proper care in its own movements, before the position off the end of the pier could be held actionable. Wright & Cobb Lighterage Co. v. New England N. Co. (D. C.) 189 Fed. 809; The Chauncey M. Depew, 139 Fed. 236, 71 C. C. A. 362; The Allemania, 231 Fed. 942, 146 C. C. A. 138.

This is illustrated by the presence of the boats off the ends of Piers 33 and 36, which, while in violation of the section of the charter, had nothing to do with the injuries complained of, or the circumstances approximately causing the injury, in the present case. The Clayton and the Kaaterskill, however, were in such position that, according to the testimony of the McAllister, they embarrassed the McAllister in carrying out the maneuver for which there appeared to be, in the opinion of the McAllister's captain, sufficient room. This occurrence was in broad daylight. The space available and the condition of the tide was not only plainly observable, but well known to the captain of the McAllister. No sudden storm or unexpected danger is shown, such as

occurred in the case of Bartley v. Dalzell and Others, and The Vauban, 243 Fed. 216, decided April 26, 1917, in this court.

The landing of the boats off the end of Pier 32, by the New York Central tug, was not of itself negligence, and, in the absence of anything to indicate possible danger, the tug was not compelled to stand by. The Express, 212 Fed. 674, 129 C. C. A. 208. But, further, the piling was not a pier head, and was customarily used as a mooring place. This makes it still more difficult to find that the position of the barges was negligence of itself at the time in question. Section 879 is to be construed strictly, and does not cover a boat hanging on a line. The Allemania, supra.

The piling or rack might be considered a part of the pier head, if the barges were injured by being in that position; but the presence of barges in daylight, alongside a row of piling used for mooring purposes and adjacent to a pier, should certainly not be held to be negligence, so as to make those boats responsible for injuries to a second boat, which was negligently handled by a vessel having in mind and being able to see the entire situation. The act of the boat which originally moved these barges into this position would not make it accountable for the accident which resulted, unless the testimony had indicated that they were being moved while the McAllister was getting the Lohman out.

The libelants should therefore recover against the McAllister in each case, and the petitions of the McAllister, bringing in the various canal boats, should be dismissed, with one bill of costs, to be divided between the New York Central, the Erie, and the owner of the Kaaterskill.

The libel of Haines against the New York, New Haven & Hartford Railroad Company Transfer No. 9 will be dismissed, with costs.

In re EINSTEIN.

(District Court, N. D. New York. September 25, 1917.)

1. BANKRUPTCY ⟸293(1)—COURTS—JURISDICTION.
   A court of bankruptcy, which had jurisdiction over a bankrupt's property, and in which ancillary proceedings were had, has jurisdiction to determine whether a fund collected by an ancillary receiver belongs to the estate of the bankrupt or another, and to make proper allowances to the receiver.

2. BANKRUPTCY ⟸163—PROCEEDINGS—EFFECT.
   Where bankruptcy proceedings are instituted, a bill of sale of all of his property, executed by a bankrupt within four months of bankruptcy, may be set aside, though intended to protect creditors.

3. BANKRUPTCY ⟸163—POSSESSION OF CREDITORS—CONSTRUCTION.
   Where a creditor of a bankrupt, who had previously attempted to extricate the bankrupt from his difficulties, accepted a bill of sale of the bankrupt's property, discharged a landlord's lien, which was a prior lien on the property, and attempted to care for the property for the benefit of creditors, the possession of such creditor cannot be treated as that of an assignee for the benefit of creditors; the prior agreement

between the parties providing for the continuance of the business and payment of creditors out of the net proceeds having been superseded.

4. BANKRUPTCY ⟸210—COURTS—JURISDICTION.

Under Bankruptcy Act July 1, 1898, c. 541, § 2, 30 Stat. 545, as amended by Act June 25, 1910, c. 412, § 2, 36 Stat. 839 (Comp. St. 1916, § 9586), and declaring that courts of bankruptcy may exercise ancillary jurisdiction over persons and property within their respective territorial limits in aid of a receiver or trustee appointed in bankruptcy proceedings pending in another court of bankruptcy, a court of bankruptcy, within whose jurisdictional limits the bankrupt's property is found, has, in the exercise of its ancillary jurisdiction, power to establish and declare the existence of liens on the property, and direct payment therefrom, and claimants residing in such jurisdiction cannot be required to litigate their claims in the district wherein the bankruptcy proceedings were instituted.

5. BANKRUPTCY ⟸116—LIENS—CLAIMS.

Claimant, a creditor of a bankrupt, who did business in Florida, paid rent due from the bankrupt, discharging the landlord's lien on the bankrupt's property. Thereafter the bankrupt's property was shipped to a foreign state for disposition. Claimant acted for the benefit of other creditors in protecting the property and attempting to dispose of it. *Held* that, while claimant was entitled, bankruptcy proceedings having intervened, and an ancillary receiver having been appointed in the state whence the property was taken, to have his claim for rent paid allowed, as the Florida landlord had a prior lien on the property, such claimant was not entitled to a lien on account of payment of transportation charges; it not appearing such transfer of the bankrupt's property was necessary.

In Bankruptcy. In the matter of the bankruptcy of Robert Einstein. George D. Chapman, ancillary receiver, having presented his account as receiver, prayed that it be settled and allowed, and his compensation and that of his attorneys fixed and allowed. Thereupon William T. McCaffrey, trustee, claimed that all funds in the possession of the ancillary receiver should be delivered to him, and that the claimants should resort to the court wherein the bankruptcy proceedings were had. Prayer of trustee overruled, and claims of receiver and others allowed.

George D. Chapman is the ancillary receiver of the estate in bankruptcy of Robert Einstein, the above-named bankrupt, in the Northern district of New York, and, having presented his account as such receiver, asks on due notice that same be settled, adjusted, and allowed, and his compensation and that of his attorneys fixed and allowed, and proper disposition made of the balance of the funds in his hands, which amount to the sum of $4,250. The petition in bankruptcy was filed in the United States District Court for the Southern District of Florida, and one Wm. T. McCaffrey of that district has been duly appointed and now is trustee of the bankrupt estate. The said trustee claims that all of such funds in the hands of said ancillary receiver should be paid over to him. He objects, not only to any allowances, but to the establishment of any liens on such funds by this court, and any order as to their disposition, claiming that this court, even though it has possession of the res, has no jurisdiction, and that the claimants must resort to the United States District Court in bankruptcy in the Southern District of Florida.

George D. Chapman is trustee in bankruptcy of the estate in bankruptcy of one Gurnsey B. Williams, whose estate is being administered in this court in the Northern district of New York, and as such he claims the entire funds and property, on the ground the goods from which same was derived belonged to said Gurnsey B. Williams, and not to said Robert Einstein. Gurnsey B. Williams, of Syracuse, N. Y., files a petition, claiming that Gurnsey B. Williams Company has a lien on such fund amounting to $1,306—for rent, $1,148,

paid to release a lien for such rent on the goods from the sale of which such fund was derived, and $148, transportation charges thereon—and asks payment of such sum therefrom. The facts will appear in the opinion.

Tracy, Chapman & Tracy, of Syracuse, N. Y., for receiver.

Benj. Stolz, of Syracuse, N. Y., for trustee Chapman.

Nash, Britcher & Eckel, of Syracuse, N. Y., for Gurnsey B. Williams Co.

Marks, Marks & Holt, of Jacksonville, Fla., for trustee McCaffrey.

RAY, District Judge (after stating the facts as above). [1] There is no doubt of the power and jurisdiction of this court to determine whether or not this fund belongs to the estate in bankruptcy of Robert Einstein or to the estate in bankruptcy of Gurnsey B. Williams, and to make proper allowances to the receiver George D. Chapman, who has had the custody and care of same, and who has been charged with the preservation of same. This court now has, and since the bankruptcy of both Einstein and Williams has had, the actual custody of this property. It is its duty to direct its officer, or receiver, to turn it over to the party entitled thereto, after making proper allowances, and this the court cannot do without first determining who "the party entitled thereto" is.

June 1, 1914, Robert Einstein, doing business as "Boston Store," rented of one Porter, as executor, etc., certain premises in Jacksonville, Fla., where he was doing business. November 2, 1914, said Einstein rented of "S. B. Hubbard and A. S. Hubbard, trustees," certain premises in Jacksonville, Fla. Einstein did business therein, and had this stock of goods above referred to in the rented stores. March 29, 1913, said Robert Einstein and said Gurnsey B. Williams, said Williams residing at Syracuse, N. Y., entered into an agreement in writing which, with other things, recited that Einstein was the owner and possessor of stocks of goods and merchandise in certain stores then occupied by him in Jacksonville, Fla., and Waycross, Ga., of the value of $26,000, and was owing certain indebtedness, which he was unable to liquidate, amounting to $16,787.33, and also recited that Einstein had secured an extension of six months for the payment of such indebtedness from certain creditors, and then proceeded:

"Now, in consideration of the sum of one dollar and of the performance of the mutual covenants herein contained by each of the parties hereto, and other valuable consideration, said party of the first part [Einstein] does hereby sell, assign, transfer, and set over unto said party of the second part [Williams] all his right, title, and interest in and to said three stores of merchandise" and "all accounts receivable"

—but upon the following terms and conditions: (1) The first party (Einstein) agreed to manage the business in each of the three stores "in the same manner as at present conducted" and to devote his entire time, etc., thereto. (2) The said first party agreed to keep and render daily reports of all sales in all of the stores and keep first party informed of all matters arising in respect to such business, and to pay all running expenses and take receipts therefor, and transmit them to second party, purchase only such new merchandise as necessary for the

proper conduct of the business and entirely subject to the approval and consent of the second party. (3) The net receipts were to be deposited in certain banks named to the credit of "Boston Department Store," and first party was to do other things not necessary to mention, except (4) "said party of the second part [Williams] hereby agrees to pay the indebtedness of said first party out of the net proceeds of sales deposited in said banks to the credit of said Boston Department Store, so far as said proceeds shall be sufficient to pay the same," etc. (5) Accounts were to be kept, etc., and then " (6) after said entire indebtedness has been paid in the manner herein provided it is mutually agreed by and between the parties hereto that this instrument shall then become null and void, and of no further effect, and said party of the second part will turn over to said party of the first part all books and papers belonging to the first party." No attempt was made to comply with the laws of Florida as to general assignments for the benefit of creditors.

November 13, 1916, and within four months of the filing of the petition in bankruptcy, for the recited consideration of $13,296.88, said Einstein, by bill of sale absolute, sold and transferred to "the Gurnsey B. Williams Company," of Syracuse, N. Y., all the goods, wares, and merchandise owned by him in said Jacksonville stores. The next day, November 14, 1916, Gurnsey B. Williams executed and delivered to said Hubbards, the lessors, the following:

"Whereas, there is a balance due A. S. & S. B. Hubbard, trustees, for rent of stores Nos. 429 and 431 West Bay street, Jacksonville, Florida, from Robert Einstein, of $1,148.00—eleven hundred forty-eight dollars—I, Gurnsey B. Williams, of Syracuse, N. Y., for value received, hereby agree with said Robert Einstein and A. S. & S. B. Hubbard, trustees, that I will pay the said rent of $1,148.00 to A. S. & S. B. Hubbard, trustees, on or before December 1, 1916.

"Dated November 14, 1916. Gurnsey B. Williams. [L. S.]

"Executed, sealed and delivered in our presence:

"H. L. Moore.

"R. L. Runion."

Thereupon said Hubbards executed the following assignment:

"For and in consideration of the sum of eleven hundred and forty-eight ($1,148.00) dollars, the receipt whereof is hereby acknowledged, we, S. B. Hubbard and A. S. Hubbard, trustees, of Jacksonville, Florida, hereby sell, assign, transfer, and set over to the Gurnsey B. Williams Company, of Syracuse, New York, the annexed claim for rent of the stores 429–431 West Bay street, Jacksonville, Florida, being the rent for the months of July, August, September, and October, 1916, hereby transferring and assigning to the said Gurnsey B. Williams Company any and all liens which we have upon the stock of merchandise heretofore contained in said stores, pursuant to the terms of the lease executed between ourselves and one Robert Einstein, conducting business as the 'Boston Store,' hereby authorizing and empowering said Gurnsey B. Williams Company at their cost and expense, in our names or otherwise, to prosecute said lien in every manner as fully as we might do. It is hereby intended to transfer to said Gurnsey B. Williams Company all of our right, title, and interest in and to any lien which we have upon the stock of merchandise formerly contained in said stores.

"S. B. Hubbard, [L. S.]

"A. S. Hubbard, [L. S.]

Trustees.

"Attest:

"Frank S. Gray.

"C. L. Dean."

December 20, 1916, a little more than one month after this bill of sale and transaction as to the rent, a petition in involuntary bankruptcy was filed against said Einstein in the Southern district of Florida, who was doing business under the name "Boston Department Store." Einstein filed an answer, denying insolvency, but adjudication and the appointment of a trustee finally followed. November 13, 1916, all the assets of said Einstein in said Jacksonville stores were removed from said stores and taken to Syracuse, N. Y., and, says the petition, "subject to the approval of the creditors of Einstein, for the purpose of turning same into cash and applying the proceeds to the payment of Einstein's creditors." This transfer to Syracuse was made under the bill of sale mentioned. Later an ancillary receiver was appointed in the Northern district of New York, and all the goods, etc., mentioned, which had been sent to Syracuse, came to the possession of such receiver, and were disposed of and converted into cash. To obtain possession of such goods Gurnsey B. Williams Company paid the rent due the Hubbards as landlord, thereby releasing their rent lien thereon, which was transferred to the Gurnsey B. Williams Company.

On or about November 22, 1916, said Gurnsey B. Williams Company sent out a circular letter to the creditors of said Einstein, stating that the Gurnsey B. Williams Company was a creditor of said Einstein in the sum of $13,600, and that it was solicitous about the business of Einstein at Jacksonville, Fla., and—

"we felt that, to protect ourselves and the other creditors from practically a total loss, it was advisable for us to take possession of his entire stock under a bill of sale, secure the consent of this landlord, and remove the stock from the store and get it under the control of ourselves and the other creditors," etc.

Attention is also called to the lien on the goods for rent, and the letter then said:

"Had the owners of the stores taken possession of the stock and forced Mr. Einstein into bankruptcy, there would have been little or nothing for the creditors, including, of course, ourselves. * * * You will realize that our only purpose was to husband these assets for the benefit of all creditors," etc.

A consent for the disposition of the goods was inclosed, and the consents of nine creditors were obtained.

[2, 3] I do not think the goods were in the possession or under the control of an assignee for the benefit of creditors. As against the proceedings in bankruptcy, commenced against Einstein December 20, 1916, the bill of sale, made for the purposes disclosed and executed November 13, 1916, could not prevail. It seems clear that the prior agreement of March 29, 1913, had been abandoned and superseded by the later agreements and transactions. At least the title was recognized as being in Einstein when such bill of sale was executed, November 13, 1916.

[4, 5] It is clear that, under the laws of the state of Florida, the landlords of Einstein had a valid lien on this merchandise for the rent paid, $1,148. To obtain the goods it was necessary to pay this rent to the landlords, and it was paid in good faith to prevent a seizure and

sale by the landlords, and was paid, as we have seen, not for the purpose of securing an undue advantage over other creditors, or for the purpose of defeating the Bankruptcy Law, but for the purpose of conserving and protecting such assets for the benefit of all creditors. The letter, recited in part, clearly shows this. The Gurnsey B. Williams Company is in the Northern district of New York. The merchandise was brought here, seized by this court, and sold here, and this court has possession of the fund. It seems to me this reduces the question in issue to the proposition: Has this court the ancillary jurisdiction or power to establish and declare the existence of this lien, direct its payment from the proceeds of such sale and also the legitimate expenses of the receivership, and direct the payment of the balance to the trustee in Florida? Or must this court, having determined that the proceeds of such sale belong to the estate in bankruptcy of Robert Einstein, direct the payment of the fund to the trustee in Florida, and relegate the Gurnsey B. Williams Company and the receiver to the court of bankruptcy in Florida? The amendments of 1910 to the Bankruptcy Law confer ancillary jurisdiction on courts of bankruptcy where property of the bankrupt may be found. Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 115 C. C. A. 527; Babbitt, Trustee, v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 502; Elkus, Petitioner, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407; 2 Remington on Bankruptcy (2d Ed.) §§ 1705, 1705¼, 1707; Acme Harvester Co. v. Beekman Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; U. S. St. 1909–1910, pt. 1, p. 838.

It seems clear that it would be unjust for a court in bankruptcy, having the actual possession of property, with different claimants thereto residing in its jurisdiction, to send the property to some other district, it might be thousands of miles distant, and relegate the parties to that court. See Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 115 C. C. A. 527. I think one purpose of the amendment of 1910 was to obviate the necessity of doing this. It is not claimed, and I am not holding, that the court exercising ancillary jurisdiction and powers in aid of the main jurisdiction has the right or power to receive proof of general claims against the bankrupt estate and decree distribution; but having possession of a specific fund, the title to which is in question and the existence or nonexistence of liens thereon, held by parties residing in the jurisdiction of the court of ancillary jurisdiction, being in question, such last-mentioned court has the power, and it is its duty, to determine title and the existence or nonexistence of such liens thereon. The existence of such power is expressly asserted in Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 871, 115 C. C. A. 527, supra, and this is sustained, I think, by the decisions in 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 502, and 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407, and 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, supra. In the Gaskell Case, supra, the Circuit Court of Appeals, Eighth Circuit, held:

"District Courts exercising ancillary jurisdictions in bankruptcy are vested with the power and charged with the duty to hear and adjudge the adverse claims * * * to the title to, or to legal or equitable liens upon, the specific property they seize as the property of the bankrupt, and, according to

their adjudications, to send the property, or its proceeds, to the court of primary jurisdiction, or to apply them to the satisfaction of such claims."

Remington, supra, adopts this rule.

There will be an order adjusting the accounts of the ancillary receiver, making allowances to him and to his attorneys, and establishing such lien for the rent paid at $1,148, and directing payment of such allowances and lien from the fund, and the transfer of the balance of the fund to the trustee in Florida.

The claims for transportation charges cannot be allowed as a lien on the property or its proceeds. This was no part of the lien on the property for which it was held by the landlords, or for which they had a right to hold it. I cannot hold that the removal from Florida to New York was necessary for the preservation of the property, or a necessary expense incident thereto.

NULOMOLINE CO. v. STROMEYER.

(District Court, E. D. Pennsylvania. September 14, 1917.)

No. 1669.

INJUNCTION ⊂⊃56—TRADE SECRETS—EVIDENCE OF USE.

Defendant will not be enjoined from selling sugar as made by him, and from selling to persons in the trade, because a former employé of plaintiff disclosed its process of sugar making to defendant, and sent him the names of customers of plaintiff, and as a broker sold defendant's sugars to former customers of plaintiff; there being nothing beyond the fact that he disclosed the information to implicate defendant in either its disclosure or its use.

In Equity. Suit by the Nulomoline Company against Julius Stromeyer. Trial hearing on bill, answer, and proofs. Bill dismissed.

See, also, 240 Fed. 228.

Leo Levy, of New York City, and Chester N. Farr, Jr., of Philadelphia, Pa., for plaintiff.

P. H. Granger and Michael J. Ryan, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. There are cases in which the principles we are asked to apply by the respective parties to the controversy are each in line with the appeal which our sense of justice makes to us, and yet the mind does not rest with satisfactory clearness upon the finding that either principle has application. The added difficulty is sometimes present of reconciling the conclusion to which our minds incline with the accepted principles of the administration of the law. The controversy with which we are now concerned presents features which suggest the kind of case above indicated. The plaintiff asks for a finding that the defendant conspired with a discharged employé of the plaintiff to have the employé disclose to the defendant the customers of the plaintiff, together with the kind of manufactured product which the plaintiff had for years been supplying to these customers,

and also information of plaintiff's secret processes of manufacture, to the end that this trade might be diverted from the plaintiff to the defendant.

Trade competition of this character, based upon these methods, is complained of as unfair, inequitable, and a legal wrong to the plaintiff, justifying the court in awarding the preventive remedy of an injunction. The defendant, on the other hand, views the effort of the plaintiff as one, under the guise of enjoining the employé from violating a confidence reposed in him, of asking the court to enjoin the defendant from using processes of manufacture which he had employed long before the plaintiff engaged in the business. The legal principle which each party invokes is clear enough, even without the decided cases which support it. Macbeth v. Schnelbach, 239 Pa. 76, 86 Atl. 688; Park v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135; Du Pont Powder Co. v. Masland, 244 U. S. 100, 37 Sup. Ct. 575, 61 L. Ed. 1016.

It is thus made evident that the controversy here is wholly one over the facts. It must be admitted that the conduct of the employé, coupled with statements, oral and written, emanating from him, give ample room for the stanch from which plaintiff expects to reach the conclusion in its favor. It is fortified in this expectation by the finding of the court having jurisdiction of the employé in an action to which he was a party that he had been guilty of the acts of which the plaintiff complains. The finding thus made, however, in no sense invites, much less justifies, the further finding that the present defendant was a participant in the wrongs thus disclosed and condemned. No suspicion entertained by the plaintiff of defendant's guilt, however well based, nor even a well-founded belief following its own investigation into the facts, will move the court to a judgment in its favor. The truth of the charge may not only be believed by the plaintiff, but the convicting facts may be known to it. None the less the judgment of the court must proceed only upon facts established by legal evidence. This is what may be termed the artificial side of the finding. As already stated, there has been an inquiry into the facts and a legal judgment of the conduct of the employé reached. In the course of this inquiry statements, some of them under the sanction of an oath, were made by the employé, and letters were written by him. He thus made evidence against himself which would inflame a suspicion already entertained by the employer, and there would naturally be given such credence to the admissions of the employé as would inculpate the defendant, with whom, along with others, the employé was charged with having conspired. It is clear, however, that proof that such statements had been made by the employé, even if made under oath, would as against the defendant be evidence of nothing, except that the employé had made the statements, and this fact might not be, and ordinarily would not be, of any relevancy in an inquiry aimed at the defendant.

The difficulty which confronted the very capable counsel for plaintiff in their efforts to develop the facts as they wished them to be found was this: They had within their reach very little, if any, evidence of the doing of the acts by the defendant of which their clients complain-

ed, other than the disclosures above mentioned to have been made by the employé. It was an easy matter for them to prove that the employé had made admissions which inculpated the defendant. They were not to be criticized for anticipating that the employé, if called as a witness and interrogated directly as to the facts, might not testify in line with his former statements, but might qualify or explain them away. The burden was upon the plaintiff to establish the facts by affirmative evidence, and counsel were in consequence under the necessity of calling the employé as their own witness. The wisdom of the trial strategy of avoiding the direct inquiry, but asking first whether the employé had not made the admissions embodying the facts sought to be proved, and then inquiring whether the statements were not true, was, of course, obvious. Ordinarily, such a method of conducting the examination of a witness would not be tolerated. Inasmuch, however, as the complaint against the defendant necessarily involved the charge of a conspiracy between him and the witness, counsel for plaintiff were permitted, after first laying ground for such a course of examination, by showing the interests of the witness to be adverse to those of the plaintiff, and his attitude to be one of hostility, to ask questions in a form which would otherwise have been objectionable as leading. The door was opened to them to the full width, and they were given the widest latitude in this respect. The required accompaniment of such a ruling, however, is that the trier of facts, to be found from such testimony, should exercise the closest scrutiny to distinguish between proof of the fact that the witness had made such prior statements and his sworn testimony in the present trial of what the real facts were. Observing this distinction, and taking into consideration all the evidence in the case, there are certain conclusions therefrom which stand out with satisfactory clearness, and other facts which are so obscured, if not lost, in a maze of mere suspicions and accusations and probabilities, not arising out of legal evidence, as that a finding of the facts must be refused.

The defendant and the plaintiff were each manufacturers of invert sugars. The defendant was in the business long before the plaintiff engaged in it. That the defendant had the widest experience and fullest knowledge of how invert sugars were made is established, not only by the evidence, but by the confirmation which this evidence received from the fact that the plaintiff, when it first engaged in the business, called upon the friendly aid of the defendant to straighten out and make efficient the work of the plaintiff's plant. The witness Tausek was in the employ of the plaintiff. As such employé he came to know who were the customers of the plaintiff, and acquired also a knowledge of their special needs, and the means adopted by the plaintiff to meet the wishes and demands of its customers. Tausek had entered into a contract with the plaintiff, by which he bound himself not to divulge any information received in the course of his employment of a confidential nature. Something of a controversy has been raised between the employer and employé over some phrases which are now in the written contract. This controversy is of small moment, for the obligation not to disclose rested upon the employé, whether he

had formally so agreed or not. A disagreement between employer and employé arose, in consequence of which their relations as such terminated in the discharge of the employé. This discharge was resented by the employé as an injustice to him, the natural sequel of which was that he has since nursed a feeling of resentment. He sought, as was, of course, his right, employment elsewhere, and, as was to be expected, drifted into that line of business with which he was familiar. This brought him, to some extent, at least, into competition with his former employer.

The essentials of the complaint brought by the plaintiff are these: One is that the plaintiff, in the development of its business, had found processes of manufacture which it thought to be peculiar to itself and claimed to be its own. It charges that the defendant has conspired with its employé to have this process disclosed to him, so that he might profit to the disadvantage of the plaintiff. Such a disclosure the plaintiff asserts would be a wrong to it, and asks to have the disclosure enjoined by the prohibitive process of the court. The other complaint is one of what is substantially unfair competition. It is involved in the further charge that the employé, having knowledge, confidentially imparted, of the customers of the plaintiff, of the special needs of these customers, and of how the plaintiff had supplied these needs, disclosed this confidential information to the defendant, in order that the defendant might be enabled to imitate the product of the plaintiff and offer it to the plaintiff's customers as the same product they had been receiving, and thus divert the trade of such customers from the plaintiff to the defendant. With whatever may be the merits of the dispute between the plaintiff and its former employé, we are not now concerned, except to the extent to which it involves the defendant. That an employé who is worthy of his employment will through the experience gained acquire knowledge and add to his skill is to be expected, and in this acquisition he should not be discouraged. He further cannot be refused the right to make use of all the skill and ability he may possess. He has no right, however, to abuse the confidence reposed in him, nor to take with him the property of his former employer. The line dividing that which belongs to him and that the right to which is still retained by the employer is a line sometimes hard to draw, and doubly hard for an employé to draw when the vision is obscured by a sense of wrong suffered. That Tausek, the former employé of the plaintiff, was not at all times either careful in drawing this line, or even disposed to draw it, could easily be found from the evidence which he has made against himself, and, as already stated, has in fact been found, partly upon this evidence, in the case against him in which his statements were legal evidence. We do not, however, feel justified in making the further finding that the defendant was a party to the doing of any wrong to the plaintiff. Proof that Tausek was both willing to disclose the processes which the plaintiff believed to be secret processes of its own, and did in fact disclose them to the defendant, does not necessarily satisfy us that the defendant availed himself of the information thus imparted, or that in fact anything was thereby imparted which had not previously been known to the defendant.

The record of the evidence is too bulky for review, but its careful consideration has impressed us of the truth of two general observations which obtrude themselves. One is, as already several times remarked, that the plaintiff was moved to institute this action by disclosures made in the litigation with its employé which unavoidably raised a suspicion that all who dealt with him so dealt with a guilty purpose. The other is that the real motive for the disclosures, so far as made to the defendant, were made in the effort of the employé to show himself to be of value to his new employer, and played no real part in their relations. That the suspicions entertained, however excusable, or even apparently justified, were not all well based, is shown by the unfounded charge that plaintiff's former employé and the defendant were brought together covertly and in a way to indicate a guilty purpose. The testimony of the witness E. B. Waldron wholly dispels such a thought.

There was nothing in the circumstances leading up to the employment to indicate the case to be anything other than the usual one of aid rendered to a man who was in search of a position. The employment which Tausek had with the plaintiff was in its manufacturing department. Whether his purpose was the proper one of making use of the skill and experience he had gained, or the improper one of seeking a market in which to sell the processes of his former employer, he would naturally have sought a new employment which was like that of his old. This he did. It is, of course, possible that what the defendant did was done with a view to the concealment of his real purposes; but what he in fact did was, not to employ Tausek to manufacture invert sugars, but to engage him as a broker to sell. Tausek did send to the defendant the names and addresses of buyers of products who had been customers of the plaintiff, and did inform the defendant of how the plaintiff made the product which these customers had been receiving. These names and addresses were available to any one through the ordinary trade lists, and processes for making invert sugars had been known for years. It must, of course, be admitted that the plaintiff had acquired no proprietary right to the custom of any prospective purchasers of defendant's product, nor could it assert the right to prevent the defendant from making invert sugars, as he and others had made them for years.

The use of information unfairly secured, however, may justify a finding of unfair competition, and the purchase of stolen processes cannot be defended. When, therefore, the answer is made that an innocent way to the receipt of the information thus unfairly given was open, and that no use was made of processes thus improperly divulged, the mind does not rest satisfied with this answer until its truth is established. If the person receiving the information had solicited it, or been in any way an active party to its disclosure, the inference of its improper use would be hard to remove. There is just here a feature of this case which operates in favor of the defendant. There is nothing beyond the fact that Tausek disclosed information to implicate the defendant in either its disclosure or its use. There is nothing to indicate that the defendant invited it, and evidence that he somewhat testily repulsed Tausek's attempt to teach him the art. This, of course, as already intimated, might have been a pretense. We have

the fact, however, that the defendant was experienced and skilled in the business, and apparently, at least, that he so prided himself upon his knowledge and methods as to resent instruction, and no entirely satisfying reason to believe that he made any changes in his processes.

The practical proposition in consequence resolves itself into this: We are asked to restrain the defendant from selling sugars made as he has long been making them, and from selling to persons in the trade, because a former employé of the plaintiff disclosed its processes for making sugars, and as a broker sold defendant's sugars to former customers of the plaintiff. We say this is the substantial proposition, because, without a finding that the defendant was the guilty receiver and user of stolen processes, or had unfairly obtained or used information, the proposition so results. Counsel for plaintiff, of course, concede that without such a finding no restraining order could issue. The thought in mind is not in conflict with the distinction emphasized in Du Pont v. Masland, supra, that the important thing is the confidential relation and the command against the violation of its obligations. It must be further remembered that the employé is not a defendant in the present bill. Aside from the question of the justice of a decree against the defendant without a finding of wrongdoing by him, it would be impracticable to formulate a decree which would preserve to the plaintiff all its rights, without infringing upon the rights of the defendant and the rights, also, of those who are concerned with the trade. Counsel for plaintiff appreciate the difficulty of framing such a decree, but think a practical working decree may be framed, and have referred us to the special forms of decree entered in many different cases. The fact that a thing has been done often settles the question of whether it can be done, but one case of this general character may present difficulties which another does not. The defect which renders such a decree impracticable, if it be such, is that the enforcement of it brings up for decision the very same questions presented by the case before the decree was entered.

The bill of complaint is dismissed, with costs to defendant.

CLEVELAND & WESTERN COAL CO. v. J. H. HILLMAN & SONS CO.

(District Court, N. D. Ohio, E. D. October 2, 1917.)

No. 9503.

1. ATTACHMENT ⇐207—FEDERAL COURTS—JURISDICTION—NECESSITY OF PERSONAL SERVICE.

Under Rev. St. § 915 (Comp. St. 1916, § 1539), declaring that in common-law causes plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant as are now provided by the laws of the state in which court is held, and that District Courts may from time to time by general rules adopt such state laws as may be in force, jurisdiction cannot be acquired, in an action begun in the federal court, by the issue and levy of an attachment, but personal service on the defendant is indispensable; the issue and levy of an attachment being permitted only in an action begun in a federal court in which personal service has been or can be made.

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2. REMOVAL OF CAUSES ⊜112—EFFECT OF REMOVAL.
A defendant may remove an action begun in the state court to the federal court, without waiving any right to object to the manner in which jurisdiction was acquired of his person, and after removal may take advantage of such objections to the jurisdiction, either of his person or cause of action, that he might in the first instance have taken in the state court.

3. ATTACHMENT ⊜127—AFFIDAVIT—FAILURE TO MAKE.
An order of attachment, issued without a sufficient affidavit, is absolutely void.

4. REMOVAL OF CAUSES ⊜118—FEDERAL COURTS—ATTACHMENT—PERFECTION OF AFFIDAVIT.
An action was begun by attachment in an Ohio state court; the defendant being a foreign corporation. After removal, the attachment was on defendant's motion discharged, because no sufficient affidavit had been filed in the state court. Thereafter plaintiff filed in the federal court an affidavit, sufficient under the state laws, and obtained the issue of an order of attachment, which was duly levied on defendant's property. Under Gen. Code Ohio, §§ 11230, 11231, an action is pending, so as to stop the running of limitations from the time process is issued, only when actual service is made within 60 days thereafter; while under sections 11279, 11280, an attachment can be issued only at or after the commencement of the action. *Held* that, as the federal court was without jurisdiction to issue the attachment in the first instance, and as an order of attachment issued without a sufficient affidavit is void, the second attachment must be discharged, notwithstanding the filing of the petition; no action having been commenced.

At Law. Action by the Cleveland & Western Coal Company, a corporation, against J. H. Hillman & Sons Company, begun in a state court and removed to the federal court. On motion by defendant to discharge attachment. Attachment discharged, and plaintiff's petition stricken from the files.

C. F. Taplin, of Cleveland, Ohio, for plaintiff.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This action was begun in the court of common pleas, Cuyahoga county, and was removed to this court by the defendant, a foreign corporation. No process was served personally on the defendant, but plaintiff had sought to obtain jurisdiction in the state court by filing an affidavit and procuring the issue of an order of attachment, which was levied on the property of the defendant. After removal here, the defendant corporation, appearing specially for the purpose, moved to discharge the attachment, because no sufficient affidavit had been filed in the state court authorizing the issue of the order of attachment. This motion was at a former day of this term sustained, and the attachment was discharged.

Thereafter the plaintiff filed in this court an affidavit, sufficient under the state law, and obtained the issue of an order of attachment, which has been duly levied on property of the defendant. No other process has issued from this court, and no personal service on the defendant has been made. In this state of the record, defendant again appears specially for the purpose, and moves to discharge this attachment,

which motion has been argued orally and on briefs, and is now before me for decision.

[1] It is settled law that jurisdiction cannot be acquired in an action begun in this court by the issue and levy of an attachment, but that personal service of process upon the defendant is indispensable. R. S. § 915 (U. S. Compiled Statutes, Annotated, 1916, § 1539), it has been authoritatively decided, permits the issue and levy of an attachment in an action begun here only in aid of an action in which personal service has been or can be made on the defendant. Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; Smith v. Reed (D. C.) 210 Fed. 968.

[2] The present action, however, having been begun in a state court and removed here by the defendant, involves somewhat different considerations. It is settled law that the defendant may remove an action begun in a state court to this court, without waiving any right to object to the manner in which jurisdiction was acquired of his person, and that after removal he may take advantage of any and all objections to the jurisdiction of the state court, either of his person or of the cause of action, that he might in the first instance have taken in the state court. In other words, the action is transferred here in the same condition precisely as existed when the petition for removal was filed in the state court. This court, by virtue of the removal, becomes possessed of the action, with all the rights and powers respecting the cause of action and the parties thereto, as the state court would have possessed. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Wabash Western Ry. Co. v. Brow, 164 U. S. 271, 280, 17 Sup. Ct. 126, 41 L. Ed. 431; Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272.

[3, 4] The exact question then is: What power exists in this court, after removal, to perfect jurisdiction of an action begun in a state court by attachment only, and in which personal service was or cannot be had? This exact question, so far as I can discover, has never been considered or decided. It is undoubtedly true that publication may be completed, and that process may be issued and personally served after removal. In Clark v. Wells, supra, the action had been begun in the state court, an order of attachment issued and served, but no personal service was had either before or after removal. It was held that the order of publication provided for by the state law might be completed after removal, and a final judgment rendered, subjecting the property so attached to the plaintiff's demand.

In Lebensberger v. Scofield (6 C. C. A.) 139 Fed. 380, 71 C. C. A. 476, the action had been commenced in a state court, an order of attachment was issued and levied, but no personal service had been made. In this condition, the petition for removal was filed, and the case transferred to the federal court. After removal, process was sued out and personally served on the defendant. After this service, the attachment issued and levied before removal was on motion discharged. It was held that the federal court had power to complete the service, and that the fact that the defendant had become a citizen of the district between the time when the attachment was levied and the process issued

from federal court was served, and that the attachment was subsequently discharged, did not cause a failure of jurisdiction.

On principle, it seems to me, if sufficient action had been taken in the state court before removal, so that, despite an order discharging an attachment after removal, plaintiff would still be in the situation of having an action pending, this court has power to perfect its jurisdiction by taking such further steps as are warranted under the state law. If, for instance, an attachment were discharged here merely because of some defect in the manner of levying the attachment, or even because of some defect or irregular action of the clerk in issuing the same, then it seems to me the jurisdiction of this court might be perfected. If this were not so, the anomalous condition would be produced of permitting the party removing the cause to come here with all the rights and remedies accorded to him by the state law, while the other party would be brought here denied of some of those rights and remedies. The net result would be that the defendant defeats the plaintiff's action by removing it. If, on the other hand, the attachment were discharged here because no sufficient affidavit had been filed in the state court authorizing the issue of an attachment, and the pendency of the action both here and in the state court depended on nothing else than the attachment proceedings, then a discharge of the attachment would leave no valid proceedings, properly begun, but not completed, upon which to base further steps to perfect the jurisdiction of this court.

In the present case the attachment was discharged here because no sufficient affidavit had been filed, justifying the issue of an order of attachment. An order of attachment issued without a sufficient affidavit is absolutely void. Endel v. Leibrock, 33 Ohio St. 254; Leavitt v. Rosenberg, 83 Ohio St. 230, 93 N. E. 904. Such is the present situation. The order of this court discharging the attachment for want of a sufficient affidavit shows that the entire attachment proceedings were void, and, being void, the situation is as if no such proceedings had been begun. The jurisdiction both of the state court and of this court over the defendant depends exclusively upon the attachment proceedings, and, inasmuch as those proceedings were utterly void, there is nothing left upon which to base further steps to perfect the jurisdiction of this court. In that situation, the filing of a new affidavit, and the issue of a new order of attachment in this court, is the equivalent of beginning an action by the issue and levy of an order of attachment without personal service on the defendant.

If the order of attachment had been discharged in the state court for the reason for which it was discharged here, the plaintiff would not have a pending action in the state court. He would have, it is true, a petition lodged in the clerk's office, with a number on the appearance docket of the court; but each act and step required by law to begin an action would have to be commenced over again. Under the Ohio law, an action is pending, so as to stop the running of the statute of limitation, from the time process is issued, only when actual service is made within 60 days thereafter. G. C. §§ 11230, 11231. An attachment can be issued only at or after the commencement of an action. G. C. §§ 11279, 11280. All of the steps indicated by these sections as necessary to give a plaintiff the status of one having an action pending in court

would of necessity have to be taken after the order discharging the attachment, if, as in the present case, the attachment were discharged for want of a sufficient affidavit.

I am therefore of opinion that an order should be entered, discharging the attachment and striking plaintiff's petition from the files of this court. An exception may be noted in behalf of plaintiff.

UNITED STATES v. BRIEBACH.

(District Court, E. D. Arkansas, W. D. October 1, 1917.)

No. 3810.

1. COSTS ⟸304—CRIMINAL PROSECUTION.

Costs, to payment of which Rev. St. § 974 (Comp. St. 1916, § 1615), provides defendant shall be subject, when judgment shall be rendered against him in prosecution for a fine or forfeiture, are those of the trial under indictment, and do not include those of the preliminary examination, which is not part of the prosecution, and which by provision of section 1014 (section 1674) is "at the expense of the United States."

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

2. STATUTES ⟸219—CONSTRUCTION—EXTRINSIC AIDS—ATTORNEY GENERAL'S OPINION.

Courts will follow the construction of a statute by the Attorney General only when it was contemporaneous and uniform, and the statute was ambiguous.

John Briebach was convicted, and fine imposed. On motion of defendant to retax costs. Motion sustained.

Gus Fulk, of Little Rock, Ark., for the motion.
W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark., opposed.

TRIEBER, District Judge. The defendant entered a plea of guilty to an information charging him with violation of section 5 of the Post Office Appropriation Act of March 3, 1917 (39 Stat. 1069, c. 162), known as the "Reed Amendment."

[1] By the judgment of the court a fine was imposed and "the costs of the prosecution of this cause." The clerk in taxing the costs included, in addition to the costs of this court, all the costs incurred before the United States commissioner, who held the preliminary examination, which resulted in the defendant being bound over to await the action of the grand jury. He did this in obedience to directions from the Attorney General, given in June, 1916. The defendant moves to retax the costs, claiming that the costs of the hearing before the commissioner are not properly chargeable as costs of this cause. The same question was before the United States Circuit Court for the Southern District of New York, in United States v. Wilson (C. C.) 193 Fed. 1007, and before the United States District Court for the Middle District of Tennessee, in United States v. Smith (D. C.) 240 Fed. 756. In both of these cases it was held that such costs are not taxable against the defendant. The opinion of Judge Sanford in the last case is quite elabo-

rate, and the conclusions reached in these two cases meet with the approval of this court.

Section 974, Rev. St. (section 1615, U. S. Comp. St. 1916), provides:

"When judgment is rendered against the defendant in the prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs."

On the part of the government it is insisted that this includes all costs from the time a person is arrested until the entry of the judgment, including the costs of the examining magistrate, the United States commissioner in this case, as well as those of the marshal and witnesses, who appeared at the examination for the government. This contention is, in the opinion of the court, untenable. A preliminary examination before a United States commissioner, or other officer, is not a case pending in any court of the United States. It was so expressly held in Todd v. United States, 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982; Virginia v. Paul, 148 U. S. 107, 119, 13 Sup. Ct. 536, 37 L. Ed. 386; Post v. United States, 161 U. S. 583, 587, 16 Sup. Ct. 611, 40 L. Ed. 816; Ocampo v. United States, 234 U. S. 91, 100, 34 Sup. Ct. 712, 58 L. Ed. 1231.

Proceedings before a commissioner, or other magistrate authorized to conduct examinations under section 1014, Rev. St. (section 1674, U. S. Comp. St. 1916), are merely preliminary for the purpose of ascertaining whether there is reasonable cause to believe that the person brought before the examining officer has violated a statute of the United States, and, if he so finds, it is his duty to hold or admit him to bail, to await the action of the grand jury. In no sense can it be said that this is a trial, for no judgment or sentence can be pronounced or imposed by the commissioner, or any judge, sitting as an examining magistrate, even if it is the District Judge, who holds the examination. In Virginia v. Paul, supra, it was said:

"Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offense, which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried are but preliminary to the prosecution, and are no more a commencement of the prosecution, than is an arrest by an officer without warrant for a felony committed in his presence."

In Ocampo v. United States, supra, it was held:

"A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. * * * In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."

To meet this omission in the statutes Congress, in enacting the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1088), added in sections 135 and 136, originally sections 5399, 5405, and 5406, Rev. St. (Comp. St. 1916, §§ 10305, 10306), the words in section 135, "or [any] officer who may be serving at any examination * * * before any United States commissioner or officer acting as such commissioner, in the discharge of his duty," and in section 136 the words, "or in any examination before a United States commissioner or officer acting as such com-

missioner," thereby clearly indicating that, in the opinion of Congress, an examination before a commissioner or other examining magistrate is not a proceeding in a court, as determined by the Supreme Court in the cases hereinbefore cited.

A commissioner or examining judge has no other power than to commit the defendant to jail or to hold him to bail. The only court in which an accused can be tried, and, if convicted, punished, is the District Court, and only upon an indictment which has been duly presented, or in case of misdemeanors he may be tried upon an information filed by the United States attorney by leave of the court. It is therefore clear that only after an indictment has been returned, or an information filed in the District Court, is there a cause or prosecution pending in a court.

There is some conflict among the decisions of the state courts under statutes somewhat similar to section 974, Rev. St. The Constitution of the state of Washington (article 1, § 22) provides that the accused in criminal prosecutions shall have the right "to have compulsory process to compel the attendance of witnesses in his own behalf." In State v. Grimes, 7 Wash. 445, 35 Pac. 361, the question before the court was whether under this provision the state, or county, were liable for defendant's witnesses at a preliminary examination, there being such liability in the trial court, and it was held that they were not. The court, after holding that the county and state are liable for such costs in the trial court, said:

"But defendant's witnesses at a preliminary examination are an entirely different matter. The constitutional provision referred to applies to trials only, and a preliminary examination is not in any proper sense a trial."

Whether the judgment entered upon a conviction reads "costs in the cause" or "costs of the prosecution" is wholly immaterial. A question left open by Judge Sanford in United States v. Smith, supra.

[2] The construction of the statute by the Department of Justice is entitled to high consideration, but it is not conclusive on the courts. Cornelius v. Kessel, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; Deweese v. Smith, 106 Fed. 438, 445, 45 C. C. A. 408, 66 L. R. A. 971, affirmed 187 U. S. 637, 23 Sup. Ct. 845, 47 L. Ed. 344; Hemmer v. United States, 204 Fed. 898, 905, 123 C. C. A. 194, affirmed 241 U. S. 379, 36 Sup. Ct. 659, 60 L. Ed. 1055. In Lewis Publishing Company v. Morgan, 229 U. S. 288, 311, 33 Sup. Ct. 867, 57 L. Ed. 1190, the court refused to follow an opinion of the Attorney General in the construction of an act of Congress. It is only when the construction by the department is "contemporaneous and uniform" that it will be followed by the courts, and then only when the language of the statute is found to be ambiguous. United States v. Healey, 160 U. S. 136, 148, 16 Sup. Ct. 247, 40 L. Ed. 369; Wisconsin Central R. R. v. United States, 164 U. S. 190, 205, 17 Sup. Ct. 45, 41 L. Ed. 399. In the last case it was said:

"Some reliance is placed on departmental construction, but we may dismiss that contention with the observation that we do not consider the true construction as doubtful, and that the departmental construction referred to was neither contemporaneous nor continuous."

The statute, digested as section 974, Rev. St., was enacted in 1792, and the construction by the Attorney General that under this act the costs before the commissioner or examining magistrate are properly taxable as costs of the cause or prosecution, was made in June, 1916, more than 124 years after the enactment of the statute. This can hardly be said to be contemporaneous. Until then, the uniform practice of this court, ever since its organization in 1836, and so far as the court has been able to ascertain, of nearly all other national courts, has been not to tax such costs against the defendant. The only reported federal cases in which such costs have been included, which the court has been able to find, is United States v. Leopold (D. C.) 43 Fed. 785, and from the report it seems the only issue raised in that case was whether costs before the commissioner in examinations, in which the defendant was discharged by the commissioner, could be taxed, when the defendant was thereafter indicted on these charges and entered a plea of guilty. The point now in issue seems not to have been raised, and of course was not decided by Judge Hallett.

Another ground upon which the contention of the government must fail is that section 1014, Rev. St. (section 1674, U. S. Comp. St. 1916), expressly provides that such examination before the commissioner, or officer of the state, shall be "at the expense of the United States." Nothing is said, in this or any other statute, that such costs shall be taxed against the defendant upon conviction. It may be proper to add, although in the opinion of the court it is not material, that in the courts of the state of Arkansas it is the uniform practice not to tax the costs of the preliminary examination as costs of a criminal prosecution. The court refers to this only for the reason that the learned District Attorney cited 1 Comp. Dec. 536, where the comptroller held that the statutes of Georgia should be followed in proceedings under section 1014, Rev. St.

The motion to retax the costs is sustained, and the clerk directed not to include any costs, except those of this court.

In re ARONSON.

(District Court, D. Massachusetts. August 6, 1917.)

No. 24446.

1. BANKRUPTCY ⟸116—RECLAMATION PETITIONS—HEARING.

Where the referee's certificate separated and distinguished the claims of several creditors, each of whom petitioned to reclaim goods in the possession of the receiver in bankruptcy, on the ground that they did not belong to the bankrupt, the fact that the referee heard the reclamation petitions together was not an abuse of discretion.

2. BANKRUPTCY ⟸140(2)—CONDITIONAL SALE—PASSAGE OF TITLE.

Whether an arrangement whereby possession of goods was transferred from one to another is a conditional sale, a consignment, or a sale on credit, depends less on how it is described by the parties than on the rights and liabilities created by it, and where the seller delivered goods to the buyer, authorizing the buyer to dispose of them and retain the

purchase price, the fact that the transaction was denominated a consignment, or a conditional sale, does not prevent title passing; ownership being acquired, and the provisions that title should not pass being fraudulent as to the buyer's creditors.

3. BANKRUPTCY ⊜140(1)—EVIDENCE—PASSAGE OF TITLE.
On petition of creditors of a bankrupt to reclaim goods, on the theory that title had not passed, evidence *held* to show that the sales were sales on credit, and title passed.

4. BANKRUPTCY ⊜116—PROCEEDINGS—PERJURY—INFERENCES.
Where a petition for reclamation of goods delivered by petitioner to a bankrupt was of a suspicious character, and supported by testimony which the referee might rightly believe to be perjured, it is proper to draw every adverse inference from the evidence, and resolve all reasonable doubts against the petitioner.

5. BANKRUPTCY ⊜140(2)—RECLAMATION PETITIONS—FRAUD ON CREDITORS.
An agreement between a seller and buyer of goods that title should not pass is unavailing, being fraudulent as to creditors, where not intended to be acted on unless the buyer should get into financial difficulties.

In Bankruptcy. In the matter of Casper A. Aronson. Petitions by the Boston Traveling Goods Company and others to reclaim from the receiver goods which petitioners contended were their own property. The referee denied the petitions, and petitioners appeal. Order affirmed.

Samuel J. Freedman, of Boston, Mass., for trustee.
Jacobs & Jacobs, of Boston, Mass., for Boston Traveling Goods Co.
Louis Rosenthal, of Boston, Mass., for Hugo Murrell.
Clarence F. Eldredge and Edward E. Ginsburg, both of Boston, Mass., for Isaac A. Simon.
Barnett White, of Boston, Mass., for Maurice Feinzig and others.

MORTON, District Judge. [1] These are three petitions brought by independent petitioners to reclaim from a receiver in bankruptcy certain goods which the several petitioners contend were their property. The learned referee heard all the petitions together. His course in so doing was objected to by the petitioner Simon; but it seems to me to have been right, and certainly it was within the referee's discretion. In the certificate the different claims are carefully separated and distinguished, and Simon's rights were in no way prejudiced by what was done. This action of the referee is affirmed.

[2] Aronson, the bankrupt, conducted a retail shop in Boston for the sale of trunks, bags, and other leather goods. All the goods here in question went into the active stock in the shop, were used for display purposes, and were sold when the opportunity arose. The proceeds from the sales were treated exactly like the proceeds from sales of goods owned by the bankrupt. All these facts were known to and approved by each of the claimants. The arrangements between the several claimants and the bankrupt—whatever the details may have been—clearly gave him the right to deal with the goods as above stated. If it was also understood that the bankrupt was to buy the goods from the vendors, it would seem that, as a matter of law, he acquired absolute title to them.

Whether an arrangement is a consignment, a conditional sale, or a sale on credit depends less on how it is described by the parties than on the rights and liabilities created by it. It is difficult to generalize, so as to cover all possible cases; but it seems clear that, where the person to whom the goods are delivered becomes obligated to buy them at a certain price, and at some time to pay for them, and also has the right to sell the goods without keeping the proceeds of such sales separate, and with the right to use such proceeds as he sees fit, there is no retention of title in the vendor, as against creditors of the buyer. To have agreed to buy goods, to take possession of them, to have the right to sell them at such price as one may fix, and the right to use the proceeds as one pleases is to own the goods. Ownership is acquired upon delivery of goods under such an understanding, and it is not negatived by an agreement that, until they shall be sold by the vendee, the title to them shall remain in the vendor. Such an agreement is inconsistent with the arrangement as a whole. It is a misuse of language to say that the title is retained; the facts show that it is not.

"Contracts of sale, under which title is to remain in the vendor, although the vendee may consume the goods, or sell them and apply the proceeds to his own use, are fraudulent as to creditors, because the stipulation that the title is to remain in the vendor is entirely inconsistent with the purpose of the contract." Ludvigh v. American Woolen Co., 188 Fed. 30, 33, 110 C. C. A. 180, 183; Id., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345.

It was in dispute whether the bankrupt agreed to buy the goods here claimed. Each of the claimants or its representative testified in substance that the goods were merely consigned to him; that he never had any title to them, and never became obligated to buy them. In no case was there a written contract of consignment or conditional sale between the bankrupt and the claimant. The evidence relied on by the claimants consists, speaking generally, of bills of parcels accompanying delivery of the goods, and of alleged conversations with the bankrupt. On the other side, there was the testimony of two clerks, employed by the bankrupt, who are now preferred creditors of the estate, which was, to say the least, inconsistent with the testimony of the bankrupt and each claimant. The foregoing statement applies to all the petitions.

[3-5] As to the Simon petition: All the goods claimed in this petition were covered by bills or delivery sheets reciting that they were "sold to Reliable Trunk & Bag Company," the name under which the bankrupt did business. There were about half a dozen such bills, running in date from October 27, 1916, to December 5, 1916. They differed as to terms. That of October 27th is net 30 days; that of November 10th has no terms stated; another of November 10th has terms "Regular"; that of November 28th has terms "Cash"; that of November 29th has terms "Cash"; that of December 1st has terms "Memo. Cons." (meaning memorandum consignment); that of December 5th has terms "Cash." The claimant makes no distinction between the arrangements evidenced by these various bills, after the one of "about November 1st" (which I take to be the bill of October 27th above referred to). No goods in this bill are now claimed.

All the goods covered by the bill of December 5th, in which the terms were stated as "Cash," were paid for by the bankrupt four days later with a 2 per cent. discount; and some of these are among those retaken by the claimant as his property, and to which title is now asserted by him. The same is true as to the bill of November 28th, and certain items therein specified. The contention that these goods, which have been bought and paid for by the bankrupt, are the property of the claimant, is obviously untenable. They were never sold by the bankrupt, but they were paid for by him—a significant circumstance in determining what his arrangement with the claimant was. Various facts, as to which there can be no doubt, are absolutely inconsistent with the claimant's testimony that the goods were merely consigned to the bankrupt, not to be paid for till sold by him, and with no obligation on his part to buy them.

It is apparent, as the referee finds, that "the evidence of both Simon and the bankrupt [is] of very little value in the matter of what the arrangement between them was." Against a claim of such an obviously suspicious character, supported by testimony which he might rightly believe to be perjured, the learned referee was quite warranted in drawing every adverse inference which the facts and evidence fairly suggested, and in resolving all reasonable doubts against the party resorting to such methods.

I have no doubt that the goods were in fact sold to the bankrupt as the bills state, that he agreed to buy them and to pay for them at the prices stated, that he had the right to sell them at such prices as he might put upon them, and to use the proceeds of such sales as he saw fit. What the nominal understanding as to payment was between Simon and the bankrupt seems to me, as it did to the learned referee, to be unimportant. It was not, in my opinion, intended to be acted on, unless the bankrupt got into financial difficulties, and was therefore fraudulent as to creditors. Flanders Motor Car Company v. Reed, 220 Fed. 642, 136 C. C. A. 250 (C. C. A. 1st Cir.). The findings of the learned referee on this petition are affirmed.

As to the petitions of the Boston Traveling Goods Company and the Murrell Leather Goods Company:

As above stated, the claimant in each of these petitions contended that the goods sought to be recovered had been merely consigned to the bankrupt, without obligation on his part to purchase them. Whether this was the fact was sharply disputed, and the evidence was conflicting. The learned referee disbelieved the testimony for each claimant, and found that all the goods had been sold, not consigned. His certificate sufficiently states the nature of the controversy, and the evidence on which he acted. I agree with his findings and conclusion.

The orders appealed from, dismissing the petitions, are affirmed.

In re MOBILE CHAIR MFG. CO.

(District Court, S. D. Alabama. September 24, 1917.)

1. BANKRUPTCY ⟸324—PROCEEDINGS—CLAIMS—"PRESENT CONSIDERATION."
Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564, as amended by Act June 25, 1910, c. 412, § 12, 36 Stat. 842 (Comp. St. 1916, § 9651), declares that liens given or accepted in good faith, and not in contemplation of, or in fraud upon, the act, and for a present consideration, which have been recorded according to law, shall to the extent of such present consideration only not be affected by the act. The amendment added the phrase "to the extent of such present consideration only." *Held* that, where a note given by the bankrupt reserved interest, the interest was part of the "present consideration," and might be recovered.
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Present Consideration.]

2. BANKRUPTCY ⟸322—PROCEEDINGS—CLAIMS.
Under such section as amended, fees paid by the holder of a note to his attorney cannot be recovered, notwithstanding the note contained an agreement on the part of the borrower, which became bankrupt, to pay all costs of collecting or securing, or attempting to secure, the note, including a reasonable attorney's fee; the note itself not fixing the fee.

In Bankruptcy. In the matter of the bankruptcy of the Mobile Chair Manufacturing Company. Petition by C. M. Kirk, H. L. McConnell, and H. S. Davies for review of an order of the referee denying the payment of interest and attorney's fees claimed by petitioner. Order of referee reversed in part; otherwise, affirmed.

Stevens, McCorvey & McLeod, of Mobile, Ala., for petitioner.
H. H. McClelland, of Mobile, Ala., for trustee.

ERVIN, District Judge. This matter comes on for hearing on a petition praying for a review of the order of the referee heretofore rendered, wherein the referee denied the payment of interest and attorney's fees claimed by petitioner.

The facts, stated briefly, are that on June 27, 1916, the Mobile Chair Manufacturing Company, the bankrupt, executed a mortgage on certain personal property to petitioner, to secure $1,500 then loaned by petitioner to the bankrupt; a list of the property being attached to and made a part of the mortgage. The note, which was given to evidence the debt and for the payment of which the mortgage is security, bore the same date, and is payable 30 days after date with interest. The agreement as to attorney's fees contained in the note is shown by the following words:

"Agree to pay all costs of collecting or securing, or attempting to collect or secure, this note, including a reasonable attorney's fee, whether the same be collected or secured by suit or otherwise."

Kirk-McConnell-Davies Company, the petitioner, is a partnership composed of C. M. Kirk, H. L. McConnell, and H. S. Davies. The petition for adjudication was filed on the 4th day of August, 1916, and the adjudication was entered on August 5, 1916, and on the 5th day of August, 1916, H. L. McConnell, who was one of the partners in the

firm of Kirk-McConnell-Davies Company was appointed receiver of said bankrupt estate.

On August 8, 1916, the receiver filed a petition, setting out the loan of the $1,500 and the making of the mortgage and note by the bankrupt, and that prior to the filing of the petition in bankruptcy the mortgagees had had all of the property covered by the mortgage piled together in a separate lot and delivered to it by the bankrupt; that a portion of the property covered by the mortgage is not yet in a completed condition, and not ready to be shipped out to fill orders which had been received therefor; that the necessary material and necessary work for completing said chairs can be had for a few hundred dollars, and that the bankrupt had on hand this material, which might be used in the completion of the chairs, so as to render them salable, and that it would be to the interest of the bankrupt estate that the receiver be authorized to proceed to complete the manufacture of the chairs covered by said mortgage; and prayed that he be authorized to borrow such money as may be necessary for labor and to purchase such necessary supplies as might be needed in the completion of the chairs, so as to sell them, and praying further, that a separate account be kept of the cost of completion of such chairs as were covered by the said mortgage. This petition has attached to it a copy of the mortgage and schedules.

On the same day an order was made by the then referee granting the prayer of said petition. Thereafter the receiver completed the manufacture of the chairs, using some materials not covered by the mortgage, as well as the mortgaged materials, borrowing money and paying for the labor necessarily used in completing the chairs, and then sold the chairs on existing contracts then held by the bankrupt concern, and collected for said chairs, and, after paying for the materials and labor, had left more than enough to pay the mortgage, interest, and attorney's fees claimed. Thereafter a petition was filed in the bankrupt estate by the mortgagees, praying for the payment of their debt, interest, and attorney's fees.

[1] The referee, on July 9, 1917, ordered the payment of the $1,500 principal, but denied payment of the interest on this mortgage and the attorney's fee claimed. The referee bases his ruling on the language of section 67d as amended, which reads as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, *to the extent of such present consideration only*, not be affected by this act."

The words italicized were added by the amendment of June 25, 1910. I find no authorities discussing this question. It will be noticed that the act, as originally drawn, preserved liens given in good faith and for a present consideration. The words added by amendment must have been designed by Congress for some purpose. Congress certainly concluded that the words "for a present consideration," as found in the original act, needed some further limitation; so the words added in 1910 were undoubtedly put into the act to further limit

the protection given by the act to liens given in good faith. It was, no doubt, found that liens, which were given for a present consideration, had also other considerations moving, and Congress intended to limit the protection given these liens to the present consideration given for such lien.

The question then arises whether the interest which the present cash consideration bears is the same as the consideration itself. I think that, in a lien given to secure $1,500 presently advanced, with interest, the interest is a necessary part of the advance. It is produced by or grows out of the money advanced. It is contracted for and absolutely payable by the terms of the lien. Suppose the mortgagor, 10 days after the making of this mortgage loan, had gone to the mortgagee and tendered the $1,500 in payment of the mortgage. This would not have required the mortgagee to take the money and surrender his mortgage. He might have properly replied:

"Your mortgage obligates you to pay, not only the principal, but the interest for 30 days, and, while I will take the money now, instead of at the end of 30 days, you still must pay me, in all events, both principal and interest."

To this extent, therefore, I think the referee erred.

[2] As to the attorney's fee, however, under the terms of this mortgage loan, an attorney may or may not have been employed. There may or may not have arisen a necessity *after* the execution of the mortgage for the employment of an attorney. This necessity could not be determined until the mortgage matured. Such employment, therefore, was contingent, and not absolutely fixed and determined by the mortgage. I cannot, therefore, see that the attorney's fee is in any sense a *present* consideration, as provided by the amendment to the section. Congress having been so particular, not only to use "to the extent of such present consideration," but then added the additional term "only," to show beyond any peradventure that the words were put in as a strict limitation, and as such should be so construed. I therefore conclude that this lien did not secure the attorney's fee.

I think the referee was correct in disallowing the attorney's fee for another reason. The language of the note obligates the maker to pay the costs of *collecting,* including the attorney's fee. The collection from the bankrupt trustee is not such a collection as was contemplated by the terms of this note. It is true there are a number of cases which hold that, where a note agrees to pay a collection fee if it is placed in the hands of an attorney for collection, this fixes the fee, so that it is added to the face of the note. Here, however, the language does not so read, and I think the language of this note brings petitioner under the cases of In re Roche, 101 Fed. 956, 42 C. C. A. 115, and Gugel et al. v. New Orleans National Bank, 239 Fed. 677, 152 C. C. A. 510.

OREGON SHORT LINE R. CO. v. PORTLAND CATTLE LOAN CO.

SAME v. PORTLAND FEEDER CO.

(District Court, D. Oregon. September 17, 1917.)

Nos. 7232, 7233.

CARRIERS ⊂=189—CARRIAGE OF LIVE STOCK—RATES—TARIFFS.

In an action by a railroad company to recover balances due as freight for shipments of cattle, published tariffs *held* to show that a differential rate from the point of shipment to a central point should be collected; provisions for charging rate from central point in case of shipments routed in a particular way not applying.

At Law. Actions by the Oregon Short Line Railroad Company, a corporation, against the Portland Cattle Loan Company, a corporation, and against the Portland Feeder Company, a corporation. Judgments for plaintiff.

A. C. Spencer and W. A. Robbins, both of Portland, Or., for plaintiff.

Carey & Kerr and Charles A. Hart, all of Portland, Or., for defendants.

WOLVERTON, District Judge. These cases were instituted to recover certain balances alleged to be due plaintiff as freight for shipments of cattle, arising by reason of alleged erroneous computations of freight when the shipments were made and settled for; the plaintiff being required to institute the actions under the federal statutes. Several shipments are involved, a statement as to one of which will suffice for illustration of the whole.

Forty-four carloads of cattle were shipped from Hereford, Tex., to Amarillo, Tex., the latter being a station on the Pecos & Northern Texas Railway, where the shipment was combined into 43 cars, 27 of which were transported thence over the lines of connecting carriers to Pocatello, Idaho, and the remaining 16 to Butte, Mont., where they were delivered to the shipper.

The plaintiff claims that, under Joint Live Stock Tariff No. 100–A, then in force, the proper charges on these shipments are made up as follows: Local from Hereford to Amarillo, $26.40 per car, and from Amarillo to Pocatello, $116.50; making a total of $142.90 per car for shipment of the 27 cars. To Butte, the same local from Hereford to Amarillo, to which is added $125 to Dillon, Mont., and the local from Dillon to Butte, $19.80; total, $171.20.

The entire controversy centers about the local charge of $26.40 from Hereford to Amarillo; the defendants insisting that Hereford is a common point with Amarillo, and that the rate designated under section 2 of the tariff constitutes the entire rate from Hereford to Pocatello. This depends upon a proper construction of the tariff. Referring to section 1 thereof, under the head of "The Pecos & Northern Texas Ry. Co.," will be found lists of stations common with Amarillo, the

rate basis being Amarillo, and other lists of stations carrying differentials with Amarillo; that is to say, the tariff indicating that certain sums should be added to or deducted from the Amarillo rate basis. By a note on page 24, it is explained that the differentials shown in section 1 are to be added to or deducted from the Amarillo rates as shown in section 2, pages 32 to 51, inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69. By the same note, it is further explained that, where no differentials are shown, the Amarillo rates as shown in section 2 are to be applied as indicated. By another note, explanatory of section 2, it is stated that rates shown in section 2, in columns headed "Amarillo," are to be applied from stations shown in section 1 as taking Amarillo rate basis, or same are to be used as a basis for arriving at through rates from stations shown in section 1 as taking differentials over or under Amarillo rates, where application and routing is provided on pages 56 to 69, inclusive, from such point of origin to destination station. On page 56 is found another note explaining application of rates, which reads:

"Rates provided herein from points of origin shown in section No. 1 to points of destination shown in section No. 2 will apply only via the routes indicated in chart on page 57, except as provided in item 350."

The exception is without application here. Note 1 to the above explanation further provides:

"Where route number is not shown, there are no through rates applicable from the originating line to the destination line via any route, except as specifically provided in section No. 3."

These several explanatory notes respecting the application of the tariff must be construed together, to ascertain their true meaning. Reading the explanatory note to section 1 by itself, and without reference to the succeeding notes, its meaning would appear to be plain that, where there were differentials, the rates shown in section 2 would not apply, unless the routing was provided on pages 56 to 69, but that, where there were no differentials shown, the shipment would take the section 2 rates, without regard to whether the application and routing were provided on pages 56 to 69 or not. The note to section 2 merely emphasizes the thought that shipments from stations carrying differentials with Amarillo will take the through rate only where the application and routing are provided for on pages 56 to 69.

When, however, we turn to the note on page 56 respecting the application of rates, we are advised that rates from points of origin shown in section 1 to points of destination shown in section 2 will apply only via the routes indicated on page 57. This is a specific declaration, general in its scope, without reference to differentials, that the rates so provided will apply only via the routes indicated on page 57. The note thereto is but a reinforcement of the idea. Page 57 is, of course, included within the limitations of pages 56 to 69. So that these later explanatory notes are but a development of the intention which possessed the rate maker from the beginning, and that must be construed to be that shipments from Amarillo common points, whether carrying a differential or not, shall not take the through rate, unless where application and routing are provided on pages 56 to 69.

Recurring again to note to section 1, page 24, the words "as indicated" in the last clause, as applying "where no differentials are shown," are susceptible of a construction, though not the natural one, viewing the context, as signifying or denoting a reference to the preceding clause and also to the note to section 2, page 32, as this latter note refers back to the item on page 24. So that the aforesaid latter clause would read that the rates shown in section 2 are to be applied as indicated by these explanatory notes, and not by section 2. This idea harmonizes the seemingly inconsistent and incongruous explanatory notes.

But, whatever may be the true rendering of the notes to sections 1 and 2, the notes on page 56 explaining the "application of rates" are directly applicable to the present controversy, as no Oregon Short Line Railroad routing is shown of shipments coming from and over the Pecos & Northern Texas Railway on page 57; and, as we have seen, the regulation is general, and specifically limits the application of rates from points in section 1 to points of destination in section 2 to the routes indicated in the chart on page 57.

This construction of the tariff results in a finding for the plaintiff in each cause of action, and upon all the counts as prayed. The findings will be general, but judgment thereon will be withheld until the defendants have had an opportunity to present such findings as they may deem essential for reserving such questions for review as they may desire.

In re FRANCISCO.

(District Court, N. D. New York. September 17, 1917.)

1. BANKRUPTCY ⟸20(1)—PETITION—CONSENT.
   Though the judge of the state court, on proceedings supplementary to execution, directed that one who subsequently became a bankrupt should not dispose of any funds in his hands, such person might for the institution of bankruptcy use funds exempt from execution, or with the consent of the owner funds in his possession belonging to another.

2. EVIDENCE ⟸82—PRESUMPTIONS.
   It will be presumed, where pending proceedings in the state court supplementary to execution the judgment debtor instituted voluntary proceedings in bankruptcy, that the state court, in determining whether the judgment debtor was guilty of contempt, will properly perform its duties.

3. BANKRUPTCY ⟸20(1)—JURISDICTION—CONTEMPT.
   While proceedings supplementary to execution were pending in the state court, the judgment debtor instituted voluntary proceedings in bankruptcy. He was adjudicated a bankrupt, and the judgment creditor, claiming that he had violated an order of the state court prohibiting him from disposing of his property, sought to continue the supplementary proceedings and to have the judgment debtor punished for contempt. *Held*, that the state court had jurisdiction to determine whether the debtor was guilty of contempt; it being his duty to obey the orders of such court until a stay should be granted by a court of competent jurisdiction, and a fine for contempt not being a debt dischargeable. Also *held*, the bankruptcy court can enjoin the party from further prosecuting the supplementary proceeding, except in so far as it relates to the punishment of a contempt committed therein prior to such bankruptcy.

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4. BANKRUPTCY ⊂=20(1)—CUSTODY OF BANKRUPT—HABEAS CORPUS.
In such case, as the presence of the judgment debtor in bankruptcy proceedings could be procured by habeas corpus, proceedings to punish him for contempt will not be stayed, on the ground that his presence in the bankruptcy court might be necessary, and that imprisonment would interfere with the proper conduct of such proceedings.

In Bankruptcy. In the matter of the bankruptcy of Charles L. Francisco. On order to show cause why further proceedings supplementary to execution on a judgment obtained in the state court prior to the filing of the petition in bankruptcy, including proceedings to punish the bankrupt for alleged contempt, should not be stayed until the question of discharge should be determined. Supplementary proceedings stayed, but order of stay denied as to proceedings to punish for contempt.

Hearing on order to show cause, granted by referee in bankruptcy, why further proceedings in proceedings supplementary to execution on a judgment obtained in the state court prior to the filing of the petition in bankruptcy, including proceedings to punish for alleged contempt of the state court, should not be stayed until the question of discharge is determined. The alleged contempt is claimed to have been committed prior to the institution of the bankruptcy proceedings. The plaintiff in the execution and judgment in the state court moves to vacate the temporary stay granted by the referee, and asks that the injunction prayed for be denied. The bankrupt asks that the temporary stay be made permanent, including the proceeding to punish the bankrupt for alleged contempt in disobeying the order of the state court enjoining the now bankrupt from disposing of any of his property.

William H. Lynes, of Delanson, N. Y., for bankrupt.
Thomas R. Tillott, Jr., of Schenectady, N. Y., for judgment creditor.

RAY, District Judge (after stating the facts as above). It appears from the papers in the case that Charles L. Francisco was adjudged a bankrupt on the 11th day of May, 1917. He was owing the International Milk Products Company, on a judgment obtained prior to the filing of the petition in bankruptcy, the sum of $224.73. This claim or judgment is one from which a discharge in bankruptcy would be a release. Prior to the filing of the petition in bankruptcy an execution had been returned unsatisfied, and proceedings supplementary to execution on such judgment had been commenced and were pending in the County Court of the county of Schenectady, N. Y., before the county judge of that county. The order of the county judge prohibited Francisco from disposing of any of his property, but notwithstanding such order, on filing his petition, in order to pay his attorney, he used some money which he had in his possession. A part of this money he claims, and files affidavits tending to show, did not belong to him at all, and the remainder the bankrupt claims, and files affidavits tending to show, was money earned and paid to him within the preceding 60 days for his personal services, and was his personal earnings, and exempt from the supplementary proceedings.

The judgment creditor in the execution claims that all of this money belonged to the bankrupt, and that he paid it to his attorney to institute the bankruptcy proceedings in defiance of the order of the county judge and in violation thereof.

[1, 2] It is plain that the bankrupt, with the consent of the owner thereof, had the right to use money in his possession which did not belong to him for the purpose of instituting the bankruptcy proceedings. It is also plain that the county judge of Schenectady county could not interfere with the use by the now bankrupt of money which was not subject to the order or jurisdiction of the county judge or County Court, but was absolutely exempt. It is presumed that the county judge will properly perform his duties, and see to it that no wrong is done the bankrupt in proceedings to punish him for contempt. It is a question for the county judge or County Court of Schenectady county to determine whether or not Francisco was guilty of a contempt of court. It is claimed in behalf of the now bankrupt that the proceeding supplementary to execution had run down and was not in force at the time the petition in bankruptcy was filed, but that is a question for the county judge to determine.

[3] This court in bankruptcy can enjoin further proceedings looking to the collection of the judgment from the property of the bankrupt, and can enjoin further examination of the now bankrupt in such proceeding; but I do not think this court in bankruptcy has any power to enjoin a proceeding in the County Court of Schenectady county, or before the county judge of that county, to punish Francisco for an alleged contempt of that court committed by him prior to the institution of the proceedings in bankruptcy. Up to the time the bankruptcy proceedings were instituted it was the duty of the bankrupt to obey all lawful orders of the County Court, or of the county judge. Unless a stay was granted by some court of competent jurisdiction, it was the duty of the now bankrupt to obey such lawful orders, even after the bankruptcy proceedings were instituted. Here there is no claim that the alleged contempt was committed after the institution of the bankruptcy proceedings. The claim is that the alleged contempt was committed before that time. A fine imposed for alleged contempt, if contempt is found, would not be a debt dischargeable in bankruptcy.

I think the order of the referee enjoining further proceedings in the proceedings supplementary to execution, so far as it enjoins punishment for contempt of court, if any, committed before the institution of the bankruptcy proceedings, should be vacated, and the application for an injunction or order restraining such a proceeding should be denied. The plaintiff in that execution and judgment should be enjoined from taking further or other proceedings under such order or in such proceeding for the collection of the debt, as the claimant may prove his claim and share with the other creditors. Punishment for the contempt of court, if any, is another matter, and a question to be passed upon by the county judge, with all the facts before him. The County Court will be able to determine whether or not there was a contempt, and whether or not it was willful, and what punishment, if any, should be imposed, if Francisco is found guilty. There will be an order enjoining and staying the International Milk Products Company, its agents and servants, and all other persons, from taking further proceedings in the proceeding supplementary to execution, except in so far as it relates to an application to the county judge or County Court to punish Fran-

cisco for a contempt committed prior to the institution of the bankruptcy proceedings.

[4] It is contended that, if the bankrupt is found guilty of and punished for the alleged contempt, it will interfere with the proper conduct of the bankruptcy proceedings. I cannot see that it will have this effect. If the bankrupt is found guilty of a contempt and punished by fine or imprisonment, this court has ample power by writ of habeas corpus to bring the alleged bankrupt before the court in case he is imprisoned.

There will be an order accordingly.

MURPHY v. MITCHELL.

(District Court, N. D. New York. October 16, 1917.)

1. PLEADING ⊂=369(1)—ELECTION BETWEEN CAUSES OF ACTION.
When the complaint contains appropriate allegations upon which a claim for equitable relief may be based, and which would seemingly also justify a recovery of damages as in an action at law, plaintiff should be required to elect on which ground he will proceed, or to so plead that there may be no mistake in this regard on the part of defendant or the court, in view of the distinction in the federal courts between actions at law and in equity, and the different manner of testing the sufficiency of the pleading.

2. DAMAGES ⊂=141—PLEADING—SUFFICIENCY.
It is unnecessary for a pleading to show in so many words that plaintiff has sustained damages, if he alleges facts showing that he has sustained damages and demands judgment based thereon for a sum named.

3. ACTION ⊂=25(2)—NATURE OF ACTION—LEGAL OR EQUITABLE.
A complaint alleged that the estate of S. was in excess of $1,000,000, that by a valid will and codicil plaintiff and her sister were made residuary legatees, and would have been entitled to as much as $800,000, that defendant made verbal representations and statements, fully set out, inducing the testator to change his will, or make a new one, when he was incompetent, that probate of this will was secured by fraud and deceit, and that by fraud and deceit plaintiff was induced to accept a small legacy given under this last alleged will. *Held*, that the suit could not be treated as one in equity to set aside the proof and probate of the last-mentioned will for fraud and deceit, but was apparently an action at law for damages for the fraud and deceit.

4. PLEADING ⊂=367(4)—MAKING DEFINITE AND CERTAIN—ACTIONS FOR FRAUD.
Assuming that the action was one at law for deceit, allegations of false representations by others than defendant, not speaking for or representing him, or not made by his authority or procurement, were irrelevant, and the complaint should be made definite and certain as to what representations were made by defendant and what representations by others, and whether the representations by others were by his authority and procurement.

At Law. Action by Mary E. Murphy against John Clark Mitchell. On application to require plaintiff to make her complaint more definite and certain. Application granted to the extent stated in the opinion.

Application on order to show cause for an order directing the plaintiff to replead and make her complaint more definite and certain, by stating clearly

and definitely, or so pleading as to show definitely and certainly whether this is an action at law or one in equity, and whether plaintiff demands or intends to demand relief in equity on the ground defendant has obtained money which equitably belongs to and should be paid to the plaintiff as assets of the estate of one Dennis Sullivan now deceased, or claims damages for money had and received and to which plaintiff is entitled, and also requiring plaintiff to elect whether she will proceed upon the present complaint as one to recover damages as in an action at law or as one for relief in equity, and also to elect whether she relies upon a cause of action in tort or one on contract, or one for damages based on the fraudulent representations set out in the complaint, or upon a cause of action for slander by reason of the alleged false representations set out in the complaint, and also that the complaint be made more definite and certain by stating what false statements and representations were made by the defendant, and what false statements and representations were made by others.

Edgar T. Brackett, of Saratoga Springs, N. Y., for plaintiff.
Rushmore, Bisbee & Stern, of New York City, for defendant.

RAY, District Judge (after stating the facts as above). The plaintiff in her brief filed on this motion by her attorney says:

"The action is one at law to recover for deceit. The complaint alleges, among other things, false representations made to the plaintiff, through and by means of which she was induced to sign waivers and a receipt in full for her interest in the estate. The things necessary to be pleaded in an action for deceit are: (1) Representations. (2) Falsity. (3) Scienter on the part of the defendant. (4) Reliance. (5) Damage.

"Under all the cases, a complaint that sets out these several facts sets out a good cause of action. Brackett v. Griswold, 112 N. Y. 454–467. A cloud of cases could be cited to the proposition. The prayer for relief is a prayer for damages only—no equitable relief being asked. While the language of the prayer does not, of necessity, characterize the complaint as either legal or equitable, it is a persuasive factor in determining the question. There was no occasion for the motion of the defendant. The complaint speaks clearly and truly what the plaintiff wishes. The motion should be denied.

"Saratoga Springs, N. Y., September 26, 1917.

"Edgar T. Brackett, Attorney for the Plaintiff.

"City Hall, Saratoga Springs, N. Y."

[1] This, is seems to me, should be regarded by the court as an election by plaintiff to regard this action and have it treated by the court as an action at law to recover damages for deceit, and not as an action in equity or one seeking equitable relief. It is informal, and perhaps not binding in subsequent proceedings, and I think the plaintiff should file a formal election to the effect stated in the plaintiff's brief. This will set that matter at rest, and enable the defendant to test the sufficiency of the complaint as one in an action at law. The propriety of and necessity for requiring such an election, when the pleading is at all equivocal in this regard, is plain, inasmuch as in the United States courts the distinction between actions at law and in equity is maintained, and the practice in the two classes of cases differ. In actions in equity the sufficiency of the pleading must be tested by motion, while in actions at law, following the New York Code practice, the sufficiency of the pleading is tested by a demurrer. Therefore, when the complaint contains appropriate allegations upon which a claim for equitable relief may be based, and which would seemingly also justify a recovery of damages as in an action at law, the plaintiff should be required to

elect on which ground he will proceed, or be required to so plead that there may be no mistake in this regard on the part of the defendant or of the court.

[2-4] The defendant has the right to test the sufficiency of the complaint before trial, and, if he demurs, assuming the complaint to be one stating a cause of action at law, he should not be defeated on the ground the action is sufficient in equity, and that the action may be construed to be one in equity. The construction this court would place on this complaint is that it states a cause of action at law for fraud and deceit, but under all the allegations this is not necessarily correct. No equitable relief is in terms demanded, but it would be easy to assert that this is immaterial, if the allegations of fact in the complaint are sufficient to justify the granting of equitable relief. Plaintiff pleads facts which show that the estate of Sullivan was in excess of $1,000,000; that by a valid will and codicil thereto the plaintiff and her sister, Hannah E. Glenn, were made residuary legatees; and that as such, under such will and codicil, the plaintiff and her said sister would have been entitled to and would have received as much as $800,000—the plaintiff as much as $400,000 or over. Then follow allegations that defendant made fraudulent representations and statements, fully set out, which induced the testator to change his will, or make a new one, when in fact incompetent; that proof and probate of this second will was secured by fraud and deceit; and that by fraud and deceit the plaintiff was induced to accept a small legacy given under this last alleged will. The facts pleaded, if actionable at law, sufficiently show damages in excess of $400,000. It is unnecessary to say in a pleading in so many words that the plaintiff has sustained damages, if he alleges facts showing that he has sustained damages and he demands judgment based thereon for a sum named.

This cannot, it seems to me, be regarded or treated as a suit in equity to set aside the proof and probate of the last-mentioned will on the ground of fraud and deceit. Must not such a proceeding be had in the court of probate jurisdiction and where the will was probated? All interested parties would have to be before the court. In an action at law to recover damages for deceit practiced on the testator and resulting in damages to a legatee, the gist is fraud and deceit. In a proceeding to set aside the probate of a will and have it adjudged invalid on the ground of fraud and misrepresentations practiced on the testator, false and fraudulent statements, if pertinent, made by any one, might be competent; while in an action at law to recover damages for fraud and deceit, resulting in damages, is it not necessary that the false and fraudulent representations relied on should have been made by the defendant in the suit or by his procurement? If this be so, then, assuming this to be an action at law for deceit, as plaintiff on this hearing asserts it to be, allegations of false representations made by others, not speaking for or representing the defendant, or not made by his authority or procurement, are irrelevant, and should not be in the pleading. Therefore I think this complaint should be made definite and certain as to who made the representations set out in the complaint. The pleading should state what representations were made by the de-

fendant, and what were made by others, and, when made by others, whether they were made by authority and procurement of the defendant or otherwise.

There will be an order accordingly.

In re KAPLAN.

(District Court, D. Massachusetts. August 13, 1917.)

No. 22939.

BANKRUPTCY ⊜414(3)—DISCHARGE—EVIDENCE.

On a bankrupt's application for discharge, evidence *held* to show that the bankrupt gave false testimony on his examination by creditors, and hence a discharge should be denied.

In Bankruptcy. In the matter of the bankruptcy of Louis A. Kaplan. On application for discharge. Application refused.

George D. Storrs, of Ware, Mass., for bankrupt.

Jacobs & Jacobs, of Boston, Mass., for creditors.

MORTON, District Judge. This is an application for discharge. The objecting creditors specify in opposition thereto the bankrupt's failure to keep adequate books of account with intent to conceal his financial condition, and false testimony by him on his examination.

The bankrupt opened a store in Ware on March 19, 1915. He filed a voluntary petition in bankruptcy on December 1, 1915, owing over $16,000, mostly to merchandise creditors. He had been unable to pay a note for $500 which fell due in August preceding. Nevertheless, in September, October, and December, he bought, mostly on credit, more than $10,000 worth of goods. When many of these purchases were made, he knew he was insolvent.

His books were entirely inadequate. There was no record of the amount of sales, or of money borrowed, or of outstanding notes; and there was no account of the disposition of cash receipts, except as they might be deposited in the bank. A considerable amount of money was not accounted for.

On his examination the bankrupt again and again replied, "I don't know," "I couldn't say," "I don't remember," to questions concerning matters which had been within his knowledge, which had taken place within a few months before the examination, and which were of such character that entire forgetfulness concerning them all is incredible. More than 60 times during an examination covering fourteen pages of typewriting, the bankrupt made answers of the sort referred to. In some instances the answers can, perhaps, be justified by the phrasing of the question; but in many others they are obviously untrue. The inference of an intent to falsify is greatly strengthened by the repetition of such answers to various sorts of questions, such as occurs in this examination.

The Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) extends to insolvent debtors very great benefits; but these are granted upon the assumption that the debtor will honestly perform his duties under the act. If he fail to do so in any particular on which objections to discharge may be grounded, there should be no hesitation in refusing

the discharge. Few duties imposed by the act are of more practical importance than that to disclose fully to his creditors his transactions immediately preceding the bankruptcy.

Notwithstanding the finding of the learned referee, and the great weight to which it is entitled, I have no doubt that the bankrupt testified falsely on his examination. The finding of the learned referee must be set aside, and the second specification of objection must be sustained. It is unnecessary to consider whether the first specification is also established, and I express no opinion on that point.

Application for discharge refused.

In re STIER MARCH CONTRACTING CO.

(District Court, E. D. Pennsylvania. November 8, 1916.)

No. 5505.

1. BANKRUPTCY ⟸252—COMPROMISE BY TRUSTEE—APPROVAL BY COURT.
   A corporation's schedules in bankruptcy included a steam shovel valued at $2,500. At a sale of the bankrupt's assets, H., the receiver in bankruptcy, withdrew the steam shovel, claiming title thereto. The bankrupt's officers testified that the steam shovel had been sold to H. six months before the petition was filed; but it did not appear that H. was present at the time of the sale, that any price had been agreed on or delivery made, and the only documentary evidence of the sale consisted of an entry on the bankrupt's books and a bill for the shovel sent to H. H.'s son was the company's vice president, and the company was heavily indebted to H. *Held*, that the circumstances were such as to throw upon H. the burden of proving his title, and the trustee's compromise of the claim of the estate against H. for $500 would not be approved, under Bankruptcy Act July 1, 1898, c. 541, § 27, 30 Stat. 553 (Comp. St. 1916, § 9611), making the trustee's power to compromise controversies subject to the approval of the court.
2. BANKRUPTCY ⟸114(1)—RECEIVER'S PERSONAL CLAIMS—DUTIES.
   It was the duty of a receiver in bankruptcy, claiming in his own right a steam shovel, included in the scheduled assets, to make a full disclosure of all the circumstances in connection with his claim, as he could not faithfully represent the interests of the bankrupt estate at the same time that he was asserting his individual claim of ownership of the principal asset of the estate.

In Bankruptcy. In the matter of the Stier March Contracting Company, bankrupt. On certificate of the referee for review of an order. Order vacated and set aside.

John C. Gilpin, of Philadelphia, Pa., for petitioner.
William Sandberg, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The petitioner prays for review of an order of the referee, entered August 11, 1916, granting leave to the trustee to accept the offer of William Henderson for $500 in settlement of all the claims of the bankrupt estate "upon or by reason of a certain steam shovel."

[1] Considerable testimony was taken before the referee upon the question of ownership of the shovel referred to, and a meeting of creditors was called, at which the offer in compromise was approved. The referee thereupon entered the order concerning which complaint is

made. It appears from the testimony that William Henderson was appointed receiver of the bankrupt; that the schedules filed included among the assets a certain steam shovel, valued at $2,500; that a sale was had of the assets of the estate, and the steam shovel withdrawn by the receiver, who claimed title to it in his own right, although it had been included among the articles advertised for sale by the auctioneer. At the time of the withdrawal, the auctioneer offered the receiver $1,500 for the shovel. In the receiver's account he charged himself with the proceeds of the sale, and at the audit the referee was asked to surcharge him with the value of the steam shovel. Mr. Henderson was nominated trustee; but objection was made because of his interest in the steam shovel, and another person elected trustee. Although the shovel was enumerated among the assets, the officers of the bankrupt company testified before the referee that it had been sold to Mr. Henderson some six months before the petition in bankruptcy was filed. It did not appear that Mr. Henderson was present at the time of the sale, that any price had been agreed upon, or that delivery was made.

[2] It was testified that, after the election of the trustee, Mr. Henderson sold the shovel to one Charles S. A. Booth for $1,200. The documentary evidence of the sale to Henderson consisted of an entry upon the books of the bankrupt company and a bill sent to Mr. Henderson for the shovel at the price of $2,500. The company, of which Mr. Henderson's son was vice president, was heavily indebted to Mr. Henderson at that time. The circumstances are sufficient to cast doubt upon the validity of Mr. Henderson's title. In his position as receiver, there should have been a full disclosure at the time of all the circumstances in connection with his claim, as he could not faithfully represent the interests of the bankrupt estate at the same time that he was asserting his individual claim of ownership of the principal asset of the estate. The trustee surely has a strong claim of title in the bankrupt, and all the facts and circumstances surrounding the transaction should have been diligently inquired into.

Under section 27 of the Bankruptcy Act, the power of the trustee to compromise controversies arising in the administration of the estate is subject to the approval of the court. The evidence in the present case is such as to prima facie throw upon the claimant the burden of proving his title.

The court, therefore, withholds its approval of the compromise. It is ordered that the order of the referee be vacated and set aside.

GEDDES et al. v. ANACONDA COPPER MINING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2831.

1. MONOPOLIES ⊂=23—COMBINATIONS IN RESTRAINT OF TRADE—PERSONS ENTITLED TO QUESTION—MINORITY STOCKHOLDERS.
Minority shareholders of a corporation, which owned property valuable for copper mining, cannot, the property having been sold to defendant, attack the sale on the ground that defendant company was acquiring mines with the intention of securing a monopoly of the copper industry, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, for the act created a new offense, and cast upon designated officers the duty of enforcing its provisions.

2. CORPORATIONS ⊂=519(3)—TRANSFER OF PROPERTY—INADEQUACY OF CONSIDERATION.
In a suit by minority shareholders to set aside a conveyance of the entire corporate property, evidence *held* to sustain a finding that the consideration was inadequate.

3. CORPORATIONS ⊂=404(1)—POWERS OF DIRECTORS—STOCKHOLDERS.
That stockholders, whose stock was nonassessable, were of ample means to pay assessments, does not deprive the directors of power to dispose of corporate property, on the theory that assessments necessary to carry on the business could not be levied.

4. CORPORATIONS ⊂=404(1)—DIRECTORS—POWERS OF.
At common law the board of directors of a private corporation could sell or otherwise dispose of the corporate property, subject to the limitation that it could not sell or dispose of the entire property.

5. CORPORATIONS ⊂=404(1)—DIRECTORS—POWERS.
A Utah mining company, whose charter authorized it to buy, sell, lease, hold, and operate mining claims, and to buy, lease, and exchange ores, etc., and do all kinds of business incident to the management of a general mining business exhausted the profitable silver ore in its mine. The treasury was depleted, the corporation was indebted, and the stock was nonassessable. A Utah act of 1905 (Comp. Laws 1907, § 322), declares that any corporation now existing or hereafter organized for the purpose of mining may purchase, lease, or otherwise acquire mining property, and, in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, their disposition by the board of directors shall not be valid or binding upon the corporation until confirmed by the majority in amount of the stock outstanding, at a meeting of the stockholders called to consider the action of the board, but that, when the articles of incorporation authorize the sale of corporate property by the directors or stockholders, sales made in accordance therewith shall be binding upon the corporation. *Held* that, though all of the property of a private corporation cannot be disposed of, unless authorized by statute or charter, or unless the stockholders unanimously consent, or unless disposition by the directors is necessary because the corporation is in failing circumstances or insolvent, etc., the directors of the Utah mining company were authorized to dispose of its entire property with consent of a majority of the stockholders, though the corporation's property was worth far more than its debts.

6. CORPORATIONS ⊂=603—SALES—EFFECT.
A sale of all of the property of a corporation does not necessarily terminate its corporate existence, for corporations may exist without property.

7. MINES AND MINERALS ⟸105(2)—SALE OF CORPORATE PROPERTY—POWERS OF DIRECTORS.

Under Comp. Laws Utah 1876, p. 232, subsequently made Const. Utah, art. 12, § 1, which authorized the amendment, alteration, or repeal of the statute under which a mining company was incorporated, the directors of a mining company are, under the act of 1905 (Comp. Laws 1907, § 322), enacted after incorporation, entitled to dispose of the entire corporate property with the consent of a majority of the shareholders; the by-laws of the company as originally organized providing for the acquisition and disposition of mining property.

8. CORPORATIONS ⟸318—SALE OF CORPORATE PROPERTY—CONTRACTS.

Contracts between corporations having common directors, while not prohibited, are voidable; and the burden rests on those seeking to sustain them to show clearly that they were entirely fair and free from wrong.

9. CORPORATIONS ⟸519(3)—CONTRACTS—EVIDENCE—ACTIONS.

In a suit by minority stockholders to set aside a contract whereby the entire property of a mining company was sold to defendant, where the president of the mining company was a director of defendant, evidence *held* insufficient to clearly show that the contract was entirely fair and free from wrong.

10. CORPORATIONS ⟸610(2)—DISSOLUTION—RIGHTS OF MINORITY SHAREHOLDERS.

Where authorized by statute, a minority of the shareholders cannot prevent dissolution in accord with the will of the majority.

11. CORPORATIONS ⟸318—SALE OF CORPORATE PROPERTY—EFFECT OF SALE.

Minority shareholders cannot complain of the sale of corporate property to defendant corporation, in which the majority shareholders were interested, where defendant offered the highest bid; the minority shareholders being only entitled to have the property sold free from any unfair combination on the part of the majority stockholders and defendant.

12. CORPORATIONS ⟸318—SALES—VACATION.

Where a sale of all the property of the corporation, which could sell without unanimous consent of its stockholders, to another corporation, which had common directors, was for an inadequate price, the sale will not be unconditionally set aside; but a public resale will be ordered, the property to be struck off to the highest bidder if thereby a greater amount should be realized, but otherwise the sale to remain undisturbed, for a majority of the shareholders, who consented to the sale, are in that event entitled to be protected.

Ross, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit by Peter Geddes and others against the Anaconda Copper Mining Company and others. From the decree denying part of the relief sought (222 Fed. 129), complainants appeal. Affirmed.

Walsh & Nolan and T. J. Walsh, all of Helena, Mont., for appellants.

L. O. Evans, of Butte, Mont., W. B. Rodgers, of Anaconda, Mont., and D. Gay Stivers, of Butte, Mont., for appellees.

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

ROSS, Circuit Judge. This suit was brought by certain minority stockholders of the appellee Alice Gold & Silver Mining Company,

a corporation organized in 1881 under the laws of the then territory of Utah, to procure a decree annulling a deed of all of its property to the appellee Anaconda Copper Mining Company, a corporation, made in consideration of a transfer of 30,000 shares of the capital stock of the latter company to the Alice Company—the grounds upon which the relief is sought being, first, that neither the board of directors nor a majority of the stockholders of the Alice Company was authorized to sell or dispose of all of its property against the protest of any of its stockholders; second, that the Alice Company had no authority to acquire the stock of the Anaconda Copper Mining Company; third, that the parties who negotiated and carried out the sale and the parties who negotiated and carried out the purchase were substantially the same, all being controlled by John D. Ryan, who was at the time a director of both companies and the president of the Alice Company, and that the consideration upon which the transaction was based was inadequate; fourth, that the purpose with which the purchase was made was to monopolize the production of copper in the Butte district of Montana, where the property is situate, and the sale of the same in the markets of the world, in violation of the federal Anti-Trust Act known as the Sherman Act.

[1] While the last point mentioned has been very ably and elaborately argued by counsel on both sides, we find it unnecessary to consider it, for the reason that, as we understand the recent decision of the Supreme Court in the case of Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118, it is not available to the appellants. That case involved the construction of the Anti-Trust Act and the effect of a profit-sharing contract of the Refining Company and those dealing with it exclusively, and the right of that corporation to recover for goods sold by it to the Manufacturing Company. The court, in denying the defense interposed by the purchaser, based upon the claim that the Refining Company had no legal existence, as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products, in violation of the Anti-Trust Act of Congress, and had further sought to perpetuate its monopoly by devising a certain profit-sharing scheme, based its ruling upon two grounds, the second of which is as follows:

"In the second place, the proposition is repugnant to the Anti-Trust Act. Beyond question re-expressing what was ancient or existing, and embodying that which it was deemed wise to newly enact, the Anti-Trust Act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. Standard Oil Co. v. United States, 221 U. S. 1 [31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734]; United States v. American Tobacco Co., 221 U. S. 106 [31 Sup. Ct. 632, 55 L. Ed. 663]. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent, not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented; and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney

General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the Circuit Court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended. Act July 2, 1890, c. 647, 26 Stat. 209. It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29, 35 [23 L. Ed. 196]; Barnet v. National Bank, 98 U. S. 555 [25 L. Ed. 212]; Oates v. National Bank, 100 U. S. 239; Stephens v. Monongahela Bank, 111 U. S. 197 [4 Sup. Ct. 336, 28 L. Ed. 399]; Tenn. Coal Co. v. George, 233 U. S. 354, 359 [34 Sup. Ct. 587, 58 L. Ed. 997, L. R. A. 1916D, 685]. Second, because of the destruction of the powers conferred by the statute and the frustration of the remedies which it creates, which would obviously result from admitting the right of an individual as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract to assert that the corporation or combination suing had no legal existence, in contemplation of the Anti-Trust Act. This is apparent, since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act, since the purpose of the statute was, where a combination or organization was found to be illegally existing, to put an end to such illegal existence for all purposes and thus protect the whole public—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale, and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then, by a failure to provide against its future exertion of power, be recognized as virtually resurrected and in possession of authority to violate the law. And in a twofold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place, because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action prompted it may be by purely selfish motives. As from these considerations it results, not only that there is no support afforded to the proposition that the Anti-Trust Act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but, on the contrary, that the provisions of the act add cogency to the principles of general law on the subject, and therefore make more imperative the duty, not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the Continental Wall Paper Case [212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486], supra."

So far as the point above alluded to is concerned, the only difference between the case cited and this is that in that case a private corporation undertook to avoid the payment of money due from it under a contract with another private corporation on the ground that the latter was an illegal monopoly, and therefore had not the power to make the contract because of the Anti-Trust Act, while here the contention is that the Copper Company was without power to make a certain purchase from another private corporation because of the same act—which is, in principle, as we conceive, no difference at all.

The articles of incorporation of the Alice Company define its powers as follows:

"The business and pursuit of the corporation shall be to buy, sell, lease, hold, own, and operate mines, mining claims, mills, mill sites, furnaces and reduction and refining works, to buy, sell, and exchange mineral ores and bullion; to buy, lease, construct, and operate roads, tramways, and freight and transportation routes; to facilitate the business of the company; to appropriate, buy, and sell water, water rights, and ways for conducting the same; and generally to do all kinds of business incident to, connected with, or convenient for the management of a general mining business, in the territories of Utah, Montana, Idaho, and in any state or territory of the United States."

The record shows that the property consisted of about 140 acres of mining ground on the hill north of the city of Butte, and is contiguous to some of the properties of the Anaconda Company; that through it runs for more than three-quarters of a mile a great silver-bearing lode called the Rainbow lode, carrying some gold, upon which lode the company commenced work about 1881, sinking a shaft 1,500 feet, and running drifts of the aggregate length of about 10 miles, and from which lode it extracted a large amount of ore, out of which it paid its stockholders, commencing March 15, 1881, and ending April 27, 1898, $1,075,000—there having, however, been no dividends paid between November 23, 1891, and December 31, 1896. While that work, according to the evidence, disclosed very large bodies of zinc-lead ore, it left available no more silver ore. The zinc-lead ore being peculiarly refractory, and there not being then, nor yet, according to the evidence, any known process by which it could be worked at a profit, and the silver ore being the only kind in the mine then, or yet, according to the evidence, known that could or can be worked at a profit, work upon the mine by the company was suspended prior to 1894. From time to time thereafter it was worked in a small way under leases—the company receiving a royalty on such ore as the lessees were able to work. Water was allowed to rise in the mine, first to the 100, and afterwards to the 700, foot level, when, about 1899, the mill, which was upon one of the claims, was closed, and the company ceased operations. In 1902 the shaft house burned, but the company erected a new hoist, by which the lessees, also called in the record "tributors," could hoist the ore they desired to take out. While the leases were in operation, the royalties received by the company were insufficient to meet its necessary expenditures for insurance, taxes, and watching the property, and also proving unprofitable to the lessees, the leases were abandoned, and all work ceased. The indebtedness of the company, of course, gradually increased, and at the time of the sale in question amounted

to $34,101.56, of which $19,575.23 was incurred in the construction of the new hoist to take the place of the one destroyed by fire. At one time during the period that the property was dormant the stock of the Alice Company—incorporated with 400,000 shares, of the par value of $25 each—sold as low as 12 cents a share, and for years was depressed to a very low point. But in 1905 John D. Ryan secured from the holders thereof an option on a majority of the stock at $1.50 a share, being on the basis of $600,000 for the whole property, and in February of the same year made the purchase pursuant to the option.

These further facts, appearing in the record and succinctly stated by counsel, should be mentioned: Prior to the year 1899 a number of independent companies were engaged in mining and smelting copper ore in and near Butte, among them the appellee Anaconda Copper Mining Company, the Washoe Copper Company, the Parrot Silver & Copper Mining Company, the Colorado Mining & Smelting Company, the Boston & Montana Consolidated Copper & Silver Mining Company, and the Butte & Boston Consolidated Mining Company, all of which were large producers of that metal. In the year mentioned the Amalgamated Copper Company was organized as a holding company, with a capital stock of $75,000,000, and it acquired a majority of the stock of the Anaconda and Parrot Companies, and all of the stock of the Washoe and the Colorado Companies, and by 1901 it had acquired a majority of the stock of the Boston & Montana and of the Butte & Boston Companies, increasing its capital stock to make these latter purchases from $75,000,000 to $155,000,000—leaving of the then large copper producing companies in the Butte field only those controlled by F. Augustus Heinze and those owned by W. A. Clark.

At the time of the formation of the Amalgamated Company there was in progress between Heinze and his companies on the one side, and the Boston & Montana and the Butte & Boston on the other, much bitter and costly litigation, which, as soon as the last-named companies became allied with the Amalgamated, involved the latter and all of its constituent companies. In 1905 and 1906 negotiations were entered into between Ryan, the president of the Anaconda and a director of the Amalgamated Company, and Thomas F. Cole, on the one side, and Heinze, on the other, for the settlement of all of the litigation and adverse claims referred to, which negotiations resulted in a final settlement by which Heinze was paid $10,500,000 in cash, in consideration of which all of the properties with which he was associated at Butte were transferred to a corporation organized by Ryan and his associates to take them over, known as the Red Metal Mining Company, all of the stock of which (having a par value of $11,000,000) was immediately acquired by another corporation organized by the same interests to hold it, with a capital stock of $15,000,000, called the Butte Coalition Company, consisting of 1,000,000 shares.

It was while these negotiations were going on that Ryan acquired, under the option that has been mentioned, a majority of the stock of the Alice Gold & Silver Mining Company, which he subsequently turned over to the Butte Coalition Company. Of the Red Metal Company, Thomas F. Cole was president, W. O. Thornton was vice-president, and J. C. Lalor, C. D. Fraser, and James O'Grady were also directors.

Of the Butte Coalition Company, Cole was president, Ryan vice-president, and Urban H. Broughton, James Hoatson, Chester Congdon, B. B. Thayer, F. L. Ames, William B. Dickson, and A. C. Carson also directors; Thayer also being then president of the Amalgamated Company.

About the same time Ryan and his associates also acquired for the same interests all of the properties of Clark, except his Poser and Elm Orlu claims, which latter two claims were located on the Rainbow lode, and not far from the properties of the Alice Company, from both of which claims more or less copper ore has been shipped. The record also shows that a considerable quantity of copper ore has been found in a property at the easterly end of the Rainbow lode, owned by the Butte-Superior Company, which lode had, until these and perhaps other recent discoveries, always been regarded in the Butte district as a silver-bearing lode only.

Very naturally, the discovery of copper ore in commercial quantities in portions of the Rainbow lode is a reasonable basis for at least hope, and, possibly, of just expectations, that like ore may be found upon further exploration in the extensive properties on the same lode of the Alice Company—especially when the various other veins that the evidence shows exist on those properties and cross its portions of the Rainbow lode are considered, together with the known extent and huge production of copper ore in the district. At all events, that prospect, as shown by the record, entered into the estimates of the value of the Alice properties made by the experts on behalf of the appellants; they testifying that the finding of copper ore therein is a geological probability, which probability, as well as their estimates as to values, however, differed very widely from those fixed by similar witnesses of the appellees, who characterized the chance of finding copper ore in the properties of the Alice Company as a geological possibility—the value of the properties, according to the estimates of the former, being from $3,000,000 to $5,000,000; whereas, according to the opinions of the witnesses on behalf of the appellees, they brought by the sale all that they were at the time worth.

[2] The 30,000 shares of the stock of the Anaconda Copper Mining Company, for which the properties of the Alice Company were sold by its board of directors, are claimed by the appellees to have been worth at the time $1,500,000, and are conceded by the appellants to have been then worth $1,250,000, while their then value was found by the court below to have been $1,500,000 plus the amount of the indebtedness of the Alice Company, the aggregate amount of which consideration the court further found was inadequate. With that finding we are of the opinion that, upon the record, we would not be justified in interfering. Taking such to be the fact, we are therefore to consider and determine whether the judgment appealed from can be sustained—which judgment adjudged and decreed the sale in question in all respects valid and binding, and the title to all of the properties of the Alice Company to have passed thereby to the Anaconda Copper Mining Company; there having been shown to the court to have been no bidder at the offer of all of the said properties at a public sale upon

notice published in accordance with a preceding interlocutory decree of the court.

[3-5] We are unable to agree to the contention on the part of the appellants that the properties of the Alice Company, in the condition they were at the time of the sale, and for years theretofore had been, could not be legally sold and conveyed by the directors of the company without the consent of all of its stockholders. We quite agree that the company cannot be regarded as then insolvent, for it owed but $34,101.56, payment of which, so far as appears, was not even being asked, much less urged (by the Butte Coalition Company, which it appears was the creditor), and owned properties for which the Anaconda Copper Mining Company was willing to pay the equivalent of over $1,500,000. At the same time, all of the ores the properties were known to contain that could be worked at a profit had been extracted and disposed of many years before, and the development of other ore therein of commercial value, should such exist, necessarily involved the risking of a large amount of money. The Anaconda Company, no doubt, could afford to take that risk—especially as the evidence shows that the exploration and development of the Alice properties could be made from the workings of some of its own properties—and it is reasonable to suppose that it had sufficient information to justify it in undertaking to do so. But the Alice Company, not only had no money with which to make such explorations and development, but was in debt, which indebtedness was necessarily gradually increasing. Its stock was nonassessable, and therefore its stockholders could not be made to furnish the money essential to any further exploration of its properties. In the course of his testimony, Ryan, the president of the company, said, among other things:

"There had been no operations on the Alice properties excepting leases since 1893. After the Butte Coalition Company acquired control of the stock, there was no change in the operations. The leases were carried on much the same as they had been theretofore; no direct company operation, except taking care of the property. We could not undertake to carry on any mining operations on the property. We had no money. The company was in debt when we took it over, and we had never seen any way of liquidating that debt. It was a nonassessable stock. We could not call on the shareholders for money, and we had no way of carrying on operations. We discussed the matter of borrowing money, offering bonds to the shareholders; but, in looking into the affairs, we could not see where we were justified to ask them for any money. The mine had been worked to a depth of about 1,500 feet, and, even with silver above $1 an ounce, had closed down. No one had ever been able to find a process that would make the zinc ore in the mine commercial, and there has never been known to be any copper in the mine, so we did not see what representations we could make to the shareholders to induce them to put up money to carry on operations."

The fact that the Butte Coalition Company owned 234,000 of the 400,000 shares into which the capital stock of the Alice Company was divided, which 234,000 shares were acquired by the former company from Ryan, and that he acquired them in large part from men also of large means, and that either or all of such owners might themselves have furnished or secured the money necessary for the further development of the properties, is, in our opinion, wholly unimportant. Conceding their ability to have done so, they were not obliged by any rule

of law or equity to do it. The circumstances under which private corporations may sell and dispose by absolute conveyance of all of their property are thus stated in Thompson on Corporations (2d Ed.) § 2429:

"First. Private corporations, when expressly authorized by statute, charter, or by-laws, may sell and dispose of all the corporate property.

"Second. Private corporations, by the unanimous consent of all stockholders, in the absence of express prohibition, may sell and dispose of all corporate property.

"Third. The directors and managing officers have the power to dispose of all the property, where the governing statute provides that private corporations may sell their entire property.

"Fourth. Where the corporation is in failing circumstances, or is in fact insolvent, the directors and managing officers may dispose of all the property, or make an assignment of all the corporate property for the benefit of creditors.

"Fifth. The majority stockholders may alienate all the corporate property, when expressly authorized by statute, charter, or by-laws.

"Sixth. The majority stockholders, even as against the protest of the minority, may dispose of all the property when the corporate business has become unprofitable, and where it would be ruinous to the corporation and the stockholders to continue the business, or where there are insufficient funds to continue the business and no money with which to pay existing indebtedness, or when the corporation is in failing circumstances, or is in fact insolvent."

The purposes and powers of the Alice Company, as expressly stated in its articles of incorporation, have already been set out. By a statute of Utah enacted in 1905, after conferring certain powers on the corporations of the state, it is further provided:

"And any corporation now existing, or that hereafter may be organized under the laws of this state for the purpose of mining, or the exploration or development of mining property, including lands bearing metal, stones, limestone, oil, petroleum, asphalt, and other hydro-carbons, shall, in addition to the powers above enumerated, have the power to purchase, take on bond, or lease or in exchange, or locate, or otherwise acquire, any lands, mines, options, territory, fields, or claims, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, subject always to the provisions of the articles of incorporation and by-laws: Provided, that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of the majority in amount of the stock outstanding, at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company." Section 322, Compiled Statutes 1907.

The board of directors of a private corporation was by the common law authorized to sell or otherwise dispose of the property of the corporation, subject to the limitation that it could not sell or dispose of its entire property. Forrester v. B. & M. Co., 21 Mont. 544, 55 Pac. 229, 353; Thompson's Com. on Corp. vol. 3, p. 2421; Id. vol. 7, p. 8356; Noyes on Intercorporate Relations, §§ 114, 281. By the Utah statute referred to, the powers of all such corporations then existing or that should thereafter be organized under the laws of the state for any of the purposes therein enumerated were manifestly extended beyond the common-law powers, and under its express terms, in view of the charter of the Alice Company, we do not think it admits of doubt that the board of directors of the latter com-

pany, in the absence of any fraud or lack of good faith, and with the consent of the majority of its stockholders, was empowered to sell and dispose of all of the property of that corporation.

[6, 7] It is true that at the time the Alice Company was incorporated the above-quoted provision of the Utah statute had not been enacted, but there was then in force a statutory provision of the territory authorizing the amendment, alteration, or repeal of the statute under which the company was incorporated (Comp. Laws Utah 1876, p. 232), which power was subsequently made a part of the fundamental law of the state (section 1, article 12, of the Constitution). Such reserved power, it was held by the Supreme Court of the state in the case of Garey v. St. Joe Mining Co., 32 Utah, 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554, does not extend to an agreement, which the statute had permitted the stockholders of a corporation it had authorized to be incorporated to make among themselves, that its stock should be paid for in full and thereafter be nonassessable. But there was no agreement of that nature in the articles of incorporation of the Alice Company, by which, as has been seen, the corporation was given the general power to buy, lease, hold, own, operate, and sell, mines, mining claims, mills, mill sites, reduction and refining works, and to do all kinds of business incident to, connected with, or convenient for the management of a general mining business.

There is in the powers thus conferred by its charter on the Alice Company no express prohibition against the sale of all of the property of the corporation; nor is there in the case any express agreement either between the corporation and its stockholders, or between the stockholders themselves, that such a conveyance should not be made—the most that can be claimed in that regard being that a conveyance of all of the property of the corporation might terminate the business of the company and thus defeat the objects of its incorporation; but not necessarily so, for, as said by the Supreme Court of Montana in Forrester v. B. & M. Co., 21 Mont. 544, 559, 55 Pac. 229, 235:

"A transfer or other disposition of all its property will not ipso facto dissolve a corporation, although the practical effect thereof may be to defeat the object of its organization. This is so because ownership or possession of property is not essential to corporate existence. Gans v. Switzer, 9 Mont. 408, 24 Pac. 18; 9 Am. & Eng. Ency. Law (2d Ed.) 565. A flourishing mining corporation may desire to sell or otherwise dispose of its entire assets for the purpose of reinvesting the proceeds in a new enterprise within the corporate purposes, or of acquiring other mining property. Such sale or other disposition might be made at common law with the unanimous consent of the stockholders, without working a dissolution; nor would a dissolution be produced by the sale or assignment of the whole property of an insolvent corporation made by the directors, either with or without the consent thereto of all the stockholders therein."

In Thompson on Corporations, § 90, it is said:

"The reserve power of the Legislature extends, not only to altering the charter for any purpose connected with the public interests, but also to altering it for the mere purpose of changing the rights of the corporators as among themselves. This view has been taken in New York, in Massachusetts, in Illinois, in Missouri, and in other states. A necessary result of this doctrine is that the Legislature may authorize any change in the organization, purposes, or powers of the corporations which the majority might desire, contrary to the will of the minority."

Upon that subject there is more or less conflict in the decisions of the courts; but we find it unnecessary to pursue or decide the question in this case, for the reasons already suggested. In the instant case the sale was made in exchange for stock in another corporation, with the intention by the board of directors of the Alice Company, as is claimed on behalf of the appellees, to thereafter apportion the stock so acquired among the stockholders of the company, or its cash value to such of them as preferred cash, and thereafter to wind up its business and disincorporate the company.

The appellees dispute both the validity of the exchange and the intent with which it was made; but we find it unnecessary to decide either of those questions, because of the views we entertain regarding the two remaining points presented by the record. It appears that Ryan was a director and the president of the Alice Company, the managing director of the Anaconda Company, a director and the president of the Amalgamated Company, and a director and the president of the Butte Coalition Company; that Thayer was a director and the president of the Anaconda Company, and a director of the Butte Coalition Company, while the latter company owned a large majority of the stock of the Alice Company, and 500,000 shares of the stock of the Anaconda Company. And although the trial court acquitted both Ryan and Thayer of any intentional wrong, saying in its opinion that it saw nothing to "inspire belief that they aimed at aught but fair bargaining, or that they designed injury to Alice and consciously abused their trust," yet said that, though the common directors were not a majority of either board, it—

"is a difference in degree, but not in principle. They may have dominated the board. In both cases is divided duty, conflicting interests, possible impaired judgment of unknown effect, difficulty of proof, and danger to stockholders. In either case, inadequacy of price is unfairness, and condemns without further inquiry in an attempt to determine whether due to corruption or honest, but mistaken, judgment unconsciously swayed by adverse interest. There is no safety otherwise."

[8] At the beginning of the suit Judge Hunt, in granting an injunction pending the litigation restraining the disposition by the Alice Company of the 30,000 shares of the stock of the Anaconda Company, held upon the showing then made that Ryan, as managing director of the Anaconda Company, "must have had some specific, detailed knowledge of ore bodies in the Alice, their extent, character, and value, which would warrant the payment of $1,300,000 for the property, is an irresistible inference. We all know that the science of mining has been so far advanced within the last 15 years that it enables engineers to express clear and definite opinion of mine values. Mere chances have given way to highly reasonable expectations based upon exploitation, study of geological conditions, assays, mineralogy, and improved commercial facilities for reducing ores," and further held (and, as we think, very correctly) that upon principle contracts between corporations having a common director should be regarded very much as are contracts between individual directors and their corporations, and that while such contracts are not prohibited, and are not prima facie void or fraudulent, they are voidable, and that the burden rests upon those who seek to

sustain them to show clearly and satisfactorily that they are entirely fair and free from wrong—citing with approval what is said upon the subject in 2 Thompson on Corporations, §§ 1242, 1243.

[9] The trial court held that by the evidence given that burden was not sustained, with which conclusion we agree, not only because of the inadequacy of the consideration, but because it appears in part from Ryan's own testimony that all of the knowledge respecting the Alice properties within the possession of the buying corporation of which he was managing director was not communicated to the stockholders of the Alice Company, of which he was likewise a director and also its president, and whose directors it is manifest from the whole record he dominated. From his testimony we extract as follows:

"The price was fixed by general conference; in the matter of the Alice Company the price was fixed more or less arbitrarily. There was nothing in the value of the mines; there was nothing demonstrated that anybody could fix any value on. It was matter of trade between the representatives of both companies. Of course, when I closed out with Mr. Heinze, I was on one side, doing the best I could for the Amalgamated, and Mr. Heinze was doing the best he could for his company. When we traded with Clark, Mr. Clark was looking after the interests of his company, and I was looking after the interest of the Anaconda and the Amalgamated Company. The Alice Company appointed a committee to confer with a committee representing the other companies. I think the board of directors appointed the committee, and I was president of the board at the time. I don't remember who the members of the committee were. My associates upon the board, representing the Alice negotiations, were Mr. Carson and Mr. Thornton. They were the two that I relied on more than anybody else in the Alice Company. They were not connected with the Anaconda, or with any of the other Amalgamated companies; but they were directors of the Alice, both men of very good knowledge of the Butte camp and its history, and as good a knowledge as anybody had of the Alice Company. Mr. Carson was manager of the Lexington mills, the adjoining property to the Alice, for years when it was in operation, and just before it closed, and probably had as intimate knowledge of that important district and Lexington districts as anybody who was then living. I don't recall who represented the Anaconda Company. There were committees representing the different companies that were in negotiation for the purchase on the part of the Anaconda Company and for the sale on the part of the other companies. I don't know that Mr. Thornton, Mr. Carson, and myself agreed readily upon the price; but I don't recall any dispute. In reality, the price was arbitrarily fixed. It had to be. It could not be otherwise. The price was not fixed by me; neither the price on that or any of the other properties. I was very careful to see it was not. I realized that just such a question as this would be asked. I don't know that I would have so little common sense as to order on the part of the Alice Company, prior to the sale of the Anaconda, an investigation to be made by anybody to ascertain the then value of the Alice property. The Alice had no value, except as to its mine. The whole matter of the value of the Alice mine was discussed pro and con at the time I took that option, and, as I say, all the talent in our organization was criticizing me for taking that option. Nothing had developed after that time, up to the time of the transfers of these properties to the Anaconda Company, in the Alice mine, or on the Alice mine property, that was worthy of investigation. We all knew the development of the adjacent property in a way, and enough to guide us in our judgment as to the effect of that value on the Alice Company. The committee that were looking after the Alice end of the trade certainly satisfied themselves what they thought was a reasonable value for the property, and made investigations accordingly, I have no doubt. All of the committees representing all the companies did that; that being a part of the arrangement. * * * I produced the statement which you requested—Complainants' Exhibit A, October 7, 1913, showing the production of copper, silver, and gold of the Badger State mine

since the commencement of operations on that property to June 30th of this year. At the present time the lowest level in the Badger State mine is approximately 2,000 feet in depth. The extraction of ore in commercial quantities began, I think, at about 1,200 feet. That vein is probably a continuation of the Jessie vein (one of the veins that crossed the property of the Alice Company). I think there was a lean zone in the North Butte property at about that depth; but the Jessie was worked and produced ore practically from the surface, not in the same high grade bodies that were encountered from about 900 down. I think the 2,000 and 2,200 foot levels in the North Butte—by common repute; I have never seen them myself—are not as good levels as above and below. I can tell you, from my mine report, that I have here the distances east and west of the working shaft of the Badger State that the developments have extended. On the 2,000-foot levels the workings extend easterly 74 feet and westerly 69 feet from the cross-cut. I cannot find any report of Professor Kemp and Mr. Keller and Mr. Klepetko bearing particularly on the Alice property. I am quite sure that they did not make a written report particularly on that property, because they were employed by the different companies in the Anaconda consolidation to value plants, to inspect workings, and to generally pass upon the value of operating properties, which, of course, was impossible in the case of the Alice, as there was no plant, and the workings were not accessible, on account of the mine being filled up with water, up to about the 700-foot level. So far as the Alice Company is concerned, there was no written report from any engineer on the property preparatory to, or anticipatory of, the sale. Mr. Thornton and Mr. Carson, both of whom are engineers with considerable experience in the valuation of mining properties, particularly in Butte, were directors of the Alice Company, and conferred with me as president of the company, and very largely determined the value of the property for the purposes of the trade. Professor Kemp did not make any report to the Alice Company. Of that I am certain. The circular to the stockholders, issued by the directors, was all the information the directors or anybody else had, and was sent to the stockholders previous to the meeting at which they were asked to vote on the acceptance or rejection of the offer of the Anaconda Company to buy the Alice property. I did not have specific information concerning the property from Mr. Buzzo [for years superintendent of the Alice Company]; but I had general information. Mr. Buzzo did not talk enthusiastically about the property, as I remember it; but he was very anxious to have the Alice property fall into the hands of some one who had money enough, or could find money enough, to open it up and develop it, in the hope that something could be developed to make it a valuable property. So far as I was able to judge, he gave me whatever information he had concerning the property."

We find in the record no evidence that Ryan ever conveyed to any of the complaining minority stockholders of the Alice Company any of the information concerning its property, or its probable or possible value, communicated to the Anaconda Company by the experts referred to in the foregoing testimony. And certainly there is no such information contained in the circular letter to the stockholders of the Alice Company, referred to by the witness as having been signed by him and its other directors, advising the acceptance of the proposition of the Anaconda Company, which circular letter we insert:

"New York City, New York, April 27, 1910.

"To the Stockholders of the Alice Gold & Silver Mining Company:

"You are advised that a special meeting of the stockholders of the company has been called to meet at the principal office of the company in the Utah Savings & Trust Building, Salt Lake City, Utah, on Friday, the 27th day of May, 1910, at the hour of 10 o'clock a. m. The purpose of the meeting is to submit to the consideration of the stockholders, and to have them pass upon, a proposed contract of sale between the company and the Anaconda Copper Mining Company of Montana. The proposition, if approved by the holders of the necessary amount of the capital stock of the company, will result in the sale and

transfer of all of the property and assets of the company to the Anaconda Copper Mining Company, in consideration of the issuance and payment by the latter company of 30,000 shares of the full-paid capital stock of said company. In submitting this proposition to the stockholders, and advising its acceptance, the management wishes to state that the Alice Gold & Silver Mining Company was incorporated under the laws of Utah on the 16th day of March, 1880, with a capital stock of $10,000,000, divided into 400,000 shares, having a par value of $25 each, all of which stock was issued in acquiring certain mining properties near Walkerville, in the county of Silver Bow, state of Montana. The mines of the company were operated actively from 1880 until 1893, and afterwards for a short period during the years 1897 and 1898. The total dividends which were paid from March 15, 1881, to March 15, 1898, amounted to $1,075,000. During the period of active operation, silver was the chief product of the company. During the year 1893, because of the market decline in the market price of silver and the lean values of the ores which were developed in the lower levels of the company's mines, it became necessary to close down its property, and practically no operations have since been conducted by the company, and no revenues have been received, except a comparatively small sum realized from the royalties paid by lessees working in certain portions of the older levels of the mines. As a result of closing down the mines of the company, the same filled with water up to the 700-foot level, and the workings between that level and the 1,500-level have been and now are inaccessible. A balance sheet, showing the condition of the company on March 31, 1910, and a profit and loss account, showing the result of such operations as have been conducted by the present management, are attached hereto and marked respectively Exhibits A and B. In 1908 the Butte Coalition Mining Company acquired by purchase from the former owners a majority of the stock of the company. The market price of silver, taken in connection with the low grade of the ores exposed, has been such that the mines of the company could not be worked at a profit, and in view of the depleted condition of the treasury of the company the management has not felt justified in endeavoring to carry out any extensive system of prospecting or development work. Recently the stockholders of other companies, to wit, the Boston & Montana Consolidated Copper & Silver Mining Company, Washoe Copper Company, Big Blackfoot Lumber Company, Butte & Boston Consolidated Mining Company, Trenton Mining & Development Company, Red Metal Mining Company, Diamond Coal & Coke Company, and Parrot Silver & Copper Company, have taken steps to effect a consolidation of all the property owned by them, by a sale of their respective properties to the Anaconda Copper Mining Company, for certain amounts of the capital stock of the Anaconda Copper Mining Company, and the last-named company, in pursuance of the same general plan, has offered to purchase all of the property of this company, paying therefor 30,000 shares of the capital stock of the Anaconda Copper Mining Company. By the consolidation above referred to the Anaconda Copper Mining Company has acquired the most important mining ground in the Butte district, and it is believed that it will be enabled, through the adoption of general systems of drainage, ventilation, and development, to prospect in an economical manner the undeveloped portion of the property thus acquired. This company is the owner of comparatively large areas of mining property which lie contiguous to some of the property belonging to the Anaconda Copper Mining Company, and which it is believed are of sufficient value to justify prospecting and development, provided the same can be carried on by a company strong enough financially to [bear the] burden of so doing. In addition to the cost which the resumption of active mining operations would entail, you are advised that it would be necessary to construct and equip new mills or reduction works of modern design and suitable character to handle the ores of the company economically, provided such ores were encountered in sufficient quantity to justify the continuance of mining operations. Such action would require the expenditure of large sums of money, at present unavailable. You are therefore advised that in the opinion of the management it would be to the best interests of this company and its shareholders to accept the proposition of the Anaconda Copper Mining Company. You are therefore requested to sign the accompanying proxy and return it in the inclosed envelope, wheth-

er you expect to be present at the meeting or not, in order that the stock owned by you may be represented and voted at the special meeting of the stockholders. Very respectfully, John D. Ryan, J. W. Allen, W. D. Thornton, A. C. Carson, E. S. Ferry, Board of Directors."

There is in the foregoing letter, not only none of the information derived by Ryan from the experts of the Anaconda and its associated companies respecting the actual probable or possible value of the properties of the Alice Company, nor any intimation of any intention of the board of directors of the latter company to wind up its business and obtain its dissolution, and, as a matter of fact, as the evidence shows, no move to that end was made until about one year after the sale and conveyance of all of the property of the company. The court below, having found that an adequate price had not been paid for the properties in question, for which reason the appellees had not sustained the burden resting upon them to show that the sale was a fair one, and having held that it could not be legally made in consideration of stock in the Anaconda Company, based upon its interpretation of the decision of the Supreme Court in the case of Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, entered an interlocutory decree to the effect that the entire property be offered at public sale by the master of the court, upon prescribed notice, and that if an amount in excess of the value of the stock given for it by the Anaconda Company—which the court fixed at $1,500,000—was not bid for it, the sale should stand confirmed; and, it having subsequently been shown to the court that at the offer of the property at public sale as provided in and by the interlocutory decree no bid was made, the court entered the final decree affirming the sale.

I am unable to see that the decision of the Supreme Court in Mason v. Pewabic Mining Co. in any respect sustains such decree. In that case a corporation of Michigan, with a capital stock of 20,000 shares of the par value of $25 each, afterwards increased to 40,000 shares, had become dissolved by the expiration of its charter on April 4, 1883, notwithstanding which fact the directors, who were elected in March of that year, continued the ordinary business of the corporation, and, among other things, made an assessment of $88,000 on the capital stock, which was paid. On the 28th of March of the following year, at a meeting called "for the election of directors and for other purposes," these resolutions were adopted, against the vote and the protests of the complainants to the suit, who were minority stockholders of the old company:

"Resolved, that the board of directors be authorized to sell and dispose of the property of the company for a sum not less than $50,000; that the president and secretary be authorized to execute all conveyances necessary to carry out the contract for the sale of the property of this company made by the board of directors; and that the board of directors be, and hereby are, authorized to close up the business of the company.

"Resolved, that it is the sense of this meeting of stockholders that the property shall be sold to a new corporation, organized under the laws of Michigan, on the basis of 40,000 shares, and that the stock of such new corporation shall be issued to and received by the stockholders of this company in payment for the same, stockholders to have the right to receive [an] equal number of shares in [the] new company, if they so elect, on surrendering cer-

tificates of this company, within 30 days after April 12, 1884, and in case a stockholder does not take stock of the new corporation he is to receive his pro rata share in money."

The vote in favor of the adoption of the resolutions was 27,919 shares, against 6,754 shares in the negative. A new corporation, called the Pewabic Copper Company, was thereupon organized under the laws of the same state, also with a capital stock of 40,000 shares, at $25 each, which was taken up by the defendant corporators, who, with two others, were named as the first directors, being the same persons who controlled the old company. The third article of this association declared that no cash is actually paid on the capital stock—the cash value of real and personal property conveyed to the company contemporaneously with its organization being the sum of $50,000. The bill prayed for an injunction and restraining order, forbidding the defendants from carrying out the purpose of transferring the property of the Pewabic Mining Company to the new corporation, and for the appointment of a receiver to take charge of the effects of the old company, that they might be sold, the debts of the company paid, and the remainder of the proceeds distributed among its stockholders. Upon the issues made and proof taken the trial court decreed that the business of the Pewabic Mining Company be wound up, and that all of its assets—

"be sold at public vendue for cash to the highest bidder: Provided, that if at such sale the bid for the aggregate of the property and assets should not be in excess of $50,000 above the amount of the debts of the company existing at the time of the sale, then the arrangement for the sale of such property, made at the stockholders' meeting in Boston on the 26th day of March, 1884, as set up in defendants' answer, shall be carried out under the direction of the special master, hereinafter designated, and as provided by the resolution adopted by the stockholders at said meeting."

The decree proceeded to refer the cause to a special master for these purposes and with these powers: That he should ascertain the assets, property, and debts of the company, and that after ascertaining and reporting the same to the court the master should proceed, upon giving the required notice, to sell the property at public sale to the highest bidder in one body, with a provision to the effect that, if the highest bid for such property at such sale should amount to more than $50,000 over and above the indebtedness of the company—

"then that the arrangement for the sale of said property, made at said meeting of the stockholders at Boston, must be set aside and held to be null and void, and the Pewabic Mining Company be enjoined perpetually from selling to the Pewabic Copper Company, and that company is enjoined from receiving its transfer of the property."

The decree further declared that the directors of the old company—

"are not liable to pay to complainants and other stockholders any money received by them since the expiration of the charter of said Pewabic Mining Company, April 4, 1883, and that an accounting by said defendant directors is hereby denied as to such expenditure made by them after the expiration of the charter."

This last provision of the decree in favor of the directors of the old company was reversed by the Supreme Court, while the other portions of the decree were by it affirmed; the court saying:

"With regard to the main question, the power of the directors and of the majority of the corporation to sell all of the assets and property of the Pewabic Mining Company to the new corporation under the existing circumstances of this case, we concur with the Circuit Court. It is earnestly argued that the majority of the stockholders—such a relatively large majority in interest—have a right to control in this matter, especially as the corporation exists for no other purpose but that of winding up its affairs, and that, therefore, the majority should control in determining what is for the interest of the whole, and as to the best manner of effecting this object. It is further said that in the present case the dissenting stockholders are not compelled to enter into a new corporation with a new set of corporators, but have their option, if they do not choose to do this, to receive the value of their stock in money. It seems to us that there are two insurmountable objections to this view of the subject. The first of these is that the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by this majority, and without any power on the part of the dissenting stockholders to take part, or to exercise any influence, in making this estimate. They are therefore reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful, or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old company at their own valuation. The other objection is that there is no superior right in two or three men in the old company, who may hold a preponderance of the stock, to acquire an absolute control of the whole of it, in the way which may be to their interest, or which they may think to be for the interest of the whole. So far as any legal right is concerned, the minority of the stockholders has as much authority to say to the majority as the majority has to say to them: 'We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it, and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one.' When the proposition is thus presented, in the light of an offer made by a very small minority to a very large majority, who object to it, the injustice of the proposition is readily seen; yet we know of no reason or authority why those holding a majority of the stock can place a value upon it at which a dissenting minority must sell, or do something else which they think is against their interest, more than a minority can do."

The court proceeded to liken the rights of the parties to that suit in regard to the assets of the dissolved corporation to those of a partnership on its dissolution, and concluded its opinion upon that point as follows:

"We do not say that there may not be circumstances presented to a court of chancery, which is winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them, and making a distribution to partners or shareholders on that basis; but this is not the general rule by which the property in such cases is disposed of, in the absence of an agreement."

In all this I see nothing to justify the decree appealed from. There the corporation had ceased to exist. Its former directors had become trustees, whose duty it was to reduce the property of the corporation with all reasonable diligence into cash, and, after paying the legitimate

indebtedness, to distribute the proceeds remaining among the stockholders. Instead of doing so, they organized a new corporation, to take over the property of the old one, and offered to award to the dissenting stockholders their proportionate shares of the stock of the new company, or to pay them for it on the basis of $50,000 for the entire property. In that case the minority stockholders of the corporation that had ceased to exist asked that its property be sold, and the court so decreed, but in doing so directed that in the event no bid in excess of $50,000 should be received that the resolution that has been referred to should be carried out, and payment made to the complainants on the basis of $50,000 as the value of the company's property; the defendants by their answer having continued their offer to pay on that basis. That portion of the decree awarding the complainants the protection mentioned does not appear to have been appealed from by either party, and was not reviewed by the Supreme Court. While affirming the order directing the sale, as has been seen, that portion of the decree appealed from which denied to the complainants an accounting by the trustees of the dissolved corporation was reversed.

Here the complainants were minority stockholders of an existing corporation, not asking for, but protesting against, the sale of its property. I think the cases wholly unlike, and am of the opinion that the judgment should be reversed, and the case remanded to the court below, with directions to enter a decree for the return to the Anaconda Copper Mining Company of the 30,000 shares of its capital stock, together with any and all dividends that have been paid thereon, and annulling the sale and conveyance to it of the properties of the Alice Gold & Silver Mining Company, the appellants to recover costs of suit.

How a sale of all of the property of a private corporation, for an inadequate price and which is otherwise unfair and wholly illegal, made by its board of directors with the consent of a majority of the stockholders, but in spite of the dissent of a minority of them, can be subsequently rendered legal by offering the property at public sale, to see if at such sale it will bring more, I am unable to understand. The offer at public auction of property of the nature of that here involved, even if there be bidders, is, in my judgment, but little, if any, test of its real value. Many courts have refused to permit evidence of what property brought at a judicial sale at public auction to be given in proof of value, while others, although admitting it, refer to it as only slight evidence. Martinett v. Maczkewicz, 59 N. J. Law, 11, 35 Atl. 662; In re McAusland (D. C.) 235 Fed. 189, 190; Rickards & Co. v. Bemis & Co. (Tex. Civ. App.) 78 S. W. 239; Street Ry. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

In the present case there was no bidder at all; thus, according to the decision of a majority of this court, there was rendered legal and valid the sale and conveyance of the entire property of an existing corporation, which sale and conveyance it was found and adjudged by the court below, and is found and adjudged by this court, were at the time they were made unfair and wholly illegal.

From that conclusion I respectfully dissent.

GILBERT, Circuit Judge (with whom concurs WOLVERTON, District Judge). We concur in the opinion of Judge ROSS, except in his conclusion that the sale to the Anaconda Company should be annulled.

[10, 11] It cannot be denied that the majority of the stockholders of the Alice Company had the right to sell the corporate property. After the sale, and at a meeting regularly called and held under the authority of the laws of Utah, the requisite number of the stockholders passed a resolution directing that the corporation be dissolved, its affairs wound up, and its assets distributed. The appellants had no power to prevent dissolution against the will of the majority. Nor had they the right to say that a sale should not be made to the Anaconda Company, if that company outbid others. They had, however, the right, and that right the court below secured to them, to have the property sold free from the effect of any unfair combination between the majority stockholders and the Anaconda Company.

[12] The court below followed the rule of Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, which holds that any stockholder can require that, upon dissolution, the corporate property shall be sold to the highest bidder for cash, and not to another corporation in which the majority stockholders are interested, and on terms fixed by them. There is no essential difference in principle between that case and this, and no substantial difference in the facts. The only difference is that in the Pewabic Case the minority stockholders were in court, insisting on their right to a sale at public auction, while in the case at bar the minority assert that no sale whatever should be made. Upon the law and the facts they are in no position to prevent a sale, nor to thwart the purpose of the majority to sell to another corporation. When they subscribed to their stock, they assented to the laws of Utah governing the distribution of assets of corporations, and they must abide by them. Nor is any relevant distinction to be found in the fact, as asserted, that in the Pewabic Case the corporation had ceased to exist, while in the present case the corporation was still in existence. It is true that the charter of the Pewabic Mining Company had expired; but under the laws of Michigan it continued to be a body corporate, for all purposes except that of continuing in business, and among the permissible functions of its continued existence as prescribed by law was that of winding up its affairs, disposing of its property and dividing its capital stock. In 10 Cyc. 1302, it is said:

"So if, in the exercise of a sound discretion, the majority of the shareholders deem it expedient to do so, they may sell out the whole property of the corporation to a new corporation, taking payment in its shares, to be distributed among such of the old shareholders as may be willing to take them. * * * If it is conceded that such action on the part of the majority is lawful, then the principle follows that the judicial courts will not examine into the affairs of the corporation for the purpose of determining whether the action is expedient, or for the purpose of scanning the motives which have led to it."

In J. H. Lane & Co. v. Maple Cotton Mills Co., 226 Fed. 692, 141 C. C. A. 448, the Circuit Court of Appeals for the Fourth Circuit said:

"The courts cannot pass upon the question of expediency of dissolution and sale, for that is the very question which the Legislature has authorized the majority of the stockholders to decide. * * * The courts cannot say that

the discretionary power of the majority, conferred by the statute, does not extend to the dissolution of a prosperous corporation, or to a dissolution which will probably result in practical consolidation by the purchase of the property by another corporation. The fact that the state has not provided for consolidation without a dissolution of the corporation and sale of the property by no means implies that there is any policy of the state against dissolution and sale resulting in consolidation."

The majority of the stockholders have rights which the court must recognize and protect. They have the right to retain the benefit of the sale already made unless a sale for a higher price can be made. This was the protection afforded the majority stockholders in the Pewabic Case, and it is here afforded by the decree of the court below.

The decree is affirmed.

ASSOCIATED PRESS v. INTERNATIONAL NEWS SERVICE.

(Circuit Court of Appeals, Second Circuit. June 21, 1917.)

No. 270.

1. INJUNCTION ⊂=63—SUBJECTS OF RELIEF—INDUCING BREACH OF CONTRACT.
   A membership news gathering association, such as the Associated Press, composed of members each of whom is, or represents, the publisher of a newspaper, is entitled to protection by injunction against acts of a competitor, inducing members to violate their contracts made by the charter and by-laws of the association, or the confidential relations created by their membership.

2. WORDS AND PHRASES—"NEWS."
   Facts, even after ascertainment, are not "news," unless they have that indefinable quality of interest which attracts public attention. Neither is news always synonymous with facts, in the sense of verity. The word "news" means no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, News.]

3. LITERARY PROPERTY ⊂=1—PROPERTY ⊂=2—SUBJECT-MATTER—NEWS.
   News, although not literary property, where it has a commercial value, is property, and as such entitled to legal protection.

4. NEWSPAPERS ⊂=7—NEWS—PUBLICATION.
   The property right of a press association in news gathered from all parts of the world for distribution to its members for publication in different cities throughout the United States is not lost by publication in one or more localities, but such property remains in the association until all of its members have had the benefit of the service.

5. TRADE-MARKS AND TRADE-NAMES ⊂=68—PROTECTION OF PROPERTY RIGHTS—NEWS.
   Complainant, the Associated Press, is a membership association for the gathering and distribution to its members, who are publishers of newspapers throughout the United States, of news, both foreign and domestic. It has no capital stock; but the expense of the service is borne ratably by the members. Defendant is a stock corporation, which gathers and distributes news to customers for profit. It induced certain members of complainant to give its agents access to news furnished by complainant, and also copied foreign news items furnished by complainant from bulle-

tins and early editions of New York papers, and the news so obtained it sent out by wire to customers further west as its own. *Held*, that such acts were a fraudulent invasion of complainant's property rights, in the nature of unfair competition, against which complainant was entitled to an injunction.

6. WORDS AND PHRASES—"PUBLICATION."

The thought running through all the uses of the word "publication" is an advising of the public; a making known of something to them for a purpose.

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

Ward, Circuit Judge, dissenting in part.

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

Suit in equity by the Associated Press against the International News Service. From an order granting a preliminary injunction, both parties appeal. Modified.

For opinion below, see 240 Fed. 983.

Cross-appeals from order entered in District Court for Southern District of New York granting in part only the preliminary injunction moved for by plaintiff.

The writ in question (reduced to its lowest terms) restrains defendant from (1) procuring any agent or employé of plaintiff, or any of its members, to give or permit defendant to take, for a consideration or otherwise, any "news" received from or gathered for plaintiff, and from using or selling "any news so obtained." The injunction as granted also (2) enjoins defendant from procuring any newspaper represented by a member of plaintiff to violate any agreement established by the charter or by-laws of plaintiff. Defendant alleges as error the issuance of the writ above outlined.

Plaintiff's motion for relief asked for what the court below granted, and further that defendant be enjoined from "copying, transmitting, selling, using, or causing to be copied, etc., any of the news furnished by plaintiff, from bulletins or newspapers published by a member" of plaintiff, and also from "competing with plaintiff" or its members by the unfair methods set forth in the bill. Injunction in substantially this form having been refused, plaintiff's appeal assigns such refusal for error.

Plaintiff is chartered by New York, under a general statute known as the Membership Corporation Law (Consol. Laws, c. 35); an act used for the organization of clubs and the like. It has no capital stock, its membership is selective, its business is the gathering of news all over the world, and the very great expense of such acquisition and transmission of information is borne by ratable levy or assessment upon its "members." Such members are practically about 950 newspaper owners distributed over the United States; but, since such owners are frequently corporations, each corporate contributor must furnish a natural person to act as the legal member of this New York corporation. Such natural person is commonly called the "representative" of whatever newspaper he serves.

Defendant is a business corporation of New Jersey, has capital stock, is engaged as a rival in the same business as plaintiff, and seeks a profit by selling the news or information it acquires to customers, usually newspaper publishers.

Some publications are members of the Associated Press, and also customers of the International; but such double service is unusual. The parties hereto are undoubtedly in keen competition, as are usually the journals served by one or the other in any given city.

News received at a principal office of plaintiff is disseminated by telegraph or telephone to members at a distance, and (in the largest cities at all events) the offices of journals taking the fullest or largest Associated Press

service contain a machine (furnished by plaintiff) of the printing telegraph type whereon the incoming news is shown automatically.

Every newspaper has, of course, a staff for the investigation of local happenings; if such paper is a member of plaintiff, it may be required to furnish to other members and through plaintiff the news of its locality. This is an important part of the Associated Press scheme of news acquisition, viz. the co-operative feature.

Plaintiff's by-laws explicitly forbid any member from imparting to any one Associated Press news "in advance of publication," or to "conduct his business in such a manner" that such news so furnished to him "may be communicated to any person, firm, corporation, or association not entitled to receive the same"—i. e., any one not in good standing with and in the Associated Press. The by-laws fix times of the day before which publication of members' newspapers shall not occur, but the exhibition of bulletins at its offices within each paper's own territory is not a violation of these rules.

The business of gathering, stating, transmitting, and selling statements of fact as "news" did not originate with either party hereto, and the general methods of journalists in regard to this department of activity are not in dispute, although (as appears hereafter) argument is hung on one old prevalent and undisputed habit of newsgatherers.

The principal facts upon which the court below based the first head of injunction are that in Cleveland, Ohio, is published a newspaper which has Associated Press membership, and had for a considerable time in its employ a "telegraph editor," who would naturally receive incoming Associated Press items. This man (in accordance with by-laws) was charged with the transmission to plaintiff of Cleveland news possessed of more than local interest, and (properly) received pay from plaintiff for so doing. Defendant corrupted this editor to apprise its agents of what he thus learned, and disseminated such news as the result of its own legitimate labor.

The second head of injunction is based on the fact that there is in New York City a newspaper which has the service of both plaintiff and defendant. In its publication office is one of the printing telegraph machines aforesaid, and the managers of said newspaper were induced to permit agents of defendant to enter their office, read what was "coming in" on the machine, and use the information thus acquired as the basis for telegraphic and other items, represented as the gatherings of its own employés from original sources, or at least they were not otherwise marked or described.

The material facts on which plaintiff moved for such injunctive relief as was refused below are undisputed and as follows:

The natural place for receiving news from Europe (and indeed beyond) is the Atlantic seaboard, and especially New York. Bulletins and early editions, put out by members of plaintiff in the seaboard cities, are read by agents of defendant, and the substance thereof transmitted by wire westward, sold to defendant's customers, and by them printed, perhaps without any knowledge on their part that the origin of and sole basis for defendant's dispatch is (e. g.) a bulletin posted in New York by a member of plaintiff, as the result of plaintiff's efforts, and certainly without any such information given them by defendant. That this practice obtains the answer admits, and justifies the same as matter of law, while alleging (in substance) that it is no more than a part or legitimate outgrowth of the newspaper habit of utilizing "tips."

This word signifies a bare intimation that something has happened. When such "tip" has been verified by independent investigation on the part of the person receiving it, the facts may be and are disseminated as discovered by the journal or news agency getting the "tip." This practice may, we believe, be regarded as universal in newsgathering circles. The District Judge did not consider the utilization of "tips" as having any necessary bearing on the bodily appropriation and sale of news from early editions and bulletins, and felt satisfied that as matter of law plaintiff should have all the relief demanded, but, regarding this last question as to the effect of "publication" by an Associated Press paper as one of first impression, refused the third demand of plaintiff, and remitted the matter to this court.

Peter S. Grosscup, of Chicago, Ill. (Fred. B. Jennings and Winfred T. Denison, both of New York City, on the brief), for plaintiff.

Samuel Untermyer and William A. De Ford, both of New York City (Henry A. Wise, of New York City, on the brief), for defendant.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Defendant does not admit the facts above stated, as to procuring news from a telegraph machine in the office of a publisher; we think them fairly and fully proven. The evidence adduced for the defense on all the other points above mentioned amounts to an assertion that what defendant is accused of wrongfully doing plaintiff itself does and has done, and it is, indeed, a part of the newsgathering trade. Upon these propositions of fact are rested the conclusions that (1) if the acts are wrong, plaintiff cannot ask relief in equity when its own hands are unclean; and (2) if they are not wrong, i. e., illegal, no ground for relief exists. In our opinion the facts concerning the Cleveland episode are proved as stated; the plaintiff does not and has not copied and sold news from bulletins, etc., of papers using defendant's service; and the "tip" habit, though discouraged by plaintiff, is incurably journalistic.

[1] If the facts are as we have now found them, no party asserts that the acts restrained by the injunction as issued can be justified, either in law or morals. The right to proceed in equity to restrain inducing to breach of contract we have recognized in American, etc., Co. v. Keitel, 209 Fed. 351, 126 C. C. A. 277; and the inequity of seeking profit by procuring the breach of any confidential relation by an employé is fully considered in Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, and Dodge Co. v. Construction, etc., Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412. The relations (inter sese) of the members of the Associated Press are quite as confidential as those of master and trusted servant; the same reasoning applies. The order, so far as attacked by defendant's appeal, we consider granted in the fair exercise of discretion, and therefore proper.

Plaintiff's appeal, being from a refusal to grant injunction pendente lite, is of an infrequent kind; but still more rare is the presentation by such appeal of a clear-cut question of law, upon undisputed facts, largely admitted in the pleadings. These facts enable us to render opinion without danger of even seeming to trench upon discretionary matters. We are practically requested to act by the District Court itself.

There is no difficulty in discriminating between the utilization of "tips" and the bodily appropriation of another's labor in accumulating and stating information. As a matter of fact, one who, on hearing a rumor or assertion, investigates and verifies it, whether with much or little effort, acquires knowledge by processes of his own; the result is his. In all the relations of life, most of what most of us say we know is but the result of verifying "tips," given, consciously or unconsciously, by those in our environment. As a matter of law or rule, it is impossible to say in advance what measure of investigation or verification must satisfy the censor, and the law does not seek to compel the vain or impossible. Doubtless there have been, and will be again, instances where

the asserted or pretended investigation is but an excuse for appropriation, where no reasonable man would believe that any effort had been made, except to conceal the absence of original work, but no such case is before us.

What is before us, and on the pleadings, is whether it is lawful, and, if unlawful, whether equity affords a remedy, for the admitted practice or habit of appropriating from bulletins and early editions the result of plaintiff's labors, and selling or otherwise gainfully using the same, either in the plaintiff's form or after passing it under the hand of a "rewrite" man. This adjective is the trade description of one who changes the language or sequence of some composition of words; his labors do not change the substance, and are immaterial to the present controversy.

Defendant justifies bodily appropriation without independent investigation, because (1) all plaintiff ever has in possession or for communication are facts; (2) all defendant takes are facts, and (3) there can be no property in facts; but (4) if there be any such property it is lost at the moment any member of plaintiff, in accordance with its own rules, publishes said facts by showing a bulletin or distributing an edition.

Plaintiff replies that it is (a) untrue that facts alone constitute its stock in trade; it deals in news; and (b) in news there is a property right recognized by reason and authority. Further (c) such property right inures to and persists in the plaintiff entity and each one of its members, and (d) is not exhausted by the act of a single member, which act is (e) improperly called by defendant "publication," a word inappropriate to "news," which is not literary property. Finally (f) plaintiff complains of defendant's admitted practices as unfair competition.

[2] (1, 2, a) With the existence of a truth, with physical facts per se, neither plaintiff nor defendant is concerned; for them facts in that absolute sense are but as ore in a mountain or fish in the sea—valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, news, unless they have that indefinable quality of interest, which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed, much news ultimately proves fictitious, yet it is excellent news notwithstanding. The word means no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.

When one copies a statement from a bulletin, he cannot assert himself to be possessed of any certain fact other than that of his own appropriation. The only fact he knows is that the bulletin maker made an assertion; but he has taken the news, because that is what the bulletin proclaimed, if its maker was skillful in his business.

[3] (3, b) Whether there is or can be any property in facts per se, any more than there is in ideas or mental concepts, is a metaphysical query that can be laid aside; for there is no doubt, either on reason or authority, that there is a property right in news capable of and entitled to legal protection. Property, nomen generalissimum, covers everything that has an exchangeable value (The Slaughter House Cases, 16 Wall. 127, 19 L. Ed. 915); that news possesses the quality stated,

seems obvious enough, when it is observed that defendant takes it, in order to exchange it against dollars.

Special or trade news of divers kinds constitute property, as has often been decided (Hunt v. Cotton Exchange, 205 U. S. at 322, 27 Sup. Ct. 529, 51 L. Ed. 821; Dr. Miles Co. v. Park, 220 U. S. at 402, 31 Sup. Ct. 376, 55 L. Ed. 502; Board of Trade v. Christie Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, affirming Board of Trade v. Kinsey, 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59, and citing with approval National Telegraph, etc., Co. v. Western Union Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Dodge Co. v. Construction, etc., Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412; Exchange, etc., Co. v. Central, etc., Co., 2 Chan. [1897] 48; Kiernan v. Manhattan, etc., Co., 50 How. Prac. [N. Y.] 194; Board of Trade v. Cella, etc., Co., 145 Fed. 28, 76 C. C. A. 28); and the point was assumed as settled by us in Board of Trade v. Tucker, 221 Fed. 305, 137 C. C. A. 255.

There is no distinction entailing a legal difference, between news of the prices of corporate securities or commodities, of sporting events, or opportunities of profitable contracting, and news of current political, social, or national events. Both require labor and expense in acquisition, transmission, and dissemination, both have exchangeable values, and all alike lose by exposure the quality of news, which, when it becomes history, may remain important, but its commercial value has largely gone.

In the National Telegraph Case, 119 Fed. 300, 56 C. C. A. 198, 60 L. R. A. 805, the property rights of the "great news agencies" were referred to as existing for the same reasons as obtained in respect of market quotations, and, as we have indicated, that decision was approvingly cited by the Supreme Court in the decision which we think settled the general proposition that all news as commercially sold is property. 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031.

Assuming, now, the existence at some time of some property right in plaintiff and to its news, the qualities producing exchangeable value may be noted. Regularity and reliability, the fruits of organization and expenditure, are of course necessary; but all that is vain unless the news is fresh, early, and, if not always first in point of time, as prompt as any. Time is of the essence, and the basic question on this branch of the discussion is: How long does the property quality endure in news?

[4] (4, c, d, e) Plaintiff is a membership corporation, its members co-operate in newsgathering, and each has in his own locality a several right to and ownership in the results of plaintiff's labors, viz. the news. The rights of members, whether printing in Duluth or Galveston, New York or San Francisco, are equal, and the aggregate of their rights is the plaintiff's right. If it be admitted that plaintiff's right of property in its news once existed, such existence was for the benefit of all its members, who, however (owing to the earth's method of rotation), cannot simultaneously exercise their several rights. Yet all exercise them at the same hour of their several days.

It is sought, if not to limit the doctrine of property in news to the time during which it remains locked up in the breast of its gatherer,

to interpret the decisions cited as meaning only that news is "like a trade secret" (198 U. S. 250, 25 Sup. Ct. 637, 49 L. Ed. 1031), lost when divulged in the course of business. Doubtless the analogy of restraining in equity wrongful knowledge of private business methods was very useful in developing the doctrine that the "courts ought to protect in every reasonable way" the "valuable right of property" in information. Dodge Co. v. Construction, etc., Co., supra. But news is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. The true line of decision is indicated by the conclusion of the court in the Christie Case—that the "information will not become public property until the plaintiff has gained his reward." 198 U. S. 251, 25 Sup. Ct. 637, 49 L. Ed. 1031. Of course, this means his reasonable reward, and, as in that instance of trade quotations, divulging the same to one patron's office full of customers did not reasonably terminate plaintiff's property, so here it is reasonable and just that each member of plaintiff and plaintiff itself should have a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth's rotation) until plaintiff's most Western member has enjoyed his reward, which is, not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights.

But the foregoing is thought to be avoided, if not controverted, by dwelling on the word "publication," and insisting in substance that when (e. g.) a single New York paper (being a member of plaintiff) prints an item and sells a copy of that edition, all the world can copy as it pleases, to any extent and for any purpose, commercial or otherwise, because nothing but copyright protects that paper, and copyright does not cover statements of fact, but merely their literary dress or form.

[6] The argument assumes that what plaintiff is interested in, and is trying to preserve, is literary property, or anything capable of copyright protection. It may be granted that the newspaper first giving out the news in question is copyrighted, that fact statements are not thereby protected as such, and that publication at common law terminated an author's rights in his manuscript and the fruits of his brain;[1] yet it still remains true that plaintiff's property in news is not literary at all, that it is not capable of copyright, and that "publication," as that word is used in the long line of decisions regarding literary rights, has no determinative bearing on this case. No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude. The word is legally very old, and of no one certain meaning. Publication of evidence in equity or admiralty, of banns, of libel, etc., bears but remote relation to the act which is thought once to have terminated an author's property, and now is a requisite to statutory copy-

[1] This is the general view. Werckmeister v. American, etc., Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591; Tribune Co. v. Associated Press (C. C.) 116 Fed. at 127; Holmes v. Hurst, 174 U. S. 85, 19 Sup. Ct. 606, 43 L. Ed. 904. The opposite opinion is divertingly sustained by Mr. Augustine Birrell in "Authors in Court," found among "Res Judicatæ."

right. The thought, however, running through all the uses of the word, is an advising of the public, a making known of something to them for a purpose. It follows that the crucial inquiry is as to that purpose: Is it lawful?

In all the "quotation" cases, it was held that the purpose of the publicity given was not to let other people sell the quotations, and that that purpose was lawful.[2] As we put it in the Tucker Case, 221 Fed. 307, 137 C. C. A. 255:

"The posting of * * * quotations on a blackboard * * * is not the sort of publication which will terminate complainant's property right in them."

Thus it appears that not all publications are alike, and this is true, even under the Copyright Acts. In Werckmeister v. American, etc., Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, an opinion by Townsend, J., of which it has been said that it "left little to be added to the discussion" (American Tobacco Co. v. Werckmeister, 207 U. S. 299, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595), that learned judge said that the use of "publication" without explanation or qualification was unfortunate. "The nature of the property in question in large measure determines the extent of public right." And it was held that unless there was an "abandonment of copyright or dedication to the public," the owner of a thing capable of copyright could "expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose."

We have assumed the newspaper first printing to be copyrighted, and no doubt its publication of its early edition was a general publication; but it could not copyright, abandon, nor destroy what it did not own, and it did not own plaintiff's property in the news, nor that of its own fellow members in California. It did own the right to print in New York, but we discover no magic in the word "publication" which takes away or terminates the rights of others.

Plaintiff's purpose in furnishing the (e. g.) New York paper with news was to have a use made of it not inconsistent with its own reasonable reward for its labor from its property and that of all the other members of plaintiff. That measure of use and reward is lawful; defendant deprives plaintiff thereof, and can show no equities; therefore defendant should be enjoined.

[5] (f) Unfair competition, like all oft-uttered legal phrases, has acquired rather a narrow use. In McLean v. Fleming, 96 U. S. 251, 24 L. Ed. 828, a decision which is near the foundation of American case law on this subject, it was said that what equity enjoins the wrongdoer from depriving another of is "the advantage of celebrity." This thought has led to the feeling that what a plaintiff must be robbed of is the good will and business ease resulting from his well-known name, or the attractive dressing, wrapping, or form of his product; that such robbery must be by imitation; and that the test of such imitation is the effect upon the public, or that part thereof likely to require wares such as those in controversy.

[2] Board of Trade v. McDearmott (C. C.) 143 Fed. 188, is probably the most extreme instance of publicity, not amounting to abandonment, i. e., to the kind of "publication" here contended for.

But this is not all the law, nor the only sort of unfairness in business methods, practiced by a competitor, and resulting in a continuing tort, for which the law affords no adequate remedy—that comes under the condemnation of equity. If defendant appropriated from an early edition of a New York paper what it wanted, and sold it, as extracted from said newspaper or as obtained per Associated Press, such action would still be obnoxious to what we have said concerning plaintiff's property rights in the news procured by itself; but, since no deception would be wrought upon the public, no action for unfair competition would lie along the lines just indicated. When and if such appropriated news is sold as the fruit of defendant's own efforts, and under its own name, it is a plain case of deception, assuming defendant's customers to be honorable men, anxious for good wares; an assumption necessarily made, in the absence of evidence to the contrary. Yet an action of such nature would lack the element of imitation, usually relied upon.

Equity, however, is not stayed because a name does not fit, or one is not at hand to accurately describe a wrong of a kind necessarily infrequent. If defendant takes what some one else owns, and sells it as of right, in rivalry with the owner, such competition is more than unfair; it is patently unlawful and the wider term comprises the narrower. But, laying aside the right of property as the ultimate foundation of suit, the business method of selling, in competition with plaintiff and its members, something falsely represented as gathered by defendant otherwise than from bulletins and early editions, is unfair, because it is parasitic and untrue. It is immoral, and that is usually unfair to some one.[3]

The flexibility of equity in granting relief against unfair methods of business was well stated by Ingraham, J., in Burrow v. Marceau, 124 App. Div. 665, 109 N. Y. Supp. 105:

"No hard and fast rule can be laid down, * * * where it is clearly established that an attempt is being made by one person to get the business of another by * * * fraud and deceit a court of equity will" intervene.[4]

And in Weinstock v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, it was said:

"Equity does not concern itself about the means by which wrong is done; it deals with the result of the fraud, which moves the arm of the law and strikes down all efforts, where fraud is practiced in securing the trade of a rival dealer."

To commercially distribute news not gathered by the sender is under the facts shown here an invasion of property rights; to send it out as one's own labor is marked by that dolus which is fraud, and that is the basis of the doctrine of unfair competition in its wide sense.

[3] Decisions granting relief from competition without the usual imitation elements, but with the fraud apparent, are Morgan v. Wendover, 43 Fed. 420, 10 L. R. A. 283; American, etc., Co. v. De Lee, 67 Fed. 329; Barnes v. Pierce (C. C.) 164 Fed. 213; Fonotipia Co. v. Bradley (C. C.) 171 Fed. 951; Prest-o-Lite v. Davis (C. C.) 209 Fed. 917, affirmed 215 Fed. 349, 131 C. C. A. 491; Prest-o-Lite v. Heiden, 219 Fed. 845, 135 C. C. A. 515, L. R. A. 1915F, 945.

[4] See this principle applied to enjoin a competitor from imitating the fashion of a model gown, bought from plaintiff by pretending to be an intending wearer. Montegut v. Hickson, 164 N. Y. Supp. 858.

Since (to summarize the matter) any bodily taking for sale of plaintiff's news, without other labor than the perception thereof, before the reasonable reward of industry is secured as above indicated, is an unlawful invasion of property rights, and any sale thereof in competition with plaintiff under pretense of individual gathering thereof is a tort of the nature of unfair competition, the plaintiff's motion for injunction should have been granted substantially as made.

The order appealed from is modified, as indicated, and the cause remanded, with directions to issue injunction against any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has, in the opinion of the District Court, passed away. The exact form of words to be used, and the insertion or omission of a definite time limit on copying and sale, will be settled in the court below in any manner not inconsistent with this opinion. One bill of costs in this court to plaintiff.

WARD, Circuit Judge (dissenting in part). A distributor of news —that is, of his information about things that have happened—neither invents, nor composes, nor manufactures anything; nor does he supply something which the public buys because it believes it originates with him and wants his article; nor does he own the news, but only his knowledge of the news. Therefore analogies from property created or protected by the patent, copyright, or trade-mark statutes, or by the principles regulating unfair competition, are wholly inapplicable. The distributor's knowledge of news which he has gathered is his property, so long as he keeps it to himself or communicates it only to others on condition that they will do so. He will be protected against any one who surreptitiously obtains this information from one of his members, subscribers, or employés, or by any form of pilfering or unfair means. Such were the cases of Kiernan v. Manhattan Co., 50 How. Prac. (N. Y.) 194; Exchange Co. v. Gregory, 1 Q. B. D. (1896) 147; Exchange Co. v. Central Co., 2 Chancery (1897) 48; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Dodge Co. v. Construction Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412; Board of Trade v. Hadden Co. (C. C.) 109 Fed. 705; National News Co. v. W. U. T. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Illinois Commission v. Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205; Board of Trade v. Christie, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; Board of Trade v. Cella, 145 Fed. 28, 76 C. C. A. 28; Board of Trade v. Tucker, 221 Fed. 305, 137 C. C. A. 255; Hunt v. Cotton Exchange, 205 U. S. 333, 27 Sup. Ct. 529, 51 L. Ed. 821. In every one of these cases the court found that the defendant got the news or the quotations surreptitiously, and enjoined him for that reason. They abundantly support an injunction on the first grounds mentioned in the opinion of the court.

But if the distributor publishes, to use a word in this connection which I think has been unreasonably criticized, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the

use of it is gone. The Supreme Court in the Christie Case, supra, 198 U. S. 250, 25 Sup. Ct. 637, 49 L. Ed. 1031, likened property in news to property in trade secrets. The two are strikingly similar. The owner of a trade secret will be given protection against any breach of confidence in respect to it by his employés and against any dishonest discovery of it by third parties. If, however, he communicates the secret to another without condition, or if any one by his own efforts, for instance, by analysis of a secret compound, learns how it is made, such person may use it without any accountability to the original discoverer. That the discoverer spent much time and money in discovering the secret would not be regarded as a reason why such persons, learning it honestly, should not make use of it.

In this case the complainant furnishes news to its members for the express purpose of their putting it on their bulletin boards and issuing it to the public in their newspapers. This is what they live on. After this it seems to me pure fiction to say that any property in the distributor survives. Everything in the nature of a confidence about the communication has ceased. That the rotation of the earth is slower than the electric current is a physical fact the complainant must reckon with in doing its business. That news dedicated to the public with the complainant's consent by the morning newspapers in New York can be telegraphed in time to appear in the morning newspapers of San Francisco cannot qualify the legal effect of the dedication.

There being not the least evidence of anything fraudulent or underhanded in this method of obtaining news, I think the injunction should be denied.

A. G. WINEMAN & SONS v. REEVES et al.

(Circuit Court of Appeals. Fifth Circuit. October 4, 1917.)

No. 2904.

1. ACTION ⊂=37—ERROR AS TO FORM—TRANSFER.
   Under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that, if it shall appear that a suit commenced in equity should have been brought on the law side of the court, it shall be forthwith transferred to the law side, if the right asserted by plaintiffs was the legal title to land shown to be in defendant's possession, and what they sought was the possession and enjoyment of such land, this would not have justified the dismissal of a bill in equity, but the suit should have been ordered transferred to the law side of the court.
2. COURTS ⊂=262(3)—FEDERAL COURTS—EQUITY JURISDICTION—INADEQUACY OF LEGAL REMEDY.
   Where plaintiffs had legal title to uninclosed timber river bottom land and the right to its possession, and had such possession thereof as the character of the land made reasonably practicable, and defendants were not in possession thereof, but, under unfounded claims of ownership, had trespassed upon and got timber from it, and, unless enjoined, would continue to do so, the remedy at law was inadequate, so as to authorize the maintenance of a bill in equity to declare defendant's claims of title void and confirm plaintiffs' title.

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3. COURTS ⊂⊃262(3)—FEDERAL COURTS—EQUITY JURISDICTION—INADEQUACY OF LEGAL REMEDY.
Under Code Miss. 1906, §§ 549–552, permitting a bill to be maintained to confirm plaintiffs' title to land claimed by defendant, whether plaintiffs are in possession or not, such enlargement of equitable right may be enforced in a federal court of equity, unless plaintiffs have an adequate and equally efficient remedy at law.

4. STATES ⊂⊃12(2)—BOUNDARIES—STREAMS.
The rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary, but that, where the stream suddenly and perceptibly abandons its old channel, the boundary remains at the former line, is equally applicable to the boundary between two states.

5. STATES ⊂⊃12(2)—BOUNDARIES—STREAMS.
Where the Mississippi river's change of its main channel from the route around a bend to a route through a chute intersecting the peninsula formed by the bend was due to a distinctly manifested diversion of a larger volume of water through the chute, and its action was visible and violent, and accompanied by the rapid caving of the banks of the chute and the carrying away of adjacent soil, with the timber on it, and cattle were carried off by the torrent, with the land on which they happened to be, there was such a change in the channel of the river as had no effect upon the boundary between the states of Mississippi and Arkansas.

6. NAVIGABLE WATERS ⊂⊃44(3)—STATES ⊂⊃12(2)—BOUNDARIES—ACCRETIONS.
Where the Mississippi river suddenly abandoned its old channel and formed a new channel, so that a considerable body of land formerly on one side of the river was thereafter on the other, the center line of the old channel, which before was a boundary subject to change of location by accretion and erosion, became a fixed and unvarying boundary, unaffected by changes afterwards occurring in either the new channel or in the old bed of the river, though under water, and gradual and imperceptible accretions to the Arkansas shore line of the old channel did not enlarge the state of Arkansas, or diminish the area of the state of Mississippi, or add to or lessen what was included within the boundary lines of the subdivisions of land in the two states which were contiguous and had the old channel as a common boundary.

Appeal from the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Suit by A. G. Wineman & Sons against W. D. Reeves and others. From a decree dismissing the bill, plaintiffs appeal. Reversed and remanded.

Gerald Fitz Gerald, of Clarksdale, Miss. (George F. Maynard, of Clarksdale, Miss., and Hugh C. Watson, of Greenville, Miss., on the brief), for appellant.

D. A. Scott, of Clarksdale, Miss., F. A. Montgomery, of Tunica, Miss., and J. B. Daggett, of Marianna, Ark., for appellees.

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

WALKER, Circuit Judge. The appellants, A. G. Wineman & Sons, brought two suits, one of them in the chancery court of Tunica county, Miss., against W. D. Reeves, J. D. Asher, John P. Moore, and A. C. Sexton, the bill in which averred that the complainants are the true and lawful owners of described lands, including accretions thereto, al-

leged to be in said Tunica county, that the defendants falsely claim to own part of said lands and timber growing on parts thereof, and under said claims have been entering upon said lands and cutting and removing timber therefrom, and, unless restrained, will continue so to do; and the bill prayed that the claims of title asserted by the defendants be declared void and held for naught, and that the title of the complainants to said land, including accretions and standing timber, be in all things confirmed. The other suit was one in replevin, brought against the appellee J. D. Asher in the circuit court of the same county for the recovery of logs cut from land described in the bill in the first-mentioned suit. Each of the suits was removed to the United States District Court for the Northern District of Mississippi. In that court, by agreement of the parties, the two suits were consolidated and tried as one; the agreement providing that the decision in the consolidated suit should be binding and conclusive on all the parties to both suits. The result of such trial was a decree dismissing the appellants' bill of complaint; that decree reciting that, the court "being satisfied that none of the lands in controversy, as described in the pleadings, are now, or were at the commencement of this suit, located and situated in the state of Mississippi; that said lands were formed by changes in the channel of the Mississippi river, caused by gradual erosion of the Mississippi shore, and were not formed by avulsion, and are accretions to the original lands on the Arkansas shore, and all of said lands are located and situated in the state of Arkansas; and that the plaintiffs are not owners of the land in controversy, and are not entitled to the relief prayed for, or to any other relief whatsoever." The appeal is from this decree.

The main channel of the Mississippi river as it was in 1824, when the Arkansas shore opposite Tunica county, Miss., was surveyed and platted, and in 1836, when the Mississippi shore, including that of Tunica county, was surveyed and platted, and as it remained for many years afterwards, except for slight changes, due to accretions to one shore and erosions from the other, went, in the direction of the flow of the water, around a bend, called Walnut Bend, turning from the westerly direction it had before the bend was reached to a northwesterly direction, and then turning again and going in a southerly direction. The result was that the land within the bend was a peninsula, extending from the Mississippi mainland in a northerly direction, except that there were two chutes, the northerly one called Whisky Chute, and the one farther south called Bordeaux Chute, through which there was, except when the river was quite low, some flow of water from the part of the river in the upper reach of the bend to the part in the lower reach of the bend. The island made by what was cut off by the first-mentioned chute was called Whisky Island, and another island, which was larger and farther south, and was bounded on the northwest by Whisky Chute and on the southwest by Bordeaux Chute, was called Bordeaux Island. Many years ago, about 1869, or a little, though not much, later, but exactly when was not satisfactorily proved by the evidence, the main channel of the river ceased to be around Walnut Bend. When this change first occurred, the new route of the main channel was through Bordeaux Chute. A result of the greater volume of the wa-

ter of the river forcing its way through that chute was that the river overflowed the part of the peninsula which was east of that chute and washed away much of its surface. This process continued for several years, while the main channel was working its way farther south. Many years before the two suits mentioned were brought in 1914 the main channel of the river had shifted so far to the south that not only all of Whisky Island and the greater part of Bordeaux Island, but also five fractional sections of land which formerly constituted a part of the mainland of Tunica county, were north of the northern shore of the river; whereas, formerly both of the islands and all the land within the boundaries of the subdivisions mentioned were on the other side of the river. What the plaintiffs claim to be the owners of is a large part of this land, with the accretions thereto, which is now north of the river, much of which was covered by the river before it reached its present channel. It gradually emerged again as the channel shifted farther south; new deposits being made where the force of the current in the main channel had scoured off the surface. It was admitted that the plaintiffs have a chain of deeds straight from the United States to all of this land as originally surveyed by the United States government in the year 1836, or thereabouts, and shown by the maps and plats of said survey to have been included in the state of Mississippi.

From the averments of the bill it is to be inferred that the plaintiffs understood that the contested claims set up by the defendants included only land which had emerged between the shore line of the subdivisions owned by the plaintiffs as it existed before the channel of the river deserted Walnut Bend and went through Bordeaux Chute, and where the middle of the old channel was before that change occurred, and a long-time right to cut timber on the remainder of such new land. The answers of the defendants so delineated the boundaries of the land claimed by them as accretions to subdivisions of land in Arkansas which they owned as to make their claims cover, not only land which had emerged in the space covered by the water of the river when it went around Walnut Bend, but also land south of the old Mississippi shore line of the subdivisions patented to the plaintiffs' predecessors in title, which had been submerged by the river and emerged again as the channel shifted farther to the south.

[1, 2] It was urged in the argument made in behalf of the defendants that the action of the court in dismissing the bill is sustainable on the ground that it was not made to appear that the remedy at law available to the plaintiffs was inadequate. The terms of the decree make it apparent that the dismissal of the bill was due, not to a conclusion that the plaintiffs had failed to show that their remedy at law was inadequate, but to the conclusion that the land which was the subject of controversy in the suit was beyond the territorial jurisdiction of the court. Even if it was true, as contended by counsel for defendants, that the right which the plaintiffs asserted was the legal title to land shown to be in the possession of the defendants, and that what they sought was the possession and enjoyment of that land, this would not have justified the dismissal of the bill; as, if such was the nature of the suit, the

proper decree to be rendered, pursuant to equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), was, not one dismissing the bill, but one ordering the transfer of the suit to the law side of the court, to be there proceeded with pursuant to the requirement of that rule. Corsicana National Bank v. Johnson, 218 Fed. 822, 134 C. C. A. 510. But the situation disclosed by the record indicates that the legal remedies available to the plaintiffs were inadequate. While the bill does not explicitly aver that the plaintiffs were, at the time the suits were brought, in actual possession of the land they claimed, it does show that they had the legal title to it, and had the right to possess and enjoy it. And there was evidence to support a finding that the plaintiffs had such possession of the land they claimed, which was uninclosed timbered river bottom land, as the character of the land made reasonably practicable. The bill averred and the evidence showed, not that the defendants were in possession of any of the land claimed by the plaintiffs, but that, under unfounded claims of ownership, they had trespassed upon and cut timber from it, and, unless enjoined, would continue to do so.

[3] In the opinion in the case of Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, in which it was held that a right given by a Nebraska statute to an owner of real property, whether in or out of possession, to maintain a suit against one claiming an adverse interest or estate in it, for the purpose of determining such estate and quieting the title, was enforceable in the United States court in favor of such an owner who was not in possession, it was said:

"No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity."

Such an enlargement of equitable right resulting from a state statute may be enforced in a federal court of equity in favor of an owner of land not in possession, when the situation is such that the legal remedies available to such owner are inadequate or less efficient than the one he seeks by bill in equity. Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046; Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909; New Jersey & N. C. L. & L. Co. v. Gardner-Lacy Lumber Co., 178 Fed. 772, 102 C. C. A. 220. Under Mississippi statutes the bill filed by the plaintiffs was maintainable in the state court in which it was brought, whether the plaintiffs were or were not in possession of the land they claimed. Code Miss. 1906, §§ 549–552. Upon its removal to the federal court, it was maintainable on the equity side of that court, unless, under the circumstances existing at the time the suit was brought, the plaintiffs had an adequate and equally efficient remedy at law. As the situation, as disclosed by the record, was such as to justify the conclusion that the legal remedies available to the plaintiffs were inadequate, we are not of opinion that it has been made to appear that the suit is one calling for an order transferring it to the law side of the court.

"It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible pro-

cess of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased, he is not accountable for the gain, and if it is diminished, he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the former line." Philadelphia Co. v. Stimson, 223 U. S. 605, 624, 32 Sup. Ct. 340, 346, 56 L. Ed. 570.

[4-6] The rules stated are equally applicable, whether the question of boundary is one betweeen private proprietors or between two states, the common boundary of which is a river. If the center of the channel is the boundary, however much its location may vary as the result of gradual and imperceptible accretion and erosion, it remains the boundary. But if the change is violent and visible, and arises from a known cause, other than gradual and imperceptible accretion and erosion, such as a cut through which a new channel is formed, the thread of the stream as it existed when such change occurred continues to be the boundary. State of Nebraska v. State of Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186. In the case last cited it was decided that a change of the boundary between the states of Nebraska and Iowa did not result from an abrupt, visible change of the course of the Missouri river at a place where the river, having previously "pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel." We think that it is made to appear by the evidence in the pending case that the disclosed change of the course of the Mississippi river, which resulted from its forcing for itself a new channel in another direction, was made in a manner quite similar to that of the change of the course of the Missouri river which was under consideration in the case just cited, and, as in that case, was without effect upon the boundary as it existed before the change occurred. While much of the evidence in the case is not clear and satisfactory, due largely to witnesses in their testimony making reference to objects the location of which is not disclosed by the record on appeal, we think that it sufficiently shows by a decided preponderance of it that the change of the river's main channel from the route around Walnut Bend to the route through Bordeaux Chute was due to a distinctly manifested diversion of a larger volume of water through that chute. In forcing for itself a new channel in a different direction, the action of the river was visible and violent. Rapid caving of the banks of what before was only a chute or bayou, and the carrying away by the stream of adjacent soil, with the timber on it, marked the deepening and widening of the new passageway. Cattle were carried off by the torrent, with the land upon which they happened to be. There was apparently credible testimony to support the conclusion that the change of the location of the main channel was so quickly effected that boats which kept in the channel in making regular runs up and down the river went around Walnut Bend going one way and followed the Bordeaux Chute route on the return trip. It was a case of the river so cutting out a new channel for itself that, after the change was effected, there was a considerable body of land on the side of the river other than the one it was on before. A result of such an adoption by the river of a new channel was that the center line of the old channel, which before was a boundary subject to

change of location, became a fixed and unvarying boundary, unaffected by changes afterwards occurring in either the new channel or in the old bed of the river around Walnut Bend. The circumstance that, after the change of channel was effected, that old bed was still under water, did not prevent or delay the transformation of the former middle line of the channel around the bend from a shifting to a fixed boundary. That boundary was no longer subject to be affected by changes in the old river bed, or in its shore lines as they formerly existed.

It is to be inferred from the evidence that the emergence of land where the bed of the river formerly was around Walnut Bend occurred a considerable time after the river had made for itself a new main channel through Bordeaux Chute. Such filling up of that old river bed as occurred was by a gradual process; towheads, sandbars, and islands making their appearance above the surface of the water and gradually enlarging, while one or the other of the formerly existing shore lines encroached as the water receded from it, until space formerly occupied by the river was no longer under water. Whether it was or was not a fact that this new land so formed first made its appearance as additions to land on the Arkansas side of the boundary, the fact that the boundary had ceased to be a shifting one before the new land was added to the old prevented the change from having the effect of enlarging the state of Arkansas or of diminishing the area of the state of Mississippi, or of adding to or lessening what was included within the boundary lines of the subdivisions of land in the two states which were contiguous and had as a common boundary a line which formerly, but no longer, was a shifting one. Though it was by means of gradual and imperceptible accretions that new land was formed or built up from where the Arkansas shore line formerly was, until it extended beyond the boundary line of the two states, such a change in the surface conditions, in so far as it occurred after the boundary ceased to be a shifting one, was without effect on the title or ownership of the tracts the common boundary of which was fixed.

The claims asserted by the plaintiffs included no land on the Arkansas side of the center line of the old channel around Walnut Bend, as that line was located when the river made for itself a new channel through Misissippi land, part of which was patented by the United States to the plaintiffs' predecessors in title. Our conclusion is that the court was in error in declining to pass on questions duly raised by the pleadings and evidence in the case, on the ground that the land in dispute is not a part of the state of Mississippi.

Because of that error, the decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

O'NEIL, Insurance Com'r, et al. v. WELCH et al.

(Circuit Court of Appeals, Third Circuit. July 23, 1917. Rehearing Denied October 4, 1917.)

No. 2227.

1. COURTS ⊜259—FEDERAL COURTS—JURISDICTION.
The federal court in the exercise of its general equity jurisdiction has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency, and distribute its assets, and no state statute can impair or destroy that power.

2. COURTS ⊜489(1)—FEDERAL COURTS—JURISDICTION.
Under Act Pa. June 1, 1911 (P. L. 599), declaring that whenever any domestic insurance company is insolvent, or is found after examination in such condition that its further transaction of business will be hazardous to its policy holders, or to its creditors or to the public, the Insurance Commissioner may through the Attorney General apply for an order directing such corporation to show cause why the Insurance Commissioner should not take possession of its property, conduct its business, and distribute its assets, the state courts have special jurisdiction to determine the solvency of an insurance company and distribute its assets, which jurisdiction is concurrent with that of the federal courts, to appoint a receiver on a stockholder's bill, determine such corporation's solvency, and distribute its assets.

3. COURTS ⊜493(1)—JURISDICTION—CONCURRENT JURISDICTION.
Where two courts have concurrent jurisdiction in the sense that each has the same jurisdiction, such jurisdiction should not be concurrently invoked and exercised, and that court which first obtains jurisdiction has the right to proceed to a final determination without the interference of the other.

4. COURTS ⊜497—JURISDICTION—TEST.
Control over the property in controversy is the test of jurisdiction.

5. COURTS ⊜500—JURISDICTION—CONCURRENT JURISDICTION.
Under Act Pa. June 1, 1911 (P. L. 599), providing that whenever any domestic insurance company is insolvent or is found to be in such condition that its further transaction of business will be hazardous to its policy holders, or its creditors, or the public, the Insurance Commissioner may through the Attorney General apply for an order directing such corporation to show cause why the insurance commissioner should not take possession of its property, conduct its business, and distribute its assets. The Insurance Commissioner by the Attorney General filed a suggestion in the state court and obtained a rule directing the insurance company to show cause why the commissioner should not take possession of its property and why the court should not order liquidation of its business and dissolution of the company. Prior to the hearing on the rule to show cause, but after it had been granted, a nonresident stockholder of the corporation filed a bill in the federal court praying dissolution of the corporation and distribution of its assets, and a receiver was appointed by the federal court. The receiver immediately took possession of corporate property in his reach. *Held* that, though the state court had not possession of the corporation's property, yet, as such remedy was open to it and was necessary to a determination of the proceeding therein instituted, the state court, though it had with the federal court concurrent jurisdiction, first obtained jurisdiction, which could not be ousted by the appointment of a receiver by the federal court; the rule that actual seizure of property is the test of jurisdiction not being applicable in view of the nature of the proceeding in the state court.

6. CONSTITUTIONAL LAW ⊜129—IMPAIRMENT OF OBLIGATION OF CONTRACTS—CHARTER RIGHTS.

Notwithstanding Const. U. S. art. 1, § 10, inhibiting the states from enacting laws impairing the obligation of contracts, and Const. Pa. art. 1, § 7, an insurance company has no charter right in remedies prescribed for its dissolution, and the state may modify such remedies without violating the constitutional provisions.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit by Homer G. Welch and another, against the Union Casualty Insurance Company, in which Samuel W. Cooper was appointed receiver. Petition of J. Denny O'Neil, Insurance Commissioner, and Francis Shunk Brown, Attorney General of the Commonwealth of Pennsylvania, was dismissed (238 Fed. 968), and petitioners appeal. Decree reversed.

Joseph L. Kun and William M. Hargest, Deputy Attys. Gen., and Francis Shunk Brown, Atty. Gen., for appellants.

Percival H. Granger and J. Howard Reber, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree of the District Court dismissing a petition of the Insurance Commissioner and Attorney General of the Commonwealth of Pennsylvania, asking the court to revoke its appointment of a receiver. The question is one of jurisdiction growing out of a conflict between State and Federal courts. As the facts are fully stated in the opinion of the District Court ([D. C.] 238 Fed. 968), only a brief outline is necessary to the present discussion.

The Union Casualty Insurance Company was a corporation of the Commonwealth of Pennsylvania. Under insurance laws in force at the time of its incorporation (Act of April 4, 1873, P. L. 20; Act of May 1, 1876, P. L. 53), the Insurance Commissioner of the Commonwealth had general supervision of insurance companies, with power to inquire concerning their solvency and management and to proceed against them when insolvent or fraudulently conducted. By the Act of June 1, 1911, the insurance laws of the Commonwealth of Pennsylvania were in part repealed and with new provisions were reenacted in a comprehensive system of State control, covering the examination, regulation, rehabilitation, liquidation and dissolution of insurance companies incorporated and doing business under the laws of that Commonwealth (Acts of June 1, 1911, P. L. 567, 581, 598, 599, 602, 604, 607). The Act of June 1, 1911 (P. L. 599) provides, among other things, a method of proceeding against insolvent and fraudulently conducted insurance companies, which, so far as it affects the question in issue, is as follows:

"That whenever any domestic insurance company, association, society, or order, including all corporations, associations, societies, and orders which are subject to examination by the Insurance Commissioner, or which are doing

or attempting to do, or representing that they are doing, the business of insurance in this Commonwealth; * * * (a) is insolvent; * * * or (e) is found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policy-holders, or to its creditors, or to the *public* * * * the Insurance Commissioner may, through the Attorney General, apply to the Court of Common Pleas of Dauphin County, or to the Court of any county in which the principal office of such corporation is located, for an order directing such corporation to show cause why the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the *public* may require.

"Sec. 2. On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such corporation, and retain such possession and conduct such business until, on the application either of the Commissioner, through the Attorney General, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the Insurance Commissioner to take possession has been removed, and that the corporation can properly resume possession of its property and the conduct of its business.

"Sec. 3. If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such corporation as of the date of the order so directing him to liquidate. * * *"

On November 15, 1916, the Insurance Commissioner of the Commonwealth of Pennsylvania, by the Attorney General, filed a suggestion in the Court of Common Pleas of Dauphin County (hereinafter called the State court), in conformity with the provisions of the quoted Act, and obtained a rule directed to The Union Casualty Insurance Company (hereinafter called the Insurance Company) "to show cause why the Insurance Commissioner should not take possession of its property, and to show cause why the Court should not order the liquidation of the business of the said company and the dissolution of the said corporation."

Pursuant to the provision of the Act, that *"On such application* * * * such court may * * * issue an injunction restraining such corporation from the transaction of its business or disposition of its property," that court, at the time it received the suggestion and granted the rule, ordered, that:

"Pending the further order of this court, the said Union Casualty Insurance Company of Philadelphia, Pa., its officers, agents and employees, *are hereby enjoined and restrained from* transacting any of the business of said company or *disposing of any of its property.*"

The rule was made returnable November 29, 1916. On that day the Insurance Company appeared and filed its answer to the suggestion, with a prayer that the rule be continued to December 19, 1916. The continuance was granted. On December 18, 1916, the day before the return day of the rule, Homer G. Welch, a citizen of New Jersey, and Consolidated Investment Company, a corporation of Delaware, filed a stockholders' bill in the District Court of the United States for the

Eastern District of Pennsylvania (hereinafter called the Federal court), alleging solvency of the Insurance Company and praying the appointment of a receiver for the conservation of its property pending the adjustment of its difficulties. Although the Insurance Company had already appeared and answered in the proceeding in the State court, it voluntarily appeared in the Federal court and filed an answer concurrently with the bill, admitting its allegations; whereupon the Federal court appointed a receiver. The receiver immediately took possession of all assets of the Insurance Company within his reach, and served certified copies of his appointment upon the Attorney General of the Commonwealth of Pennsylvania and upon the judges of the State court.

The State court, on December 19, 1906, the return day of the rule to show cause, acting apparently in ignorance of the proceeding in the Federal court of the day before, proceeded with its hearing and entered an order directing the dissolution of the Insurance Company and the liquidation of its assets by the Insurance Commissioner in the manner prescribed by law, the decree being expressly based on the finding that the Insurance Company was insolvent and that its further transaction of business would be hazardous to its policyholders, its creditors *and the public*. On the next day, December 20, 1916, the Insurance Commissioner and the Attorney General, being then informed of the action of the Federal court, hastened to the Federal court and presented a petition praying that it revoke its appointment of a receiver. The Federal court granted a rule to show cause why its order of appointment should not be vacated, and upon its return, dismissed the petition and discharged the rule, in accordance with an opinion filed ([D. C.] 238 Fed. 968). This is an appeal from that decision.

The denial of the petition by the Federal court was based upon its understanding that its appointment of a receiver and his appropriation of the res prior to the decree of dissolution but subsequently to the institution of proceedings in the State court vested jurisdiction in the Federal court so fully and completely that neither law nor comity required its surrender to the State court. Judging from the consideration given by the learned District Judge to the general subject of conflict of jurisdiction between State and Federal courts, we infer that the broad subject, with its many phases, was as elaborately discussed before him as it was before us, raising many questions which we think are not in issue.

As we view the case, it does not present questions:—whether a Federal court has power to decree the dissolution of a corporation of the Commonwealth of Pennsylvania in a proceeding in which its jurisdiction first attached; whether a Federal court has authority to supersede and take away the general control over insurance companies vested by State statute in the Insurance Commissioner, before the Insurance Commissioner has in the exercise of his control begun proceedings in a State court; whether a Federal court has authority to supersede and annul action by a State court after proceedings there have been begun and jurisdiction has been acquired; or, generally, whether a state law can limit or impair the jurisdiction of a Federal court conferred by Act

of Congress, or whether a Federal court, having first acquired jurisdiction, should in comity relinquish it to a State court in deference to state statutes. All these questions were in some measure considered in the decision and argued on appeal. As we view it, the case presents the single question: Which court first acquired jurisdiction? No other question is in issue and no other will be decided.

[1, 2] The starting point in this controversy, therefore, is the jurisdiction of the two courts. It cannot be doubted that the Federal court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power. It is equally clear that the State court has power, in the exercise of its special jurisdiction, to determine on the Attorney General's suggestion the solvency of an insurance corporation, deliver its property to an officer with the function of a receiver, and distribute its assets; and that there is no Federal statute which impairs or destroys that power. Therefore, in considering the one question of priority of jurisdiction, we assume that the Federal and State courts named have concurrent jurisdiction in the appointment of receivers and in administering the affairs of insolvent corporations, though invoked and proceeded with in different ways.

[3] While the two courts have concurrent jurisdiction in the sense that each has the same jurisdiction, it is the policy of the law that the jurisdiction of both shall not be concurrently invoked and exercised; hence it is a well settled rule that as between two courts having concurrent jurisdiction of the subject of an action, the court which first obtains jurisdiction has the right to proceed to its final determination without interference from the other. Pitt v. Rodgers, 104 Fed. 387, 389, 43 C. C. A. 600. In our mixed system of State and Federal jurisprudence, such a rule is found not only desirable but necessary. It was therefore early held (Taylor v. Tainter, 16 Wall. 366, 21 L. Ed. 287), that:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

When, therefore, we find which court first obtained jurisdiction of this controversy, we have answered the question as to which should retain it.

[4, 5] Control over the property in controversy is the test of jurisdiction, Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103. Upon this the parties agree. But at this point the parties and the authorities separate, following two lines, one to the effect that priority of judicial seizure, without regard to the previous pendency of a suit in another court, is the test of jurisdiction over the res, Powers v. Blue Grass B. & L. Asso. (C. C.) 86 Fed. 705; Knott v. Evening Post Co. (C. C.) 124 Fed. 342; 11 Cyc. 1010—Cases; and the other to the effect, that jurisdic-

tion is acquired by the beginning of the proceeding and not by actual seizure of property in all cases where dominion and control of the property are essential to the full accomplishment of the action, Vowinckel v. Clark & Sons (C. C.) 162 Fed. 991; McKinney v. Langdon, 209 Fed. 300, 305; Mound City Co. v. Castleman, 187 Fed. 921, 110 C. C. A. 55; Texas v. Palmer, 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316; McDowell v. McCormick, 121 Fed. 61, 57 C. C. A. 401; Adams v. Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1; Hirsch v. Independent Steel Co. (C. C.) 196 Fed. 104. An analysis of the cases discloses, that both these contentions are correct according to the subject matter to which they are applied and the thing intended to be done. The subject matter and object of an action therefore have as important a bearing upon the determination of the question whether jurisdiction is acquired by the beginning of the suit or by the appointment of a receiver and his seizure of property, as have the acts of the court in reducing property to its control.

If the action in the State court had been brought as in the Federal court on stockholders' or creditors' bill, the jurisdiction invoked in both courts being in behalf of parties with like rights over the same subject matter, the race for jurisdiction would have fallen within and would have been determined by the line of authorities which hold that the court which first obtained control of the property through seizure by its appointed receiver, first acquires jurisdiction without regard to which first commenced proceedings. Cases supra. When, however, from the character of the parties and the very nature of the two proceedings, different rights are asserted and different remedies are pursued, though the essential issues and subject matter are the same, the question when jurisdiction is acquired is likely to be determined by considerations other than the court's actual possession of the property in controversy. These considerations have received attention by courts in similar cases where an action in a State court was begun first, and a receiver was first appointed by a Federal court. In McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226, the court said:

"It is a maxim of the law that a court having possession of property cannot be deprived thereof until its jurisdiction is surrendered or exhausted, and that no other court has a right to interfere. It is a principle of right and of law which leaves nothing to the discretion of another court and may not be varied to suit the convenience of litigants. Merritt v. American Steel Barge Co., 24 C. C. A. 530, 79 Fed. 228. It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of unseemly conflicts between federal courts and the courts of the states. As between them it is reciprocally operative—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of that of other courts. It is settled, however, that actual seizure or possession is not essential, but that jurisdiction may be acquired by acts which, according to established procedure, stand for dominion and in effect subject the property to judicial control. It may be by the mere commencement of an action the object, or one of the objects, of which is to control, affect, or direct its disposition. See Mound City Co. v. Castleman, 110 C. C. A. 55, 187 Fed. 921, and the cases cited. The principle often applies 'where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control

of the property to be affected.' Farmers' Loan & Trust Co. v. Railroad, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. The mere fact that an exigency calling for a receiver may arise does not make the jurisdiction of the court in that respect relate to the beginning of the action (Shields v. Coleman, 157 U. S. 168, 178, 15 Sup. Ct. 570, 39 L. Ed. 660), as perhaps where it is an ordinary aid to execution on a final judgment and dependent upon conditions or circumstances that may or may not occur. But where the declared purpose of an action in whole or in part is directed to specific property, and the full accomplishment thereof may require judicial dominion and control, jurisdiction of the property attaches at the beginning of the action. And it is so if dominion and control are essential to the action, though not yet exercised."

Applying these observations to the case in hand, it is to be noted that the action in the Federal court was brought under the general jurisdiction of that court and was of a character indicated by the stockholders' bill upon which it was instituted. The action in the State court was brought against a creature of the State by a State official to enforce the State's rights in a court vested by State statute with special jurisdiction to try and determine those rights. We must therefore inquire with some care into the subject matter of the State action before we can determine when the State court acquired jurisdiction and whether it was deprived of it by the subsequent action of another court.

The Commonwealth of Pennsylvania has prescribed by law a comprehensive system of rules governing the incorporation and operation of insurance companies within its borders. It has undertaken, as a State function, their examination, regulation, and, when necessary, their dissolution. In assuming this function the State has defined rights conferred upon insurance companies and rights reserved to itself, imposed duties and prescribed remedies. In conferring upon insurance companies incorporated under its laws the right to solicit business from the public, it imposed upon them the duty to be solvent and to conduct their business honestly, and reserved to itself the right to inquire both as to their solvency and business conduct, and when necessary to stay their business and end their existence.

The state engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the state pursues a remedy prescribed by the same law that conferred the corporation's rights and defined the state's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General, files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the State's suggestion the court starts a judicial inquiry by directing to the Insurance Company a rule to show cause why the Insurance Commissioner should not take possession of its property, *and at the same time* (that is at the very beginning of the suit) the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry.

The jurisdiction of the State court thus invoked is a special jurisdiction conferred by statute as a part of the State's policy of insurance regulation and control. It is not conferred for the protection of cor-

porations' policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceeding; though not nominally present as a party, it is nevertheless present in the person of the Attorney General.

The statutory proceeding includes several prescribed steps, namely, the filing of the suggestion, the rule to show cause (and if needed, an accompanying order restraining the disposition of the corporation's property), hearing on the rule, a decree dismissing the proceeding or directing the Insurance Commissioner to take over the property and conduct the business of the corporation and proceed with the liquidation and distribution of its assets. In this order, actual or physical possession of the property of the corporation is not acquired until the rule has been returned and made absolute. Yet it is absolutely essential to the declared purpose of the action that the property of the corporation, its subject matter, shall not be withdrawn from the jurisdiction of the court before its inquiry is completed. To that end the statute affords, as against the corporation and its officers, the remedy of injunction, to be invoked, if desired, at the inception of the proceeding. As against stockholders, the law is equally effective. The law under which an insurance company is incorporated subjects it to State supervision and administrative control, and ordains the proceeding by which its life may be determined and its affairs wound up and liquidated. The rights of such a corporation are therefore subordinate to the rights of the State, and the rights of stockholders are no greater than those of the corporation. When, therefore, the statutory proceeding has been begun in a State court and by its commencement jurisdiction has been acquired over the corporation, neither the corporation nor its stockholders, nor its creditors can divest the court of its jurisdiction or deprive the State of its public function by subsequently invoking the aid of a Federal court to remove the corporation's property beyond the reach of the State court and thereby withdraw from the State court the subject matter of the action there pending. If this were not so, every action instituted by the state government against an insurance company might be interrupted and defeated by a non-resident stockholder filing in a Federal court a bill accompanied with the answer of an acquiescing corporation, after action has been begun in the State court and before in its orderly progress the property of the corporation has been physically seized. Thus the policy of the State would be thwarted and its administration overthrown; the State's creature would be more powerful than the State itself. We are satisfied that no such thing was contemplated either in Federal or State polity.

In disposing of this question it is important to note that we are not concerned with a situation where a Federal court on a stockholders' bill appointed a receiver, and, acquiring control of the corporation's property, acquired jurisdiction before the State moved in the State court, Lyon v. McKeefrey, 171 Fed. 384, 96 C. C. A. 340; we are dealing with a situation where the State moved first, where the State court first acquired jurisdiction over the corporation by its appearance

and answer, and exercised a species of control over its property by a restraining order long before a bill was filed in the Federal court and long before a receiver was appointed by that court, and where in one day more it would have completed its control over the corporation's property by actual seizure but for the appointment of a receiver by the Federal court, made possible only by the willing answer of the corporation filed concurrently with the bill.

The act of the State in bringing suit was the exercise of a governmental power; the acts of the State court in pursuing a procedure established to insure the full accomplishment of that power stand for dominion over the entire subject matter in litigation, and subject the property of the corporation to its jurisdiction for the full purpose of the judicial proceeding, which includes its possession, liquidation and distribution. We are therefore of opinion that the State court acquired jurisdiction not only of the corporation but of its property upon the inception of the proceeding, and, being first to acquire jurisdiction, is entitled to retain it until the State has wrought its function and until the jurisdiction invoked has been exhausted.

[6] The appellees attack the decree of the State court, entered in pursuance of the Act of June 1, 1911, P. L. 599, upon the ground that in enforcing the remedies of that Act against the defendant corporation created prior thereto, charter rights are impaired and burdens are imposed in violation of article 1, section 10 of the Constitution of the United States, and article 1, section 7 of the Constitution of Pennsylvania. In disposing of this contention, it is sufficient to say, that the particular rights asserted as charter rights acquired by the corporation under laws in force at the date of its creation, were rights in the remedies thereby prescribed to be employed against it; and the particular burdens complained of as being imposed by laws subsequently enacted, are the new and different remedies to which the corporation was subjected. The point of the complaint therefore is as to remedies lost and imposed. In these we find no charter rights assailed. Nor do we find burdens imposed, other than such as the Commonwealth may constitutionally impose and to which the corporation must submit.

The decree below is reversed.

JONES v. PETTINGILL et al.

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

No. 1173.

1. PARTNERSHIP ⊂=203—ACTIONS BY FIRM—DEATH OF PARTNER—EFFECT.

Under Rev. St. § 955 (Comp. St. 1916, § 1592), providing that, when either party dies before final judgment, the executor or administrator may, if the cause of action survives, prosecute or defend the suit, and section 956 (Comp. St. 1916, § 1593), providing that, if there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant,

where a contract sued on was made with the two plaintiffs as partners, and any interest acquired by one dying before judgment survived to the other, the suit was properly permitted to proceed in the survivor's name as surviving plaintiff, without the deceased party's executor or administrator becoming a party.

2. CHAMPERTY AND MAINTENANCE ⊜5(7)—RAISING OBJECTIONS.
Where a contract, challenged as contrary to good morals, champertous, and void, is such a contract as a court of equity should not enforce, the objections on this ground might be considered by the District Court of its own motion, whether suggested by the parties or not.

3. APPEAL AND ERROR ⊜173(6)—REVIEW—QUESTIONS NOT RAISED BELOW.
An appellate court may consider such objections of its own motion, whether raised below or not.

4. COURTS ⊜405(17)—CIRCUIT COURT OF APPEALS—ASSIGNMENT OF ERRORS—NECESSITY.
Under the express provisions of rule 11, and of rule 24, par. 4 (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii) of the Rules for the First Circuit, the court may, at its option, notice plain errors, though not assigned.

5. CHAMPERTY AND MAINTENANCE ⊜5(3)—AGREEMENTS WITH ATTORNEYS.
A contract between an attorney and client for contingent compensation for professional services, whereby the attorney is to pay the entire expense of litigation, control its settlement, and be jointly and equally interested with the client in the property involved, when recovered, is so far contrary to the policy of the law that a court of equity will not enforce it.

6. CONTRACTS ⊜129(1)—PUBLIC POLICY—AGREEMENT AS TO SETTLEMENT OF SUIT.
A stipulation in such an agreement by attorneys for a contingent fee, purporting to invalidate any settlement of the attempted litigation by the client, unless made in the attorneys' presence and with their consent, is against public policy and void.

7. CHAMPERTY AND MAINTENANCE ⊜5(6)—AGREEMENTS WITH ATTORNEYS.
A contract between an attorney and client for contingent compensation, whereby the attorney is to pay the entire expense of litigation, control its settlement, and be jointly and equally interested with the client in the property recovered, is obnoxious to the policy of the law of Porto Rico, in view of Civ. Code 1902, § 1362, prohibiting officials of justice from acquiring the property and rights in litigation, and including in this prohibition lawyers with regard to the property and rights which may be the object of the litigation in which they take part.

8. CHAMPERTY AND MAINTENANCE ⊜5(3)—AGREEMENTS WITH ATTORNEYS.
A bill founded directly upon such agreement, and seeking to establish alleged rights under it, cannot be maintained in a court of equity, though not brought against the client, but against a purchaser of her interest in the property recovered.

9. APPEAL AND ERROR ⊜162(1)—WAIVER OF RIGHT TO APPEAL—ACCEPTANCE OF BENEFITS.
Decrees adjudged that plaintiff owned an undivided interest in a plantation, and was entitled to redeem such interest from defendant upon payment to him of a specified amount, and decreed that plaintiff pay defendant such amount, and that the receipt taken therefor be lodged in the registry of the court. Three days after entry of the decree there was filed an acknowledgment, signed by defendant, that he had received the amount ordered paid. The following day defendant petitioned for reconsideration of the decrees, and after denial of his petition he appealed, so conditioning his appeal bond as to make it operate as a supersedeas. It appeared that he mistakenly supposed himself under the necessity of receiving the money and filing the receipt. *Held*, that there was no such unmistakable acquiescence on defendant's part in the decrees appealed from, or acceptance of benefits thereby, as deprived him of his right to appeal; the receipt not hav-

ing been understood and intended as such acquiescence, and the court still having the power to restore both parties to their rights by directing proper repayment.

10. JUDGMENT ⊂649—CONCLUSIVENESS—NATURE OF JUDGMENT.

In a suit to recover plaintiff's share of a plantation, which her father, O., was occupying at the time of his death under a lease and obligation of purchase and sale between him and A., the court entered an order reciting that A. desired only payment of whatever might be found due him, and to hold a lien until such payment should be made, and that so to treat the claim would eliminate considerable controversy, and directed that the property be considered as belonging to O.'s succession, subject to A.'s mortgage for such amount as might be found due by the court and thereafter paid A. by the receiver then in charge. *Held*, that it was not apparent how the court, even with the consent of the parties, could thus transform A.'s claim into a conveyance to O.'s heirs with a mortgage back from the heirs, but, in any event, the order embodied only a proposed compromise agreement, never carried out, and wholly ineffective to change the nature of O.'s interest in the plantation; the court never having determined the amount due under the so-called mortgage, and no steps towards such determination having ever been taken.

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

Suit by N. B. K. Pettingill and others against Walter McK. Jones. From a decree in favor of complainants, defendant appeals. Reversed and remanded, with directions.

Francis E. Neagle, of New York City, and Woodward Emery, of Boston, Mass. (Martin Gilbert, of Boston, Mass., on the brief), for appellant,

N. B. K. Pettingill, of Tampa, Fla., for appellees.

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

DODGE, Circuit Judge. The rights asserted by the appellees, plaintiffs in the District Court, are based upon a contract in writing, made at Ponce, March 20, 1905, between them and Adelaida Olivieri. Her agreements were as follows:

"I agree to pay to Messrs. Pettingill and Leake, my lawyers, the half of what I may receive if the judgment of the court is favorable in a suit which I am going to bring in the Federal Court against Antonio Olivieri, executor of Felix Olivieri, if said lawyers pay all the costs and expenses of said suit, and carry it to a conclusion. In case of settlement the lawyers shall receive the half of whatever sum is paid to me in settlement of their fees. In accordance with the judgment of the court, I will pay to them and divide with them in proportion of one-half of whatever I may receive by order of the court."

Their agreements were as follows:

"We agree to bring this suit in favor of [said Adelaida], paying all costs and expenses, and carrying it to a conclusion, either by settlement or judgment of the court."

The final clause of the contract, to which both the parties subscribed, was as follows:

"Moreover it is agreed that, in case of settlement by agreement, such settlement shall not be valid, if not made in the presence and with the consent and assistance of the two parties to this contract."

Felix Olivieri, referred to in the agreement, was Adelaida Olivieri's father. The contemplated suit against his executor was brought and carried to a conclusion by Pettingill and Leake, in accordance with the agreement. In it she claimed one-ninth of his real estate as his heir; also a legacy of $5,000 given her, and charged upon his real estate, by his will. The final judgment of the court, rendered May 18, 1910, was in her favor. She was adjudged to be owner of one-ninth of her father's interest in a coffee plantation called Limon, and entitled also to a charge upon the whole of his said interest in the sum of $5,000.

The above litigation, carried on in the Federal District Court for Porto Rico, involved the appointment of a receiver, who took custody of the Olivieri estate, including so much of the Limon property as is here in controversy. This, although Olivieri did not own it, he was occupying at the time of his death under a "lease and obligation of purchase and sale," made between him and certain Alvarados, its owners, October 24, 1900, to expire July 31, 1908. As is further stated below, there was an attempt during said litigation to deal with this as if it had in fact belonged to the Olivieri estate subject to a mortgage in favor of the Alvarados.

Pending said litigation, and while said property was in the receiver's custody, Jones acquired from the Alvarados all their rights in it. Later, after the above final decision, he also bought from Adelaida Olivieri all her interest in it and in the legacy charged upon her father's estate in her favor, according to said decision. In these acquisitions one A. B. Marvin was associated with him, but Marvin need not be further referred to; Jones having since become sole owner of whatever they both so acquired.

The present suit was brought by the plaintiffs in the Federal District Court for Porto Rico, July 16, 1910. Adelaida Olivieri, her husband, Jones, and Marvin were made defendants. We are now concerned only with the relief sought against Jones. Alleging that the rights in Limon acquired by him as above from Adelaida Olivieri had been acquired with notice of their above contract with her, they asked that he be enjoined from transferring what he had so acquired; that they be decreed to be "the equitable owners of an undivided half interest in and to" said $5,000 charge upon Limon; that "the attempted cession and assignment thereof" by her to Jones be declared "fraudulent and void" as against them; that they be decreed entitled to a cession of Jones' rights acquired from the Alvarados, as above, upon the same terms upon which Jones acquired them, or upon payment of the amount legally due thereon; that Jones be ordered to make such cession upon payment tendered; and for specific performance of their above contract with Adelaida Olivieri.

[1] The plaintiff Leake died in April, 1912, after the present bill had been filed, but before the entry of any decree in the suit. No executor or administrator has become party in his place, according to Rev. St. § 955 (Comp. St. 1916, § 1592), and Jones has contended that all the proceedings since Leake's death are void, because the suit has not been so revived, nor carried on by the surviving plaintiff, in pursuance of Rev. St. § 956 (Comp. St. 1916, § 1593). But we think it sufficiently

clear that the contract was with the two plaintiffs as partners, that any interest acquired therein by Leake would have survived to Pettingill, and that the record shows the suit to have proceeded since Leake's death in Pettingill's name as surviving plaintiff. In the District Court's rulings regarding this question, assuming that Pettingill and Leake acquired any interest in the property in dispute by virtue of their contract, we find no error.

The District Court, on March 21, 1914, decreed that Pettingill was "entitled to relief under the bill"; that he had acquired and then owned an undivided half interest, equally with Jones, in so much of Limon as Adelaida had conveyed to Jones, as above, both their interests having been acquired "by purchase from Adelaida Olivieri"; also that he was entitled to redeem from Jones one-half of one-ninth of her father's interest in Limon, upon payment to Jones of a proper proportion of "the sum found to be due by" Olivieri's heirs "upon the Alvarado mortgage," crediting against such sum the net proceeds of the property while held by Jones, less the value of Jones' improvements. Reference to a master was ordered, to ascertain the amount so to be paid Jones for the purpose of such "redemption."

The master having reported said amount to be $1,464.75, the District Court, on March 1, 1915, confirmed his report, and further decreed that Pettingill pay Jones said amount, the receipt taken therefor to be lodged in the registry of the court.

From these decrees, both entitled "Final Decree," after a motion for reconsideration thereof had been denied May 29, 1915, Jones appealed to this court on July 8, 1915.

The principal question raised before us was not raised by the answer to the bill, nor at any time during the proceedings in the District Court, until Jones alleged in his petition for reconsideration, above mentioned, as ground for reconsideration, that the District Court had erred in not holding the contract sued on "contrary to good morals, champertous, and void," and therefore a contract upon which no recovery could be had. In denying the petition the District Court held, as appears from its opinion dated May 29, 1915, that Jones could not attack the validity of the contract for the first time after final decree, nor at any time "when not a party to the contract"; and discussion of its validity was regarded as unnecessary. It also held Jones estopped in any case from raising the question, by acceptance from Pettingill of the amount required for "redemption" of the interest claimed by him, as determined by the master.

[2-4] The above objections to the validity of the contract raise a question of public policy, apparent from the record and involving no disputed questions of fact. The contract is annexed in full to the bill, both in Spanish and in English. If it appears from the record to be such a contract as a court of equity should not lend its aid to enforce, the above objections go to the foundation of the rights asserted in the bill, and are objections such as the District Court might have considered of its own motion, whether suggested by the parties or not, and such as might have been urged in arrest of judgment. They are also such objections as an appellate court may consider of its own motion,

whether raised below or not. Primeau v. Granfield, 193 Fed. 211, 114 C. C. A. 549; Griggs v. Nadeau, 221 Fed. 361, 363, 137 C. C. A. 189. It is said that they are not properly raised by the assignments of error; but this court may, under its rules 11 and 24, paragraph 4 (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii), notice at its option plain errors not assigned, and has repeatedly done so.

[5] That this is a contract which "would have been regarded as champertous and void under the old common law" is conceded; but it is said that there is no jurisdiction wherein the common-law rule has not been changed to a large degree, the extent of change varying in different jurisdictions. We shall assume, in view of Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983, McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746, Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64, Ball v. Halsell, 161 U. S. 72, 80, 16 Sup. Ct. 554, 40 L. Ed. 622, and Nutt v. Knut, 200 U. S. 15, 21, 26 Sup. Ct. 216, 50 L. Ed. 348, that the contract is not to be held either void or voidable, merely because the attorneys' compensation is made contingent upon success or amount of recovery; it having been free, so far as appears, from fraud, misrepresentation, or unfairness. The above decisions relate to contracts for services in prosecuting claims against the United States or before tribunals acting under the authority of the federal government.

But the agreement that the attorneys shall have a contingent fee of 50 per cent. is by no means the most objectionable feature of this contract. They undertake in it to pay all the costs and expenses of the contemplated suit, and it provides that no settlement by their clients shall be valid, unless they are present and consent. Further, although there is no assignment by her to them, in express terms, of part of her interest, she is made to agree with them, who do not claim to have had any interest of their own in the property, "to pay to and divide with them in proportion of one-half of whatever I may receive by order of the court." The construction of this agreement which they assert in paragraph II of their bill is that they—

"should have and be entitled to a one-half interest in whatever property or other assets of said estate they might succeed in recovering for [her]."

Paragraph V of their bill further alleges that:

"Upon the entry of the final decree [they] became entitled under and by virtue of the contract aforesaid to an equitable undivided one-half interest in and to said lien upon said plantation Limon, and whatever amount might be ultimately found to be due thereon, and in and to the said undivided one-ninth interest adjudged to [her] in the general assets of the estate."

And this was the construction adopted by the District Court, as appears by its decree March 21, 1914, the substance whereof has been already stated. In an opinion dated March 9, 1914, directing the entry of said decree, after holding that Jones had bought in subordination to the plaintiff's claim under said contract, it is said that Adelaida Olivieri could under the circumstances—

"sell her interest in the property, but could sell no more than her interest. She had already vested [the plaintiffs] with a half interest, and could pass only the other half interest to Jones. * * * It follows that [the plaintiffs] are cotenants of this property."

It may be that there are jurisdictions in which the local legislation would afford ground for upholding some even of the above provisions; but, generally speaking, we think it clear that a contract between attorney and client, for contingent compensation for professional services, whereby the attorney is to pay the entire expense of litigation, to control its settlement, and to be jointly and equally interested with the client in the property involved when recovered, is a contract so far contrary to the policy of our law that a court of equity will not enforce it.

In Gregerson v. Imlay, 4 Blatchf. 503, Fed. Cas. No. 5,795, Judge Blatchford refused to enjoin one party to a contract having similar features (though not between attorney and client) from breaking it, and declared that, even if the contract might be barely valid at law, a court of equity should lend no countenance to it, because tainted with champerty and maintenance.

In McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746, the agreement between attorney and client had been for a fixed sum, contingent upon success, to be paid out of the proceeds of land in litigation. An objection that the agreement was champertous was held sufficiently answered by the fact that the attorneys—

"did not agree to pay any of the costs, they did not agree to take any part of the land, which was the subject of the suit, for their compensation, nor did they agree to take anything but money." 96 U. S. 416.

In Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302, a deed in trust was held void for champerty, because, after providing that the trustee should sue for, take possession of, and sell the granted land, it further provided that one trustee, an attorney, should retain out of the proceeds one-third, after paying out of said one-third all the trustees' costs and expenditures. It was the agreement by the attorney to take as his compensation a part of the thing in dispute, and to prosecute the litigation at his own expense, which was regarded as making the deed embodying it contrary to public policy, and therefore void. The court concurred in the condemnation of such agreements expressed by the Court of Appeals for the District of Columbia in Johnson v. Van Wyck, 4 App. D. C. 294.

In Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212, the Court of Appeals for the Eighth Circuit, relying on the last-cited decision, affirmed a refusal to order specific performance of a contract to prosecute litigation for a contingent fee payable in kind out of what should be recovered, and also to pay all costs of the litigation. It was said that, even if an action at law would lie upon such a contract, it was so far tainted with illegality that a court of equity ought not to enforce it.

[6] As to the stipulation purporting to invalidate any settlement of the contemplated litigation by the client, unless made in the attorneys' presence and with their consent, we can have no hesitation in regarding it as against public policy and void for that reason. The District Court for Porto Rico so regarded a stipulation to the same effect, in a contract similar in many respects to this, in Rodriguez v. Cueli, 1 Porto Rico Fed. 272, 275. In re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441, and Wel-

ler v. Jersey City, 68 N. J. Eq. 659, 61 Atl. 459, 66 Ann. Cas. 442, may also be referred to.

[7] While the local law here involved—i. e., the law of Porto Rico—deals with the above questions from a somewhat different point of view, and its policy is to be gathered more from Codes based on the civil law, or from commentators thereon, than from reported decisions, we find no reason to believe that contracts like that here in question are regarded in Porto Rico as any less obnoxious to the policy of the law than they are in the United States. The well-recognized grounds for believing danger to the public interest to be inherent in them, can be no less strong there than here.

By section 1362 of the Porto Rican Civil Code of 1902, which took the place of an earlier Code containing like provisions, judges, public prosecutors, clerks of courts, "and officials of justice" are made incapable of acquiring by purchase the property and rights in litigation before the court in which they exercise their respective duties; including in this prohibition acquisition by assignment. The same prohibition expressly includes—

"the lawyers, with regard to the property and rights, which may be the object of the litigation, in which they may take part by virtue of their profession and office."

The Spanish Civil Code contains similar prohibitions, and the Spanish authors agree that under Spanish law an agreement by an attorney to prosecute litigation for an interest in the property involved is forbidden, and therefore void.

[8] It is said that the above objections can at most render the contract voidable by Adelaida Olivieri, and that they cannot avail Jones. But if, as we hold, they render it incapable of enforcement in a court of equity, whatever validity might be conceded to it in a suit at law against her, the present bill, which is founded directly upon it and seeks to establish alleged rights under it, cannot be maintained. Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302, above cited.

[9] A motion to dismiss this appeal, because not taken in time, has not been insisted on; but Jones' acceptance of the amount ordered to be paid him by the decree entered March 1, 1915, is relied on as estopping him from claiming or maintaining it; and, as has been stated, this was the view taken by the District Court.

Three days after said decree was entered—i. e., on March 4, 1915—there was filed in court an acknowledgment in writing, signed by Jones, that he had received from Pettingill $1,464.55, "being in full compliance with the order of this court, upon the final decree herein, made upon March 1, 1915, in which said complainants were directed to pay me said sum." As has appeared, the decree required such receipt to be filed in the registry. On April 5th Jones' petition for reconsideration was filed, on May 1st, it was answered, and on May 29th the court denied it. Except so far as indicated by what appears as above from the record there is nothing to show acquiescence by Jones in the provisions of the decree. He does not appear to have otherwise acknowledged satisfaction thereof by Pettingill, nor to have taken any

other step indicating acquiescence. That the above receipt was not understood or intended by him as constituting such acquiescence is indicated by his subsequent application for rehearing and appeal. His appeal bond is so conditioned as to make it operate as a supersedeas. From the opinion filed by the District Judge in denying a rehearing, it appears that Jones mistakenly supposed himself under the necessity of receiving the money and filing the receipt therefor.

Believing, as we do, that the District Court ought not to have entertained the bill, we do not think that such unmistakable acquiescence on his part in the decrees appealed from appears, or acceptance of benefits thereby, as must involve the loss of his rights as appellant. The right to appeal is a right not to be held waived, except upon clear and decisive grounds. The District Court, which holds his receipt, can, upon reversal, restore both parties to their rights as they stood before said payment was made, by directing proper repayment to Pettingill. Erwin v. Lowry, 7 How. 172, 184, 12 L. Ed. 655.

[10] The view of the case which we take renders it unnecessary to consider at length a question to which much of the argument has been devoted, viz. whether or not the District Court erred in treating that part of the Limon property not owned by Felix Olivieri at the time of his death, and afterward acquired by Jones from its owners, as in fact belonging to Olivieri's heirs, subject to a mortgage in favor of Jones' grantors, the Alvarados, so that Jones could take from them only a mortgagee's interest, subject to a right of redemption in the Olivieri heirs.

The District Court held that an order entered by it on June 7, 1907, in the litigation to recover Adelaida's share of the Olivieri estate, to which the Alvarados became parties, had so adjudged; that this order had become final as to all the then parties in interest, and had established the above situation as res judicata for the purposes of the present case. It is upon this holding that the provisions of the decrees appealed from regarding redemption are based.

Said order of June 7, 1907, after reciting that the Alvarados desired only payment of whatever might be found due them from Olivieri's estate, and to hold their lien upon the premises leased to Olivieri until such payment should be made, and that so to treat their claim would eliminate considerable controversy as to the construction of the instrument dated October 24, 1900, under which Olivieri held the property, directed that said property be considered as belonging to the Olivieri succession subject to the mortgage of said Alvarados, for such amount as might be found due by the court and thereafter paid said Alvarados by the receiver then in charge.

We fail to understand how the court could in any event have had any power, even upon the consent by all parties then before it, which does not appear, thus to transform the Alvarado claim under their agreement with Olivieri, whatever its nature, into a conveyance by them to Olivieri's heirs, with a mortgage back from said heirs to them.

But it is enough to say that said order clearly appears to have embodied only a proposed compromise agreement never carried out. The court never determined under it any amount to be due under said

"mortgage," nor were any steps toward such determination ever taken. Jones' contention in the present suit that such order was wholly ineffective in the present suit, so far as he was concerned, ought, in our opinion, to have been sustained. In so far as the decrees appealed from are based upon the existence of the supposed "mortgage," or any alleged right in Pettingill to redeem from it what Jones bought from said Alvarados, we hold them erroneous. It follows that the above payment to Jones ought not to have been ordered or made.

The decrees appealed from are reversed, and the case is remanded to the District Court, with directions to dismiss the bill as to the appellant, Jones, upon payment by him of the amount for which his receipt on file therein is given, with interest, either to said Pettingill or into court for him; and said appellant recovers his costs of appeal.

SIMPSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 1, 1917.)

No. 2943.

1. PROSTITUTION ⊂⊃1—WHITE SLAVE ACT—APPLICABILITY.
   Under White Slave Act June 25, 1910, c. 395, § 3, 36 Stat. 825 (Comp. St. 1916, § 8814), providing that any person who shall induce "any woman or girl to go from one place to another in interstate or foreign commerce * * * for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent and purpose on the part of such persons that such woman or girl shall engage in the practice of prostitution or debauchery or any other immoral practice," shall be punished as therein directed, defendant, who induced a woman to travel from California to Mexico to manage a house of prostitution, was guilty; the act not being limited to the personal immorality of the woman induced to travel in interstate commerce.

2. INDICTMENT AND INFORMATION ⊂⊃110(3)—WHITE SLAVE ACT—SUFFICIENCY.
   An indictment in the language of the statute, charging that the defendant unlawfully induced a named woman to travel in interstate commerce from California to Mexico for the purpose of managing a house of prostitution and conducting a place where persons of the opposite sexes meet and have illicit intercourse, is sufficient.

3. COURTS ⊂⊃374—CRIMINAL PROSECUTIONS—INDICTMENT—APPLICABILITY OF STATE LAWS.
   Indictments in federal courts are not amenable to state laws.

4. PROSTITUTION ⊂⊃4—WHITE SLAVE ACT—EVIDENCE—SUFFICIENCY.
   In a prosecution under White Slave Act, § 3, evidence *held* to support a verdict of guilty.

5. CRIMINAL LAW ⊂⊃1169(5)—IMPROPER EVIDENCE—HARMLESS ERROR.
   In a prosecution for a violation of White Slave Act, § 3, that the court received secondary evidence of the contents of two telegrams, which later had to be stricken out because the government was unable to make the preliminary proofs, was not reversible error, the defendant making no objection to the procedure nor requesting a stronger admonition to the jury, or asking that other means be adopted for his protection, competent proof convincingly pointing to the guilt of defendant.

6. PROSTITUTION ⊜4—WHITE SLAVE ACT—EVIDENCE—TELEGRAPH COMPANY RECORDS.

To show that defendant induced a woman named to travel from California to Mexico, the records of a telegraph company, showing that defendant had a charge account with it and that a few days before she made the trip he had sent telegrams addressed to the city where she then was, showing only the surname of the addressee, which was the same as that of the woman named, were material.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

James B. Simpson, indicted as James B. Miller, was convicted of a violation of the White Slave Act, and brings error. Affirmed.

Alfred F. MacDonald and Jud R. Rush, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and J. Robert O'Connor and Clyde R. Moody, Asst. U. S. Attys., all of Los Angeles, Cal., for the United States.

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

DIETRICH, District Judge. James B. Simpson, the plaintiff in error, was convicted of a violation of section 3 of the White Slave Act (36 Stat. 825), which provides that any person who shall knowingly induce "any woman or girl to go from one place to another in interstate or foreign commerce * * * for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery or any other immoral practice," etc., shall be punished as therein directed. There are two counts in the indictment, in the first of which the defendant is charged with having unlawfully induced one Vida White, alias Rogers, to travel in interstate commerce from California to Tia Juana, in the republic of Mexico, "for a certain immoral purpose, to wit, for the purpose of placing said Vida White, alias Vida Rogers, in a house of prostitution and having her remain therein." The sufficiency of this count we need not consider, for upon it the defendant was acquitted. The second count, upon which he was found guilty, is in all particulars identical with the first, except that here it is charged that the defendant's purpose was to have the woman "manage a house of prostitution and conduct a place where persons of the opposite sexes meet and have illicit sexual intercourse."

[1] It is first contended that the indictment is insufficient for the reason that the management of a house of prostitution does not come within the denunciation of the statute, in that, as is claimed, only the personal sexual immorality of the woman induced to travel in interstate commerce is contemplated, and a woman may conduct a house of prostitution without engaging in such immoral practice. We do not think the scope of the statute is limited to cases of personal acts of

sexual immorality upon the part of the woman transported. It is to be conceded that under the rule of ejusdem generis, the phrase "other immorality" implies sexual immorality, but it would be too rigorous an application of this rule to limit the phrase to the personal sexual immorality of the woman herself. It is well understood, of course, that the general purpose of Congress in enacting the law was to check the spread of prostitution and other forms of sexual debauchery by denying, in a large measure, to those engaged in that business, the facilities of interstate commerce, and for one having a house of prostitution in Mexico to induce a woman to go there to become the efficient means for maintaining what is perhaps the most offensive form of the evil against which the statute is expressly directed would admittedly be violative of the letter, and, as we think, clearly contrary to the spirit, of the statute. This view is thought to be supported by the construction placed upon the act in the Athanasaw Case, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911, and is not inconsistent with anything decided by this court in Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391.

[2, 3] It is further objected that the indictment does not conform to the California Penal Code. But it charges the offense in the language of the statute, and sets it forth with sufficient particularity to enable the defendant intelligently to prepare his defenses; no more is required. Indictments in the federal courts are not amenable to state laws.

[4] It is next assigned that the evidence is insufficient to support the verdict, and emphasis is particularly laid upon the dearth of proof touching the averment that the defendant induced the woman to go to Mexico. There is direct evidence that defendant owned and operated a house of ill fame, called The Palace, at Tia Juana, that on the day after Thanksgiving in 1915 Vida Rogers and another woman by the name of Louise Bordeau left a house of like character in San Francisco and went directly to San Diego, where they were met at the train by the defendant; that the next day they were both at Tia Juana in The Palace, the former as "mistress" and the latter as an inmate, together with about 20 other women. The defendant also was there, and from that time on he often came there, and dined at the restaurant connected with the house and frequented by the women. It was further shown that Vida White, or Rogers, received two telegrams at San Francisco, one a few days before she went to Tia Juana, and the other about two weeks earlier. These telegrams are not in the record, but it is shown that during this period the defendant, who with his wife occupied rooms at the Victoria Apartments in San Diego, had a "charge account" with the Western Union Telegraph Company, and according to the records of this company he sent a telegram to one White, at San Francisco, on November 15th, and another on November 23d. It further appears that he was acquainted with Vida White and visited her upon several different occasions at the house of ill fame in San Francisco, where she was the "mistress." The jury doubtless found that defendant induced her to go to Tia Juana by the promise of compensation, either contingent or absolute, in consideration of

her taking charge of the house. That such an arrangement must have existed almost immediately after she got into Mexico is scarcely open to question, and it is a fair inference that it was entered into before she left San Francisco. Upon the whole, while perhaps remotely circumstantial, the evidence is of such character as almost irresistibly to produce conviction of the defendant's guilt.

[5] It is also assigned as error that the court received secondary evidence of the contents of the two telegrams above referred to. At the close of the case for the government it was stricken out, with instructions to the jury not to give it place in their consideration. That it was improvidently received is conceded, and the only question now is whether under all the circumstances its reception constitutes reversible error. It is hardly necessary to say that we do not commend the course pursued, for the reception of incompetent evidence is always attended with peril, even though it may be stricken out later on. And here there was apparently no substantial reason for not first requiring the preliminary proofs which it later turned out the government was unable to produce. But, it is to be noted, there can be no suspicion that the prosecution acted in bad faith, for the district attorney volunteered to withdraw the proffered telegrams until the requisite preliminary proofs could be made. It was upon the court's own motion that the testimony was received, subject to a motion to strike it out later on, and to this course no objection was raised by the defendant. Nor, when subsequently the testimony was stricken out, was there any request or suggestion that a stronger admonition be given to the jury, or that other means be adopted for the protection of the defendant against possible prejudice. Counsel for the defendant was presumably in a position more quickly to anticipate or apprehend jeopardy to his client than any one else, and it is not unreasonable to assume that upon an objection to the suggested course the court would have refrained from pursuing it; and if, at the time the evidence was stricken out, or later, there had been a request that the jury be more particularly warned against the danger of being unconsciously influenced by the incompetent testimony, the court would doubtless have granted it. If there were any evidence of bad faith on the part of the prosecution, or if the court had declined to give heed to any reasonable complaint or suggestion on the part of the defendant, or if we entertained any substantial doubt of the correctness of the verdict, we would not hesitate to direct a new trial. But the government ought not to be put to the necessity of retrying the case because of an incident treated so casually by all parties, when the competent proofs quite convincingly point to the defendant's guilt.

Under the well-established rule that exceptions to instructions must be specific (see rule 10 of this court [208 Fed. vii, 124 C. C. A. vii]), the defendant's general exception might, with propriety be wholly ignored, but we have examined the instructions, and we are satisfied that upon the whole the jury was fairly and adequately advised of the law.

[6] Although there are no assignments covering the admission of the two exhibits offered by the government involving the records of the

telegraph company, we are asked to review the action of the court in this respect, upon the ground that it was palpably erroneous and manifestly prejudicial to the defendant. In this view we cannot concur. With or without the contents of the telegrams, the evidence was clearly material, and upon the whole, while its competency is not entirely free from doubt, it is thought the preliminary proofs were sufficient to warrant its admission.

The judgment is affirmed.

REDERIAKTIEBOLAGET AMIE v. UNIVERSAL TRANSP. CO., Inc.

(Circuit Court of Appeals, Second Circuit. August 20, 1917.)

1. COURTS ⟸405(1)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—PRACTICE.

Appeals and writs of error are to be taken to the Circuit Court of Appeals in the manner practiced in the Supreme Court before 1891.

2. APPEAL AND ERROR ⟸399—"WRIT OF ERROR"—FUNCTIONS—"CITATION."

A writ of error operates proprio vigore to remove the record, while the citation gives notice to the parties and brings them into court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citation; Writ of Error.]

3. COURTS ⟸405(14)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—PERFECTION.

Under Rev. St. § 1000 (Comp. St. 1916, § 1660), declaring that every justice or judge signing a citation on any writ of error shall, except in cases brought by the United States, or under the direction of any department of the government, take good and sufficient security that plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fail shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs where it is not a supersedeas, a writ of error, but for Supreme Court rule 29 (32 Sup. Ct. xii), of which rule 13 for the Circuit Courts of Appeals (150 Fed. xxviii, 79 C. C. A. xxviii), is a copy, and which declares that supersedeas bonds in District Courts and Circuit Courts of Appeals must be taken, with good and sufficient security, that plaintiff in error or appellant shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, might be perfected and the cause heard without any security at all, except for costs.

4. COURTS ⟸405(15)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—SUPERSEDEAS BOND.

Under Supreme Court rule 29, of which rule 13 for the Circuit Court of Appeals is a copy, and which requires the giving of a supersedeas bond, the failure of plaintiff in error to give a supersedeas bond does not, as but for the rule the writ of error might be prosecuted, under Rev. St. § 1000 (Comp. St. 1916, § 1660), without giving such bond, affect the jurisdiction of the Circuit Court of Appeals, for the writ of error of itself removes the cause, and the failure to give such bond is a mere irregularity, and so it is within the power of any Circuit Judge or judge of the Circuit Court of Appeals to fix such bond after expiration of the 60-day period prescribed by section 1007 (section 1666).

5. COURTS ⟸405(15)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—SUPERSEDEAS BOND—AMOUNT.

Where the judge signing a writ of error and citation fixed the amount of the supersedeas bond by formal order, a judge of the Circuit Court of Appeals will not interfere with the amount fixed in the order for the supersedeas bond, though plaintiffs in error induced such judge to sign

the citation without producing the bond, for, such judge having made a decision, a subsequent judge should not interfere therewith.

6. ATTACHMENT ⟸1—PERSONAL ACTION—NATURE OF.
Where there was personal service on defendant, though its property was attached, the action is a personal one; the attachment being for purposes of security only.

7. COURTS ⟸405(15)—FEDERAL COURTS—CIRCUIT COURT OF APPEALS—WRIT OF ERROR—SUPERSEDEAS BOND.
Plaintiff in error instituted an action against defendant by personal service, but attached defendant's interest in a ship over and above a maritime lien. The ship was discharged, both from the lien and from the attachment, by the execution and filing of one instrument, which first secured the maritime lien, and, junior to that lien, the attachment and ensuing judgment pro tanto. *Held* that, despite the unique nature of the security and that as plaintiff's attachment of the ship was accidental he had the right to issue execution on rendition of a judgment, and a supersedeas bond was necessary, under rule 13 for Circuit Courts of Appeals, where defendant sued out a writ of error.

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

A writ of error to the District Court for the Southern District of New York having been taken out by plaintiff in error (defendant below), the same having been allowed and citation issued, a motion is made in this court to "fix the amount of the supersedeas bond to be given in this case." Plaintiff restrained from issuing execution, provided defendant completes its security within 10 days from filing the order.

Saul S. Myers and Thomas B. Nixon, both of New York City, for plaintiff in error.

Kirlin, Woolsey & Hickox, of New York City, for defendant in error.

Before HOUGH, Circuit Judge.

HOUGH, Circuit Judge. This motion having been duly made before me, it is thought to be my duty to hear it. That, however, does not assume that I have, therefore, any power to grant the relief moved for.

[1] Whether a single judge of the Court of Appeals has power to regulate procedure on appeal in the way here demanded is not plain on the face of the statute; yet this much may be spelled out. Appeals and writs of error are to be taken to the Circuit Court of Appeals in the manner practiced in the Supreme Court before 1891. In similar proceedings in the Supreme Court in Peugh v. Davis, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. Ed. 127, it was held that where an appeal had been allowed, but no security taken, a judge of the appellate court might take it more than 60 days after decree entered. No reason appears why the same might not be done on a writ of error.

In this case a writ was allowed and citation signed, and further an order was entered in the District Court fixing the amount of the bond to stay execution (commonly called a supersedeas bond); but the question remains, whether noncompliance with that order prevented the writ and citation from having their usual effect. The result of plain-

tiff in error's argument is that noncompliance with the order of L. Hand, J., leaves the writ and citation operative, and entitles this court or a judge thereof to fix the bond, even at a figure utterly variant from that directed by the court below.

[2, 3] A writ of error operates proprio vigore to remove the record; a citation gives notice to the parties and brings them into court. Atherton v. Fowler, 91 U. S. 143, 23 L. Ed. 265; Cohen v. Virginia, 6 Wheat. 264, 5 L. Ed. 257. There is no doubt that (so far as statute is concerned) the plaintiff in error may review by writ a judgment at law, without seeking to stay execution on the judgment; i. e., without supersedeas. It therefore appears clear that, but for the operation of Supreme Court rule 29 (32 Sup. Ct. xii), of which our rule 13 (150 Fed. xxviii, 79 C. C. A. xxviii) is a copy, a writ may be perfected and the cause heard regularly without any security at all, except for costs, under R. S. § 1000 (Comp. St. 1916, § 1660).

[4] The nature of supersedeas and the origin of our use of the word is fully shown in Omaha Hotel Co. v. Kountze, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609. Rule 29 was passed cotemporaneously with the decision in Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. Ed. 762 (see this stated in Jerome v. McCarter, 21 Wall. 17, 30, 22 L. Ed. 515), and in order to quiet disputes which had prevailed in the Supreme Court itself as to whether the rule of Catlett v. Brodie, 9 Wheat. 553, 6 L. Ed. 158 (an action at law), applied to equity suits, and especially to foreclosures, ejectments, etc. The cases heretofore cited show directly or by reference the history of this difference of opinion concerning what is now section 1000, R. S., and was originally a section of the Judiciary Act of 1789. In the condition of practice created by rule 29, Brown v. McConnell, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495, was decided, pointing out that a writ of error is process of the appellate court, while an appeal may be taken without any Supreme Court action at all, and further that security (which is what in our phrase "works a supersedeas") is given under R. S. § 1000, on signing citation, and that failure to take it is irregularity only, not "necessarily avoiding citation," and not affecting jurisdiction.

We must construe rule 13, C. C. A., as the Supreme Court has done, with rule 29, S. C. Under such construction, I think that the writ and citation herein have duly removed the record to and brought the parties into this court without any supersedeas bond; that such lack does not affect our jurisdiction, but is an irregularity, and leaves it within the power of any Circuit Judge of the circuit, or of the Circuit Court of Appeals itself, to fix such bond, even after the 60-day period of R. S. § 1007 (Comp. St. 1916, § 1666), has expired. What, under rule 13, the court would, should, or could do with the case, if no full bond is ever given, is not before me, and I express no opinion. Such opinion would depend (1) on a construction of rule 13 not now involved, and (2) on the power of this court to pass rule 13, or of the Supreme Court to pass rule 29, and in effect (perhaps) refuse longer to hear appeals and writs in which no security exists, or is given, except for costs.

[5] The first inquiry here is: How did this irregularity which gives me jurisdiction occur? None was intended, for when L. Hand, J.,

signed writ and citation, he fixed the amount of the supersedeas bond by formal order, which these plaintiffs in error have refused to obey. This sort of order is the common practice, and judges assume that the order entered is enough; never before have I known a citation availed of without complying with the cotemporaneous order as to security.

The reason for this singularity is that Hand, J.'s order is said to be so plainly in the face of rule 13 as to be null, wherefore in effect no lawful order was made, and this application is made on a (legally) clean slate. The argument for this application is not put just that way, but such is its necessary logical implication. I shall not stop to discuss the admissibility of such contention. I am satisfied of my jurisdiction, and there are two reasons why the action of Hand, J., will stand so far as I am concerned:

(1) His relation to this case on writ is just the same as mine might have been. I could have allowed the writ, signed the citation, and taken the security; so could any other Circuit Judge or District Judge sitting in the Southern district of New York. Plaintiff in error chose to go to Judge Hand, and he made decision. As matter of discretion and of law I would refuse to review his action when sitting alone. Plaintiff in error should take nothing by the fact that the citation was signed, without actually seeing the bond, for it is beyond all doubt that such actual production of a "good and sufficient" bond might have been insisted on as strict matter of law, before any judge affixed his name to any citation.

[6, 7] (2) I agree with Hand, J., as to the construction of rule 13. This is an action at law in which an attachment issued. There was personal service of defendant below, or its equivalent; therefore the attachment was no more than mesne process and the attached property only security (so far as it goes) for a judgment in personam. The attached property was whatever defendant below owned in a ship, over and above a maritime lien which has now ripened into a final decree for about one-third of the value of the vessel. The ship was discharged both of the maritime lien and from the attachment herein by the execution and filing of one rather hybrid document for her total value. In form that document is a stipulation for value, and from its tenor I think it clear that it first secures the maritime lien, and junior to that lien the attachment and ensuing judgment pro tanto.

But the usual clauses of an admiralty stipulation apply to both the admiralty case and common-law action; it is a continuing security in both trial and appellate courts, and is not collectible after appeal or writ taken until the appellate court has spoken favorably to libelants and original plaintiffs. Therefore here by an unusual but clear undertaking defendants below have given partial security,—the action otherwise is an ordinary common-law suit in personam (Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931), and not one in which "the property in controversy necessarily follows the suit." That phrase (even without the illustrations given by the rule itself) refers to suits seeking to recover specific property or adjudicate liens in or rights to some particular realty or chattels. This is no such case. Plaintiff below happened to attach a ship; he might as well have attached a credit or anything

else belonging to his opponent—the warrant was general; the ship accidental.

The result is that the order of Hand, J., was right. Defendant in error has the right to issue execution as therein permitted. Such right will be enjoined if plaintiff in error completes its security within 10 days from filing order hereon. Security is fixed at the figure named in Hand, J.'s order. New order filed herewith.

SOUTHERN TRUST CO. et al. v. LUCAS.

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

No. 4870.

1. FRAUD ⊜7—FIDUCIARY RELATIONS—HOW CREATED.
Where the parties to a transaction are strangers, they remain such, unless both consent by word or deed to an alteration of such status, and one party, by pleading ignorance and inexperience, and declaring her reliance upon the other, cannot impose a fiduciary obligation or status on such other without his consent.

2. TRIAL ⊜296(2)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.
In an action for fraud on an exchange of an apartment house by plaintiff for a farm owned by defendant's client, an instruction stating that one of the issues was whether there was "a condition of confidence, a reliance by the plaintiff on the defendants, she having informed them that she had no experience in such matters and relied upon them," though erroneous, was not fatal error, where another part of the charge required a finding that plaintiff depended entirely upon defendants' agents and told them so, and that they assumed to act in that capacity.

3. FRAUD ⊜23—FIDUCIARY RELATIONS—HOW CREATED.
Where a trust company, which negotiated an exchange by plaintiff of an apartment house for a farm owned by one of its clients, sought the handling of plaintiff's property, and with full knowledge of her inexperience and desires, and her reliance on its protection and representation of her interests, proceeded under conditions justifying her in believing that they were caring for her interests, they could not abuse her confidence, but were bound to care for her interests and exercise good faith in so doing.

4. FRAUD ⊜11(2)—FRAUDULENT REPRESENTATIONS—VALUE—FACTS OR OPINIONS—"STATEMENT OF FACT."
While a statement as to value is in one sense an expression of an opinion and in most cases nothing more, where it is made under conditions which show that it was intended to be treated as an immediate factor inducing action, and was made with knowledge that it would be accepted as a basis of action, instead of a mere element to be investigated before action, it becomes for all practical purposes a statement of fact.

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

5. TRIAL ⊜296(10)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.
In an action for fraud in negotiating an exchange of properties, the court's characterization of expert testimony as to what constituted value in real estate as a joke, and his further statement, when objection was made, that he had used a mild term, though they might better have been omitted, were not prejudicial, where in this immediate connection

the court clearly stated his reasons for the use of the expression, and what he meant by it, and impressed on the jury that what he said was not binding on them, and that they must judge the facts for themselves.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by Ollie Lucas against the Southern Trust Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

W. B. Smith and J. H. Carmichael, both of Little Rock, Ark. (J. Merrick Moore and W. H. Rector, both of Little Rock, Ark., on the brief), for plaintiffs in error.

E. L. McHaney and George W. Murphy, both of Little Rock, Ark., for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. Error from judgment for $14,963.66 as damages through deceit. The cause of action and proof for the plaintiff below was as follows:

An invalid widow, who owned an apartment house, being desirous of turning it into money, so that she could go with her aged father and small daughter to California, was induced by representatives of the trust company to permit them to exchange the apartment house for a large farm. The trust company officials represented to her that they would exchange her property for a farm which they said they knew to be worth $30,000; that they could and would then readily sell the farm, and, after taking out their stipulated commission, turn over to her a balance of $23,000. She told them that she knew nothing of farms or farming, or of farm values, did not want a farm, but wanted to convert the apartment house into money, and that this was the only property she had and her sole means of support. Relying upon their above assurances that the farm was of such value, and that they could within 30 days realize upon it for her the above sum in cash, she placed her property in their hands for such disposition. Before and during the time of the above representations and negotiations the company was, without her knowledge, the agent for the owner of said farm, and had unsuccessfully tried to dispose of it for a sum much less than the value of her property, and the officials knew the true value of the farm. Their representations to her were knowingly false, and made for the purpose of deceiving her and acquiring her property. She relied upon their statements of the value of the farm, what they could do with it, and that they were representing her as agent in the transaction. The defendant company in its pleadings and evidence challenged the plaintiff on all material points.

In the course of the charge to the jury occurs the following:

"So the issues in this case, gentlemen, which you are to determine are three: First, was there a condition of confidence, a reliance by the plaintiff on the defendants, she having informed them that she had no experience in such matters and relied upon them? That is the first issue to be determined. Second, were there false and fraudulent representations made by the defendant, or its agents, as to the value of the farm to the plaintiff which were material and which the plaintiff was induced to believe to be true and on the strength of it made that trade when she would not have made it if

the true facts had been stated to her? That is the second issue. Third, if what she alleges is true as to these two first issues, was the farm which she obtained worth less in value than the property which she exchanged? If it was worth as much as much or was worth more, then she was not injured and could not recover."

The defense was that no such representations had been made but that she had dealt at arm's length upon her own judgment after inspecting the farm; that any statements of value by the company officials were mere expressions of opinion; that the farm was equal in value to her property, so that she had suffered no loss.

The company attacks the first item in the charge of the court by saying:

"The court evidently intending to say that the defendant in error could create a fiduciary relation by simply telling the agent of plaintiffs in error that she relied upon his statement. We think a fiduciary relation is one of trust, confidence, and is a status, and that it cannot be created by the vendor stating to the purchaser that she is relying wholly upon the judgment of the purchaser as to what the property she is selling is worth."

[1] It is true that one party cannot create a legal obligation or status by pleading ignorance and inexperience to an opposing party in a business transaction. Those who have in the law's view been strangers remain such, unless both consent by word or deed to an alteration of that status. The communicated desire or intention of one to impose upon the other a different status, involving greater obligations, is ineffective, unless the other consents to the changed relation. It is true that consent may find expression in acts as readily as in words. But such consent cannot be implied from a bare procedure with the transaction, after one party has declared his or her inexperience and reliance upon the other. The knowledge of this state of mind in a party may be an important consideration in determining the existence of fraud, as indicating what effect might be anticipated from statements made; but it cannot establish a confidential legal status.

[2, 3] If the above quotation were the entire charge upon that point, it would be fatal error. But another part of the charge requires a finding that:

"In this transaction Mrs. Lucas depended entirely upon the Southern Trust Company's agents and had told them so, *and that they had assumed to act in that capacity* (italics ours)."

They cannot accept her confidence, and abuse it to her hurt. They cannot consent that she rely upon them, and deceive her through that very reliance. Much less can they deceive her, both as to the justification of that reliance and also as to the facts which would be protected thereby. Here the pleading and her proof were that the company's officials had sought the handling of her property, and, with full knowledge of her inexperience, desires, and reliance upon their protection, and their representation of her interests, had proceeded under conditions which would have justified her in believing that they were caring for her interests. Such a situation creates the obligation upon them to do so, and to exercise good faith in so doing.

[4] As to the second point, respecting the representations as to value: A statement as to value is from its very nature, in one sense,

an expression of opinion. In most instances it rises to no greater dignity. But where it is made under conditions which show that it was intended by the one uttering it to be treated as an important factor inducing action, and was made with knowledge that it would be accepted as a basis of action, instead of a mere element to be investigated by the other before action, it becomes, for all practical and effective purposes, a statement of fact, and is classed as such. There was here testimony justifying that view by the jury.

As to the third point, regarding the claimed absence of damage, because the value of the farm at least equaled that of the apartment house, it is enough to say that was a question of fact for the jury, upon conflicting evidence.

[5] A further point is urged in claimed prejudicial language used in the charge. In commenting upon the testimony of certain experts, who had testified as to what constituted value in real estate, the court characterized it as a "joke," and later, on objection to that language, said he had used a mild term. This language was extreme, and would better have been omitted. In immediate connection therewith, however, the court clearly stated his reasons for the use of the expression and what he meant by it; also, the court was very careful to impress upon the jury that what he might say was not binding upon them, and that they must themselves be the judges of the facts. We are not prepared to say that, in a closer case, the effect of this language might not be prejudicial; but we do not think it should be so regarded here.

The judgment is affirmed.

VIAVI CO. v. VIMEDIA CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. September 3, 1917.)

No. 4800.

1. TRADE-MARKS AND TRADE-NAMES ⟸59(5)—IMITATION OF NAMES—DESCRIPTIVE WORDS.

The words "cerate," "capsules," "suppositories," "tablets," "liquid," "laxative," and "pencils," as applied to proprietary medicines, are not subject to exclusive appropriation as trade-names; and hence, where plaintiff sold such medicines as "Viavi Capsules," "Viavi Suppositories," etc., defendants' manufacture and sale of similar medicines as "Vimedia Capsules," "Vimedia Suppositories," etc., was not an imitation of plaintiff's names.

2. TRADE-MARK AND TRADE-NAMES ⟸59(5)—IMITATION—NAMES OF ARTICLES.

Where plaintiff sold a proprietary medicine as "Viavi Royal," defendants' sale of a medical preparation as "Vimedia Sovereign" was not a deceptive imitation; the words "sovereign" and "royal" being distinct in form and suggestion.

3. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION—IMITATION.

It was not unfair competition for a manufacturer and seller of proprietary medicines to use books, charts, circulars, and printed forms having a general resemblance to those of another, in the same business, as to contents, such as anatomical plates, description of diseases and symptoms, and advice to the sick; such material being common in the domain of

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

*Rehearing denied December 10, 1917.

the proprietary medicine business, and no one having a monopoly of these forms of expression.

4. TRADE-MARKS AND TRADE-NAMES ⊂=77—UNFAIR COMPETITION—INTERFERENCE WITH BUSINESS.

It was not unfair competition for a manufacturer and seller of proprietary medicines to solicit and offer inducements and persuasions to the customers and agents of a competitor to become its customers and agents, where no contract relations were threatened.

5. TRADE-MARKS AND TRADE-NAMES ⊂=70(1)—UNFAIR COMPETITION—IMITATION.

In the absence of such a monopoly as a patent confers, any person may reproduce the proprietary medicines of another, and sell them under representations that they are the same article, if not sold as such other manufacturer's goods.

6. TRADE-MARKS AND TRADE-NAMES ⊂=70(4)—IMITATION—PACKAGES AND LABELS.

Neither the use of the same colors nor of the same form of containing vessels, cartons, or labels constitutes unfair competition, when such features are in common use in the trade, especially when they serve purposes of utility, convenience, or attraction.

7. TRADE-MARKS AND TRADE-NAMES ⊂=70(4)—IMITATION—PACKAGES AND LABELS.

Defendant used bottles, boxes, and tins for its proprietary medicines similar to those of plaintiff, and inclosed them in cartons having a general correspondence in form and color, and the labels were of similar sizes and colors and had the same general style of letters. The forms of the containers, however, were such as were naturally suggested by the necessities of the business, and the colors presented no unusual characteristics. Plaintiff's engraved scrolls and symbols were not copied, and its trade-name, "Viavi," did not appear on defendants' articles, while its own trade-name, "Vimedia," was constantly repeated and printed in type of large size, while defendant's name and address appeared in conspicuous letters. There was no persuasive testimony that purchasers had been actually deceived. *Held* that, notwithstanding the resemblances of colors and form, the difference in other respects in the dress of the goods was such that there was no unfair competition.

Stone, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by the Viavi Company against the Vimedia Company and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

John A. Barnes, of Chicago, Ill., and Arthur Miller, of Kansas City, Mo. (New, Miller, Camack & Winger, of Kansas City, Mo., on the brief), for appellant.

Frank T. Brown, of Chicago, Ill., and Henry D. Ashley, of Kansas City, Mo. (Charles M. Nissen, of Kansas City, Mo., Arthur L. Sprinkle, of Chicago, Ill., and Ashley & Gilbert, of Kansas City, Mo., on the brief), for appellees.

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

MUNGER, District Judge. This suit was brought to restrain unfair competition in business and to protect what was claimed to be a trade-mark and a trade-name. The appellant and its predecessors in in-

terest for many years have been engaged in making and vending proprietary medicines to which it has applied the name "Viavi." It is claimed that the name was registered as a trade-mark in 1891. The medicines are put up in bottles, in cylindrical wooden boxes, and in tin boxes, and these are inclosed in cardboard cartons of ordinary forms. The general method of sale was the procurement of local representatives, who purchased the medicines, and who were given the right of sale in limited territory. These representatives solicited customers among those supposed to be ailing, to whom the medicines were supplied for use. The goods were not sold through the ordinary means of drug and chemical stores. The defendant Fuller, with an associate, became local representatives of appellant at Kansas City, Mo., in 1899, and continued under the name of the Missouri Viavi Company, until 1903, to procure and vend the goods of appellant. In the latter year the defendant Laederich joined Fuller and his associate, and they formed a new company, called the Missouri Viavi Company, to continue the same business in a larger territory. Mr. Fuller retained this connection until 1905, when he withdrew and caused the incorporation of a company known as the Vimedia Company. It obtained the registration of the word "Vimedia" as a trade-mark in 1906. The Vimedia Company have also been engaged in the manufacture and sale of proprietary medicines of the same general type as those made by the Viavi Company. The word "Vimedia" has been applied to these medicines. They were put up in containers of the same general style as those of the rival company and were sold by the same general plan of local representatives.

The Viavi Company made and sold medicines it called "Viavi Capsules," "Viavi Suppositories," "Viavi Cerate," "Viavi Tablettes," "Viavi Liquid," "Viavi Laxative," "Viavi Pencils," and "Viavi Royal." The Vimedia Company has made and sold medicines it called "Vimedia Capsules," "Vimedia Suppositories," "Vimedia Cerate," "Vimedia Tablets," "Vimedia Liquid," "Vimedia Laxative," "Vimedia Pencils," and "Vimedia Sovereign."

[1, 2] In 1911 Laederich became a stockholder and officer in the defendant company and has been engaged in its service ever since. The suit asked the same relief against the persons made defendants as was asked against the Vimedia Company. A large amount of testimony was presented on the hearing of the issues, and the trial court entered a decree in favor of the defendants. Appellant has abandoned its claim of infringement of the trade-mark "Viavi," and it concedes that the word "Vimedia," standing alone, is not an infringement of the trade-name "Viavi"; but it asserts that an injunction should have issued against the use of the word "Vimedia," in conjunction with the words already stated, as appellations of medicines. The words "cerate," "capsules," "suppositories," "tablets," "liquid," "laxative," and "pencils" are not distinctive of appellant's medicines, nor subject to its exclusive appropriation as trade-names. They are properly descriptive of the goods, are well-known terms of trade, and were in similar use long before appellant began business; and hence the defendant company's use of the words cannot be said to be an imitation of appellant's

peculiar terms. They are similar to such words as "pills," "tonic," "lozenges," etc. The word "sovereign" is so distinct in form and suggestion to the word "royal," as applied to a medical preparation, that it cannot be called a deceptive imitation.

[3] The remaining questions relate to practices that are said to constitute unfair competition. Both of the companies use books, charts, circulars, and printed forms that have general resemblances as to contents, such as anatomical plates, descriptions of diseases and symptoms, and advice to the sick. The material used is common in the domain of the proprietary medicine business, and, as no copyright is relied upon for special protection, the plaintiff has no monopoly of these forms of expression. Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002; S. R. Feil Co. v. John E. Robbins Co., 220 Fed. 650, 136 C. C. A. 258; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135; Black v. Ehrich (C. C.) 44 Fed. 793.

[4] In building up the selling agencies of the Vimedia Company, some who had acted as selling agents for the Viavi Company and some who had purchased goods from it were solicited to become agents and customers of the Vimedia Company. Complaint is made that this constituted a raid upon appellant's business organization beyond the limits of fair competition. The evidence does not show any plan on the part of the defendant company to induce employés of the appellant to break contract relations with it. Inducements and persuasions were offered to those who had dealt with appellant to deal thereafter with the Vimedia Company; but it is legal business rivalry and competition for one to induce customers of one person to become patrons of another by honest persuasion, where no contract relations are threatened, else a new business establishment could rarely gain a foothold. West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 131 Fed. 890; Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; Johnson v. Hitchcock, 15 Johns. (N. Y.) 185.

[5] In some instances the local sellers of the Vimedia preparations have represented to prospective purchasers that the articles were the same or as good as Viavi. Apart from the question of the responsibility of the defendant company for these representations lies the fact that appellant has no patent for these medicines. In the absence of such a monopoly as a patent confers, any persons may reproduce the articles, if they can, and may sell them under the representation that they believe they are the same article, if they exclude the notion that they are the plaintiff's goods. Saxlehner v. Wagner, 216 U. S. 375, 30 Sup. Ct. 298, 54 L. Ed. 525; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135; Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

[6] Both of the companies use similar bottles, boxes, and tins to contain the medicines prepared by them, and the cartons used to inclose them have a general correspondence in form and color. The labels on the containers and cartons are also of similar sizes and colors and have the same general style of letters. There is nothing unusual or distinctive in this dress of goods. Neither the use of the same colors, or of the same form of containing vessels, cartons, or labels, alone constitutes unfair competition, when such features are in common use in the trade, and especially when these features serve purposes of utility, convenience, or attraction. P. Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496; Globe-Wernicke Co. v. Fred Macey Co., 119 Fed. 696, 56 C. C. A. 304; Marvel Co. v. Pearl, 133 Fed. 160, 66 C. C. A. 226; Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co., 80 Fed. 105, 25 C. C. A. 314.

[7] The forms of these containers are such as are naturally suggested by the necessities of the business in which they are used, and the pale yellow color of the cartons, the yellow labels with black letters, and the white labels with black letters present no unusual characteristics. The engraved scrolls and symbols appearing on the Viavi Company's goods have not been copied, nor does the word "Viavi" appear thereon. The paper used for labels and to cover all cartons by the defendant company has imprinted upon it in diagonal lines the word "Vimedia," constantly repeated, so that the word occurs 36 times on each square inch. The word "Vimedia" is printed in type of large size on each container and carton. On appellant's goods appears the legend that they are prepared by the Viavi Company, Incorporated, at San Francisco, Cal., U. S. A., and at Windsor, Ont., Can., while on defendant company's goods appears the legend in equally conspicuous letters that they are prepared by the Vimedia Company, Kansas City, Mo., U. S. A., Windsor, Ont., Can.

There is no presuasive testimony that purchasers have actually been deceived by any confusion of the goods. Notwithstanding the resemblances of colors and forms, the difference in other respects in the dress of the goods is such as to persuade that no one of ordinary intelligence will be deceived. Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Kann v. Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324; P. Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496; Proctor & Gamble Co. v. Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; S. R. Feil Co. v. John E. Robbins Co., 220 Fed. 650, 136 C. C. A. 258; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 124 C. C. A. 409.

We think the decree of the lower court is right and should be affirmed.

STONE, Circuit Judge (dissenting). The appellees had been closely associated and were intimately acquainted with the entire business of appellant in all its methods, phases, and results. They started out to compete in the same field. There is no question in my mind of their

close and intentional imitation of appellant's business methods, packages, and literature, in outline and in many details. Everywhere are earmarks suggesting a consciousness that the imitation could not lawfully be exact, joined to an executed intention of going to the very edge of what they deemed lawful imitation. While it may be that the form of many of the packages is utilitarian, that some of the business methods are open to public use, and that the name is slightly different, yet it is remarkable that such similitude in name, color of package, contents, and arrangement of literature could have been employed for any reason, except to confuse the present or prospective customers of appellant. This evident intention on the part of persons skilled in the trade and familiar with appellant's business and customers, when joined to actual instances of confusion on the part of such customers, as is shown by the evidence, makes a case of intentional and successful unfair competition.

INTERSTATE NAT. BANK OF KANSAS CITY, MO., v. YATES CENTER NAT. BANK OF YATES CENTER, KAN., et al.*

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

No. 4887.

1. PRINCIPAL AND AGENT ⟸177(1)—NOTICE TO AGENT—PRESUMPTIONS.
The knowledge of an agent is imputed to the principal, on the presumption that the information was communicated by the agent by reason of the relation; but, where the circumstances surrounding the agent are such that he would naturally have concealed his knowledge from the principal, the law will not presume that it was communicated.

2. BANKS AND BANKING ⟸262—KNOWLEDGE OF OFFICIALS—IMPUTATION TO PRINCIPAL.
Where the president of a bank introduced a stockman to plaintiff, another bank, which was the metropolitan correspondent of the one of which he was president, and induced plaintiff to make loans to him on chattel mortgages, the notes being signed, not only by the stockman, but by the president, the president's knowledge that funds deposited in the bank of which he was an official to the credit of the stockman were the proceeds of sales of mortgaged cattle is not, by reason of his official position, imputable to the bank of which he was president, so as to impress such funds with a trust in favor of plaintiff; it apearing that the president induced the stockman to dispose of the mortgaged cattle without notifying plaintiff, or delivering the proceeds, and was a party to a scheme, with reference to the disposition of the cattle, which, if not criminal, was fraudulent and bordering thereon.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Bill by the Interstate National Bank of Kansas City, Mo., against the Yates Center National Bank of Yates Center, Kan., and Charles D. Hammer, substituted as receiver of the Yates Center National Bank in place of C. A. Korbly. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

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

*Rehearing denied November 19, 1917.

W. F. Guthrie, of Youngstown, Ohio, and C. Angevine, of Kansas City, Kan., for appellant.

Altes H. Campbell, of Iola, Kan., for appellees.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. Plaintiff appeals from dismissal of its bill to set aside satisfaction of three mortgages on the ground of fraud, and to have a preference declared as to funds in the hands of the defendant receiver equal in amount to the sum arising from wrongful disposition of the mortgaged property by the mortgagor which had been deposited in appellee bank and checked therefrom by the mortgagor.

The mortgages, satisfaction of which was sought to be set aside, were given by T. C. Ryan to secure the payment of certain notes, and covered cattle. After these mortgages had been in force for some time, and a small payment had been made thereon, for the purpose of consolidating the balances and securing an additional sum, a single note was given, secured by mortgage, purporting to cover all of the property included in the three mortgages, and thereupon those mortgages were canceled. Thereafter the plaintiff ascertained that, largely prior to the execution of this last note, the maker thereof had disposed of most of the chattel security at the instigation and procurement of one Ricker, the president of the defendant Yates Center National Bank, and that the funds arising from such disposition had been deposited in that bank with full knowledge, on the part of the president, both of their origin and of the existence of the mortgages. The bank having passed into the hands of a receiver, and the mortgagor having withdrawn his funds from the bank, this suit seeks to impound the funds coming into the possession of the receiver, equal in amount to the receipts from the cattle, and to secure a preference thereon.

The theory of the bill is that the money came to the bank accompanied by the knowledge of its improper origin, and therefore the bank and its succeeding receiver obtained and held it as trustee for the plaintiff. It is not disputed that the proceeds from the sold mortgaged cattle were deposited in the bank to Ryan's credit and later drawn out by him; that the president of the bank, Ricker, had, when they were deposited, accurate knowledge of their origin and the existence of the mortgages; and that no other person connected with the bank had any such knowledge until after Ryan had overdrawn his account. The crux of the case, therefore, is whether or not the knowledge of Ricker was, under these circumstances, the knowledge of the bank.

[1] The basis of imputing knowledge from an agent to a principal is that the principal cannot be heard to deny responsibility for knowledge acquired by his agent, which would affect his principal's business, and which he would naturally communicate to his principal or use for his benefit. The imputation of knowledge to the principal is but the application of a presumption that the information was communicated by the agent. Like most presumptions, it is based upon that legal method of working out justice which often is called into action by necessity, to wit, to treat as existent that which normally and naturally

would occur, but which is difficult or impossible of direct proof by the party upon whom the burden of proof rests. If the circumstances surrounding the agent in respect to the knowledge are such that he would naturally conceal it from his principal, the law will not presume, in the absence of proof, that he did the unusual and unnatural thing of communicating it. Nor will it, proof being absent, hold his principal as possessing information he normally would not have.

[2] The high official position in the bank of Ricker, and his actual knowledge, would bind the bank, unless his connection with that knowledge was such as to preclude any theory or presumption of his communicating it to other officials of the bank, or using it for the benefit of the bank. To ascertain the situation of Ricker in this respect the court has carefully read and considered the entire evidence. Ricker was not a witness, and the record is strangely silent as to the cause of his absence. The testimony revealing Ricker's relation to the matter in question was from T. C. Ryan, who executed the notes and mortgages and sold the cattle; Helen F. Ryan, his wife; J. B. Ryan, a member of a stockyard commission company at Kansas City, and not connected with the other Ryans; R. M. Cook, vice president of the plaintiff bank; George S. Hovey, president of the plaintiff bank; and A. H. Gillis, formerly receiver of the defendant bank; numerous exhibits, including the notes, mortgages, account sales, and drafts covering the sale of the cattle; correspondence between Ricker and Mr. Cook or Mr. Hovey; and statements from the books of the two banks, including T. C. Ryan's account. This evidence shows Ricker, as president of a country town bank, introducing to plaintiff, the city correspondent of that bank, T. C. Ryan, who desired to borrow considerable sums of money to enable him to purchase cattle; the knowledge by Ricker, through previous dealings and acquaintance, that Ryan was a ranchman with little unincumbered property; the virtual certification of Ryan's financial worth by joining him as comaker on the notes to plaintiff; the receipt of a commission from the plaintiff for so doing; the apparent performance of some services for plaintiff, as presenting the notes for Ryan's signature, filing one or more of the mortgages for record, and inspecting the cattle covered by the mortgages; the insistence by him that Ryan sell the cattle and appropriate the proceeds without application on the mortgaged indebtedness or notification of the sale to plaintiff (a criminal act on Ryan's part and at a time when he—Ricker—was liable on the notes); Ryan's excuse that Ricker silenced his protest by saying that he was liable on the notes and would pay them; Ryan's dealings with defendant bank, always through Ricker personally, and sometimes involving large sums; the peculiar manner in which Ricker dealt with Ryan's account in the defendant bank, such as debiting it by ticket on April 17th with $2,250, which would have resulted in slight overdraft of Ryan's account, but which was placed to the credit of "C. G. Ricker, Vice President," and so held until July 1st, when it was retransferred to Ryan's account, then heavily overdrawn; the carrying for weeks of checks against the account as cash items without charging them to the account; crediting Ryan's account with $3,500 from a draft for that amount at a time when he was overdrawn more

than $3,200; the carrying as a credit of the above draft from August 9th until October 4th, when it had been refused by the firm upon which it was originally drawn to cover cattle not then shipped, and when the amount was never received until shipment, almost two months later, to another commission firm; the acceptance by Ricker, for the defendant bank, of notes signed, as Ryan testified, some "in my own name and some made by me in my two given names"; notes made to defendant bank through Ricker by Ryan's 12-year old son and by his wife. Ryan claimed he did not know why Ricker had them make notes, or whether the proceeds were credited to him, though he paid his son's note, with the exception of $400.

The evidence referred to, and other on the same line, convince the court either that Ricker was using T. C. Ryan as a tool in working out his nefarious plans against both banks, or that Ricker and Ryan were operating together, in utter disregard of the welfare or safety of the two banks, if indeed they were not moved by a more sinister motive. In any event, Ricker was engaged in reprehensible, if not criminal, conduct toward one or both banks. It cannot be presumed that he would communicate such actions, or the knowledge of the acts of his tool or confederate, Ryan, to any one, much less to his employer, the defendant bank, or that he would use the information to benefit the defendant bank. Therefore his knowledge of Ryan's dealings with the mortgaged cattle cannot be imputed to the bank. Hence neither it nor its receiver can be held as trustee of any proceeds through such sale.

The judgment is affirmed.

NORTH AMERICAN DREDGING CO. OF NEVADA et al. v. MINTZER et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2913.

1. NAVIGABLE WATERS ⚖1(1)—WHAT CONSTITUTES "NAVIGABLE" STREAM.

A tract of marsh or tide lands largely submerged at flood tide was intersected by tidal sloughs, one of which was a mile, more or less, in length, and in its lower reaches as wide as 100 feet or more, with a depth of from 2 feet or less at low tide in its shallowest parts to approximately 7 or 8 feet at its flood, and deepening somewhat towards its mouth. It had never been used or regarded as navigable, other than for duck boats or punts for hunting or fishing, until within a few years, when an oil company established a plant on adjoining land, and on a few occasions took power boats and scows of light draft up the channel on the flood tide, and it was impracticable to put the channel to such use without deepening it for the purpose. *Held*, that the stream was not a "navigable" stream.

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

2. NAVIGABLE WATERS ⚖37(7)—LANDS UNDER WATER—CONSTRUCTION OF GRANT.

Title to the soil underlying such channel was in those claiming under a grant from the state, whether or not the channel was navigable.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit by Lucio M. Mintzer and another, as executors of William Mintzer, deceased, against the North American Dredging Company of Nevada and another. From an order 242 Fed. 553, — C. C. A. —, granting an injunction, defendants appeal. Affirmed.

Earl D. White, of Oakland, Cal., and D. J. Hall, of Richmond, Cal., for appellants.

Edward J. McCutchen and John F. Cassell, both of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal from an order in favor of plaintiffs below, appellees, Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the estate of William Mintzer, deceased, granting injunction restraining defendant, appellant, North American Dredging Company of Nevada, from dredging and cutting a canal across property owned by them in the city of Richmond, Cal., and awarding damages. The bill alleged that complainant's testator at the time of his death was seised of certain described lands, and that about April 15, 1915, defendant trespassed by beginning to dredge a canal 80 feet in width and 8 feet in depth for a distance of from 4,000 to 5,000 feet across the land of testator. Defendant denied seisin or possession by plaintiffs, and alleged that the land described was a navigable waterway, with a public terminus connecting the city of Richmond with San Pablo and San Francisco Bays, and that at no time had plaintiffs or their testator had title to the land covered by the waters of the channel; that on the 15th of March, 1915, the defendant entered into a contract with the city of Richmond, wherein defendant agreed to dredge a channel through the south channel of San Pablo Canal, and that such work was commenced in April, 1915, for the purpose of improving the waterway in the interests of commerce and navigation. The city of Richmond intervened, and alleged the existence of a navigable channel within the limits of the city, and that the best interests of the city required the improvement of its navigability; permission to make such improvements having been received from the War Department of the United States. Plaintiffs denied the navigability or commercial character of the channel, and alleged that the intervener and the Standard Oil Company of California have entered into a contract whereby the city of Richmond would cause the soil dredged from the property of plaintiffs to be deposited upon the property of the Standard Oil Company, the latter agreeing to pay the city of Richmond therefor, and that if the channel is deepened in accordance with the contract between the intervener and defendant it will enable the Standard Oil Company to obtain a waterway to San Pablo Bay across the land and property of plaintiffs.

The turning point in the case is whether or not the waterway involved is navigable. It was the opinion of the District Court that it was not; that it never had been in fact navigable in any true sense, and has not been considered, either by the public or by the authorities of the state of California, as capable of navigation; and, furthermore, that the works sought to be prosecuted could not be carried on without ar-

tificial aid. Before reaching this conclusion, and in order to get a better understanding of the evidence bearing upon the physical situation, the District Judge made a personal inspection of the lands and channel involved in the controversy, and with painstaking care has described the situation, substantially as follows:

[1] The channel involved is about a mile in length, running through a tract of salt marsh or tideland, comprising about 500 acres, with the northerly boundary on San Pablo Bay and extending southerly for a mile, more or less, between a natural waterway called San Pablo creek, which borders on the east, the "Potrero" constituting the San Pablo peninsula on the west. The land was acquired by plaintiffs' grandfather by grant from those holding under the state Tideland Act. It is subject to tide action, largely submerged at flood tide, and mostly exposed at its lower stages. It is intersected by tidal sloughs cut by the flux and recession of the waters of the bay in their diurnal flow, some of them of magnitude and others dwindling to rivulets; at high tide many of these sloughs have considerable water, and at low tide the mud bottom is practically exposed. The particular channel in controversy branches from a larger stream a short distance south from where the San Pablo creek debouches from the marsh land into San Pablo Bay, and thence it winds its way throughout the length of the tract of 500 acres. The channel varies in width and depth from 100 feet or over in its lower reaches, and narrowing farther south, with a depth varying with the tide from 2 feet or less at low tide in its shallowest parts toward the south to approximately 7 or 8 feet at its flood, and deepening as it flowes to its mouth enters the San Pablo Canal. When the predecessors of the plaintiff acquired these tidelands, and for years thereafter, there was no settlement in the immediate neighborhood; the lands being largely used for farming and grazing. Years ago plaintiffs' grandfather built a dike across the lands near the northern boundary to keep out the tide and render the land more available for pasturage. This dike, except for a tide gate, was built solidly across the channel involved herein, and was maintained up to 1901 in a way to restrain the influx of the tide and to make the lands more available for pasturage. To a great extent the dike has disappeared, but evidences of it now exist.

The San Pablo Canal has always been navigated to some extent, but the channel in controversy and other sloughs intersecting the land have never been used or regarded as available for any kind of navigation, other than for duck boats or punts for hunting and fishing. About 1900 the Santa Fé Railroad selected Point Richmond as a terminus on San Francisco Bay, and the city of Richmond began to grow. The city is described as built upon the high land southerly and westerly of the marsh lands in question; the high land extending northerly in a peninsula terminating in San Pablo Point, partly dividing the waters of San Pablo Bay from the Bay of San Francisco. The corporate limits of the city of Richmond have extended to include this body of tidelands, but the latter is unreclaimed and unimproved, except by the Standard Oil Company, which has a refining plant at Richmond. The site of the refining plant includes a portion of marsh land purchased

from plaintiffs' testator from the southerly end of the tract hereinbefore described. When the plant was built, the slough or channel involved continued into the portion of the marsh acquired by the Oil Company, and somewhat recently the Oil Company has built a levee across the channel, and along the northern boundary of its marsh lands, and has filled in the channel where it crosses the lands of the company. North of the marsh land sold to the Standard Oil Company is a strip of land about 200 feet wide, sold by the predecessors of the plaintiff to the Belt Line Railroad. This narrow strip, running across the marsh between the lands of the Oil Company and the present holdings of the plaintiffs, forms the southerly boundary of the latter and the northerly boundary of the former.

The court found that it was only after the Oil Company had established its works that any effort was made to navigate the channel by craft or burden; that occasionally power boats and scows of light draft have been taken up through San Pablo creek into the channel involved, on the flood tide, but that it was impracticable to put the channel to such use without deepening it for the purpose. About 1915 an arrangement was made between the Oil Company and the city of Richmond, whereby the city agreed to pay the defendant to dredge the channel, and the Oil Company, in consideration of the removed soil being put on its land within its levee or bulkhead, agreed to pay the city for the material. Proceeding upon the theory that the channel was a public navigable waterway, a permit from the War Department of the United States was procured to enable the work to be prosecuted.

Upon these facts, which are supported by substantial evidence, the court was right in holding that the channel was not a navigable waterway. While any very exact rule cannot be stated, we find that the Court of Appeals for the Eighth Circuit, in Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447, has cited many cases to uphold the test it has expressed in this way:

"To meet the test of navigability as understood in the American law, a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation. Toledo Liberal Shooting Co. v. Erie Shooting Club, 33 C. C. A. 233, 90 Fed. 680; Moore v. Sanborne, 2 Mich, 520, 524, 59 Am. Dec. 209; Morgan v. King, 35 N. Y. 454, 458, 91 Am. Dec. 58; Brown v. Chadbourne, 31 Me. 9, 1 Am. Rep. 641 [50 Am. Dec. 641]; Griffith v. Holman, 23 Wash. 347, 63 Pac. 339 [83 Am. St. Rep. 821]; Wethersfield v. Humphrey, 20 Conn. 218; Rowe v. Granite Bridge, 38 Mass. [21 Pick.] 344; Gaston v. Mace, 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Neaderhouser v. State, 28 Ind. 257; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Railroad v. Brooks, 39 Ark. 403, 43 Am. Rep. 277."

Chisholm v. Caines (C. C.) 67 Fed. 285, cited by appellants, does not conflict with the quotation from Harrison v. Fite, supra.

We need not go into a discussion of the differences in the testimony of the witnesses. It is fair to say that there were some disagreements between them, particularly in respect to the capacity of the waterway, but, as already said, we accept the conclusions of the lower court as to the facts. Estep v. Kentland Coal & Coke Co., 239 Fed. 617, 152 C. C. A. 451; Ebner Gold Mining Co. v. Alaska Juneau G. M. Co., 210 Fed. 599, 127 C. C. A. 235.

[2] The question of title of the lands, including the soil underlying the channel itself, was clearly correctly decided upon the authority of Knudson v. Kearney, 171 Cal. 250, 152 Pac. 541.

Affirmed.

PUGET SOUND TRACTION, LIGHT & POWER CO. v. FRESCOLN.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2887.

DEATH ⊜27—ACTIONS FOR DEATH—DEFENSES—FORMER RECOVERY.

Rem. & Bal. Code Wash. § 183, provides that, when death is caused by wrongful act or neglect, the heirs or personal representatives may maintain an action for damages, and that, if deceased leave no widow or issue, his dependent parents, sisters, or minor brothers resident within the United States may maintain the action. Section 194 provides that no action for personal injury to any person occasioning his death shall abate, nor shall the right of action determine by reason of such death, if he have a wife or child or dependent parents, sisters, or minor brothers, but that the action may be prosecuted or commenced in their favor. *Held* that, where the plaintiff in an action for injuries died from the injuries before trial, and his widow, as administratrix and in her own right, was substituted as plaintiff and prosecuted the action to judgment, the judgment did not bar an action by her for damages from the death, as under the Washington decisions she could not have recovered damages for the death in the first action and, though there was but one negligent act, it gave rise to two wrongs, one against the injured man's estate, and the other against his dependent relatives.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by Anna F. Frescoln against the Puget Sound Traction, Light & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 225 Fed. 441.

J. W. Frescoln brought action in the superior court of Kings county, Wash., against Puget Sound Traction, Light & Power Company, plaintiff in error here, to be called defendant, for $5,323 damages for injuries received while alighting from a car owned by the defendant. Upon issues framed trial was set for October 13, 1914, but on September 15, 1914, the injured man died. Thereafter, in November, 1914, the widow, Anna F. Frescoln, defendant in error here, to be called plaintiff as administratrix and in her own right, was substituted as plaintiff, and individually and as administratrix of the estate of J. W. Frescoln filed a supplemental complaint, alleging the matters set forth in the original complaint, and also the death of Mr. Frescoln, and asked judg-

ment for $20,613. Upon trial a verdict for $2,500 for the plaintiff was rendered, but the state court granted motion for judgment in favor of the defendant notwithstanding the verdict. Thereafter Mrs. Frescoln appealed to the Supreme Court of the state, and that court reversed the judgment of the superior court and directed judgment upon the verdict, and on April 15, 1916, judgment was accordingly entered. Before the appeal just referred to, Mrs. Frescoln, as the widow of Mr. Frescoln, on May 11, 1915, brought this present action in the superior court of the state, asking $25,000 damages for the death of her husband, J. W. Frescoln. In due course the action was removed to the federal court, where the defendant answered, pleading the former action for damages instituted by J. W. Frescoln in his lifetime and the judgment secured therein by Mrs. Frescoln. At the time of the filing of such answer the appeal above referred to had not been decided by the Supreme Court. Anna Frescoln, plaintiff herein, moved to strike out the affirmative defense, but the lower court denied the motion. 225 Fed. 441. Afterward, when the Supreme Court of the state had reversed the judgment of the lower court in the original action brought by Frescoln, and after the judgment on the verdict was entered in accordance with the ruling of the Supreme Court, plaintiff herein, Anna F. Frescoln, filed an amended reply herein, admitting the institution of the action by Mr. Frescoln, but setting up the appeal, the reversal of the judgment by the Supreme Court, the entry of judgment upon the verdict, and praying judgment upon the pleadings. When the case came to trial, before the introduction of evidence, defendant moved for judgment upon the pleadings, upon the ground that the deceased had instituted an action for the personal injuries he received during his life, which action, after his death, had been revived and prosecuted to judgment by the plaintiff, Anna F. Frescoln. The court denied the motion, and upon trial verdict was rendered for the plaintiff, Anna F. Frescoln, for $4,500, and thereafter judgment was entered on the verdict. By writ of error the defendant brings the case to this court.

James B. Howe and H. S. Elliott, both of Seattle, Wash., for plaintiff in error.

Thomas H. Bain, of Seattle, Wash., for defendant in error.

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

HUNT, Circuit Judge (after stating the facts as above). From the foregoing statement the question for decision is whether, under the statutes of Washington, where one receives personal injuries as the result of the negligence of another and during his life begins an action to recover therefor, but before trial dies as a result of the injuries inflicted, and his widow, as administratrix and in her own right, revives and carries on such action for personal injuries to judgment, an independent action for wrongful death will lie in favor of the widow. The statutes of the state which have to do with the matter are as follows (Remington & Ballinger's Codes, vol. 1):

"Sec. 183. (4828.) * * * When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action. * * * In every such action the jury may give such damages, as under all circumstances of the case may to them seem just.

"Sec. 194. (4838.) No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States

at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death."

Defendant's contention is that under the statutes quoted the beneficiaries are the same, and that the same parties plaintiff are not entitled to recover for the same wrongful act, and that to permit two recoveries would be to permit double damages to be assessed against the wrongdoer, in that it would permit a recovery of the full amount of damages sustained by the deceased, and then a second recovery by the same individuals for the damages resulting to them from the death of the deceased. In their argument counsel for the defendant say that in the states where two concurrent actions are permitted they are maintained in two different and distinct rights, in that the action under the survival statute is brought by the personal representative for the benefit of the estate of the deceased, while the action under the death statute is brought by or for the benefit of the heirs expressly mentioned in the various death statutes; and further that, inasmuch as there is no provision in the state of Washington whereby the one statute makes the estate of the deceased the beneficiaries and the other certain heirs the beneficiary, there is a vital distinction between the statutes of Washington and those of states where two concurrent actions are allowed.

In support of its position defendant cites, among other cases, Riggs v. Northern Pacific Railway, 60 Wash. 292, 111 Pac. 162, and Longfellow v. Seattle, 76 Wash. 509, 136 Pac. 855. But an examination of these decisions shows that in the former the court went no further than to hold that the beneficiaries under the death act of the state of Washington could not split their actions, and in the latter that the statutes, so far as they coincided, meant to afford separate and coexistent remedies, permitting one recovery for the one death rather than cumulative recoveries. Clearly, therefore, they are not decisive of the point involved in the present case, for here there has been no attempt to make two recoveries for one wrong. It is true there has been but one negligent act; but that negligent act has given rise to two wrongs, one against the estate of the injured man, the other against his dependent relatives. In the survivor case all the heirs of the deceased are beneficiaries of the verdict; while under the death statute only dependent relatives may be beneficiaries of the recovery. In the first action, prosecuted to judgment by Mrs. Frescoln, she could not have recovered damages for the death of her husband. This rule was laid down by the Supreme Court of Washington in Thompson v. Seattle, R. & S. R. Co., 71 Wash. 443, 128 Pac. 1070, where the court affirmed an instruction to the jury that, in an action prosecuted for damages arising out of injuries resulting from negligence, the jury could award nothing for the death of the injured person, and nothing for the loss caused by reason of the death of such a person. This case refutes the argument that there is a vital distinction between the statutes of Washington and other states permitting concurrent actions.

In Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795, sections 183 and 194, hereinbefore quoted, were considered by the Supreme Court, and it was held that each of the sections was intended to serve its separate purpose, and must be so construed as to secure that result. Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400, 30 Pac. 714. This court also has discussed the general question, and in Northern Pacific Railway Co. v. Adams, 116 Fed. 324, 54 C. C. A. 196, on writ of error to the Circuit Court for the District of Washington, held that under the statutes heretofore quoted there was a right of action in favor of the heirs or personal representatives of a person whose death was caused by the negligence of another to recover such damages as might be just, as a new and separate cause of action for damages for the loss sustained by such beneficiaries, and that such right was not dependent upon the right of the deceased to maintain an action for the act which caused his death had he survived. The decision in that case was reversed (in Northern Pacific Railway Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513), but there was no intimation that the view of this court as to the rights of action was not correct.

In Railroad Co. v. Dickson, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, the court discussed section 241 of the Constitution of Kentucky, which provides that, "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same," and section 6 of the Kentucky Statutes, which provides that, "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same; and when the act is willful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased," and held that the cause of action thus created was independent of any right of action the deceased might have had or would have had if he had survived the injury. In Brodie v. Washington Water Power Co., 92 Wash. 574, 159 Pac. 791, the court said:

"The statutes were enacted to overcome defects thought to exist in the common law. By the common law no person had the right to recover for the death of another, no matter how wrongfully or negligently caused, and the right of action possessed by a person injured did not survive his own life. The first section of the statute cited is plainly a survival statute. Its purpose is to preserve in the beneficiaries named therein such right of action as the injured person himself had because of the wrongful or negligent act causing the injury, and is confined to such personal loss as the injured person sustained. The second, although originating in the same wrongful act or neglect, begins where the other ends and is confined to such loss and damage as the beneficiaries named have suffered by the death of the person injured. Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795; Thompson v. Seattle, Renton & S. R. Co., 71 Wash. 436, 128 Pac. 1070."

Our conclusion is that under the interpretations of the laws of the state the question is settled and that the judgment of the District Court was correct.

Affirmed.

NG CHOY FONG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2864.

1. CONSTITUTIONAL LAW ⊂=266—POISONS ⊂=2—DUE PROCESS—PRESUMPTION OF INNOCENCE.

Act Cong. Feb. 9, 1909, c. 100, 35 Stat. 614, as amended by Act Jan. 17, 1914, c. 9, 38 Stat. 275, providing in section 2 (Comp. St. 1916, § 8801) that, if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium, or derivative thereof, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation or concealment of, such opium, knowing the same to have been imported contrary to law, shall be punished, and that whenever, on trial for a violation, the defendant is shown to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury, and in section 3 (Comp. St. 1916, § 8801a) that on or after July 1, 1913, all smoking opium or opium prepared for smoking found in the United States shall be presumed to have been imported after the 1st day of April, 1909, on which date the importation of opium, save for medicinal purposes, etc., was forbidden, and that the burden of proof shall be on the accused to rebut the presumption, is not invalid, as violating Const. Amend. 5, declaring that no person shall be compelled in any criminal case to be a witness against himself, for the statute did not do away with the presumption of innocence, or require accused to take the stand, but merely declared a rule of evidence; the presumption declared not rebutting the inference of innocence.

2. CRIMINAL LAW ⊂=789(4)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for violating Act Cong. Feb. 9, 1909, c. 100, as amended by Act Jan. 17, 1914, c. 9, §§ 2, 3, by concealing and facilitating the transportation and concealment of opium, where the court charged that accused was presumed to be innocent, and that such presumption continued to operate in her favor until overcome by evidence establishing her guilt beyond a reasonable doubt, but that such presumption should be considered with the statute declaring that possession of opium should be deemed to make out a prima facie case, etc., the instructions were not misleading, and could not have led the jury to believe that accused should be convicted without proof of guilt beyond a reasonable doubt.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Ng Choy Fong was convicted of violating Act Cong. Feb. 9, 1909, c. 100, as amended by Act Jan. 17, 1914, c. 9, by having concealed and facilitated the transportation and concealment of opium prepared for smoking purposes, and which she knew was imported into the United States contrary to law, and she brings error. Affirmed.

George J. Hatfield, of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and M. A. Thomas, Asst. U. S. Atty., both of San Francisco, Cal.

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

HUNT, Circuit Judge. Plaintiff in error, a Chinese woman, was convicted of violation of the act of Congress of February 9, 1909, as

amended January 17, 1914, in having on August 12, 1915, concealed and facilitated the transportation and concealment of 660 five-tael cans of opium prepared for smoking purposes, which she well knew had been imported into the United States contrary to law. Under the writ of error she assails the constitutionality of the portions of sections 2 and 3 of the act of February 9, 1909, which provide that on and after July 1, 1913, all smoking opium found within the United States shall be presumed to have been imported after April 1, 1909, and that possession of such opium shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury. We quote the material parts of the sections:

"That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided," etc.

Sec. 2: "That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be" punished, as provided. "Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

Sec. 3: "That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

[1] The position taken is that the provisions referred to are in conflict with article 5 of the Amendments to the Constitution, in that they take away from a defendant the protection of the presumption of innocence, and that they "tend to compel the defendant to take the witness stand," whether or not she wishes to, at the peril of being convicted of a crime not proved against her. The question is presented by objection to the following instructions given by the lower court to the jury:

"These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the government prove that the defendants had, after July 1, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1, 1909, and such possession imputes to the defendants a guilty knowledge sufficient to warrant a conviction unless the defendants shall explain such possession to your satisfaction. If, therefore, you are satisfied from the evidence beyond a reasonable doubt that defendants did have possession of this opium, and that it was smoking opium, then such possession will be sufficient to warrant a conviction, unless the defendants have explained such possession to your satisfaction."

Examination of section 1 of the act above quoted (Comp. St. 1916, § 8800) shows that it is a general prohibition against importing opium after April 1, 1909, except for use in certain purposes not here relevant. Section 2 is a declaration that it is unlawful for any person to

conceal or facilitate the concealment of opium which has been unlawfully imported, knowing it has been imported contrary to law. These are the substantive commands of the law with relation to the opium. But, in order to make the law as effective as might be, Congress, in its wisdom, meant to facilitate the practical administration of the statute by establishing these rules: (1) That if, upon trial, a person is shown to have had opium illegally imported in his possession, such possession shall be deemed enough evidence to authorize conviction unless such possessor shall explain the possession to the satisfaction of the jury. (2) That after July 1, 1913, all opium found shall be presumed to have been imported since April 1, 1909, and the accused must take it upon himself to rebut this presumption.

There can be no doubt of the general power and authority of Congress to create a rule changing the burden of proceeding in a criminal case, by providing that upon the production of certain facts it shall rest upon the defendant, and also to establish a rule of evidence making proof of one fact prima facie evidence of another related thereto. We must, of course, keep it in mind that the statute under examination has not attempted to make a rule that any inference or presumption of fact shall be conclusive at law. Wigmore on Evidence, § 1354. The statute has laid down a rule, not of substantive law at all, but merely of evidence. It does not in any way conclusively shut out all evidence from defendant; it has declared that, a prima facie case being made, the duty of producing evidence to avoid the effect of such prima facie case is upon the defendant. The great weight of authority confirms our belief that such a law is in no way in excess of power. Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Morgan v. State, 117 Ind. 569, 19 N. E. 154; Voght v. State, 124 Ind. 358, 24 N. E. 680; Com. v. Smith, 166 Mass. 370, 44 N. E. 503; Board v. Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. St. Rep. 705; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; State v. Higgins, 13 R. I. 330, 43 Am. Rep. 26 note.

[2] The court in its instructions expressly told the jury that defendant was presumed to be innocent, and that such presumption continued to operate in defendant's favor until it was overcome by evidence establishing guilt beyond a reasonable doubt, but that the presumption of innocence must be considered in connection with the statutory inferences read to the jury, and that the prosecution must establish every element of the crime charged beyond a reasonable doubt. These several instructions made no conflict with respect to the inferences from the evidence in the case. The jury, in effect, were told that the possession of the opium, if a fact, was enough to authorize conviction, unless the defendant went forward with evidence which accounted for such possession; and again, that the inference or presumption to be drawn was that the opium found was imported after a certain date unless the defendant went forward and overcame such inference. Thus, the duty of production of evidence could not have been misunderstood, while upon the whole case it was for the prosecution to establish guilt beyond a reasonable doubt. Wilson v. U. S., 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090; Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct.

235, 41 L. Ed. 624; Dunlop v. U. S., 165 U. S. 486, 502, 17 Sup. Ct. 375, 41 L. Ed. 799; Greenleaf on Evidence (16th Ed.) §§ 32, 33, 34.

The position of defendant at the close of the evidence for the prosecution was like that of any other defendant against whom a prima facie case is made. She could elect whether or not she would proceed, or stand upon her plea as against the evidence of the government. She chose to proceed; and, having failed to satisfy us that the verdict of guilty is violative of any of her rights, she must abide the result of the trial.

The judgment is affirmed.

GIN DOCK SUE v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2858.

1. ALIENS ⟸32(12)—DEPORTATION OF CHINESE—REVIEW OF PROCEEDINGS.
A Chinese person's application for admission to the United States as a returning Chinese merchant was denied by the Commissioner of Immigration. An appeal to the Secretary of Labor was dismissed, and pending an application for reopening the case, he escaped from detention. *Held* that, on a subsequent proceeding for deportation, the mercantile status of the Chinese person could not be inquired into, having been determined by the judgment of the immigration officials, and not being open to review, unless the proceedings were unfair.

2. ALIENS ⟸31—CHINESE PERSONS—PROCEEDINGS FOR DEPORTATION.
Where a Chinese person, applying for admission to the country as a returning merchant, escaped from detention pending a petition to reopen his case, his application having been denied and admission refused, he may, though by reason of his escape he continued in the country for more than three years, be thereafter deported under Immigration Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (Comp. St. 1916, § 4270); for though an alien, who has violated no law, except that he is in the country through an irregular entry, cannot after three years' residence be deported, unless charged with immorality, etc., the order denying such Chinese person's application for admission stood as a judgment requiring deportation throughout the period of his entire residence.

3. ALIENS ⟸23(1)—DEPORTATION OF CHINESE PERSONS—DEFENSES.
That a Chinese person sought to be deported was a merchant did not entitle him to remain, where his status as such was acquired subsequent to his entry into the country surreptitiously, by escaping from detention quarters after he had been denied permission to land.

4. ALIENS ⟸23(1)—DEPORTATION OF CHINESE PERSONS—DEFENSES.
A Chinese person, who resided in the United States for over six years, carrying on the business of a merchant, does not, by reason of his connection with an association of Chinese attached to the Chinese consulate, fall within the exemption of Act May 6, 1882, c. 126, § 13, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 118 (Comp. St. 1916, § 4300), declaring that exclusion provisions shall not apply to diplomatic and other officers of the Chinese or other governments traveling upon the business of that government.

5. ALIENS ⟸23(1)—DEPORTATION OF CHINESE—ATTENDANT OF CONSUL.
A Chinese person, who became secretary of an association of Chinese persons attached to the Chinese consulate, who had no credentials from his government or passport from the minister at Washington, is not an

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

*Rehearing denied January 7, 1918.

attendant of a consular officer, within Act Sept. 13, 1888, c. 1015, § 14, 25 Stat. 479 (Comp. St. 1916, § 4314), exempting Chinese diplomatic or consular officers and their attendants from provisions for the deportation of Chinese persons, though such Chinese person did some work for the consul and was a member of an advisory board; the association being benevolent in its nature and composed of Chinese from a particular province.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Deportation proceedings by the United States against Gin Dock Sue. Deportation was directed by the commissioner, and a like order (230 Fed. 657) being entered, on appeal to the District Court, defendant appeals. Affirmed.

From the stipulation of counsel, the following facts are gleaned: Appellant departed from the United States for China July 9, 1907. He returned July 14, 1908, and, under the name of Yeung Lung Soo, applied for admission as a returning Chinese merchant. His admission was denied by the commissioner of immigration at the port of San Francisco August 26, 1908. An appeal was taken from the commissioner's decision, which was dismissed by the honorable Secretary of Labor October 1, 1908. An application was made for a reopening of the case November 4, 1908, but on November 28, 1908, appellant escaped from his place of detention, and on December 8, 1908, the commissioner of immigration denied the application because of the fact that appellant had escaped from the place where detained and was a fugitive.

The present proceeding was instituted before a United States commissioner, by complaint of an immigration inspector, seeking the appellant's deportation on the ground that he was then illegally within the United States. The commissioner ordered him to be deported, and on appeal to the District Court a like order was made and entered. The case is now here on appeal from the judgment of the District Court.

George A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

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

WOLVERTON, District Judge (after stating the facts as above). Three contentions are made opposing appellant's deportation: First, that he is a Chinese official, and on that account may not be excluded; second, that he has been engaged in business in California as a Chinese merchant for the past 6½ years, and for that reason may not be excluded, although ordered deported for a prior irregular re-entry; and, third, that the court has jurisdiction, and should now inquire into the mercantile status of appellant for the year prior to his departure from the United States, it being claimed that his status was that of a merchant, and for that reason that he should not now be deported. We will consider these in their inverse order.

[1] The obstacle in the way of our inquiry into the mercantile status of the appellant for the year prior to his departure from the United States is that the decision, order, and judgment of the commissioner of immigration are final, and a bar thereto, and preclude further action by the courts, unless the appellant has not been accorded a fair hearing;

and the fairness of his treatment at such hearing is not a matter of controversy here. His appeal to the Secretary of Labor was dismissed, which put an end to the inquiry, unless his case was reopened for further hearing. An attempt was made to reopen it, but was defeated by the appellant's act in escaping from his place of detention. The crucial question here is whether appellant shall be deported in pursuance of the order and judgment of the commissioner of immigration. Whatever his status at that time, that judgment has settled that it was not such as to entitle him to a re-entry into the United States, and by this the court is precluded from entertaining further inquiry, except, as we have indicated, upon complaint that he was not accorded a fair hearing before the commissioner. Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

[2] It is urged in support of the second contention that, appellant having remained within the United States for the period of three years, he cannot now be deported, although his entry was irregular—this for two reasons, namely: (1) That he was not proceeded against within 3 years, in pursuance of section 21 of the general act to regulate the immigration of aliens into the United States; and (2) that his status has been that of a merchant in the meantime—indeed, it is said, for 6½ years prior to the present hearing.

It is quite true that an alien may not be deported after 3 years' residence, who has violated no law except that he is here through an irregular entry, if he is not otherwise chargeable with personal immorality. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. In the present case, however, the appellant has been proceeded against within the 3 years. He was, in fact, proceeded against instantly upon his attempt to effect a re-entry, and his right to re-enter was adjudged adversely to his contention. The 3 years have elapsed, with this order and judgment standing against him, neither reversed nor annulled. In other words, the judgment in the meanwhile has been in effect declarative of his unlawful status, as being within the country surreptitiously.

[3] This brings us to the inquiry whether, notwithstanding the order and judgment that he was without the right or privilege of re-entry, his remaining within the United States surreptitiously for more than three years, with the status of a merchant, cures his unlawful entry. In Tsoi Sim v. United States, 116 Fed. 920, 54 C. C. A. 154, which involved the right to remain in the United States of a Chinese woman who lawfully entered before the Chinese Exclusion Act was enacted, and remained there afterwards, but failed to register as required, and was thereafter lawfully married to a citizen of the United States, it was held that, by reason of her marriage, appellant took the status of her husband, and was not subject to deportation; the court assuming that she was subject to deportation previous to her marriage. So it was held, respecting a French woman, who, pending proceedings for her deportation under the immigration laws, married a citizen of the United States, that, by reason of having taken the status of her husband, she was entitled to remain. Hopkins v. Fachant, 130 Fed. 839, 65 C. C. A. 1.

In Ex parte Ow Guen (D. C.) 148 Fed. 926, the relator, a Chinaman, was a resident of this country before the adoption of the Chinese Exclusion Act. He went to China, leaving the affidavits of two white witnesses showing him to be a merchant in Lowell. On his return he was refused admission because, although a merchant in fact, he was said not to be in law, as he had been a laborer and remained unregistered. He came again, and applied for admission as a merchant, but was ordered deported, because he had been an unregistered laborer. The court held that the relator, as an unregistered laborer, was entitled to all the rights of a resident alien until proceeded against and deported—among others, the right to become a merchant, and that, when he became a merchant, he had all the rights of one under the law. This was not a case of curing an unlawful entry by becoming a merchant. It was merely a case in the end where, a Chinaman having applied to enter as a merchant, and having been denied entry on the ground that he had been formerly within the United States with the status of a laborer, it was declared that he had the right to change his status, and, having done so, in pursuance thereof had the right of re-entry as a merchant.

These cases are not controlling here. If appellant's re-entry had been surreptitious only, the case would be different. He came and applied for re-entry, and was adjudged not to be entitled thereto. After the judgment had gone against him, he escaped, and remained in the country in spite of the efforts to deport him in pursuance of the order and judgment of the commissioner of immigration. It does not seem to us that an unlawful resistance of a lawful order and judgment, however long continued, can have the effect to outlaw such order and judgment. It is not through the neglect of the government that the order has not been executed, but through the adroitness of appellant in keeping himself secreted. We think, therefore, that, while appellant's long residence in this country might have cured a merely surreptitious entry, it does not cure an unlawful resistance of the judgment and order of deportation. To hold otherwise would be to encourage resistance to lawful authority.

[4, 5] The next inquiry is whether appellant is a Chinese officer within the exempted class. Section 13 of the act of May 6, 1882, as amended July 5, 1884 (23 Stat. 118), provides that the act "shall not apply to diplomatic and other officers of the Chinese or other governments traveling upon the business of that government"; and section 14 of the act of September 13, 1888 (25 Stat. 479), further provides "that the preceding sections shall not apply to Chinese diplomatic or consular officers or their attendants." The appellant clearly does not bring himself within the provision of section 13 of the earlier act. He is not in any sense an officer traveling upon the business of his government. Nor is he a diplomatic or consular officer within the meaning of section 14 of the act of 1888. Can he be said to be an attendant of such an officer, admitted to the United States under special instructions of the Department of Commerce and Labor?

K. Ow Yang, the Chinese consul general for the port of San Francisco, testifies that appellant is secretary of the Ning Yung Association,

and attached to the Chinese consulate, and that he has been so attached since last November (1913); that he was selected by the Ning Yung Association, and that all the members of the different associations assist in the consular work; that all the presidents of such associations come from China, but that the secretary is usually selected in this country on account of his knowledge of English. The appellant has no credentials from his government, nor a passport from the minister at Washington. He simply is secretary of an association, who may do some work for the Chinese consul if he sees fit to call upon him for that purpose, and a member of the advisory board of the consul. It further appears that the Ning Yung Association is composed of all the Chinese living in this country who come from Ning Yung province in China, and that the work of the association is benevolent in character. This testimony shows the appellant to be an officer of the Ning Yung Association—an association organized in this country; not an association even of the Chinese government, nor organized by its authority. By reason of his being such an officer, the Chinese consul avails himself of his assistance in doing consular work; but we infer that he is not a regular attendant of the consul, any more than are the secretaries of all the six associations of Chinese residents in this country similarly organized, who may be members of an advisory board of the consulate. This, as we are impressed, does not constitute the appellant an attendant of the consular office of the Chinese government, within the meaning of section 14 of the act of Congress of September 13, 1888. But, even if he had become an attendant by reason of his selection by the Ning Yung Association as secretary, we think that would not avail to cure his unlawful resistance to deportation under the order and judgment of the commissioner of immigration. Nor do we think that the treaty relations between this government and China help his case.

Affirmed.

AMERICAN BANK OF ALASKA v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2815.

1. BANKRUPTCY ⟸303(3)—TRANSFERS—KNOWLEDGE OF TRANSFEREE—EVIDENCE.

In a suit by the trustee of bankrupts, composing a mining copartnership, to recover the value of gold dust delivered by the bankrupts to defendant bank, evidence *held* to show that the dust was sold to the bank in the ordinary course of business, that its value was at once ascertained and credited by tellers' slips to the account of the bankrupts, who were doing business as a partnership, and at once offset against their notes and debts, and that the bank had no knowledge at that time that the firm was insolvent, or that an unlawful preference would be given.

2. BANKRUPTCY ⟸164—PREFERENCES—DEPOSITS—EFFECT OF.

The deposit of gold dust in a bank to the account of the depositor is not a transfer of money as a payment or security, and does not operate to diminish the estate of the depositor.

3. BANKRUPTCY ⟸326—PREFERENCES—WHAT CONSTITUTE.

Where a depositor, who was indebted to a bank, make a deposit in the usual course of business, the bank's application of the amount of the de-

posit to its indebtedness is valid as a set-off, under Bankruptcy Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (Comp. St. 1916, § 9652), and is not a preference under section 60a (section 9644).

4. BANKRUPTCY ⊂=326—DEPOSIT AND CREDIT—CHARACTER OF TRANSACTION.
That the books of a bank did not show the entry of credit until the day after a deposit of gold dust does not change the character of the transaction, where at the time of the delivery of the dust to the bank credit was actually given by tellers' slips.

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Action by G. Johnson, as trustee in bankruptcy of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts, against the American Bank of Alaska, a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Action by Johnson, as trustee in bankruptcy of the mining partnership of T. Mitchell & Co., of Fairbanks, Alaska, against the American Bank of Alaska, at Fairbanks, to recover $3,750.27, with interest, upon the theory that the action of the bank with respect to certain gold dust, of the value of $3,750.27, delivered to the bank on the evening of July 31, 1913, constituted an unlawful preference, and was voidable under section 60 of the Bankruptcy Act. The case was tried to a jury, and general verdict for the trustee was rendered. Judgment in accord with the general verdict was entered, and the bank sued out writ of error.

Thomas A. McGowan, John A. Clark, and John Knox Brown, all of Fairbanks, Alaska, and Charles J. Heggerty and Knight & Heggerty, all of San Francisco, Cal., for plaintiff in error.

Herman Weinberger, of San Francisco, Cal., and Louis K. Pratt and Thomas A. Marquam, both of Fairbanks, Alaska, for defendant in error.

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

HUNT, Circuit Judge (after stating the facts as above). There is little conflict in the testimony, and the facts are substantially as follows: Mitchell & Co., a partnership, consisting of Thomas Mitchell, J. J. Fallon, and H. Fawcett, had an account with the bank for some weeks before July 31, 1913. By June 9, 1913, the firm owed about $1,500, besides a debt of about $400 to the bank. The first clean-up, on July 3, 1913, amounted to $1,904. This was turned into the bank, where the overdraft was then $1,400, and was credited to the firm. Checks were drawn against it, and again overdraft was made. The second clean-up, on July 16th, realized $2,280, and was also put in the bank to the credit of the firm, and checks were honored. The third clean-up was on July 30th, and was made subsequent to a telephone message from Brunning, cashier of the bank, advising the firm that it had no money and that notes and overdrafts were due, and that he (Brunning) had deposited his note for $500 to meet checks to reduce the overdraft. On the evening of July 31st, about 5 o'clock, after regular banking hours, Fallon, who had charge of the books and accounts,

went to the bank with gold dust worth $3,750.14. The firm then owed over $13,000, of which it owed the bank, on notes and overdraft $4,096.14; the debt being for labor account checks, merchandise, and other things paid for by the bank between July 16th and 31st.

Fallon, in testifying as to the occurrences in the bank, said that he and Fawcett went to the bank about 5 o'clock and left the firm bank book and the gold dust, which was "to be blown and credited the same as before"; that he went back in the evening, between 7 and 8 o'clock, and was told that the dust was not cleaned up, whereupon he said he would call in the morning; that the next morning, when he called, Mr. Brunning gave him the bank book and vouchers, and told him that he had been instructed to get all overdrafts in, and said, "I have applied it and disbursed it," and that the bank could not carry the firm any longer. Fallon also said that the book was returned on August 2d, and showed that on July 31st $3,750.27 was placed to the credit of the firm; that on August 2d the books and vouchers returned showed that the bank had paid checks for $6,329.70 since the previous balance, and that it had credited the firm account with the last clean-up, and charged against the account the notes the firm had in the bank, and that there was still an overdraft of $133.70. The books of the bank, offered in evidence, showed deposits of proceeds of gold dust and check withdrawals and overdrafts. A deposit of $2,213.14 was made on July 18th; one of $500 on July 19th to reduce overdraft; one on July 31st of $3,750.27; while on July 16th overdraft was $133.71; on August 2d checks amounting to $6,329.70 were returned. Petition in involuntary bankruptcy was filed August 23, 1913.

The evidence showed that between June 11, 1913, when the firm commenced to do business with the bank, and July 31, 1913, the bank honored the checks of the firm and paid out for them $9,683.35, and received and credited gold dust from them amounting to $7,934. On the evening of July 31st a garnishment was levied upon the bank in an action brought by certain creditors against the firm, but these proceedings were all subsequent to the delivery of the gold dust to the bank. Brunning, the cashier, testified that the credit of the proceeds of the dust was made July 31st; that the books were balanced as on that day and that a deposit slip, which was introduced in evidence, showing the advance of $3,734.12 was made that day, but that the entries in the individual ledger carrying the credit and showing the charges were not made by the bookkeeper until August 1st and 2d; that, in accordance with the usual custom of the bank, the notes were treated as a check would be, and were charged up and the overdraft extinguished as far as could be, and that in this way he made the set-off then and there; that all was done before 6 o'clock, and that he did not then know anything of impending suits against the firm, or that its prospects were bad. The cashier explained an entry of $19.13 on August 2d as the difference between what the dust brought at $16.40 and what it realized after the assay; the purchase having been made at the rate of $16.40 an ounce, with the understanding that if it "went better" the firm would get the credit, but that if it did not go $16.40 the bank would sustain the loss.

[1] Without statement of more of the evidence, we think it clearly shows that the gold dust was sold to the bank on July 31st in due and customary course of business; that the value was at once ascertained and credited by teller's slips, July 31st, to the account of firm, and at once offset against the notes and debts of the firm to the bank; that the bank acted in good faith, and had no knowledge, when it received the gold dust and credited the firm account, that the firm was insolvent, or that any unlawful preference would be given to the bank. The law which must control can be briefly stated:

[2, 3] The deposit of the proceeds of the gold dust to the credit of the firm in the bank did not operate to diminish the estate of the mining firm. The deposit was not a transfer of money as a payment or security. New York County National Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; Continental Trust Co. v. Chicago Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268. The transaction established the relationship of debtor and creditor. There having been a general deposit in course of business when the credit was made, the bank had a right to set off the notes and to dismiss the overdraft. Cumberland Glass Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042; In re Wright-Dana Hardware Co., 212 Fed. 397, 129 C. C. A. 73.

[4] The fact that the books of the bank do not show the entry of the credit until August 1st does not change the character of the transaction, for the time the dust was delivered to the bank and credit therefor was actually given by the slips is the time when the deposit was made. 3 Ruling Case Law, 531; Wasson v. Lamb, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342. One bit of evidence which strongly, upholds the statement of the bank cashier as to the time when the credit was given is the testimony of Mr. Pratt, counsel for the creditors, who levied the writ of garnishment already referred to, who says that on the same evening that the attachment papers were issued he called up the officials of the bank and asked them what his clients "caught" by the garnishment, and was told nothing was attached, as the firm was heavily in debt to the bank, which had "just credited that clean-up," and that the firm still owed the bank. There is no showing of fraud in the transaction. The bank had paid checks for the half month preceding July 31st, when the firm was owing the bank a considerable amount, and, although the officers were solicitous about the account, they had no reasonable ground to believe that the condition of the firm was desperate, or that it would not be able to go on with its mining.

Counsel for the firm rely upon Mechanics' & Metals National Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121. But in the Ernst Case the deposits were not received in the usual course of business, and were really intended to be payments to give a preference. German-American State Bank v. Larimer, 235 Fed. 501, 149 C. C. A. 47. In Fourth National Bank v. Smith, 240 Fed. 19, —— C. C. A. ——, the Court of Appeals of the Eighth Circuit, reviewing the more recent decisions by the Supreme Court, holds, as is undoubtedly the law, that, if a bank to which a depositor owes money had knowledge of the depositor's insolvency, but, prior to bankruptcy proceedings, sets off

against the debt of the depositor the amount of the deposits made by the depositor in the usual course of business, the transaction is valid as a set-off under section 68a of the Bankruptcy Act, and is not a preference under section 60a of the Bankruptcy Act, inasmuch as the making of the deposit merely creates a relation of debtor and creditor between the bank and the depositor, and the application of the deposits to the indebtedness involves no transfer of the property.

It follows, from what we have said, that upon the established facts the court should have granted the motion for a verdict in favor of the bank. The judgment will be reversed, and the cause remanded, with directions to enter a judgment for the defendant notwithstanding the verdict.

KATZ v. COMMISSIONER OF IMMIGRATION AT PORT OF SAN FRANCISCO, CAL.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2812.

1. ALIENS ⟸51—DEPORTATION—GROUNDS.
   Under Act Feb. 20, 1907, c. 1134, §§ 2, 3, 34 Stat. 898, 899, as amended by Act March 26, 1910, c. 128, §§ 1, 2, 36 Stat. 264 (Comp. St. 1916, §§ 4244, 4247), relating to the exclusion of aliens, and declaring that prostitutes and women and girls coming to the United States for the purpose of prostitution, or any other immoral purpose, and persons who are supported by or receive, in whole or in part, the proceeds of prostitution, shall not be admitted, and that any alien, having entered the United States, who shall receive, share in, or derive benefit from the earnings of any prostitute shall be deported, an alien who, after entrance into the United States, leases premises for use by prostitutes, is not, in view of the scope of the statute, to be deported; the provisions for deportation, under the principle of ejusdem generis, being directed at those persons, male or female, who directly live upon the earnings of prostitutes.

2. DISORDERLY HOUSE ⟸2—SUPPRESSION—NATURE OF POWER.
   The power to regulate and suppress brothels is police in its character, and is one to be exercised by the states, rather than by the federal government.

3. ALIENS ⟸54—DEPORTATION—EVIDENCE.
   In a proceeding for the deportation of an alien, evidence *held* insufficient to show that he was receiving the earnings of a prostitute.

4. DISORDERLY HOUSE ⟸17—OWNERSHIP—PROOF.
   In a proceeding for the deportation of an alien on the ground that he was sharing in the earnings of prostitutes, proof of his ownership of a disorderly house cannot be made by proof of general reputation.

5. HABEAS CORPUS ⟸92(1)—DEPORTATION—FINDINGS BY COMMISSIONER—SCOPE OF REVIEW.
   While the weight of the evidence supporting a finding of fact by the commissioner of immigration cannot be reviewed, the courts may determine on habeas corpus whether there was any evidence to support the commissioner's finding; that being a question of law.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Petition by Joseph B. Katz for writ of habeas corpus against the Commissioner of Immigration at the Port of San Francisco, Cal. From a judgment denying the writ, petitioner appeals. Reversed.

Marshall B. Woodworth, of San Francisco, Cal., and S. Luke Howe, of Sacramento, Cal., for appellant.

John W. Preston, U. S. Atty., and Caspar A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

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

WOLVERTON, District Judge. The appellant, an alien, who has been a resident in this country since 1906, was adjudged and ordered to be deported by the commissioner of immigration of San Francisco, on the charge of being "unlawfully within the United States, in that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes." Subsequently appellant applied to the District Court for a writ of habeas corpus, the petition setting forth, by way of an exhibit attached thereto, all of the proceedings had before the commissioner of immigration. A demurrer was interposed to the petition, which, after presentation and argument, was sustained; the court holding that, as it appeared that the appellant was the owner of a house in which prostitution was practiced and carried on, and had received rent thereon from an inmate thereof, one Nellie White, it should be held that he was "deriving benefit from the earnings of a prostitute."

Error is assigned by appellant on account of this holding. It is further urged on the part of the government that the petition otherwise shows on its face that the appellant is guilty of receiving the earnings of prostitutes.

[1, 2] We must seek for the purpose and object of the statute, in order that we may properly construe the provision which it is claimed appellant has violated. Section 2 of the act in question, being that of February 20, 1907, as amended by Act March 26, 1910 (36 Stat. 263, 264), relates to the exclusion of certain classes of aliens. These are specified as idiots, imbeciles, feeble-minded persons, etc., and among the rest "prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose," and "persons who are supported by or receive in whole or in part the proceeds of prostitution." The language relating to this class of persons is of the same import as that contained in section 3, under which the charge against appellant is preferred. That of the latter section is no broader, and manifestly it was not intended to extend to any persons other than the language of section 2 was designed to reach. The manifest purpose of Congress was to exclude aliens of that particular class, as well as those answering to the other classes enumerated. Section 3 was designed to reach aliens, although admitted into this country, who should thereafter be found guilty of the acts proscribed. But the classification as it respects persons receiving the earnings of prostitutes is the same in both sections. It is very clear what persons are meant to be included by the classification:

"An inmate of or connected with the management of a house of prostitution, or practicing prostitution."

Over against this, but in the same connection, is included any alien who shall receive, share in, or derive benefit from the earnings of any prostitute. This alludes to another class, but allied in association to the prostitute class. It is perfectly well known what this class is. There are many vile persons of the male sex, who allow themselves to be "supported by" (using the language of section 2), and take the earnings of, fallen women, which they appropriate to their own particular use, and many of them have no other visible means of livelihood. This is not to say that women may not be guilty of living off the earnings of fallen women as well, nor that a man may not be guilty of keeping a brothel; but the two classes are clearly defined, so that there need be little uncertainty as to the style or character of persons Congress designed to comprise by such classification. It is quite unreasonable to suppose that the dry goods salesman or the grocer, who sells his goods to a fallen woman and takes the price from her, or a cabman, who carries her for hire and receives the hire from her, or, as in the present case, the landlord, who rents her abode to her and takes rental therefor, all or any of them were designed to be classified as persons who receive or derive benefit from the earnings of a prostitute, and such, we are impressed, is not the intendment of the statute.

The power to regulate and suppress brothels and bawdyhouses, which includes the regulation of leasing houses or buildings for such purposes, is police in character, and in general is exercised by the states and local municipalities, rather than by the general government; and the statute in question manifests no intendment to encroach upon or interfere with such regulations. It deals, as we have seen, with certain alien classes, and provides for the deportation of aliens comprised thereby, and, considering the spirit and purpose of the statute, we think that there is no intendment to include an alien landlord, who leases to a prostitute the house in which she lives or practices prostitution and receives from her the rental thereof. The spirit of the law is vital, for interpretation, where the letter leads to incongruities or absurdities. Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. This construction is as well within the doctrine of ejusdem generis, which we think is applicable here. 36 Cyc. 1119.

[3, 4] We now turn to the contention of the government that the petition of the appellant otherwise shows on its face that he was guilty of receiving the earnings of prostitutes. It will be kept in mind what the charge in the warrant is, and it is with reference to this charge, and to none other, that the inquiry must be conducted.

Numerous affidavits are set forth by the petition, by way of an exhibit thereto. We will make reference to such affidavits. Robert A. Peers, after setting forth certain matters respecting Harry Katz, avers that since the time alluded to "the two brothers, Harry Katz and Joseph Katz, have conducted a house of prostitution on the property [describing it], and it is a well-known fact in Colfax that the Katz brothers were interested in the management of this house of prostitution, over which Nellie White, a notorious prostitute, presided as

madam," and that he has frequently heard the property described as the Katz house and the like. Lucy F. Peers deposes that "it was generally know that the Katz brothers were associated with the house." Jeannie K. Lobner deposes to the same effect, using practically the same language. Minnie G. Williams deposes as follows:

"The affiant further avers that it is understood, and, ever since the said H. H. Katz established said house of prostitution at the north entrance of town, it has generally been accepted as a fact by the people of Colfax, that the Katz brothers, H. H. Katz and Joseph Katz, conducted said house of prostitution at the north entrance to town, managing and directing the same, and that no one was ever heard to deny that they conducted and managed the said house of prostitution, until they, the Katz brothers, were arrested in 1914."

This affiant interposed another affidavit, which is in the nature of a reply to the argument of counsel for the appellant before the commissioner of immigration, and contains nothing additional. A number of citizens have also interposed a protest against efforts made to prevent the deportation of Harry and Joseph Katz; but it contains no averments purporting to set forth substantive evidence, unless it is wherein they say that:

"It has been a matter of common knowledge that they were profiting by the earnings of prostitutes."

These affidavits and protests contain the strongest showing made against Joseph Katz respecting his alleged receiving of the earnings of a prostitute or prostitutes. The very best that can be made out of the testimony, and the whole thereof contained in the record, is that it is wholly hearsay and based upon common repute in the vicinity; the affiants generally asseverating upon information and belief. There is practically no substantive testimony of fact. Locally—that is, in the state of California—the fact that a house is being conducted as a house of ill fame may be shown by common repute; but there is no rule of which we are aware by which the ownership or management of such a house may be so proven. Of course, if it were shown that Joseph Katz was conducting or managing such a house, it would be a reasonable inference and deduction that he was taking the earnings of the inmates. There is not a syllable of testimony that he accepted such earnings, except that he was the owner of the house and accepted rentals from the occupant, which in itself, as we have seen, is not sufficient to condemn him under the charge. Some substantive evidence of the fact of managing and conducting such a house, besides mere hearsay and expression of opinion and belief (which is practically the equivalent of no competent evidence of the fact sought to be proven), is necessary upon which to base the inference of his having taken the earnings of the inmates.

[5] We are aware of the holding of the Supreme Court that the question is for the commissioner of immigration, and the court is not permitted to look behind his finding, when it is a matter of weighing the evidence; but where there is substantially no evidence competent to establish the charge preferred, it then becomes a question of law for the court. The principle involved has been substantially determined by the case of Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A.

159. In this view, the petition of appellant states a good cause for the writ.

The judgment of the District Court will therefore be reversed, and the cause remanded for such other proceedings as are not inconsistent with this opinion.

BACKUS, Commissioner of Immigration, v. KATZ.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2917.

ALIENS ⇐54—DEPORTATION PROCEEDINGS—EVIDENCE.

In a proceeding for the deportation of an alien, evidence *held* insufficient to show that he had received or was receiving the earnings of a prostitute; hence deportation was improperly ordered.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Petition by Harry Katz for writ of habeas corpus against Samuel W. Backus, as Commissioner of Immigration at the port of San Francisco, now succeeded by Edward White, as Commissioner of Immigration at said port. From a judgment discharging petitioner from the judgment and order of the Commissioner directing deportation, the Commissioner appeals. Affirmed.

John W. Preston, U. S. Atty., and Caspar A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

Marshall B. Woodworth, of San Francisco, Cal., and S. Luke Howe, of Sacramento, Cal., for appellee.

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

WOLVERTON, District Judge. This case is here on appeal by the commissioner of immigration from the judgment discharging the appellee from the judgment and order of the commissioner directing his deportation. The cause first came up for hearing in the District Court, on demurrer to the petition of appellee for a writ of habeas corpus. The demurrer being overruled, a hearing was had on the merits, resulting in the discharge of the appellee.

The same question is presented here as in the case of Joseph B. Katz v. Commissioner of Immigration, 245 Fed. 316, — C. C. A. —, which is decided herewith, namely, whether the testimony before the commissioner is of a nature to support his finding and order of deportation. Besides the testimony noticed in the Joseph B. Katz Case, to which reference is here made, we will review the additional testimony contained in this record which has allusion to Harry Katz.

Harry Katz was a resident of Sacramento, in the state of California, but an occasional visitor to Colfax. Charles H. Hill deposes that, in the latter part of 1909 and the early part of 1910, he saw a person,

known to him by sight as Harry Katz, frequently enter and leave a certain house on Church street, as much as several times a day and on many days; that he saw him superintend alterations and repairs, and enter the house with parcels and leave without them, and in many and divers ways show more than ordinary interest in it. Frank Schillinger says that Katz used said property as a house of prostitution, remodeling the same, and adding small rooms thereto. This does not refer to the house which Joseph Katz owned later. Edward H. Honn deposes that he knew of Katz when it was commonly understood that he conducted and managed a house of prostitution on Church street; that after his arrest, in 1909, Katz proceeded, within a few weeks, to get possession of a house and lot at the north entrance of the city, and to enlarge said house and equip it for prostitution, and, according to general repute, that he continued to conduct and manage it as a house of ill fame; and that he came regularly and continuously from Stockton or Sacramento to Colfax, and remained several days each month, with headquarters in said house, and that Nellie White was commonly described as "Nellie Katz" and as the "Katz woman." Fergus Graham Irving testifies that he has frequently seen Harry Katz, during the last two years, about said house at different times of the day, and that he seemed to be entertaining female inmates; Robert F. Pottol, that these houses were spoken of, and by common repute were known, as houses of ill fame; J. T. Taylor, that during the erection of said house he frequently saw Katz superintending and directing about the place, and acting in a manner indicating proprietorship; Harvey L. Wolfsen, that during the winter of 1912–13 he saw Katz about the house, apparently superintending the repairing. Then follows the statement of an immigration inspector, which cannot be regarded in any sense as testimony to establish the charge.

Now, while there is a variation of the showing here, there is nothing of substance to differentiate this from the Joseph B. Katz Case, and what we have said there upon the subject in hand has pertinent application here, and is decisive, also, of the present controversy. There is no substantive proof in the record competent to establish the fact alleged that appellant received or was receiving the earnings of a prostitute. The Joseph B. Katz Case is therefore decisive of this, and the judgment of the District Court will be affirmed. .

THE GEORGIANA.

ATLANTIC MARITIME CO. v. TYSELL et al.

(Circuit Court of Appeals, First Circuit. July 27, 1917.)

No. 1271.

1. SALVAGE ⇐8—RIGHT TO COMPENSATION—NATURE OF SERVICE.
Members of a crew of a vessel, which had grounded and whose entire crew had left her, while trying to return to the schooner to take a fresh departure for the shore, found that she had floated off and was beating about by herself, not over a mile from a dangerous and little frequented

shore. They boarded her, found her down by the head, and her rudder damaged or displaced, but hoisted her jib, and found that she could be got to make headway on a course which finally grounded her on a beach, where she was in no danger. *Held*, that these services were salvage services, entitled to be compensated as such, unless their connection with the vessel or her voyage precluded them from acquiring rights as salvors.

2. SEAMEN ⊂⊃28—SHARE IN EARNINGS—LIEN.
Where a fishing trip is undertaken on what is known as the quarter lay plan, whereby the owners have one-quarter of the net proceeds, and the other three-quarters are shared by the master and men in various proportions, bait, ice, and provisions being first paid for, the members of the crew have a lien upon the vessel and the catch on board, corresponding to the lien of seamen shipped for hire in the ordinary way.

3. SALVAGE ⊂⊃18—RIGHT TO COMPENSATION—MEMBERS OF CREW.
Members of a fishing crew shipping on the quarter lay plan, while they remain bound by their engagement, are regarded as under contract to do all within their power, whatever the emergency, for the safety of the vessel and the catch, and as incapable, like seamen serving for wages, of becoming salvors, but as soon as they are discharged from their agreed service, formally or expressly, or by implication from the circumstances, and have been released from any obligation to exert themselves for the benefit of the vessel or property on board her, their previous connection with the vessel does not prevent them from becoming salvors in respect of any such exertions.

4. SALVAGE ⊂⊃48—RIGHT TO COMPENSATION—EVIDENCE.
In a suit for compensation for services rendered by members of a crew, who returned to their vessel and brought it to a place of safety after it had been deserted by the master and crew, evidence *held* to support the District Court's finding that the vessel and the voyage were abandoned when all hands left the schooner, though there was some evidence that the master intended to return, and though he gave some orders to the members of the crew after leaving the schooner.

5. SALVAGE ⊂⊃29—AMOUNT.
Where members of a crew of a schooner, which had grounded and been deserted, found that she had floated off and was then within a mile of a dangerous and little frequented coast, and at considerable danger to themselves boarded her and brought her aground on a beach, where she lay in safety, and worth $2,500 in her damaged condition, a salvage award of $200 to each of the two libelants would not be reduced, though the amount of the labor or skill involved was not considerable.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Libel by John W. Tysell and others against the schooner Georgiana; the Atlantic Maritime Company, claimant. From a decree for the libelants, the claimant appeals. Affirmed.

George L. Dillaway, of Boston, Mass., for appellant.

Howard W. Brown, of Boston, Mass., for appellees.

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

DODGE, Circuit Judge. Appealing from a salvage award of $200 to each of the two libelants here appellees, the owners of this schooner contend that the services for which the award is made were rendered while said libelants were members of her crew, and therefore incapable of acquiring rights as salvors against her.

The schooner was a fishing vessel, on a fishing voyage at the time. Her crew numbered 22 including the two libelants. About two weeks after leaving Gloucester, during which time she had taken 50,000 or 60,000 pounds in all of cod and haddock then on board, she ran aground on the southerly end of Black Ledge, distant about 3 miles from Isaacs' Harbor, which is some 70 miles east of Halifax, on the Atlantic coast of Nova Scotia. Her entire crew left her in dories for the shore soon afterward. This they did at about 2:30 a. m., on Thursday, December 30, 1915, leaving the schooner apparently fast aground, rolling and pounding on rock bottom, and already leaking badly. That it was unsafe for them to stay longer aboard her where she was is undisputed; it was snowing, and the wind, from about E. N. E., was blowing at the rate of 20 or 25 miles an hour.

When all hands left her as above, the master had told the crew "it was all off," and had recommended them to take with them in the dories such of their clothes and personal effects as they could get together without losing much time. He directed the dories to keep together after leaving the vessel, in order that he, being acquainted with the locality, might pilot them to a safe landing place. He has testified that he intended next morning to try and save all the property, if possible and if there was a chance to do it. He tried, after getting ashore, to find a motorboat which he could use, and which would have been necessary in any such attempt, but was unable to procure one. That he told all the crew, before they left her, what his intentions were as to any further attempt at saving the vessel, does not appear; but there is evidence that he told some of them, who were in the same dory with him, while rowing ashore. Whether there could have been any chance of saving her, or anything from her, had she remained on the ledge where she grounded, depended altogether on the wind and weather. Had the wind increased, or changed so as to blow more from the eastward, it may be assumed that there would have been no chance at all.

The two libelants and another of the crew (who has disclaimed any right to salvage) left the schooner as the only occupants of the same dory. They lost sight of the other dories, and later found themselves heading toward breakers not very far from Black Ledge, became uncertain as to the proper course toward the landing for which the other dories were heading, and turned back to find the schooner again, in order to take a fresh departure from her. While rowing toward her supposed position, they sighted a red light, which proved to be her port light, and they then found that she had floated off the place where she had been left aground and was beating about by herself between Black Ledge and the shore. They boarded her, found her down by the head, with the water over her forecastle and cabin floor, so that nothing could be accomplished by such pumping as they could do, but nevertheless capable of staying afloat for a while longer. She had been left with her jib triced up, her forestaysail, foresail, and mainsail set, the main sheet being slacked off. Attempts to steer her showed that her rudder had been so damaged or displaced that she would not answer her helm. She was coming up to and falling off again from

the wind. Directly to leeward there was, as the chart shows, a dangerous shore not over a mile distant.

They thereupon lowered, cut loose, and hoisted the schooner's jib; and found, after it was set, that she could be got to make headway on a course which ultimately took her to a point at the head of Fisherman Harbor, some 2 miles or more distant from the place where they had found her, and nearly 3 miles in a direct line from where she had been aground on Black Ledge. They kept sounding, with tackle which they improvised, as she progressed. She ran aground, at the point where she reached the shore, on a beach; and was thereafter in no danger either of sinking in deep water or of drifting ashore upon rocks. They then took down her sails, having to cut the halyards in order to get the mainsail down, and waited for daylight. Soon after daylight the master who had landed considerably earlier, with the remainder of the crew, not far away, came aboard and asked the three men to watch her while he went to the nearest telegraph office, some 4 miles distant. They stayed aboard her during the day, but not during the following night. Other members of the crew visited the vessel while she lay there, and removed what they could find aboard her belonging to them. She was later removed and taken ultimately to Gloucester, with the aid of a wrecking steamer sent for by the master. In this, however, the crew did not take any part; they left for their homes on Sunday, January 2d; the wrecking steamer having arrived before they left.

[1] The above services would, without doubt, have been salvage services, entitled to be compensated as such, if rendered by persons in no way connected with the vessel or her voyage. The schooner, afloat, deserted, and sinking, off a little frequented and dangerous coast, as these men found her, was clearly in imminent danger of total loss. To board her and stay aboard her, as they did, in such weather, unable to direct her movements, except to a limited degree, and uncertain how long she would be able to keep afloat, involved real danger to them, even if it be conceded that statements in the opinion below, that they had lost their dory when they boarded the schooner and that no other small boats appear to have been left on board her, are not sufficiently supported by the evidence. That her owners were enabled to get her back to Gloucester in a reparable condition may fairly be said to be due to their exertions from the time they discovered her afloat until she was beached at Fisherman Harbor. Not only is this conclusion fully supported by the evidence, but on January 2d, in a communication to the insurers of three-eighths of the vessel owned by him, the master stated in writing his opinion that the three men were "entitled to some recompense for their part in putting the vessel where she can be saved; otherwise she would be a total loss."

The alleged salvors had not been serving on the schooner for wages. The fishing trip for which they shipped had been undertaken upon what is known as the "quarter lay" plan; i. e., the owners were to have for the use of their vessel one-quarter of the net proceeds of the catch, a part of said quarter being due from them to the master; the other three-quarters were to be shared by the master and the men engaged, in

various proportions, bait, ice, and provisions for the voyage being first paid for therefrom.

[2] For the value of their respective shares in the catch taken, upon a trip made upon terms like the above, the members of a fishing crew have a lien upon the vessel and the catch on board, corresponding to the lien of seamen shipped for hire in the ordinary way, for their unpaid wages against vessel, cargo and freight pending, so long as anything remains of either. See The Carrier Dove, 97 Fed. 111, 38 C. C. A. 73, decided by this court in 1899.

[3] While the members of such a crew remain bound by their engagement for the trip, they are to be regarded as under contract to do all that it may be within their power to do, whatever the emergency, for the safety of the vessel and catch, and as incapable, like seamen serving for wages, of becoming salvors as to the same.

But as soon as the members of such a crew are discharged from their agreed service, whether formally or expressly, or by implication from the circumstances, and have been thus released from any obligation to exert themselves for the benefit of the vessel, or property on board her, their previous connection with the vessel does not prevent their becoming salvors in respect of any such exertions. The District Court has found that this vessel was finally abandoned when her master and crew left her aground on Black Ledge, and that the men on board were thereafter released from further obligation to her; a finding which her owners assert to have been unjustified by the evidence, and therefore erroneous.

[4] As has been stated, the master told the men "it was all off" at the time they took to the dories. There is no evidence that he ever formally or expressly discharged them, except that one of the two libelants testified that he told them next day, at Fisherman Harbor "they were all clear." There were no wages due them; and as to their shares in the catch, it would in any case have had to arrive where it could be sold before their claims to a share could have amounted to anything; and there is no proof that such claims were ever of any value. The fish on board was not proceeded against in this case, nor its proceeds in the owners' hands, and what became of it, or any proceeds therefrom does not appear; but the evidence tends to show that, after the vessel had filled, it would not be worth enough, in any event, to cover the expenses chargeable to the crew for the trip. As to the master's intention of returning next day to the vessel on the ledge, we can hardly regard it as of any significance after the vessel had come off that ledge and become exposed to the very different and more immediate danger of sinking before daylight, thus changing altogether the situation to which the alleged intention related. After telling them that "they were all clear," instead of keeping them together for any further continuance of the trip with the schooner, beached as she then was and the wrecking steamer expected, we do not think he can claim to have held them until that moment bound to the vessel's service, in view of his statement to them the night before when they were leaving the vessel, that "it was all off." It does not appear that the schooner afforded either of the men on board her or

any of the crew food or shelter while they remained at Fisherman Harbor. It is said that during her stay there they obeyed the master's orders until after he had told them "they were all clear." While some suggestions or requests made by him appear to have been followed, it is not clear from the evidence that these were either given or understood as orders to a crew in the vessel's service. Upon the evidence we cannot hold the District Court's finding that vessel and voyage were abandoned when all hands left the schooner on Black Ledge to have been erroneous.

[5] The schooner is valued for the purposes of this case at $2,500, which must necessarily mean that she had that value as she lay on the beach in her damaged state, as above. Although the time occupied by the libelants' services was short and the amount of labor or skill involved not considerable, the value to the vessel of the result accomplished was so important as to prevent us from reducing the amount awarded on the ground that it is excessive.

The decree of the District Court is therefore affirmed, and the appellees recover their costs of appeal.

HESKETT v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 3004.

1. MASTER AND SERVANT ⟸110—INJURIES TO SERVANT—STATUTE.
Under Gen. Code Ohio, § 8951, forbidding common carriers to haul a locomotive not provided with secure grabirons or handholds in the sides and ends thereof, a railroad company is guilty of negligence, where it operated an engine on the pilot of which a turtleback or iron bar had been placed, which rendered it impossible to use the handholds.

2. MASTER AND SERVANT ⟸286(5), 289(1)—NEGLIGENCE ⟸97—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.
Gen. Code Ohio, § 9018, declaring that, in actions brought against a railroad company for personal injuries to an employé, the fact that the employé was guilty of contributory negligence shall not bar recovery, when such negligence was slight and that of the employer great, but that damages must be diminished, and that all questions of negligence and contributory negligence shall be for the jury, abolishes the common-law rule of contributory negligence as an absolute bar, and adopts the rule of comparative negligence, making the questions whether the railroad employé's negligence was slight as compared with that of the company, as well as the comparative degrees of negligence, jury questions.

3. MASTER AND SERVANT ⟸296(13)—INJURIES TO SERVANT—INSTRUCTIONS—PROPRIETY.
Plaintiff, a railroad section hand, suffered injuries when he attempted to board a moving engine, and in an action for such injuries contended that they resulted from the negligence of the company in placing a heavy iron bar or turtleback on the pilot of the engine, which prevented him using the handholds. The court charged that, if plaintiff was warned before the accident not to attempt to get on trains or engines in motion, then under the circumstances with respect to the speed of the engine and the small space between the engine and the car, where plaintiff

stated he attempted to board the engine, plaintiff could not recover, though the railroad company was negligent as claimed, because having warned him not to board moving train, the company was under no duty to make conditions safe for him. *Held*, that the instruction, which must be interpreted as relating solely to the railroad company's negligence, was proper only if the warning to plaintiff amounted to an actual and subsisting prohibition against boarding a moving train, and where the evidence showed that, though section hands, including plaintiff, were warned not to board moving trains, nevertheless their superiors acquiesced in their boarding moving trains, and did not stop trains which used to carry such employés to and from their work, the instruction was improper, tending to mislead the jury, for a railroad company cannot prohibit employés from boarding moving trains and at the same time permit them to do so, and escape responsibility.

4. MASTER AND SERVANT ⊂244(3)—INJURIES—NEGLIGENCE.
A railroad employé, who boarded a moving train in violation of mere warnings, is guilty of only contributory negligence, and unless the warnings amounted to a prohibition the company's negligence in equipping an engine, which contributed to the injury, furnishes basis for recovery.

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

Action by William Heskett against the Pennsylvania Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions to grant new trial.

Anderson, Matthews & Wall, of Youngstown, Ohio, for plaintiff in error.

Arrel, Wilson, Harrington & De Ford, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error, who was plaintiff below, was in the employ of defendant in error as a member of a special section gang of 20 to 30 men engaged in resurfacing track and making fills with slag, which was hauled for the purpose on cars drawn by a yard engine operated by a regular crew; the engine being provided at both the tender and pilot ends with footboard and grabirons or handholds. For the purpose of riding to dinner at the camp maintained by the railroad company, plaintiff attempted to step on the footboard on the front or pilot end of the engine, which was then moving, tender foremost, at a speed of 8 to 12 miles an hour and hauling six empty cars; he missed either his footing or his handhold, fell under the cars, and lost a leg.

Plaintiff claims that the accident was due to the negligent presence on the pilot, unknown to him, of a "turtleback"[1] which so protruded over

[1] A turtleback is described as a channeled and flanged piece of iron, about 3 feet long and 6 inches wide, tapered down at each end and higher in the center, weighing from 50 to 150 pounds, and used for rerailing cars.

the footboard and handhold as to contact with plaintiff's hand, preventing his grasping the handhold, and causing him to lose his balance.

Defendant denied that there was a turtleback on the pilot, gave evidence tending to show that plaintiff's fall was due to stumbling when trying to mount the footboard, and that his attempt to mount the moving train was in disobedience of express instruction to the contrary, which disobedience directly and proximately caused the accident; also pleading that plaintiff was guilty of contributory negligence in attempting to board the moving engine in the manner adopted and under the existing conditions.

At the conclusion of the testimony on the trial the jury was instructed that (in the absence of warning to plaintiff not to get on moving trains or engines) it was defendant's duty to keep the handhold accessible, and it would be liable for permitting the turtleback to be so laid upon the pilot as to cause plaintiff's accident, through his inability to seize the handhold, and that in such case, if plaintiff's negligence was slight and that of the defendant greater in comparison, the damages must be diminished in proportion to the amount of negligence attributable to plaintiff.

The court further charged, however, that:

> If plaintiff was warned before the accident, "as the defendant claims," not to attempt to get upon trains or engines when in motion, "then, under the circumstances shown in this case with respect to the speed of the engine and the small space between the engine and the car, where [plaintiff] says he attempted to mount the engine, the plaintiff would not be entitled to a verdict in his favor even if the railroad company was negligent, as he claims that it was, because having warned him not to attempt what he did attempt to do, the company was under no legal duty to make conditions safe for him if he violated that warning."

Defendant had verdict and judgment. The only question before us concerns the correctness of this latter instruction.

[1, 2] The instruction was proper only upon the theory that defendant owed plaintiff no duty to keep conditions on the pilot safe for plaintiff, and was thus not itself negligent. The accident happened in Ohio. Section 8951 of the General Code forbids a common carrier to haul a locomotive "not provided with secure grabirons or handholds in the sides and ends thereof"; and we have no doubt that making the handhold inoperative by carrying a turtleback on the pilot is within the statute. See by analogy United States v. Illinois Central R. R. Co. (C. C. A. 6) 177 Fed. 801, 101 C. C. A. 15. Plaintiff's contributory negligence did not necessarily bar recovery. Section 9018 of the General Code of Ohio provides that:

> In actions brought against a railroad company for personal injuries to an employé the fact that the latter is "guilty of contributory negligence shall not bar a recovery when such negligence was slight and that of the employer greater, in comparison. But the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employé. All questions of negligence and contributory negligence shall be for the jury."

This statute abolished the common-law rule of contributory negligence as an absolute defense in bar, and adopts the rule of comparative

negligence, in cases where the negligence of the plaintiff is slight and that of the defendant greater in comparison.[2]

The questions whether plaintiff's negligence was slight as compared with that of defendant, as well as of comparative degrees of negligence, were for the jury (Lewis v. P., C., C. & St. L. Ry. Co., supra; Sherman v. T. & O. C. Ry. Co., 25 O. C. D. 449, 453, affirmed 88 Ohio St. 617, 106 N. E. 1083); as was also the question of proximate cause (Erie R. R. Co. v. White, 187 Fed. at page 559, 109 C. C. A. 322; Hales v. Mich. Central R. R. Co. [C. C. A. 6] 200 Fed. 533, 537, 118 C. C. A. 627).

Should we take judicial cognizance of the fact that defendant was engaged in interstate commerce, and the Federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1916, §§ 8605–8612]) thus exclusively applicable (Texas & Pacific R. R. Co. v. Rigsby, 241 U. S. 33, 37, 41, 36 Sup. Ct. 482, 60 L. Ed. 874), the situation, under familiar rules, would be even more favorable to plaintiff, so far as the defense of contributory negligence is concerned.

[3, 4] But we construe the criticized instruction as not intended (as plaintiff in error regards it) to relate to the subject of plaintiff's negligence, which was elsewhere properly treated, but only to defendant's negligence, although considerations of speed of train and small space between engine and car, mentioned by the court, related only to that subject. In its instructions concerning the alleged warning, the court rightly disregarded an alleged general rule of defendant prohibiting the mounting of moving cars, for lack of evidence of its applicability to members of the section gang in question.

We think the criticized instruction was proper, provided the warning referred to amounted to an actual and subsisting prohibition, so understood by plaintiff, against mounting a moving train. If it fell short of that, its disregard would be at most merely contributory negligence. We are not satisfied that the jury would naturally understand the instruction as relating to an actual prohibition of that character. While there was express testimony that the members of the work gang generally, including plaintiff, had been warned by the section foreman and the train conductor every morning (including the morning of the day of the accident) not to attempt to get on or off a moving train, it was not only undisputed that the men were permitted to ride on the cars between the camp and the place of work (the foreman testifying, "Of course they ride on the train going to and from their work"), the only limitation being the asserted warning—not conceded, but denied—against getting on or off the cars when in motion; but there was also substantial testimony that the members of the work gang were in the habit of getting on and off the moving trains for the purpose of riding between the camp and the place of work, without objection or protest from the

[2] Lewis v. P., C., C. & St. L. Ry. Co., 89 Ohio St. 9, 13, 104 N. E. 1002; Erie R. R. Co. v. White (C. C. A. 6) 187 Fed. 556, 558, 109 C. C. A. 322; Erie R. R. Co. v. Kennedy (C. C. A. 6) 191 Fed. 332, 335, 112 C. C. A. 76; Standard Steel Tube Co. v. Prusakicueicz, 23 O. C. D. 133, 136, affirmed 87 Ohio St. 472, 102 N. E. 1131.

foreman or conductor; that the train never stopped for the purpose of letting the men on or off, the foreman telling them to "just pile on the best you can." The testimony would support a conclusion that the alleged warnings were never enforced, but were habitually disregarded, with the apparent acquiescence and implied approval of the officers whose duty it was to enforce them—the foreman even admitting that he himself sometimes got off and on the train when in motion. But even if the proof fell short of an inference that the conductor so approved, a warning by the gang foreman would, under the instruction, bar recovery.

Moreover, to warn does not necessarily mean to "forbid"; it may mean only to "caution" or "admonish."

In fact the foreman said at one point in his testimony:

"I had seen the men getting on and off the moving cars previously lots of times, but I always warn them when going on the main track to be very careful about getting on and off moving cars when they were on the main track."

But, whatever may be the definition of the word "warn," a railroad company cannot categorically prohibit, and at the same time constantly permit, its employés to mount moving cars and still escape responsibility. Spaulding v. Railroad, 98 Iowa, 205, 211, 67 N. W. 227; No. Pacific R. R. Co. v. Nickels (C. C. A. 8) 50 Fed. 718, 722, 1 C. C. A. 625; Knickerbocker Ice Co. v. Finn (C. C. A. 2) 80 Fed. 483, 25 C. C. A. 579; Eastman v. Railroad Co., 101 Mich. 597, 602, 60 N. W. 309; Railroad Co. v. Reagan, 96 Tenn. 128, 139, 140, 33 S. W. 1050. In this state of the testimony, an unqualified instruction relieving the defendant, as matter of law, from all liability in case the claimed warning had been given, was, in our opinion, erroneous; for we think the jury may not unreasonably have understood it as forbidding recovery from the mere fact of verbal warning at any previous time, regardless of the question of defendant's implied permission to the contrary.

For this reason the judgment must be reversed, and the cause remanded to the District Court, with directions to award a new trial.

RICHARD et al. v. PARKER et al.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1917.)

No. 4799.

INDIANS ⇐16(3)—LANDS—OIL LEASE BY MINOR—EFFECT OF DEATH OF LESSEE.

In 1912 a Creek minor of the full blood, through his guardian, and with the approval of the Secretary of the Interior, executed an oil and gas lease on his allotment, which was subject to restrictions upon alienation. The lease provided for the payment of royalties to the Indian superintendent for the benefit of the lessor, and under the regulations of the department to which the lease was subject the superintendent was authorized to withhold payment of such royalties until it was considered for the interest of the minor or his heirs that they should be paid over. The lease further provided that, in event restrictions on alienation should be removed, it should be released from the supervision of the Secretary,

and royalties should be paid to the lessor, or the then owner of the land. The lessor died while still a minor, leaving his father as his sole heir. A large sum in royalties had previously been paid to the superintendent, and other royalties were thereafter paid to him. Act May 27, 1908, c. 199, § 9, 35 Stat. 315, provides that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." *Held* that, under such statute, the effect of the death of the lessor was to terminate all control over the land and of the lease by the Secretary, and also over the royalties previously collected.

Stone, Circuit Judge, dissenting.

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

Suit in equity by Eastman Richard and another, administrators of the estate of Samuel Richard, deceased, against Gabe E. Parker and another. Decree for defendants, and complainants appeal. Reversed.

Britton H. Tabor and J. B. Lucas, both of Checotah, Okl., for appellants.

Paul Pinson, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for appellees.

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

MUNGER, District Judge. Samuel Richard, a minor, was a full-blood citizen of the Creek Nation of the Five Civilized Tribes of Indians, residing in Oklahoma. He held an allotment of 160 acres of land. On April 13, 1912, acting through his guardian, he executed an oil and gas lease of this land to the Kathleen Oil Company. The lease was approved by the probate court and by the Secretary of the Interior. On January 24, 1916, and while yet a minor, Samuel Richard died, and thereafter appellants were appointed as his administrators. The sole heir of Samuel Richard is his father, Eastman Richard, who is one of the administrators.

The lease provides for a payment to the United States Indian superintendent, for the use of the lessor, of a royalty on the proceeds of oil and gas obtained from the land. The lessee and its assigns have extracted large quantities of oil from the land, both before and after the death of the lessor, and have paid the superintendent, as royalties, the sum of $216,145.16. The greater portion of this amount was paid during the lifetime of the lessor. This suit was brought by the administrators of Samuel Richard against the superintendent and cashier of the Five Civilized Tribes to recover this money and to restrain them from collecting royalties further under the lease.

Under the original Creek treaty (Act March 1, 1901, c. 676, 31 Stat. 861) and the supplemental Creek treaty (Act June 30, 1902, c. 1323, 32 Stat. 500) the alienation of allotted lands was forbidden for a fixed period, without the approval of the Secretary of the Interior. By subsequent acts of Congress (Act April 21, 1904, c. 1402, 33 Stat.

189; Act April 26, 1906, c. 1876, 34 Stat. 137; Act May 27, 1908, c. 199, 35 Stat. 312) certain classes of beneficiaries were released from the restrictions upon alienation, but the land of Samuel Richard, as a minor, was subject to restrictions upon alienation during his lifetime. At the time of the execution of the lease to the Kathleen Oil Company, section 2 of the last-mentioned act of Congress contained this provision:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

In the lease appeared this condition:

"In event restriction on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian superintendent shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the Eufaula National Bank, of Eufaula, Oklahoma, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease."

The lease recited that it was subject to the regulations of the Secretary of the Interior then or thereafter in force. The regulations promulgated by the Secretary provided for the payment to the United States Indian agent of all royalties accruing under any lease made on behalf of a minor, and for the retention of these funds by the superintendent, or other designated disbursing officer, to the credit of the guardian of the minor. The superintendent was authorized by these regulations to withhold the disbursement of this money until it was considered for the interest of the minor or his heirs that it should be paid. The question presented for decision is whether the restrictions in the lease and in these regulations are still in force, or were they abrogated by that portion of section 9 of the act of May 27, 1908, which reads as follows:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

In the acts which have been cited, Congress has manifested its intention gradually to release governmental control over the lands of those members of the Five Civilized Tribes who were deemed capable of the management of their own property. The act of May 27, 1908, very greatly enlarged the classes of those who were left free to deal

with their allotments. In the committee reports to each house of Congress, accompanying the bill, it was stated that one object of the bill was to release about 8,000,000 acres, or one-half, of the restricted allotments from further supervision by the United States over its alienation. Among other provisions for such release is that found in section 9 of the act, which has been quoted above. The language of this section seems clear and definite. The death of an allottee removes all restrictions over the alienation of his land, other than a homestead, except that no conveyance of any interest in the land by a full-blood Indian heir is valid unless approved by the proper probate court. No exception was made because of existing leases of the land, unless a lease had been executed, but had not been approved by the Secretary of the Interior; in that case, the lease was subject to the approval of the Secretary (section 3). Congress knew that many leases of Indian lands were outstanding, for it had authorized their execution by previous acts, and by section 3 of this act it permitted allottees of land from which restrictions were removed to cancel the leases upon agreement with the lessees. The omission to reserve any other supervision than that by the probate court over conveyances by full-blood heirs of allottees is rendered more significant by the fact that, in the next proviso in section 9, the right of supervision by the Secretary of the Interior over another class is expressly retained.

Notwithstanding the fact that Congress left but one restriction upon the alienation of this land, the control of the probate court, appellees claim that other restrictions exist to the extent that the Secretary of the Interior may collect the royalties under the lease made by the deceased allottee and may retain from his administrators the royalties collected before and since his death. In support of this claim appellees say that the Secretary of the Interior had the authority at the time this lease was made to make regulations as to the approval of the leases executed by minor allottees which had the force and effect of law; that these regulations provided for the impounding of the royalties and for the payment to the lessor, or his heirs, at the discretion of the Secretary as to time and amount; that the lease by Samuel Richard provided that it should be released from the grasp of these regulations only when all restrictions should be removed; and that as one restriction still exists, because the consent of the probate court must be obtained to validate a conveyance by the heir, all restrictions have not been removed, and therefore the terms of the lease and of the regulations of the Secretary remain in force as to control of the royalties. The answer to this contention is that the powers of the Secretary of the Interior over this land are only derivative. These supervisory powers, as expressed either in the regulations of his department, or in the lease, cannot survive the grant under which they were made, and when Congress declared that all restrictions upon alienation, except one, were removed, none of the powers reserved in the regulations and lease longer remained operative. By the enactment of this statute the right was conferred upon the heirs of the allottee to make a conveyance of the allotment upon the one condition of its approval by the proper probate court, and the ap-

proval of the Secretary of the Interior was unnecessary. United States v. Knight, 206 Fed. 145, 124 C. C. A. 211; Harris v. Gale (C. C.) 188 Fed. 712; McHarry v. Eatman, 29 Okl. 46, 116 Pac. 935; Nicholas v. Cornelius (Okl.) 152 Pac. 831; Hope v. Foley (Okl.) 157 Pac. 727.

The removal of all restrictions upon alienation included the release of control over the collection of royalties under the lease, after the death of the allottee, as the "royalties to accrue were a part of the estate remaining in the lessor." United States v. Noble, 237 U. S. 74–80, 35 Sup. Ct. 532, 535, 59 L. Ed. 844. While the royalties that had been collected and withheld by the Secretary of the Interior prior to the death of the lessor, were personal property (United States v. Noble, supra), the control of these funds was an incident of the power to approve of the lease; and, when Congress declared its purpose to allow the heirs of allottees to alienate the land free from all restrictions, we think it was the intention of Congress to dispense with further supervision by the Secretary of the Interior over the funds that had been collected under that power. In other words, Congress did not intend, in allowing the heirs of allottees to alienate their land free from all restrictions, subject only to the approval of the proper probate court, to leave the heir in the same position as the intestate was before his death. The legislation meant something. Neither did Congress intend to postpone the enjoyment of the estate by the heir until after he had sold it with the approval of the probate court, which would be the only way he could remove the only restriction left.

For these reasons the decree of the lower court is reversed, and the cause is remanded, with directions to enter a decree for complainants in accordance with this opinion.

STONE, Circuit Judge, dissents.

CHICAGO & N. W. RY. CO. v. ZIEBARTH.

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

No. 4816.

1. LIMITATION OF ACTIONS ⟸34(1)—STATUTE—APPLICABILITY.
   The South Dakota statute of limitations (Code Civ. Proc. S. D. § 60), declaring that it includes an action on a liability created by statute, other than a penalty of forfeiture, applies to an action created by statute, though the liability is in the nature of a specialty.

2. COURTS ⟸375—FEDERAL COURT—STATE LIMITATION STATUTES.
   As the federal statutes, requiring a carrier to collect the full transportation charges provided in the authorized tariffs, contain no period of limitation, local limitation statutes, though varying, will govern the action; hence, in an action in the federal District Court for South Dakota for the amount of an undercharge, Code Civ. Proc. S. D. § 60, is applicable.

3. COURTS ⟸375—FEDERAL COURT—STATE STATUTE OF LIMITATIONS.
Statutes of limitation being statutes of repose, an action by a carrier to recover the full charges authorized, brought in federal court under the commerce statute, is governed by local state statutes of limitation; the federal laws prescribing no limitations.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by the Chicago & Northwestern Railway Company against M. J. Ziebarth. There was a judgment dismissing the complaint, and plaintiff brings error. Affirmed.

A. K. Gardner, of Huron, S. D., for plaintiff in error.

Caldwell & Caldwell, of Sioux Falls, S. D., for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. This is an action by a carrier against a shipper for the amount of an undercharge on an interstate shipment. The case was presented upon the pleadings and an agreed statement of facts. The writ of error is from a judgment dismissing the complaint, as barred by limitation of the state statute.

[1] A single question of law is involved: Can a state statute of limitations operate to bar a recovery for an interstate freight undercharge? There is no controversy that the South Dakota statute of limitations is an effective bar to this action, if it is applicable. The railway company claims it does not apply for several reasons. It contends that "where the liability is created by positive provisions of statute, and not by the act of the parties, the statute of limitations cannot be pleaded." We do not know any reason for such a rule, and the authorities cited are not to that effect. They, and many others like them, follow the rule that liabilities in the nature of specialties do not come within the wording of the statute of King James nor those patterned thereafter. But that is merely a matter of the meaning and compass of the particular statute. The South Dakota statute here involved (Code of Civil Procedure of the State of South Dakota, § 60) goes further, and includes "an action upon a liability created by statute, other than a penalty of forfeiture." The liability here sought to be enforced is in the nature of a specialty since it finds its being in the statute. It would not come within the statute of King James, but the above-quoted South Dakota statute includes it.

[2] The company further contends that Congress did not intend the state statutes of limitation to apply to actions of this character, because such would destroy the uniformity at the basis of the commerce legislation, and because the collection of tariff undercharges is not simply a right given to the carrier, but a positive duty imposed upon it to collect and upon the shipper to pay such.

The claim of lack of uniformity, if state statutes of limitation were applied, is based upon the varying periods of limitation existing in the different states. The state statutes of limitation do differ as to the periods within which suits may be brought. The commerce statutes are almost dry of any attempt at limitation, and as to this character of cases

entirely so. Therefore the choice is between state limitations and no limitations. Authority has decided that the state statutes apply. This court, in Murray v. Chicago & Northwestern Railway Co., 92 Fed. 868, 35 C. C. A. 62, decided the claim of a shipper for damages because of discriminatory rebates was barred by the state statute. In Ratican v. Terminal Railroad Ass'n (C. C.) 114 Fed. 666, Judge Adams, lately a very learned judge of this court, but then of the Circuit Court, decided the same point in the same way, saying:

"The Interstate Commerce Act prescribes no limitation of time within which actions based thereon shall be instituted. Such being the case, the statute of limitations of the state in which the action is brought must apply and control."

In Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, which was by a shipper for reparation because of discriminatory and of extortionate charges falling within section 16 of the Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384), as amended (Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 [Comp. St. 1916, § 8584]), and controlled by the national statute in the nature of a limitation applying to suits by shippers, Mr. Justice Van Devanter clearly intimates the application of local statutes of limitation where the federal statute has not made provision. He says (236 U. S. 424, 35 Sup. Ct. 333, 59 L. Ed. 644, Ann. Cas. 1916B, 691):

"The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several states and subject them to limitations of its own creation which would operate alike in all the states. * * * The proviso was in the nature of a saving clause, and while, as before observed, it probably was not intended to revive claims which were then barred by applicable local laws, we think there is no warrant for saying that it was not intended to include claims accrued more than two years before the amendment."

Nor is this expression weakened by the case of A. J. Phillips Co. v. Grand Trunk Western Railway Co., 236 U. S. 664, 35 Sup. Ct. 444, 59 L. Ed. 774, decided three weeks later, where the court had in view the same proviso of section 16. We therefore conclude that the contention based upon lack of uniformity cannot be sustained.

[3] As to the claim that the local statutes should not apply, because the collection and payment of tariff undercharges is not simply a right, but a duty: The foregoing cited cases are equally applicable and controlling in this connection, but possibly it may be useful to add some further observations. Without passing upon it, the concession may be made that the duty claimed does exist. That of itself reveals no reason why an action to enforce that duty should not be amenable to limitations. Even treason, aimed at the life itself of the nation, is expressly made subject to limitation. R. S. § 1043 (Comp. St. 1916, § 1707). And the penal clause of this very act has been held so confined in United States v. New York Central & H. R. R. Co. (C. C.) 157 Fed. 293, by Judge Hough, now a member of the Court of Appeals of the Second Circuit.

The reason for applying limitations to this, as well as to all other actions, lies in the nature and object of statutes of limitation. There

should be distinguished a class of statutes which, in connection with a created right, prescribe a term within which it must be enforced. While such prescription is in form a special statute of limitation, it is often intended by the Legislature to have a more far-reaching influence. Where such intention is found by the courts, the term is not treated as a statute of limitation in the ordinary sense, but as an essential portion or element of the right itself. Phillips Co. v. Railway Co., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774. But statutes of limitation, strictly speaking, are measures of repose. They are no part of any right, nor do they have at all in view any change of the legal liabilities in the litigation controlled by them. They leave the rights and liabilities of the parties untouched. In fact, their object is the proper protection of those rights and liabilities. They recognize that such rest upon facts which in very many instances are in dispute, and must, if brought for judicial settlement, be determined by evidence. Experience has left no doubt that lapse of time naturally, if not inevitably, results in loss of evidence pertinent to, and often decisive of, the existence of the facts in controversy, and that this is especially true where no warning (as by institution of litigation) has been given of any need for its prompt collection and preservation. To obviate this risk of loss, and consequent injustice, such statutes do not permit one who has in mind the judicial enforcement of a claimed right to remain watchfully or negligently in ambush until time has destroyed the defensive testimony of his opponent, and then begin his assault. They put into the hands of the one so slothfully attacked, as a personal privilege which may be urged or unused, the right to decline to enter a contest thus long delayed. They are beneficent in their purpose and effect. There is, therefore, ordinarily nothing in the nature of an action which should exempt it from limitation, if the Legislature controlling so wills.

It is true that courts, purely as a matter of statutory construction, have exempted the sovereign from statutes of limitation which did not clearly show an intention to include such. The historical reason for this attitude may be found in the very old maxim, "Nullum tempus occurit regi." Godb. 295; Hobart, 347; Gibson v. Chouteau, 13 Wall. (80 U. S.) 92, 20 L. Ed. 534. However, the sovereign may make itself subject to such statutes, as witness the statute limiting the time of bringing suit to annul land patents on the ground of fraud. Act March 3, 1891, c. 559, 26 Stat. 1093 (Comp. St. 1916, § 4992). But this case is not brought by the sovereign to protect some right attaching to sovereignty, and therefore cannot claim the benefit of the above rule.

The judgment is affirmed.

CHICAGO, B. & Q. R. CO. v. DAWSON et al. *

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

No. 4798.

1. JUDGMENT ⟸597—SPLITTING CAUSE OF ACTION—WHAT CONSTITUTES.
Plaintiffs' right of action as copartners, for destruction of their personal property by fire negligently set out by defendants' locomotive, is not identical with plaintiffs' right of action as tenants in common of varying interests, for injuries to their realty resulting from the same fire; and hence plaintiffs' recovery in an action for injuries to the realty will not, on the theory that they split a single cause of action, prevent subsequent recovery for destruction of their personalty.

2. JUDGMENT ⟸572(2)—CONCLUSIVENESS—WHAT CONSTITUTES.
Plaintiffs, who were copartners and tenants in common of varying interests owned realty, filed in the state court two suits for damages resulting from a fire negligently set out by defendant railroad company, one to recover for the destruction of the personal property, and the other for injuries to plaintiffs' realty. The action for destruction of personal property was removed to the federal court, and, the one for injuries to real property not being removed, plaintiffs had judgment for damages. After such judgment, plaintiffs sought to obviate the necessity of proof of the cause of the fire by amending their petition in the action for destruction of personalty, which was removed to the federal court. A demurrer was sustained to the amended petition, which alleged that the parties to the action in the state court were identical with those in the federal court, though the two causes of action were distinct; that the same fire and cause thereof, and defendants' liability, and the same facts, were involved, except the ownership and destruction of the personalty, and plaintiffs' damage; that such facts, aside from the exception, had become res judicata, and were binding by the judgment in the state court; and that defendant was estopped to deny the matters so determined. One of the grounds of the demurrer attacked the petition on the theory that plaintiffs, having split the single cause of action, could not recover a second judgment therefor. *Held*, that the sustaining of the demurrer to the amended petition was not a conclusive adjudication that a first cause of action had been split, but left plaintiffs free to file an amended petition.

3. APPEAL AND ERROR ⟸1002—REVIEW—VERDICT.
A verdict on conflicting evidence will not be disturbed on writ of error.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Cecil Dawson and J. W. Settle, copartners as Dawson & Settle, against the Chicago, Burlington & Quincy Railroad Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

M. G. Roberts, of St. Joseph, Mo., and George A. Mahan, of Hannibal, Mo. (O. M. Spencer, of St. Joseph, Mo., on the brief), for plaintiff in error.

Charles T. Hays, of Hannibal, Mo., and J. P. Boyd, of Paris, Mo. (Roy B. Meriwether, of Monroe City, Mo., and Berryman Henwood, of Hannibal, Mo., on the brief), for defendants in error.

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

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

*Rehearing denied November 7, 1917.

STONE, Circuit Judge. Writ of error by defendants below from recovery of damages caused by burning of contents of blacksmith shop by fire alleged to have been started from passing locomotive.

Two suits were filed in the state court for damages occasioned by this fire. One for injury to the realty, for $2,990; the other, this action, for injury to personalty, for $15,000. The realty case, filed two days prior to this suit, resulted in judgment for the plaintiff, was appealed by the company, and since the submission of this case has been affirmed by the state Court of Appeals (193 S. W. 43). The present case was removed and tried after judgment in the state trial court in the other cause.

The railroad company here urges: (a) That the plaintiffs, having brought two actions for different elements of damage caused by the same fire, have fallen within the rule prohibiting splitting of causes of action, and therefore can recover only the amount sought and put in judgment in the realty case which was first filed and first tried; and, (b) that there was no substantial testimony that its locomotive caused the fire.

[1] (a) For the protection of litigants and of courts, the law wisely requires that there be sought in one suit all damages arising out of a single cause of action. To enforce this requirement but a single recovery is permitted, where only one cause of action exists. The test of a claimed violation of the rule is whether the suits are the same or different causes of action, and this is determined by legal identity or difference in the parties, the theory of liability, and the necessary evidence. The realty suit was brought by Cecil Dawson and J. W. Settle as tenants in common (undivided one-third and two-thirds) of a lot and building thereon, for destruction of the building; the instant suit was by the same persons as copartners conducting a blacksmith business in the above building for loss of partnership tools, machinery, equipment, and materials located therein. While the same individuals brought both actions, in each they appeared and based their right of recovery upon a stated legal status or relationship toward the burned property. That status was a material link in the pleading and the proof. It was different in the pleading, and each suit required proof which had nothing in common with the other in this respect. One was a tenancy in common in unequal parts of real estate; the other was partnership ownership in apparently equal portions. There is nothing in common, and therefore no identity in the two relationships. This conclusion is emphasized by another consideration. The judgment in the realty case was the individual property (one-third and two-thirds) of each of the plaintiffs, and might be subject to exemptions if levied on by judgment creditors of either of the plaintiffs; while the judgment in this case is partnership property, entitled to no exemptions. There is a failure of that identity of parties and proof necessary to identity of cause of action; hence no splitting of a single cause of action.

[2] The company contends that this point of the splitting of the cause of action had become res adjudicata through the sustenance of a demurrer to the first amended petition. After the judgment in the state trial court in the realty suit the plaintiffs sought to obviate proof

in this case of the cause of the fire by amending their petition. This amendment, after describing the realty suit and the judgment therein, continued as follows:

"Plaintiffs state that the parties to said cause in said state courts are identically the same as the parties in this cause, but that said two causes of action are distinct; that the same fire, and the cause thereof, and defendant's liability therefor, and the same facts and issues there involved, save and except the ownership and destruction of the machinery, tools, equipments aforesaid, and the amount of plaintiffs' damage resulting from such destruction thereof, are involved in the case here at bar; that said facts and issues, aside from the exception aforesaid, have become and are res adjudicata and binding upon the parties herein by reason of said proceedings in said state court, that court having then and there full, complete, and general jurisdiction in that behalf of said parties and of said cause of action so determined as aforesaid; and that said defendant is by reason of the premises estopped to deny or in any manner controvert any of said facts and issues so determined as aforesaid in said state court, both of said causes of action depending upon identically the same evidence and proof, save as to the ownership of said tools, machinery, equipments, and materials and the amount of damages resulting from the destruction thereof."

To this petition defendant filed its demurrer upon five grounds, which may be summarized as insufficient statement of facts to constitute cause of action and split cause of action. This demurrer was sustained generally. Whereupon plaintiff filed a second amended petition, omitting all reference to the realty suit. To this petition defendant ultimately filed an amended answer, inter alia, pleading split cause of action, and, based upon the above demurrer ruling, res adjudicata. Plaintiffs replied, admitting filing and facts of realty suit, and saying:

"Admit that the parties to this cause are the same persons and corporation as the parties to the action for damage to the buildings tried in said Monroe court. But plaintiffs aver that they are suing herein in a different right, to wit, in joint right as equal copartners, from their several rights sued on in said other or appealed cause, and aver that this suit involves a different subject-matter, and involves as well a remedy which could not have been included in the other suit; and plaintiffs aver that said two causes of action are separate and distinct, that the said copartnership had no interest whatever in the subject-matter of said other suit, and that [his] suit involves certain issues not involved in the other."

Sustaining the demurrer to the first amended petition had no further office nor effect than declaring that pleading insufficient to support a cause of action. It left plaintiffs free to attempt another statement of their case. The ruling was not binding upon the trial court, and might have been departed from by it. In fact, if the basis of this ruling was split cause of action, it was so departed from, for the court refused to sustain a later motion for judgment on the pleadings as finally made up, although such motion and pleadings clearly presented the identical point. The demurrer ruling possessed none of these attributes of finality characterizing res adjudicata. Our conclusion is that there was no binding determination in the lower court that this suit was barred, because a single cause of action had been split, and that there was no such splitting of action.

[3] (b) Plaintiff in error urges that the record contains no substantial evidence that the fire was started by a locomotive, or that a loco-

motive passed the burned property near enough the time the fire was discovered to have been the cause thereof. A careful examination of a voluminous record reveals a decided conflict in the testimony upon those points. The jury would have been amply justified in finding in favor of defendant, but we cannot say that there was not substantial testimony to the contrary.

The judgment is affirmed.

C. B. NORTON JEWELRY CO. v. HINDS.

In re JONES.

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

No. 182.

1. BANKRUPTCY ⟸368—TRUSTEE—ALLOWANCES.
   Where it was apparent from the first that a sale by the trustee in bankruptcy of chattels held by the bankrupt subject to a mortgage would result in no balance over the lien for the benefit of the general estate, but would only foreclose the lien, the trustee is not entitled to commissions and expenses for making a sale of the property, though the mortgagee consented.
2. BANKRUPTCY ⟸368—TRUSTEE—ALLOWANCES.
   Under Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, which permits commissions to trustees on all moneys turned over to any person, including lienholders, a trustee in bankruptcy who sells chattels subject to a mortgage is not, where it was apparent that no surplus would result to the general estate, entitled to commissions, for it was not his duty to foreclose the mortgage, and the statute obviously was not intended to allow commissions in such case.
3. BANKRUPTCY ⟸272—RECEIVER—ALLOWANCES.
   Where a receiver in bankruptcy took possession of chattels subject to a mortgage, the amount of which exceeded their value, and the property was subsequently disposed of by the trustee, the trustee is entitled to allowances for taxes paid thereon and expenditures in preserving the property, for the receiver properly took possession of the property until the validity of the lien could be determined.

Petition to Revise Order of the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

In the matter of the bankruptcy of C. L. Jones. Petition by the C. B. Norton Jewelry Company to revise an order of the District Court authorizing allowances to K. F. Hinds, trustee in bankruptcy, from the proceeds of the sale by the trustee of property covered by petitioner's mortgage. Order revised and modified.

Samuel Feller, of Kansas City, Mo., for petitioner.

William Hatch Davis, of Muskogee, Okl., for respondent.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. This case arises on a petition by a valid chattel mortgage lien creditor of a voluntary bankrupt to revise an order of the District Court permitting the proceeds from the sale by the

trustee of property covered by the mortgage to be reduced by certain allowances in connection with the care and disposition of that property and with the general administration of the estate.

The undisputed facts are that the petitioner herein was the holder of a valid chattel mortgage, executed long prior to the adjudication in bankruptcy and covering certain fixtures and stock in a retail jewelry store; that in the schedule filed by the bankrupt were set forth the existence of this chattel mortgage, the amount of the then existing indebtedness thereunder, which was more than $2,000, and the estimated value of the security, which was placed at $1,500; that the bankruptcy petition was filed January 5, 1915; that January 22, 1915, the respondent was appointed receiver of the property; that February 3d a receiver's sale was ordered to be made, and was made February 12th; that February 13th, at the first meeting of the creditors, the respondent was elected and qualified as trustee; that upon that date this petitioner filed a petition of intervention, claiming the mortgaged property, and the earlier sale was set aside; that with full knowledge and consent of this petitioner a resale was made by the trustee on March 1, 1915, free from the claim of this lien.

The petitioner claims that it is entitled to the entire proceeds, $655, of the trustee's sale. The claim of the respondent, allowed by the order of the District Court, was that this amount should be reduced by $217.18. This latter sum was made up of three classes of items: Balance (after exhausting all other assets) of $94.93, expenses in administering the bankrupt estate; commission of $17.30, allowed the trustee on the sum ordered paid over to this petitioner; expenditures of $104.95, in connection with the preservation and care of the chattels covered by the mortgage, composed of $12.35 expenses of the receiver, $30 compensation of the receiver, and $62.60 taxes.

[1] The controversy is over the propriety of the allowance of the above items. In so far as the allowance for general expenses in the administration of the estate and for commission to the trustee are concerned, the case of In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737, decided in this court, is controlling. In that case the court refused to allow for commissions and expenses of a trustee in making sale of mortgaged property, deciding in effect that, as it was apparent from the first that there would be no balance over the lien for the benefit of the general estate, the bankruptcy official should not, as such, have taken steps which could have but the single result of enforcing the lien with no benefit to the estate. To the insistence of counsel that the present case is distinguishable upon the ground that the sale was here consented to, it may be said that in the Harralson Case the sale was in accordance with a stipulation and petition in which the claimant joined.

[2] Nor was, as urged by respondent, the amendment of 1910 (36 Stat. 838, 840), which permits commissions to trustees on all moneys turned over to any person, including lienholders, intended to cover payment of proceeds from sales of property which should not have been disposed of by the trustee, but should have been turned over to the lienholder. The principle which denied repayment of actual expenses

incurred by the trustee in sale of the lien property in the Harralson Case was that it was no part of the duty of the trustee to sell the lien property, with or without the consent of the lienholder, when there could be no benefit to the estate. When he acted outside the scope of his office, he could not make any claim at all as a trustee. We think the reasoning of that case sound, and do not believe Congress intended by the 1910 amendment to permit trustees to charge a compensation for performing acts outside their duties as such.

[3] It was found to be necessary for the preservation of this property that a receiver be appointed to take charge of it before the selection of a trustee. Under the circumstances this was a proper step until the validity of the lien revealed in the bankrupt's schedule could be properly determined. It was as much for the benefit of the mortgagee as for that of the bankrupt's general estate. Expenditures necessitated by such receivership do not come within the decision or reasoning of the Harralson Case, and should be allowed. They here consist of compensation of the receiver, $30, and expenses, such as invoicing, appraising, and incidentals in connection with the receivership, amounting to $12.35. Both of these sums, under the meager evidence, seem proper in amount. To this should be added $62.60 taxes paid on this particular property.

Our conclusion is that the order should be revised, to the effect that the trustee be directed to pay over to the petitioner the sum of $550.05, which is the sale proceeds less the above receivership items and taxes; and it is so ordered.

CONTINENTAL GIN CO. v. STOCKER et al.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1917.)

No. 4867.

PRINCIPAL AND SURETY ⊂=161—ACTION ON NOTES—DEFENSES BY SURETY.
Evidence *held* insufficient to sustain the defense by sureties on promissory notes that the payee agreed to apply the proceeds of a mortgage given by the principal, if sold on foreclosure, on such notes, in preference to other notes of the series.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Martin J. Wade, Judge.

Action at law by the Continental Gin Company against W. D. Stocker and J. Oscar Howard. Judgment for defendants, and plaintiff brings error. Reversed.

For opinion of lower court, see 235 Fed. 1005.

J. L. Hull, of Muskogee, Okl. (N. A. Gibson and T. L. Gibson, both of Muskogee, Okl., on the brief), for plaintiff in error.

Malcolm E. Rosser, of Muskogee, Okl. (Geo. S. Ramsey, of Muskogee, Okl., and Edgar A. De Meules and Villard Martin, both of Tulsa, Okl., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The Gin Company, hereafter called the plaintiff, sued Stocker and Howard, hereafter called defendants, on two promissory notes, dated September 6, 1911, for the sum of $1,550 each. The defendants pleaded in defense that the notes sued on were the first two of a series of four notes for the same amount given for the purchase price of a gin sold by the plaintiff to the Farmers' & Merchants' Gin Company of Stigler, Okl.; that defendants signed said notes as sureties only, and before said notes were signed one J. D. Ray, while acting as the agent of the plaintiff in making the sale of the gin, orally promised and agreed with the defendants that, in case default should be made in the payment of the notes given by the Farmers' & Merchants' Gin Company and the mortgage given to secure the purchase price of the gin should be foreclosed, the proceeds of the foreclosure sale would be first applied to the payment of the two notes sued upon in this action; that, notwithstanding this agreement, the mortgage given to the plaintiff by the Farmers' & Merchants' Gin Company upon the gin was foreclosed prior to the present suit, and all the proceeds of the sale applied upon the last two notes of the series of four which defendants did not sign. It was further alleged that the proceeds of the mortgage foreclosure would have fully satisfied the notes sued on in the present action, and therefore defendants prayed that the suit be dismissed. The case came on for trial, and, as the execution and delivery of the notes were admitted, the defendants assumed the burden of establishing their defense.

Evidence was introduced upon the question of whether any contract, as alleged, was ever made between the defendants and the plaintiff, through its agent, J. D. Ray, and upon the question as to whether said J. D. Ray had apparent authority from his principal to make the contract pleaded; it being conceded or undisputed that he had no actual authority to do so. It appeared from the evidence that the mortgage upon the gin had been foreclosed, and that the sum realized therefrom by the plaintiff after the payment of prior liens and costs was $2,713.30, which had been applied upon the two notes last becoming due in the series of four. Under the charge of the court the jury allowed this last-named sum as a credit upon the amount due upon the notes sued upon. The plaintiff sued out a writ of error from the judgment entered on the verdict.

Numerous errors have been assigned; but we have found it necessary to consider but one assignment of error, and that is the one which alleges that the court erred in refusing to direct a verdict for the plaintiff for the full amount due upon the notes. There is an interesting discussion of the validity and nature of such a contract as is pleaded in defense contained in the briefs of counsel, and also upon the question as to whether oral evidence was competent to vary the written contract of the parties entered into at the time of the purchase and sale of the gin.

A careful consideration of the evidence, however, has convinced us that there was not sufficient evidence of a contract, such as is pleaded by the defendants, to warrant the court in submitting that question to the jury. The following is all the evidence in the record bearing upon

the question of whether there was a contract. Mr. Howard, one of the defendants, being upon the witness stand, was asked by his counsel the following question:

"Q. Proceed; go ahead, and state what Mr. Ray said to you. A. Mr. Ray said, 'Go ahead and sign the notes;' that if the—the purchase price would be taken out of the earnings, and if it was sold before the purchase price would be put on the two first notes, and after the thing was about over with I turned around and said to Mr. Ray, 'If you don't do this and agree to do this'— He says, 'I will take good care of you; I have a good credit with the Continental Gin Company and I can manage them as long as I want to.' I wouldn't have signed the note, if that hadn't been the agreement."

The defendant Stocker, while upon the stand, testified that Ray said that defendants "were taking no chances in indorsing; that the property would take care of those two notes, and they would be paid first; that the only chances we were taking that some unforeseen catastrophe would wipe the whole thing out." The witness Stocker was again asked the following question:

"Now, you stated a while ago, Mr. Stocker, that Mr. Ray told you that if you signed these notes that you would not run any risk, except in case of catastrophe, because the proceeds of the property would be applied first to them? A. Yes, sir; and also the earnings of the company, earnings of the gin company; he and Mr. Holcomb were the gin company."

This is all the evidence in the record tending to show a contract between Ray, as the agent of the plaintiff, and the defendants that the proceeds of the mortgage foreclosure, if the mortgage should be foreclosed, would be applied to the payment of the notes in suit. Manifestly, the evidence is not such upon which a jury would be authorized to find a verdict that there was such a contract. The last question put by counsel assumes that the witness had stated something which he did not state, and in answering the question the witness stated that Ray had said that the notes would also be paid from the earnings of the company. As to the contract, therefore, the evidence was to this effect. Howard testified that Ray said:

"The purchase price would be taken out of the earnings, and, if it [the gin] was sold before, the purchase price would be put on the two first notes."

Stocker testified that Ray said:

"The property and earnings of the company would take care of the notes, and they would be first paid."

The words "purchase price" refer to the price paid by the gin company. We are clearly of the opinion that a verdict against the plaintiff on the question of contract based upon such evidence ought not to be allowed to stand, and therefore it was the duty of the trial court to have directed a verdict as requested. For this error the judgment below must be reversed, and a new trial ordered.

We might rest the case here; but, in view of the fact that there is to be a new trial, we think it is proper to say that in our opinion there is no evidence in the record that would sustain a verdict by the jury that Ray had apparent authority to make the contract pleaded.

Judgment reversed, and a new trial ordered.

ROYAL INDEMNITY CO. v. BEISEKER.

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

No. 4817.

1. PAYMENT ⊂⊃21—ACCEPTANCE OF CHECK—EFFECT.
Where defendant, which executed an indemnity bond securing to plaintiff payment of three certificates of deposit issued to him by a bank, refused to renew its bond, and plaintiff, seeking to collect the certificates of deposit, received from the bank a draft, the draft cannot be treated as having been accepted in payment, for the accepting of a check or draft in payment of an indebtedness in some other form does not operate as an extinguishment of the indebtedness, unless it appears that such was the intention of the parties, and plaintiff obviously would not accept a draft in payment of a certificate of deposit, where the surety would not renew its obligation.

2. PRINCIPAL AND SURETY ⊂⊃121—LIABILITY OF SURETY—NEGLIGENCE.
Where plaintiff, who held certificates of deposit issued by a Washington bank and guaranteed by defendant, on being notified that defendant would not renew its bond, deposited them with his local bank for collection, and such bank transmitted them to a metropolitan Minnesota bank, which bank sent them to the Washington bank for payment, and the Washington bank, after an exchange of telegrams on July 2d, sent the Minnesota bank a draft on a Seattle trust company in payment, which draft, being received by the Minnesota bank on July 6th, was forwarded to Seattle, where it arrived and was presented on July 9th, there was no negligent delay in presenting the draft for payment.

3. PRINCIPAL AND SURETY ⊂⊃121—ACTIONS—NEGLIGENCE.
Where defendant executed an indemnity bond securing to plaintiff payment of certificates of deposit issued by a bank, and plaintiff, on being notified that defendant would not renew the bond for another year, deposited for collection the certificates of deposit with a local bank, at his place of residence, the fact that plaintiff or his agents were guilty of negligence in presenting for payment a draft given by the bank issuing the certificates will not preclude recovery on the bond, where the bank, payment of whose certificates defendant guaranteed, had no intention of paying them, and would at any time have stopped payment on the draft, for the delay, though negligent did not injure defendant.

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

Action by A. N. Beiseker against the Royal Indemnity Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

George S. Grimes, of Minneapolis, Minn., and Joseph J. Youngblood, of Fessenden, N. D., for plaintiff in error.

John O. Hanchett and Aloys Wartner, both of Harvey, N. D., for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

STONE, Circuit Judge. From a recovery on an indemnity bond securing to Beiseker payment of three certificates of deposit issued to him by the First International Bank of South Bend, Wash., the company sues its writ of error.

The loss is undisputed, but the company challenges liability on the grounds: (a) That the bank paid the certificates covered by the bond with a draft which was accepted in payment, and the loss is really for dishonor of the draft which is not covered by the bond; (b) negligent delay in and careless method of presentation of the certificates for payment.

[1] (a) The acceptance of a check or draft in payment of an indebtedness in some other form does not operate as an extinguishment of that indebtedness, unless it appears that such was the intention of the parties. Beiseker was having these certificates cashed at this time, as the evidence shows, solely because the company would not renew its bond and the bank could secure no substitute indemnity. It is not, therefore, to be believed that he would take the bank's draft with the intention of having it operate as an extinguishment of the certificates and a consequent loss of the security of this bond, nor could the bank or the indemnity company have so understood his actions.

[2, 3] (b) As to the urged point of negligence in presenting the draft, the question is one of law on undisputed facts. Beiseker, living at Harvey, N. D., for cash took out the three certificates from the First International Bank of South Bend, Wash. The bond provided for payment of the certificates by the bank "until June 11, 1915." From June 5th to June 14th there was correspondence by letter and wire between the indemnity company and Beiseker as to whether the company intended to renew its bond. Upon the last date the company definitely wired Beiseker that it would not renew. No complaint was urged on argument as to any omission to act prior to June 14th. The next day Beiseker deposited the certificates in a local bank at Harvey for collection, with directions to send them direct to the First International for payment. The same day this bank sent them to its correspondent at Minneapolis, with similar instructions, and with the request to wire in case of nonpayment. The Minneapolis bank, the day it received the certificates, forwarded them directly to the First International for payment, where they arrived June 19th or 20th. Receiving no answer, the Minneapolis bank wired the First International June 25th, receiving favorable answer June 28th. July 2d the First International sent draft in full on a Seattle, Wash., trust company to the Minneapolis bank, which received it July 6th, and that day forwarded it to Seattle, where it arrived July 9th. On this last date the cashier of the First International appeared in person and notified the trust company not to pay the draft. No negligence is shown by the above-outlined course of dealing.

But the existence or nonexistence of negligence is not decisive in this case. It is highly questionable whether negligence on the obligee's part is any defense to an insurance contract, unless it be expressed or clearly implied in the terms of the bond. However this may be, negligence cannot be a defense, unless its absence would have prevented the loss. Here it is conceded that the bank was just as financially able to pay the draft July 9th as it would have been to pay the certificates upon June 11th or 14th, or any intervening date. It is very clear that the bank had no intention of paying them at any of these times. It hoped

to get renewed security, and thereby the extension of the certificates, and it obstructed and delayed taking an open stand until it ascertained, July 8th or 9th, that the bond could not be made, when it ordered the dishonor of the draft. In short, the time and method of presentation of the certificates had no effect whatever on their nonpayment.

The judgment is affirmed.

TREADWELL v. CORKER & SMITH.

(Circuit Court of Appeals, Fifth Circuit. October 9, 1917.)

No. 3086.

APPEAL AND ERROR ⊂=78(3)—DECISIONS REVIEWABLE—FINAL JUDGMENT—"FINAL DECISION."

Where defendant, in an action to recover a sum claimed under a contract, filed a plea denying the indebtedness, and also a plea in recoupment, seeking to recover an amount greater than that claimed by plaintiff, an order sustaining a demurrer to the plea in recoupment is not, as it did not dispose of all of the issues raised by the pleadings, a "final decision" within Judicial Code (Act March 3, 1911, c. 231) § 128, 36 Stat. 1133 (Comp. St. 1916, § 1120), declaring that the Circuit Court of Appeals shall exercise appellate jurisdiction to review final decisions in the District Court, and hence a writ of error to review the order sustaining the demurrer will be dismissed.

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

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by Corker & Smith against A. P. Treadwell. There was a judgment for plaintiff, and defendant brings error. Writ dismissed.

Henry B. Troutman and L. C. Hopkins, both of Atlanta, Ga., for plaintiff in error.

Owens Johnson, of Atlanta, Ga. (Thos. B. Felder, of Atlanta, Ga., on the brief), for defendant in error.

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

PER CURIAM. This was an action by the defendants in error (hereinafter referred to as the plaintiffs) against the plaintiff in error (hereinafter referred to as the defendant) to recover an amount claimed to be due under an alleged contract. To the plaintiff's petition the defendant interposed a plea denying the alleged indebtedness, and also a plea of recoupment seeking to recover of the plaintiff an amount greater than that claimed in the plaintiff's petition. The plaintiff demurred to the last-mentioned special plea as it was amended.

With reference to this demurrer the record shows that the court "ordered that the demurrer be and it is hereby sustained." Other than the quoted order, the record does not show any disposition of the issues raised by the pleadings in the case. So far as appears from the record,

the case stands at issue in the District Court, and the whole of it has not been finally determined by that court. We are of opinion that the order mentioned is not such a final decision as is required to support a writ of error. Judicial Code U. S. § 128; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; Webster Coal & Coke Co. v. Cassatt, 207 U. S. 181, 28 Sup. Ct. 108, 52 L. Ed. 160; Bank of Rondout v. Smith, 156 U. S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441; Kingman v. Western Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192; Maas v. Lonstorf, 166 Fed. 41, 91 C. C. A. 627.

The writ of error is dismissed, without prejudice to the right of the defendant to have an appellate review of the ruling complained of, after a final decision of the case.

NASH et al. v. MINER.

(Circuit Court of Appeals, Seventh Circuit. December 7, 1916. Rehearing Denied April 10, 1917.)

No. 2352.

PATENTS ⊜328—VALIDITY AND INFRINGEMENT—DRAFT RIGGING FOR RAILWAY CARS.

The Miner Patent, No. 758,677, the O'Connor patent, No. 829,728, and the Nash patent, No. 858,746, each relating to draft-rigging for railway cars, *held* not infringed, conceding their validity.

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

Suit in equity by William H. Miner against Charles J. Nash and the Universal Draft Gear Attachment Company. Decree for complainant, and defendants appeal. Reversed.

Louis K. Gillson, of Chicago, Ill., for appellants.
George I. Haight, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge. The matters here in dispute pertain to what is termed a tandem draft-rigging in relation to car couplers. Because of the limited space between draft-sills, within which space draft-rigging must be mounted, it has been found desirable, if not necessary, to provide for the increased strain upon shock-absorbing elements growing out of the tendency to enlarged car equipment, to at least double the efficiency of former devices, by arranging the draft-rigging in tandem rather than abreast of each other. Of necessity the great strain of the heavier train calls for increased strength in all the parts pertaining to the coupling of cars. To keep up with the demands thus growing out of the enlarged car equipment and make reasonable provision for the safety and duration of the coupling devices, all within the same space utilized for that purpose when

the requirements were lighter, has invoked the genius and skill of many inventors—among others, appellee Miner, who seems to have been fertile in attempts to meet the situation. He is unable to say that he has not secured over a hundred patents to that end.

The present suit is based upon three patents, viz.: Claims 17 and 18 of patent No. 758,677, granted to Miner May 3, 1904, for a tandem draft-rigging for railway cars—reading as follows, viz.:

17. In a draft-rigging, the combination with a stop-casting having a lower flanged portion furnished with open slots to receive connecting-bolts, of a removable follower-supporting plate and short connecting-bolts securing the same to the stop-casting, substantially as specified.

18. In a draft-rigging, the combination with a stop-casting having at its middle portion a lower flange provided with a transverse slot to receive a connecting-bolt, of a removable follower-supporting plate and short connecting-bolts securing the same to the stop-castings, substantially as specified.

Claims 2, 4, 5, and 6 of patent No. 829,728, granted to J. F. O'Connor August 28, 1906, for draft-rigging for railway cars, reading as follows, viz.:

2. A railway draft-rigging side-plate or stop-casting, consisting of a cast web of substantially uniform thickness, free from T and other flange-like sections, and having upright convolutions therein forming stops or shoulders for the followers to abut against, substantially as specified.

4. A railway draft-rigging side plate or stop-casting, comprising a cast-metal web of substantially uniform thickness throughout, free from T and other flange-like sections, and having a plurality of upright convolutions therein forming stops or shoulders for the followers to abut against, and provided with further upright convolutions therein forming intermediate stops or shoulders for the followers to abut against to limit the compression of the springs, substantially as specified.

5. In a draft-rigging for railway-cars, the combination with the draw-bar, springs and followers, of side plates or stop-castings each consisting of a cast web of substantially uniform thickness throughout, having integral upright bends or convolutions therein forming upright stop-shoulders, and having also horizontal convolutions forming longitudinal strengthening ribs or flanges, said horizontal convolutions extending between but not across said upright convolutions, substantially as specified.

6. In a railway draft-rigging side-plate or stop-casting, consisting of a cast web of substantially uniform thickness throughout, furnished with a series of upright convolutions therein forming stops or shoulders for the followers to abut against, and furnished with horizontal or longitudinal convolutions therein forming longitudinal strengthening ribs or flanges, said horizontal convolutions extending between but not across said upright convolutions, substantially as specified.

And all the claims of patent No. 858,746, granted to C. J. Nash for draft-rigging for railway cars July 2, 1907. So far as deemed necessary for the purposes of this suit, claim 1 is representative of the invention claimed by the patent. It reads as follows, viz.:

In a railway draft-rigging, the combination with the draw-bar, springs and followers, of side-plates or stop-castings each consisting of a main cast web, having upright open bends therein forming the main stops for the followers to abut against, and having hollow intermediate stops, the double upright walls of which strengthen and stiffen against buffing said main web at the intermediate portions of the stop-casting between the followers or main stops, and at the same time prevent abnormal thickness or body of metal at such intermediate portions, substantially as specified.

All of which patents are owned by Miner.

Claims 17 and 18 aforesaid involve the use of slotted as distinguished from round bolt-holes for receiving the bolts which secure the lower flange of the stop-casting to the so-called follower-plate, to the stop-casting and to the supporting plates. These follower-supporting plates are removable. In order to get at and repair, replace, or adjust the springs, yoke, and other portions of the draft-rigging when necessary, it is important that these supporting plates be removed with as little difficulty as possible. Miner hit upon the slotted bolt-holes and short bolts. These slotted bolt-holes are old—very old in some arts. They seem also to have been used in prior art draw gear for railway cars—see patent to C. H. Starr, No. 382,840, granted May 15, 1888, where the slotted bolt-hole is used to receive the bolts which hold the draw-spring cage in place; and Hoey patent, No. 593,097, granted November 2, 1897, for draft-beam attachment for railway cars, where the slotted bolt-hole is used for the reception of the stirrup bolts; and the Turnipseed and Williams patent, No. 691,085, for means for attaching draft timbers to the draft-sills of freight cars, where it is used for the reception of bolts *E* which carry the draft-plates *B*.

It does not appear that slotted bolt-holes had ever been used in the exact combination of claims 17 and 18, although Starr accomplished the same end Miner did, viz., he thereby avoided the necessity of tearing up the car floor. Starr was providing for a single draft-gear. The use of the slotted bolt hole does not seem to have been indispensable to the use of appellee's short bolt, there being ample clearance for the use of round holes. Both the short bolt and the slotted bolt hole are used for the same purpose and in the same way as in the prior art. They furnished a more convenient method for removing and replacing the several elements of the draft-rigging device.

The claims of the O'Connor patent in suit pertain to the side-plate or stop-casting of a railway draft-rigging. This is usually made of malleable iron or other annealed metal. On its web are the stops or shoulders against which the spring followers abut. The side plate of the patent is described in the specification as being of uniform thickness at all points,

"so that the stop-casting as a whole will be entirely free from T or other sections which would result in giving the casting a greater thickness or body of metal at some points than others, with the consequent imperfections, casting strains and defects which have heretofore been incident to the making of side-plates or stop-castings of the old constructions wherein the stops or shoulders from right-angle or T sections with the main plate or web of the casting."

It is the claim of the patent that variations in the thickness of the wall of the convolutions constituting the stops or shoulders are productive of defective castings by reason of the more rapid cooling off of the thinner portions and the tendency of the metal to be injured by one part cooling off after the rest had become cool. O'Connor sought to remedy this without weakening the shoulders. Formerly, it seems, the casting had to be chilled at its thickest points. O'Con-

nor claims to have made this unnecessary by his uniform web. It will be observed that claims 5 and 6 do not specifically mention the elimination of T sections from the castings. No other method of procuring uniform thickness is designated in the specification. Indeed, no casting could accomplish that end and still have the T section. We deem the language of claims 5 and 6 as contemplating freedom from T sections. Nor was the production of convolutions on the web, upright or horizontal, new. Side-plates in which there were raised shoulders and other convolutions, disclosing no T sections, may for the purposes of this suit be conceded to be new. Though Harvey patent, No. 447,323, seems to have gone far toward the accomplishing of this result as early as 1891, and others had claimed to have eliminated T sections in their castings, prior to O'Connor, O'Connor accomplished his purpose by making the stop shoulders, the intermediate stops and the longitudinal strengthening ribs three-sided or hollow.

The idea of O'Connor was to provide a plate which should avoid weaknesses incident to the casting process. He did not undertake to produce new features or functions into draft plates. He disclosed no new relation or operation between the spring followers and the bosses on the cheek plates, nor any new arrangement of the several parts of the draft-gear as such. Except for their tendency to become damaged in the casting process, the side castings theretofore in use were just as usable in draft-gears as those made under the O'Connor patent.

In the view we take of the matter, it is unnecessary to pursue this question further. The Nash patent in suit, the specification says, is related "more particularly to improvements in the construction of the side-plates or stop-castings of the draft-rigging." "Railway draft-rigging stop-castings," the specification proceeds,

"are subjected in practical use to enormous blows, shocks, or strains, and great difficulty is experienced from the draft rigging breaking or giving away at the stop-castings or the shoulders thereon against which the followers abut, and in so designing the side-plate or stop-casting that it will afford the necessary stops or shoulders for the followers to abut against, and at the same time be of a form capable of being so cast as to produce homogeneous and perfect castings, free from casting strains or other defects incident to unequal distribution of metal and varying thicknesses in different parts of the casting, which is ordinarily required to be of considerable length and with a straight flat face to fit against the draft timber or sill of the car, and with the necessary bolt holes or bosses for engagement therewith, and at the same time to possess the necessary strength and stiffness against bending or buckling at the intermediate portions of the casting between the followers of the draft-rigging.

"The object of my invention is to provide a draft-rigging side-plate or stop-casting, by means of which the difficulties or objections heretofore experienced may be practically overcome or obviated.

"My invention consists in the means I employ to practically accomplish this object or result, as herein shown and described and more particularly specified in the claims."

The patent further sets out that:

"Each of the side-plates or stop-castings *B* is further provided with intermediate stops or shoulders b^5 to limit the compression of the springs, and the in-

termediate stops b^5 are made hollow, or with double upright walls b^6 and b^7, so that this intermediate portion of the stop-casting between the followers may be adequately strengthened against buffing or other blows, while at the same time the unequal distribution of metal in the casting at this part will be avoided, and the web of the casting maintained of substantial uniform thickness throughout. The inner wall b^6 of the hollow intermediate stop b^5 is furnished with a bolt-hole or opening b^8 through which the bolt F connecting the stop-casting with the draft timber or sill may be inserted, and the back or outer wall b^7 of the hollow stop b^5 is furnished with a boss or projection b^9 to enter a suitable notch or mortise in the draft timber or sill A, and thus relieve the connecting bolts F in part from strain. Each of the side-plates or stop-castings B is further provided with an integral upright and flange b^{10} at each end, and with an integral upper guide flange b^{11} to guide the followers, and with a removable lower or bottom guide G which is removably connected to the side-plate or stop-casting by bolts g, which fit in slots b^{12} in the bottom lugs b^{13} of the stop-casting at the lower ends of the main stops b b^1 b^2. Each of the side-plates or stop-castings may also preferably be furnished with depressions b^{14}, reducing the thickness of the main web B^1 at certain parts, where it can be done without detriment, and thereby lessening the weight of the casting as a whole. The upright end flanges b^{10} of the stop-casting are connected to the front and rear stops respectively by horizontal connecting ribs b^{15}.

"By means of the hollow intermediate or spring compression limiting stops, in connection with the open bend or convolution main stops, my new draft-rigging side-plate or stop-casting is adequately stiffened or reinforced against buckling at the intermediate portions thereof between the followers or the main stops, while at the same time the casting is made of a shape such that the metal is evenly distributed and the casting freed from abnormal thicknesses or bodies of metal at different portions of its length, so that in the practical production of the same there is little liability for production of casting strains or warping due to the unequal cooling and contraction at different parts, and defects incident thereto."

The end sought by the patentee was the strengthening of the main stops and the portions of the web of the stop-castings, intermediate the main stops. Nash's original claim 3 called for "a draft-rigging side-plate or stop-casting having main stops and hollow intermediate stops," etc. This claim was disallowed on one of Miner's and on O'Connor's prior patent. Nash then amended by adding the words "with front and back upright walls"—constituting his present claim 3. A further advantage claimed was the limiting of the compression of the springs and serving as a guide thereto laterally. All this was to be accomplished without undue thickness of metal. The peculiar feature of the patent consists in what are termed the double upright walls, consisting of six walls inclosing a hollow cube. The inner wall or face of this stop serves as a guide to the springs, preventing buckling. The stop must under the patent be an inclosed structure, at least substantially. It is appellee's contention that the alleged infringing device, while lacking a face wall next to the springs, yet contains the substance of the Nash patent. With this position we do not agree.

Appellants' device, alleged to infringe the Nash patent, and more particularly the intermediate stop thereof, has five walls only. The web forms the base wall, while the four flanges rising perpendicularly from the web form the four sides. The side wall opposite the base is missing. All of the Nash claims call for the six-sided intermediate stop.

We find that the Miner patent in suit discloses no invention as to the elements thereof employed in the appellants' device. There is no new use of the slotted bolt-holes. We therefore hold that patent, even if valid, not infringed by appellants. If there be anything new in the O'Connor patent, a question we do not pass on, we find that as to such matter appellants do not infringe the patent. They do not manufacture a draft-rigging draft-plate of uniform thickness, nor do they otherwise trespass upon appellee's monopoly therein. With reference to the Nash patent, as above stated, appellants have no intermediate stops "having front and back upright walls." In view of Nash's assignment to Miner, we do not pass upon the validity of the latter patent.

There seems to be considerable confusion as to just what patents the parts alleged to be infringed are taken from, in view of the vast number of patents in the prior art. We do not deem it important to decide this. After a careful consideration of all these, so far as shown in the record, we are satisfied that, while appellee's device is one which seems to appeal to the railroads as suitable and convenient, those features of it which appellants use are old. No amount of convenience, availability, and popularity can overcome the absence of invention. It is the province of mechanical skill to bring to invention effectiveness, which is second only in importance in the advance of science to invention itself. In the present case one may easily get the two confused. We are clear, however, that for the reasons stated, infringement is not established.

The decree of the District Court is reversed, with direction to dismiss the bill for want of equity.

HOLT MFG. CO. v. C. L. BEST GAS TRACTION CO. et al.

C. L. BEST GAS TRACTION CO. v. HOLT MFG. CO. (two cases).

(District Court, N. D. California, S. D. July 30, 1917.)

Nos. 167, 168, 240.

COURTS ⟸352—FEDERAL COURT—REFERENCE—POWER TO REFER WITHOUT CONSENT OF PARTIES.

There is nothing in the new equity rules (198 Fed. xix; 115 C. C. A. xix) which deprives a federal court of equity of the discretionary power previously recognized and exercised to refer a case to a master, without consent of the parties, to hear the evidence in full and report his findings and conclusions on the whole case; but in such case his findings and conclusions are advisory only, and fully reviewable by the court.

In Equity. Suit by the Holt Manufacturing Company against the C. L. Best Gas Traction Company and another, with two cross-suits. On motion by the C. L. Best Gas Traction Company for reference of the consolidated suits to a master. Motion granted.

Scrivner & Montgomery and Oscar T. Barber, all of San Francisco, Cal., for C. L. Best Gas Traction Co.

John H. Miller and Chas. E. Townsend, both of San Francisco, Cal., and C. L. Neumiller, of Stockton, Cal., for Holt Mfg. Co.

VAN FLEET, District Judge. These are cross-suits in equity between the parties for the infringement of certain patents. The cases having been heretofore consolidated for trial, the Best Gas Traction Company now moves for a reference to the master, to take the testimony and report to the court his findings and conclusions on the issues, upon the ground that the nature of the controversy and the multiplicity of the questions of fact involved present matters of such complicated detail and technical character, and the taking of so large an amount of evidence, oral and documentary, that a hearing of the controversy by the court, in the first instance, will necessarily be so prolonged and consume such a length of time as to seriously interrupt and interfere with the dispatch of the ordinary business of the court and the disposition of other cases on the calendar.

The motion is supported by affidavits of counsel of the moving party, setting forth in some detail the number of claims involved in difference and the character and extent of the evidence that it will be necessary to present, and giving an estimate of the time that, in the judgment of counsel, is likely to be consumed in the hearing. The motion is opposed by the opposite party, and affidavits of its counsel presented, of a character tending to antagonize the showing made in support of the motion.

An examination into the nature of the controversy dividing the parties, the character of the evidence, and the length of time which, within the court's experience, the trial may reasonably be expected to consume, satisfies me that the case is one which should appropriately be sent to the master, if that action may competently be had. The question raised in opposition to the motion is whether, under the new equity rules, power exists in the trial court, without the consent of the parties, to order a case to the master, for the purpose of hearing the evidence in full and reporting his findings and conclusions on the whole case for the advice of the court; the contention being that, if such power ever existed, which counsel questions, it has been taken away by the new rules.

So far as concerns the doubt suggested as to the existence of such power, when exercised within proper limitations, as the law stood prior to the promulgation of the present rules, it cannot be regarded as open to serious question. Its existence is distinctly recognized in the leading case of Kimberly v. Arms, 129 U. S. 524, 9 Sup. Ct. 355, 32 L. Ed. 764, relied on by counsel opposing the motion, and by many other cases from the Supreme Court and other federal courts—sometimes implicitly; in many instances expressly. It is enough to refer to but two or three cases, where the question is very elaborately and learnedly discussed, and the cases on the subject fully cited. See Connor v. United States, 214 Fed. 522, 131 C. C. A. 68 (opinion by Judge Morrow), and the very interesting case of Bliss v. Anaconda Copper

Mining Co. (C. C.) 156 Fed. 309 (opinion by Judge Hunt); s. c. (C. C.) 167 Fed. 342; s. c. (on appeal) 186 Fed. 789, 109 C. C. A. 133.

The line of cleavage which defines the proper limits of the court's power in the premises, and which counsel seems to have lost sight of, is well and clearly stated in these cases. If the scope of the reference, in the absence of consent, is such as to contemplate a sending of the "whole case" to the master, with the purpose that he shall "decide" it—that is, that a decree shall be entered in accordance with his findings substantially as made—the propriety of such a reference, or the power to make it, has never been recognized in this country, nor, indeed, clearly acquiesced in (although, in its early history, sometimes indulged) in the English High Court of Chancery. Henderson's Chancery Practice, 164. Such a reference is held, in effect, to involve an abdication by the court of its judicial functions and the duty which rests upon it alone to decide controversies regularly submitted for its determination, by its own judgment, which may not competently be done. And it will be found on analysis that this is all that is meant by the general expressions, found in some of the cases relied on by counsel, that a reference of the "whole case" to a master for a "decision" or a "determination" cannot be had without the consent of the parties. Stokes v. Williams, 226 Fed. 148, 141 C. C. A. 146; Hattiesburg Lumber Co. v. Herrick, 212 Fed. 834, 129 C. C. A. 288; Goldsmith Silver Co. v. Savage, 229 Fed. 623, 144 C. C. A. 33.

But if the reference be one, although covering all the issues, where the court reserves unto itself the full power to exercise its right and duty of review of the evidence and the findings and conclusions of the master, and finally deciding the case, as based on such review, then such reference may be had, although neither of the parties consent thereto. The distinction is in the effect of the master's findings. When, as held in Kimberly v. Arms, supra, the reference is by consent:

"The master is clothed with very different powers than those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference, by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

But, where the reference is had without the consent of parties, the master's report has no such effect. In other words, in the first instance, the finding of the master has, in substantive effect, the force of a final determination; in the second, it is merely advisory to the court, to be adopted only to the extent that it may accord with the judgment of the court upon a review of the whole record. Mastin v. Noble, 157 Fed. 506, 85 C. C. A. 98; In re Thomas (D. C.) 45

Fed. 786; Bosworth v. Hook, 77 Fed. 686, 23 C. C. A. 404; Garinger v. Palmer, 126 Fed. 910, 61 C. C. A. 436; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; Babcock v. De Mott, 160 Fed. 882, 88 C. C. A. 64 Within these limitations, it has always been regarded as competent to refer all the issues to the master as to refer one or more or less than all.

Have the new rules worked any change in the powers of the court in this respect? I think the rules themselves answer the inquiry in the negative. While they were unquestionably put forth by the court after painstaking research and labor to that end, with a purpose to simplify and expedite the somewhat cumbersome and highly artificial and involved style and methods of pleading and practice theretofore obtaining on the equity side, and conform them more nearly to modern Code methods, and have undoubtedly worked great advances to that end, they exhibit throughout a studied purpose on the part of the court to avoid making any change affecting general principles or the more fundamental powers of the court as theretofore obtaining in equity administration, and an examination of them will disclose that this is as true of the particular power here involved as in all others. It is true that rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi), so far as pertinent here, provides:

"In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules."

And rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv) follows with the provision that:

"Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it."

But while these provisions exhibit a purpose to depart from the old method of referring all cases either to an examiner, for the taking of the evidence, or a master, for the purposes of making a report thereon, the very language imports that this restrictive requirement is not intended to be the exclusive method, but that (rule 59) it is to be left to the discretionary power of the court to say what character of case shall be deemed exceptional; and when these provisions are read, as they must be, to determine their scope with all others of a cognate character, of which there are a number (see rules 60, 61, 62, 66, 67, and 68 [198 Fed. xxxvi, xxxvii, xxxviii, 115 C. C. A. xxxvi, xxxvii, xxxviii]), they clearly negative any such limiting purpose as is here contended for.

It may be added that rule 114 of this court, providing for references to the master, was made and adopted by the judges of this court and the Circuit Judges after a full and careful consideration of the new equity rules and as being in entire harmony therewith. Among other things, that rule provides:

"The court may of its own motion direct a reference to the standing master, or other suitable person, of any cause in equity, or issue therein, presenting matters of any complicated detail or of technical or scientific char-

acter, or wherein the hearing is likely to be prolonged to such an extent as to interfere with the ordinary business of the court. * * * The findings and conclusions of the master and the proceedings had before him shall be subject in all respects to a review by the court upon exceptions to his report, but no such exception will be considered, except in the court's discretion for good cause shown to the contrary, unless it shall appear that the matter of the exception had theretofore been presented to the master in the form of an objection."

This rule would seem to conform fully to the principles above stated, and as it fully protects the rights of the parties in the particulars as to which apprehension has been expressed at the argument, I am of opinion that the interests of justice will be subserved by granting the present motion in accordance with its terms.

An order may be entered to that effect.

In re HELFGOTT.

Ex parte PARKER, HOLMES & CO.

(District Court, S. D. New York. October 3, 1917.)

1. BANKRUPTCY ⟸414(3)—DEBTS—VALIDITY.
   Evidence *held* to show that an alleged indebtedness by a bankrupt in favor of his father, which appeared from his books, the entries having been made subsequent to the time it was alleged to have been incurred, was fictitious, and was part of a scheme to defraud creditors.

2. BANKRUPTCY ⟸409(1)—DISCHARGE—KEEPING BOOKS.
   Where a bankrupt, as part of an artifice to defraud his creditors, made false entries in his books, showing that he was indebted to his father, allowed his father to recover judgment uncontested, and to sell on execution his stock of goods, the bankrupt was, the entries being false and fraudulent, guilty of a failure to keep books, as required by Bankruptcy Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 (Comp. St. 1916, § 9598), and so discharge must be denied.

In Bankruptcy. In the matter of the bankruptcy of Samuel Helfgott. Objection by Parker, Holmes & Co. to the bankrupt's discharge. On motion to confirm master's report, recommending discharge. Discharge denied.

Motion to confirm a master's report recommending a discharge in bankruptcy. The objections were, first, that the bankrupt had obtained property on a false written statement; second, that he had failed to keep books of account; third, that he had conveyed his property in fraud of creditors.

The bankrupt had signed a financial statement on September 10, 1914, omitting to state that he owed his father any money. He swore that "between August and January" of that year he had in fact borrowed of his father $500 in sums of $50, $75, $100, and that about January 14, 1915, his father, having earlier pressed him for the money, sued him, and got an uncontested judgment for $518; the same attorney appearing for the father as now appears for the bankrupt here. Execution being issued the property, which had a cost value of about $3,000 and consisted of a retail stock of shoes, was sold in execution and brought about $680. Out of this the judgment was paid, together with the costs of the sale and other incidentals, amounting in all to $100. The bankrupt received the balance of only about $60, and, having absented himself from the sale, made no inquiries about it. He was, he said, at all times on

friendly terms with his father, and began to live with him a few months after the events recorded. After execution issued, about January 20, 1915, and until the sale on January 26, 1915, he was allowed to remain in possession and continue the sale of the stock on his own account.

The father, being called, corroborated his son's story, giving as an explanation of his access to such large sums, since he was employed at $16 a week or less, that he had from time to time pawned jewelry, and thus raised the sums in question.

The bankrupt kept a ledger, in which were entered his accounts with his creditors, and upon one page appears the account of his father, consisting of seven items, aggregating exactly $500. This entry was concededly made on December 30 or 31, 1914, shortly before the action was started by the bankrupt's father. The date of the items are between September 18th and December 30th, and are said by the bankrupt to have been taken from loose slips of paper recording the loans, made at the time when the money was borrowed, and destroyed when the ledger entry was made.

The master concluded that the evidence did not show that the written statement was false, since it did not appear that any of the money, if borrowed at all, had been borrowed before September 10th. He concluded, also, that the sale in execution was a device to convey away property in fraud of creditors, but that, being more than four months before petition filed, it was not a bar to discharge; the objecting creditor having failed to show that the bankrupt had kept concealed any of the proceeds within that period. To these conclusions no protest is now made. The master likewise concluded that the destruction of the slips was not a failure to keep books or papers with intent to conceal the bankrupt's financial condition, because he was not satisfied that the father ever lent his son the money as alleged. To this the objecting creditor urges that, granted this was true, the entry in the ledger was at least to give color to the fraudulent conveyance, and, being a false entry, falls within the specification of failing to keep books of account.

Samuel J. Rawak, of New York City, for Parker, Holmes & Co.
Joseph H. Robins, of New York City, for the bankrupt.

LEARNED HAND, District Judge (after stating the facts as above). The only issue open is whether the loans by the bankrupt's father were fictitious. If they were genuine, there is no adequate reason to suppose that the method of keeping the books and records was with fraudulent intent, under section 14b(2). It must be conceded, moreover, that, if the loan was genuine, the bankrupt's apathy about the sale and ruin of his business might have arisen from a desire to let his father get back his money out of a business from which he knew that he would never receive a cent anyway, and that his father's apparently harsh conduct would not have ruined a business which could ever have been successful, because at any reasonable valuation the bankrupt was insolvent.

[1] Nevertheless the loan was between near relatives, a circumstance at which bankruptcy courts always look with suspicion, and concededly it was not entered in any contemporaneous permanent record, although one existed proper for the case. Moreover, the entry of the whole items about January 1, 1915, and very shortly before the action was commenced, and the supposed destruction of the slips, is a sinister circumstance. If the bankrupt had in fact at that time desired to make more permanent evidence of a real loan, apprehending some question of its authenticity, why should he have destroyed the original slips which would have gone far to corroborate it? Is it not more probable

that the entry, made after the supposed demand for payment, was in fact a blind for a fraudulent conveyance? The whole story fits perfectly with a prepared plan to make way with the assets for the benefit of the father or the son or both.

On the other hand, the father was in no position to advance $500 in less than four months. He disclaimed any savings, and took recourse to a common enough device in such cases of a story about pawning jewelry. Yet, even upon his own statement, the value of his jewelry was only $300 or $400, upon which it is impossible to suppose that he could raise more than $200 or $250. This, coupled with an alleged loan of $100 from one Sam Sukowsky, is all that he tries to account for. His total earnings from September 15th to December 30th were at most not more than $240, and it is incredible that out of these he could have made up the difference of $150 and lived with his wife for $90.

[2] The master found that the sale was fraudulent, a conclusion impossible, if it was only a preference, and further said that he was not satisfied that any loan had ever been made. His attention was apparently not drawn to the point that the entry in the ledger might be a failure to keep books under section 14b(2), as the necessary consequence of that conclusion. That question arises, once the loan is found to have been fictitious, as I find it to be. The making of false entries in the books is, of course, a failure to keep true books of the most glaring sort, and only from true books can the bankrupt's financial condition be ascertained. In this case the bankrupt's intent was to conceal his financial condition by these false entries, because he expected to use them in support of his fraudulent effort to do away with his property.

Therefore it follows that the second specification was sustained. As in most such cases, there is no direct evidence of the fact; but the proof is more than mere suspicion, and there is small doubt that the whole scheme was an artifice to defraud creditors, of which the ledger entry was a part.

Discharge denied, on the second specification, with costs.

UNITED STATES ex rel. TROIANI v. HEYBURN, Sheriff, et al.

UNITED STATES ex rel. KILINSKY v. SWIFT et al.

(District Court, E. D. Pennsylvania. October 13, 1917.)

Nos. 9, 10.

HABEAS CORPUS ⇐16—REVIEW—DETERMINATION BY MILITARY TRIBUNAL.

Writ of habeas corpus will not issue, when the investigation will in effect be an appellate review of what has been determined by some other tribunal of competent jurisdiction, as determination by the established military tribunal of liability to draft, depending on citizenship, in the absence of arbitrary denial of rights.

Two proceedings in habeas corpus—one, on the relation of Giovanni Troiani against John E. Heyburn, Sheriff of Delaware County, and

another; the other, on the relation of Abraham Kilinsky against Edward Swift and others, members of Local Board for Division No. 8, City of Philadelphia. On petitions for allowance of writs. Allowance denied.

John N. Landberg, Joseph W. Henderson, and Francis Rawle, all of Philadelphia, for petitioners.

T. Henry Walnut, Asst. U. S. Atty., and Francis Fisher Kane. U. S. Atty., both of Philadelphia, opposed.

DICKINSON, District Judge. The technical question raised is whether a writ of habeas corpus should of right issue. The real question is when and how far the courts should invade the domain of military authority. This country has been found and adjudged to be in a state of war. The national defense is an absolute necessity of our existence. The people of the United States have prepared themselves for such a situation by confiding to Congress the power to declare war and to support and maintain armies for the national defense. This is necessarily a master power, to be exercised without the hampering interference of any one. The call of men to the colors is within, and necessarily within, the exercise of this power. To whom the call goes out, and who is to make an answering response, are matters germane to, and indeed necessarily involved in, the exercise of the war-making power. Questions which necessarily arise, or may be expected to arise, must be determined in some way and by some tribunal. The war-making power may therefore provide the required system and constitute the needed tribunals. It is not only lawful, but fitting, that they should be military tribunals.

Congress has constituted such tribunals for the war in which our people are now engaged. The lawful and independent jurisdiction which belongs to other tribunals belongs to them. To this jurisdiction all must submit, and all who are well disposed to our country will willingly submit. Upon whom of those within the prescribed age limits, who have registered, the duty of military service has been imposed, because of their being citizens or denizens who have declared their intention to become citizens; who are to be excluded from the privilege of service, because alien enemies; who are exempt from service, because of the existence of any of the prescribed reasons for exemption; who are ill fitted for the performance of military service; and who have responsibilities and duties elsewhere so imperative and urgent as to prevent active military service—are all matters of which these tribunals have jurisdiction. They, indeed, constitute in an emphatic sense the subject-matter of that jurisdiction. When and within what limits are the courts justified in interfering with the exercise of this necessary jurisdiction and this well-ordered system? To the courts, it is true, has been committed the duty of safeguarding all the rights of the individual, and of course his right to his personal liberty. The writ of habeas corpus is a practically effective and justly valued instrument for the enforcement of that right. It deserves the high tribute and eulogy which counsel for relator has paid to it. The liberty, however, which it protects is liberty under the law.

The power of the court to enforce this writ is limited, as is every other power, to its lawful exercise. Untold numbers of persons are restrained of their liberties, to whom the courts can give no relief. A line defining the limits of their interference must be drawn. It is not a limitation of the power, but in the occasion of its exercise. A recognized line is defined by the query of whether the investigation will in effect be an appellate review of what has been determined by some other tribunal of competent jurisdiction. This is voiced in the maxim or phrase that the writ of habeas corpus cannot be made a substitute for a writ of error. It does not necessarily mean that the courts may not cross this line; but it does mean that the courts recognize the duty of not crossing it, unless the call to do so is imperative, because of want of jurisdiction, usurpation of power, or arbitrary denial of rights. All the facts we are here asked to find either have been or may be determined by other tribunals established by law for this purpose. If they have not been asked to determine them, the relators should be referred to those tribunals. If they have been decided, we see no occasion under the averments of these petitions to exercise an appellate duty which has not been imposed upon the court.

One of the questions raised is that of citizenship. By the express terms of the act, one who is an alien, unless he has declared his intention to become a citizen, is not within the provisions of the Military Service Act (Act May 18, 1917). Whether the fact should be found in favor of a particular relator can be determined by one tribunal as well as by another, and should be determined by that tribunal to which Congress has committed the duty to pass upon it. The fact that some of the relators claim to be subjects of the king of Italy, and by treaty not liable to military service here, we do not see affects the question. The treaty and act of Congress are alike in this respect. The difference is that the fact upon which their exclusion rests is one which upon the demand of the sovereign to whom they owe allegiance may be found, and their release ordered by the Department of State. This, then, is an additional recourse open to them. Many practical reasons buttress the clearly established policy of the law.

All which we are now called upon to determine is that the averments of the petitions in these cases do not move the court to the issuance of the writs, or bring the applicants within the class who may seek the protection of the courts.

The allowance of the writ is therefore in each case denied.

In re SHEA.

(District Court, D. Massachusetts. August 13, 1917.)

No. 20231.

1. COURTS ⟸365—PRECEDENTS—STATE COURTS.
In determining, in bankruptcy proceedings, the nature of transactions between the bankrupt and others, the decisions of the highest state court, if not controlling, are of great weight.

2. BROKERS ⟸24(1)—STOCKBROKERS—GAMING CONTRACTS—WHAT AMOUNT TO.
A broker, carrying stocks on margin for a customer, according to the custom of brokers with reference to speculative accounts, must, to prevent the transaction from being a gaming one and to put himself right, show that he had under his control, free from the just demands of other customers and available for delivery to the particular customer, the stocks delivery of which the customer, on payment, will be entitled to demand.

3. BANKRUPTCY ⟸407(5)—DISCHARGE—FALSE STATEMENTS.
A broker informed customers carrying stocks on margins that he had such stocks for them. The broker in fact had no such stocks on hand, subject to the demands of customers, free from other demands, as required by the custom of brokers. Relying on the broker's statement, customers made payments on margins, and subsequently made other payments. *Held* that, where the broker was conversant with the facts, his discharge in bankruptcy must be denied, on the ground that he made false statements to obtain money, even though he did not consider the statements false, and expected thereafter to acquire such stocks for the customers.

In Bankruptcy. In the matter of the bankruptcy of Daniel J. Shea. On application for discharge. Application refused.

Byron W. Reed, of Boston, Mass., for bankrupt.

Dunbar, Nutter & McLellan and Jacob J. Kaplan, all of Boston, Mass., for creditors.

MORTON, District Judge. The specification of objection based on the failure to keep adequate books of account is disposed of by the referee's finding.

The specification of objection charging that money was obtained upon statements in writing that were materially false is, upon the findings of the referee and the inferences to be drawn therefrom, sustained. The learned referee has not found, as I construe his report, that the objecting creditors were merely betting with the bankrupt or his company on the course of prices. He says that:

"It was understood by both parties that these transactions were carried on with the bankrupt as a broker, and as speculative margin accounts, according to the custom of brokers in relation thereto." (Report, p. 4.)

[1, 2] The transactions took place in Massachusetts, and in determining the legal effect of them the decisions of the highest court of this state are, if not controlling, certainly of great weight. The duty of the broker has been stated by the Massachusetts Supreme Judicial Court as follows:

"The broker, to put himself right in such a case as the one now before us, must show that he has under his control, free from the just demands of other customers, and available for delivery to the particular customer whose case is in question, the stocks of which that customer, upon payment, will be entitled to demand delivery." Greene v. Corey, 210 Mass. 536, 548, 97 N. E. 70, 72.

[3] The statements of account rendered by the bankrupt, or with his knowledge and approval, to the objecting creditor, specifically said that there was "on hand" for them stock which the bankrupt or his company did not own and had no contract for delivery of. The learned referee finds that:

"The bankrupt did not in fact have any other stock of these descriptions at that time available, either in possession or by right of any contract, for delivery to the creditor, if payment had been made by the creditor and demand had been made for the stock." (Report, pp. 3, 4.)

After these statements had been made to the creditor, payments to the bankrupt or his company were made by her. Each customer's account seems to have been treated as an entirety, and not as a series of unrelated purchases or sales of different stocks. Payments made subsequent to the statements must, I think, be regarded as having been procured, in part, at least, by the showing of stock on hand for the customer. This fact is not categorically stated by the learned referee. He says, however:

"The objecting creditors made payments to the bankrupt to be credited on the account, believing that the bankrupt was carrying on margin for them, respectively, the shares of stock recited in the last monthly statement of accounts as being on hand." (Report, p. 2.)

The creditor's belief that the bankrupt had the stocks on hand was undoubtedly one of the inducements to further payments by the creditor.

It does not appear that the bankrupt understood that the statement that stocks were on hand was false. But he knew what the facts were, and he knew what was being represented to the customers; and he cannot escape responsibility for what was said upon the ground that he did not realize the legal effect of the language used. Nor does the fact, if it be so, that the bankrupt's intention was to buy and deliver shares, if the customer should call for them and pay the balance due, save the statement that shares were on hand from being false.

The false statement, in order to bar discharge, must have been made for the purpose of obtaining money or credits. The creditor's stocks were being carried on margin. If it became necessary to increase the margin, further payments might be made to the bankrupt or his company by her. In doing so, she would act, as both parties understood, in reliance on the statement. This was one of the reasons why it was made by the bankrupt or his company. It is not necessary that the sole purpose of the statement should have been to obtain money or credits. If that be one purpose, and the statement be knowingly false, it is sufficient to bar a discharge.

Application for discharge refused.

TOBY et al. v. SCRANTON RY. CO.

(District Court, M. D. Pennsylvania. May Term, 1917.)

No. 905.

1. STREET RAILROADS ⟸112(2)—NEGLIGENCE—RES IPSA LOQUITUR—FALL OF TROLLEY POLE.
The doctrine of res ipsa loquitur applies, where the trolley pole of a street car in use falls, striking a pedestrian; such an accident not happening in the ordinary course of events, in the absence of negligence in its construction, inspection, or use.

2. COURTS ⟸365—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
In the absence of uniform recognized decisions by the state court governing the rights and conduct of persons regarding the matter under consideration, the federal court may regard with equal respect the decisions of courts of other states.

At Law. Action by Edith Toby and others against the Scranton Railway Company. On motion to quash statement. Motion denied.

Willard M. Bunnell, R. L. Levy, and H. W. Mumford, all of Scranton, Pa., for plaintiffs.

Warren, Knapp, O'Malley & Hill, of Scranton, Pa., for defendant.

WITMER, District Judge. This is a motion to quash plaintiffs' statement. The statement alleges that, while the plaintiff was crossing North Washington avenue, in the city of Scranton, Pa., a trolley pole of the defendant's car, by reason of the negligence of the defendant company, fell from the roof of said car, and in falling struck the plaintiff upon her head, causing severe injuries.

[1] The plaintiff rests her case upon the alleged falling of the trolley pole, insisting that it raises a presumption of negligence on the part of the defendant, entitling her to recovery, to which the defendant takes exception. The motion implies answer of the question whether the maxim of res ipsa loquitur applies to the case as it is made to appear from the plaintiffs' statement. This doctrine applies only to cases of accident arising under the most exceptional circumstances. Minn. & St. L. R. R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995.

Judged by the limitation laid down in Wigmore on Evidence, vol. 4, § 2509, as applied by the court in D. & H. Co. v. Dix, 188 Fed. 901, 110 C. C. A. 535, it would appear that the case falls within this rule. No injury is to be expected from the operation of a trolley pole, unless from a careless construction, inspection, or user. The breaking of the trolley pole does not happen in the ordinary course of events, unless there is some negligence, either in its construction or in the management of it. The inspection and user of the instrument occasioning the injury at the time of the accident was in the defendant, and, it being alleged that the plaintiff was without fault, the defendant will be held to explain.

[2] I am fully aware of the contrary conclusion reached in Zercher v. Phila. Rapid Transit Co., 50 Pa. Super. Ct. 324, in which the matter

was squarely decided. Having, however, carefully considered the expressions of our own state Supreme Court on kindred subjects, including also the conclusion reached in Campbell v. Consolidated Traction Co., 201 Pa. 167, 50 Atl. 829, where it was held that proof of the fall of the trolley wheel and the drop of the car while ascending a grade, to the injury of a vehicle on the street, gave rise to the presumption of negligence, and made it incumbent on the defendant to show due care had been used, I am not free from doubt whether this case could not be distinguished from the tenets of the Supreme Court, were it of any importance here. As was said by Judge Gray, speaking for the Court of Appeals of this circuit, in Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367, the court below—

"was not bound by the decision of the state court in such a case, although judicial comity might require it to bow to a line of decisions so uniform and well settled, and extending through so long a time, as to establish a rule of conduct which 'it would be wrong to disturb.'"

Such uniform recognized decisions governing the rights and conduct of persons regarding the matter under consideration are here wanting, and the court is at liberty to regard with equal respect the decisions of courts of other states. In a well-considered opinion, reviewing at considerable length the line of cases falling within the maxim "res ipsa loquitur," the Supreme Court of Ohio, in Cincinnati Traction Co. v. Holzenkamp, 74 Ohio St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 800, 113 Am. St. Rep. 980, reached the conclusion that proof of the falling of a trolley pole from an electric car, upon a person where he had a right to be, raised the presumption of negligence on the part of the traction company, and unless rebutted, the party injured is entitled to recover. The principle upon which this conclusion is founded was fairly stated and quoted with approval by the court, as it appears in Shearman & Redfield on Negligence (5th Ed.) § 59:

"Proof of an injury, occurring as the proximate result of an act of the defendant, which would not usually, if done with due care, have injured any one, is enough to make out a presumption of negligence. When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The plaintiffs' statement sufficiently states a cause of action, and defendant's motion is therefore denied.

In re COX-RACKLEY CO.

(District Court, E. D. North Carolina. August 21, 1917.)

BANKRUPTCY ⊂=288(2)—ACTION BY TRUSTEE—SUMMARY PROCEEDINGS.

Under Bankruptcy Act July 1, 1898, c. 541, § 2(7), 30 Stat. 545 (Comp. St. 1916, § 9586), authorizing the bankruptcy courts to cause the estates of bankrupts to be collected, reduced to money, and to determine controversies in relation thereto, and section 23b (section 9607), providing that suits by the trustee shall only be brought in the courts where the bankrupt might have brought them, unless by consent of the proposed defendants, except suits for the recovery of property under certain sections, where before the filing of a petition in bankruptcy property had been levied on under executions, and after the filing of the petition, no injunction having been obtained or receiver appointed, the deputy sheriff sold the property under the executions, and paid the proceeds to the clerk of the court, who paid a part thereof to the attorneys for the judgment creditors, and such attorneys paid such proceeds to the judgment creditors before the adjudication in bankruptcy, and the deputy sheriff and the attorneys therefore had no property of the bankrupts, or anything representing the property of the bankrupts, in their control on the date of the adjudication, the bankruptcy court could not entertain a summary proceeding by the trustee to require them to pay over and deliver the funds of the bankrupt coming into their possession or under their control after the filing of the petition.

In Bankruptcy. In the matter of the Cox-Rackley Company, bankrupt. On petition for review of an order of the referee dismissing a summary proceeding by the trustee. Order affirmed.

Russell M. Robinson, of Goldsboro, N. C., for trustee.

Langston, Allen & Taylor, of Goldsboro, N. C., and Murray Allen, of Raleigh, N. C., for respondents.

CONNOR, District Judge. The referee's certificate discloses the following case:

Prior to February 12, 1917, respondent Homer Brock recovered a judgment for the sum of $28.90 against Cox-Rackley Company. Respondents Langston, Allen & Taylor, attorneys at law, representing certain nonresident creditors, on or about the same date, recovered several judgments against said Cox-Rackley Company, aggregating the sum of $1,428.74. Executions were issued upon all of said judgments, returnable to the superior court of Wayne county, and placed in the hands of respondent D. G. Rhodes, deputy sheriff of said county, who immediately levied upon the stock of goods of Cox-Rackley Company, located in the town of Mt. Olive, in said county, being the place at which said corporation was engaged in conducting a general merchandise business. He advertised the goods for sale pursuant to the terms of the executions, to take place February 26, 1917.

On February 23, 1917, certain creditors of Cox-Rackley Company filed, in the office of the clerk of this court, at Raleigh, a petition in involuntary bankruptcy against said corporation, alleging insolvency and the recovery of said judgments and levy of the executions thereupon as acts of bankruptcy. A subpœna was duly issued, and, together

with a copy of the petition, delivered to the United States marshal, returnable March 10, 1917. It appears that the deputy marshal, to whom the subpœna and petition were delivered for service, was unable to find either of the officers of the corporation until some day subsequent to February 26, 1917. No injunction, or other order, was asked for, or issued, restraining the sale of the goods, nor was any application made for the appointment of a receiver. On February 26, 1917, the deputy marshal went to Mt. Olive, and, before the sale took place, as advertised, under the executions, delivered a copy thereof to respondent D. G. Rhodes, who, pursuant to the advice of his attorney, proceeded to sell the goods and delivered them to the purchaser. He immediately paid the amount received from the purchaser, $4,800, into the office of the clerk of the superior court of Wayne county, as directed by the terms of the writs of execution in his hands, and made due return of his action in the premises, receiving from the clerk a check for $47.41, the amount of his cost and commissions. The clerk gave to respondent Homer Brock his check for $28, the amount due on the judgment recovered by him against the corporation. He gave to respondents Langston, Allen & Taylor, attorneys, a check for the amount due on the judgment recovered by them for their clients. He gave to J. R. Hood, attorney for the Cox-Rackley Company, a check for $3,294.95, being the balance remaining in his hands. This amount was later paid to the trustee, and is not involved in this controversy.

The referee does not find, nor is there evidence sufficient to fix the the clerk with, notice of the filing of the petition in bankruptcy. There was some conversation in his office between the attorneys in regard to the matter, but nothing was said to the clerk calculated to put him upon notice; he proceeded in strict accordance with his official duty.

Respondents Langston, Allen & Taylor collected the check given to them by the clerk and held the proceeds about a week, during which time no demand was made on them to retain the money, nor was any action taken towards securing an injunction or receiver. They deducted commissions and remitted the amounts due their several clients. The referee finds that respondents Langston, Allen & Taylor and Mr. Dannenberg and D. G. Rhodes had actual knowledge that an involuntary petition in bankruptcy had been filed against Cox-Rackley Company before the sale of the goods. The knowledge of Rhodes appears to be based upon the delivery to him by the deputy marshal of the subpœna and the petition. He further finds that respondents Langston, Allen & Taylor and Dannenberg, attorneys and agents of the creditors, other than Brock, had reasonable cause to believe that Cox-Rackley Company was insolvent before the judgments were obtained, or suits were brought against said corporation. There is no evidence, or finding by the referee, in regard to knowledge or reasonable cause to believe on the part of respondent Homer Brock respecting the insolvency of Cox-Rackley Company.

On March 10, 1917, Cox-Rackley Company was adjudged bankrupt, and W. A. Dees duly elected and qualified as trustee. On April 3, 1917, he filed his petition before the referee, setting out substantially the

foregoing facts, asking that notice issue to respondents to show cause why they should not be ordered to—

"pay over and deliver the funds and assets of the estate of said Cox-Rackley Company, which came into their possession, or under their control, as above set forth, and for an order requiring and admonishing the judgment creditors hereinbefore mentioned and each of them, to show cause, if any they have or know, and each of them, respectively, why they should not pay over and deliver to W. A. Dees, trustee, the amount of funds and assets of the said bankrupt turned over to them on account of their respective judgments hereinbefore mentioned."

The referee issued notice to respondents Langston, Allen & Taylor, D. G. Rhodes, and Homer Brock, returnable on April 14, 1917, when they appeared and challenged the jurisdiction of the referee to make any order or render any judgment in a summary proceeding against them. After hearing the evidence and argument, the referee found the facts as certified, and found as a conclusion of law:

"That respondents are not guilty of any contempt and that this proceeding is not the proper remedy."

The trustee filed his petition for review in accordance with the provisions of the statute, general orders, etc. The proceeding, so far as it relates to the creditors, who received, and so far as appears retain, the proceeds of the sale, other than Homer Brock, appears to have been abandoned. The question presented upon the record, and argued by counsel, is directed to the jurisdiction or power of the court, by the summary method adopted by the trustee, to compel respondents, or either of them, to pay over the proceeds of the sale of the goods which came into, and before the filing of this petition passed out of, their possession and control.

It is conceded that respondents D. G. Rhodes and Langston, Allen & Taylor did not have in their possession, or under their control, any property or money, or anything representing property or money, of the bankrupt, on March 10, 1917, the date of the adjudication, nor on April 3, 1917, the day upon which this proceeding was instituted. Neither the bankrupt, nor this court, nor either of its officers, had in their possession, or under their control, at the date of the filing of the petition in bankruptcy, nor subsequent thereto, any goods, property. or money, the proceeds of the sale of, or representing, any such property at the time of, or subsequent to, the filing of the petition. This fact is not determinative of the rights or remedies of the trustee, but it is essential that it be kept in view for the purpose of discussing the question of procedure. The respondent D. G. Rhodes, in strict obedience to the terms of the writs of execution issued from the state court having jurisdiction in the premises had, prior to the filing of the petition in bankruptcy, levied upon and taken into his possession the property of the defendant. For the purpose of executing the writ, the title to the property of the corporation was thus vested in him. He was proceeding, as was his duty, to sell the property for the purpose of satisfying the judgments, when the petition in bankruptcy was filed.

Counsel for the trustee strongly insists that, upon the facts certified by the referee, and conceded by the respondents, the courts may, by a

summary proceeding order, and by appropriate proceedings compel, respondents to pay over to the trustee the proceeds of the sale of the goods. Of course, upon the finding that neither of them had such proceeds in their custody, or under their control, either at the time of the adjudication or since that date, the logical result of his contention leads to the further conclusion that, upon their failure to do so, they may be attached for contempt. Unless this be true, the court is invited to do a vain thing, because it is manifest that they have not the ability to comply with the order which the court is asked to make. It is therefore necessary, before proceeding further in the discussion, to examine and endeavor to fix the extent of the power of the court to entertain this proceeding.

The power vested in the court of bankruptcy to entertain the petition of the trustee and grant the relief, it is alleged, is found in section 2 (7) of the act:

"To cause the estates of bankrupts to be collected, reduced to money, * * * and determine controversies in relation thereto." Comp. St. 1916, § 9586.

This section, in connection with the provisions of section 23b, came under discussion in Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. In White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, it was held:

"That the * * * court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody."

This language was used in response to the specific question submitted by the Circuit Court. In Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, the property, which had been transferred by a general assignment for the benefit of creditors nine days before the adjudication, was in the possession of the purchaser at the sale made by the assignee. In a summary proceeding, the purchaser consenting to the form of procedure, the summary proceeding was sustained. In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, it appearing that the defendant held money "as the agent of the bankrupt, and without any claim of adverse interest in himself," the power of the bankrupt court to order its payment to the trustee of the bankrupt was sustained. In that case it appeared that E. B. Nugent was adjudged bankrupt March 23, 1900, upon the petition of his creditors filed February 19, 1900. On February 9, 1900, he delivered to his son, W. T. Nugent, $4,133.45 to hold as his agent. On February 14, 1900, he delivered to his said son a check for $12,000, the proceeds of which, at the time of the adjudication and of the institution of the proceeding, remained in his hands as agent of the bankrupt. The referee found that the respondent had the money in his hands as agent or bailee only. He was ordered to pay it over to the trustee, and upon refusal to do so was attached for contempt. The order was affirmed. It will be observed that in each of these cases the property, or money, was in the possession, and under the control, of the respondents.

In Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, it appears that certain persons made an assignment for the benefit of their creditors to one Comingor; that he proceeded to execute the trust, selling the property and disbursing the larger portion of the fund, reserving his commissions. Within four months from the date of the assignment, the assignors were adjudged bankrupt, and the Louisville Trust Company appointed receiver. After some litigation in the state courts, not affecting the question of jurisdiction, the referee made an order requiring Comingor and his counsel to appear and show cause why they should not pay over to the receiver the amount of his commissions and fees received by his counsel. They challenged the power of the referee to entertain the summary proceedings, and respondent showed that he had retained $3,398.90 of the proceeds of the sale of the property assigned to him on account of his commissions before any bankruptcy proceedings were instituted and had without any order of the court paid his counsel $3,200. The referee held the response insufficient and made the rule absolute. Upon petition for review, the order of the referee was affirmed. This was reversed by the Circuit Court of Appeals, and this judgment affirmed by the Supreme Court.

The next case, in order of time, is Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. In view of the weight attached to this decision by counsel for the trustee to sustain this proceeding, it will be well to state concisely the facts: Petitioner, on March 6, 1899, recovered judgment against one Kenney for a large amount. Execution was issued on the judgment and levied on his property and sale made thereunder, March 15, 1899. Shortly after the levy of the execution one Abbett sued out a writ of attachment against Kenney and caused it to be levied on the same stock, charging that the judgment against Kenney was fraudulent. Abbett commenced, in aid of his attachment, an injunction suit for the purpose of preventing the further enforcement of the judgment, and obtained a temporary order restraining the sheriff from paying to petitioner the money derived from the sale of Kenney's property. The restraining order was vacated April 13, 1899. On the same day, and before the sheriff had returned the execution, or paid the money collected on it, a petition in involuntary bankruptcy against Kenney was filed in the District Court, and an order made by the District Judge restraining the sheriff from paying the money to Clarke, the execution creditor. Kenney was thereafter adjudged bankrupt, and the plaintiff appointed trustee. The judge thereupon made an order directing the sheriff to pay the money in his hands derived from the sale of the property of Kenney to the trustee. It was held that, when Kenney was adjudged bankrupt, the lien obtained by the levy of the execution was rendered null and void, and the property levied upon discharged; that the money received by the sheriff took the place of the property. To the contention that, upon the sale, the money became the property of the creditor, and not of the defendant in execution, it is said:

"The writ of execution had not been fully executed. Its command to the sheriff was to seize the property of the judgment debtor, sell it, and pay the

proceeds over to the creditor. The time within which that was to be done had not elapsed, and the execution was still in his hands, not fully executed. The rights of the creditor were still subject to interception. * * * A different question might have arisen if the writ had been fully executed by payment to the execution creditor."

The learned justice is careful to say that the decision of the question is not before the court, "and may depend on many other considerations." The opinion carefully restricts the decision to the facts apparent upon the record.

In Whitney v. Wennam, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, the trustee filed a bill in equity against defendants, who had the possession of property belonging to the bankrupt and the proceeds of property which had been sold. The jurisdiction of the court to entertain the bill was sustained. In First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, in the fourth headnote it is said:

"The bankruptcy court is without jurisdiction to determine adverse claims to property not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien is asserted."

In Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, an order in a summary proceeding was sustained, directing the delivery to the trustee of the books and records of a bankrupt corporation. In Murphy v. Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, the property of the bankrupt, being in the possession of the receiver of the court, was seized by a sheriff, pursuant to a writ of replevin issuing from the state court against the bankrupt. Mr. Justice Moody, discussing the question presented upon the claim of the trustee, said:

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive * * * of all other courts, although otherwise the controversy would be cognizable in them. * * * When the court of bankruptcy, through the acts of its officers, such as referees, receivers, or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and * * * its possession cannot be disturbed by the process of another court." Hebert v. Crawford, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800.

It will be observed that, in each of the cases cited, the court, sustaining summary proceedings by the bankrupt court, either the respondent had in his possession, at the time of the adjudication, the property claimed by the trustee or its proceeds, or had interfered with the possession of some officer of the bankrupt court. In none of them had the property, or its proceeds, passed out of the possession or beyond the control of respondents, before the adjudication, or the institution of the summary proceeding; they had the ability to comply with the order to deliver the property or pay over the money received by them at the time it was made. In Re Rathman, 183 Fed. 913, 106

C. C. A. 253 (C. C. A. 8th Cir.), Judge Sanborn reviews all of the decisions, and discusses exhaustively the cases in which a summary proceeding may be resorted to. In that case the bankrupt, more than four months prior to filing the petition, executed mortgages to the respondent on real and personal property to secure his promissory note. Thereafter, and within four months of the filing of the petition, he executed a general assignment to another person, with the approval of respondent, transferring and assigning the same property covered by the mortgage. The assignee took possession of the property; he sold a part of the personal property, a stock of merchandise; and that portion which he did not sell he delivered to the trustee in bankruptcy. Between the date of the assignment and the sale, the petition for adjudication of the mortgagor and assignor was filed. A foreclosure proceeding was instituted in the state court, and the real estate and a portion of the personal property brought to sale and purchased by respondent. The trustee filed a petition before the referee, and he issued an order to respondent to show cause why the chattel mortgage and the certificate of sale of the real and personal property should not be avoided, and why he should not pay to the trustee the value of the mortgaged personal property that he bought at the foreclosure sale. The trustee also asked for orders touching the sale of the real estate, but for the purposes of this case this is immaterial. The respondent challenged the jurisdiction of the referee. The judge states the question raised by the record, saying that the trustee did not ask the possession, and the respondent was not called upon to show cause why he should not deliver the possession, of any property to the trustee:

"What the trustee asked by the petition was the final adjudication of (1) his claim to recover of the respondent, for the latter's alleged conversion of the personal property which he bought at the foreclosure sale thereof, the legal damages in conversion, the value of the property converted, at the time of its conversion."

This language describes the character of the claim made by the trustee here, the only difference being that there the respondent had in his possession the property, and here respondents have neither the property nor its proceeds. The judge, after reviewing the decisions of the Supreme Court, says:

"How, then, may the trustee escape from the decisions that have been cited, from the declarations of the Supreme Court that the jurisdiction of the bankruptcy court summarily to determine claims to liens upon, and title to, property claimed as a part of the bankrupt, arises out of its actual possession of the property, * * * and is exclusive of all other courts, because the actual possession draws to it the legal custody of the property, although otherwise such claims would be cognizable by other courts"—citing a number of cases.

The judge proceeds to state the contention of the trustee that the filing of the petition in bankruptcy, followed by the adjudication, without more, gave the bankruptcy court constructive possession of the property and vested it with jurisdiction to determine all claims of title to liens upon it, although the actual possession of it was never acquired by the bankruptcy court. He discusses the contentions seriatim, in the light of the decided cases. In regard to the claim, made here, that

"the filing of the petition is a caveat to all the world, and in effect an attachment and injunction," he says:

"But the later decisions of the Supreme Court adjudge that this statement applies only to parties who have no substantial claim of a lien upon or title to the property of the bankrupt, and that, against those who have such claims of existing liens or titles when the petition in bankruptcy is filed, that filing is neither a caveat nor an attachment, that it creates no lien, and that until the bankruptcy court, by some act of one of its officers, takes actual possession of the property, or makes such claimants parties to the proceeding by some order or process, or notice of the proceeding, comes to them, their liens, titles, and remedies are unaffected thereby, and they are strangers to the proceeding" —citing a number of decided cases.

Conceding that the bankruptcy court may, and upon application would, upon the filing of the petition, have issued an injunction restraining the sheriff from selling, and, if necessary, have appointed a receiver to take possession of the property, and thereby brought it within its jurisdiction, the court was not asked to do either, although counsel for petitioning creditors well knew that it was advertised to be sold under the executions on February 26, 1917. Judge Sanborn states forcibly and clearly the conclusion to which the contention would result—that, if correct in all cases, it excludes the jurisdiction of every other court, and gives the bankruptcy court the power to determine, summarily, all claims to liens upon, or interests in, the property in such custody:

"But this theory flies in the face of the settled rule, repeatedly announced by the Supreme Court, that the actual possession by the bankruptcy court is the indispensable condition of its exclusive and of its summary jurisdiction"—quoting the language used by the court in Bardes v. Bank, supra.

The learned judge thus concludes his examination and review of the decided cases:

"Here is the touchstone of the exclusive and of the summary jurisdiction of the bankruptcy court to determine the merits of adverse claims to liens upon, and titles to, property claimed to belong to the bankrupt. It is the taking possession of the property, as the property of the bankrupt, by the act of some officer of the bankruptcy court, such as a referee, a receiver, or a trustee."

The court dismissed the proceeding upon the ground that the court had never, through its officers, taken possession of the property, and upon the further ground that respondent was an adverse claimant. In Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897, Judge Sanborn carefully stated the grounds upon which the summary jurisdiction rested, in strict accordance with his opinion in the Rathman Case. In Stone v. Mark, 227 Fed. 975, 142 C. C. A. 433, he said that subsequent decisions had not persuaded to any modification of the conclusions reached in the Rathman Case.

A careful examination, with the aid of the well-prepared briefs of counsel, have failed to disclose any case in which a summary proceeding has been sustained, when the respondent had not interfered with the possession of the property after it had come into the possession of the court through its officers, or, as in the Nugent Case, held the property as agent of the bankrupt. In these cases the respondent is a mere bailee or agent of the bankrupt. As pointed out in Clarke v. Larre-

more, supra, Judge Brewer leaves the question open when the sheriff had paid the money over to the creditor, with the significant observation that its decision "would depend upon many other considerations."

De Friece v. Bryant (D. C.) 232 Fed. 233, relied upon by the trustee, was a suit in equity; no question of the summary jurisdiction was involved. The judge said:

"Here the relief sought is not by summary proceeding. It is sought by a plenary or independent suit. This is the only way in which it is obtainable in any court. It is not obtainable anywhere by proceedings of a summary character."

In discussing one phase of the bill, the learned judge asserts the power of the court, in case the trustee has possession of the property, to protect it from interference by appropriate proceedings.

An examination of the facts appearing in the decisions cited by the trustee does not disclose any case in which the respondent has not the property claimed by the trustee, or its proceeds, either in his possession or under his control. In Re Breslauer (D. C.) 121 Fed. 910, it appeared that respondent obtained a judgment against Breslauer within four months of the filing of the petition in bankruptcy, and the sheriff sold the property under execution on August 11, 1902, and, after deducting his commissions, paid over the balance to the respondent. "The money paid over by the sheriff to the bank [respondent] was deposited by itself, and a certificate * * * issued therefor in the name of the bank. The fund has been kept separate." Judge Ray held that, upon the adjudication in bankruptcy, the judgment became null and void, as did the levy and sale thereunder, and the property itself, or its proceeds, may be followed and reclaimed by the trustee, in whom the title thereto vested on the 12th day of August, 1902," that being the date of the adjudication, and ordered the money paid over to the trustee. It is not necessary, for the purpose of this discussion, to say more than that the fact that the money, the proceeds of the sale, was "kept separate," and its delivery, or payment over to the trustee, within the power of the respondent, clearly, and in a most essential respect, distinguishes the case from that disclosed in this record.

Attention is called to the citation of the case by Judge Lambdin, in Dreyer v. Kicklighter (D. C.) 228 Fed. 744. That was a bill in equity to set aside a sale made by a sheriff, upon the ground that it was not properly conducted and that defendant, purchaser, was not a bona fide purchaser. The sale was set aside upon terms. It appeared that the money derived from the sale had been paid over to the plaintiff in the execution. While in no respect relevant to the questions in issue and decided, the judge, referring to the fact that the money had been paid to the plaintiff in the execution, said:

"The trustee, however, is entitled to collect this amount back as a voidable preference from the plaintiff in fi. fa."—to whom the constable paid over the money, citing the Bresslauer and Larremore Cases, supra.

The proposition advanced here is not presented in that case, nor was it in either of the cases cited, and was expressly excluded in the Larremore Case. In Re Kenney (D. C.) 95 Fed. 427, the sheriff sold the property of the bankrupt under an execution issued upon a judgment

rendered within a month before the petition was filed. A stay was obtained against the payment of the money to the plaintiff. Clarke v. Larremore, supra, was an appeal from the order of Judge Brown. See, also, In re Kenney (D. C.) 97 Fed. 554. This procedure was open to petitioning creditors here.

The learned counsel for trustee insists that the filing of the petition places all of the property of the bankrupt in custodia legis, and that, therefore, the sale by the sheriff was a disturbance of, an interference with, the possession of the court, and therefore a contempt of such court. It is undoubtedly true that the Supreme Court has used the language quoted in a number of decisions, as it has frequently said that filing the petition, from the time it was filed in the clerk's office, operated as an attachment upon the property of the bankrupt—an injunction against its transfer. Following this statement, counsel say that the deputy sheriff, before making the sale, was notified of the filing of the petition, and that by his further action he and the other respondents particeps criminis have made themselves liable to an attachment for contempt, of which they can purge themselves only by paying the proceeds over to the trustee; that if, by paying the money over to the plaintiffs in the execution, they have rendered themselves unable to deliver the money received from the sale, they can be discharged only by showing their inability, from any source, to comply with the order of the court. These propositions are entitled to serious consideration. Their adoption, with the logical results, are of grave import to the respondents, and others similarly situated.

While the courts have uniformly held that the filing of the petition in bankruptcy operates as an attachment of the bankrupt property, and that from such time it is in custodia legis, it will be observed that in all of these cases, either, as in Mueller v. Nugent, supra, the property sought to be reached was in the possession of the bankrupt, or the respondent as his agent or bailee, or, as in the Larremore Case, the sheriff, or the trustee, pursued his remedy for its recovery by a plenary suit. In Bank v. Cox, 143 Fed. 91, 74 C. C. A. 285, the trustee brought an action of assumpsit against the attaching creditor, to whom the proceeds of the sale had been paid. Acme Harvester Co. v. Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, was an adversary suit in the state court brought to the Supreme Court upon a writ of error. In Fairbanks Scales Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841, the property in controversy was in the possession of the plaintiff. The controversy involved the question of priority of claim.

Counsel insists that, unless the trustee may, by summary proceedings, enforce his rights, he will be without remedy, or, if compelled to resort to a plenary action, he will be subjected to expense and delay. The argument, while not without force, is addressed to the question of convenience. The answer to it is found in the ample provisions found in the Bankruptcy Act for protecting the property of the bankrupt between the date of filing the petition and the adjudication and election of the trustee. Collier on Bankruptcy (10th Ed.) 36-66, Bryan v. Berkheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; In re Horstein (D. C.) 122 Fed. 266. These remedies are usually—it may be said,

uniformly—resorted to. The fact that a careful examination of the Federal Reports fails to disclose any case in which, upon facts, similar to those disclosed here, a summary proceeding has been instituted, is significant. Upon the "reason of the thing," and upon principle, the objections to the procedure are very strong. Jurisdiction in summary proceedings, being of statutory authority, and based upon necessity to prevent threatened loss to the rightful owners of property, or defiant disobedience to the orders and decrees of courts, should not be enlarged by construction or implication. Ample procedure is prescribed by the Bankruptcy Act for the protection of the rights of the trustee. If the proceeding may be sustained, the respondent deputy sheriff is subjected to imprisonment as for a contempt of the court for executing the lawful process of the state court, in the absence of any injunction or other order from the federal court. He consulted his attorney, not the attorneys of the plaintiffs in the execution, sold the property, and promptly paid the money into the clerk's office, as he was directed by the writs to do. One of the attorneys for the petitioning creditors was present when the money was paid to the clerk. He gave no notice of objection to the course pursued. The proceeding against this respondent was properly dismissed.

The respondents Langston, Allen & Taylor, in strict conformity to their professional duty, obtained judgment and caused executions to issue thereon, before any proceeding in bankruptcy was instituted. They were under no obligation to suspend the enforcement of the executions until other creditors decided whether they would file a petition against the debtor. Certainly, in receiving the money from the clerk for their clients, they were guilty of no violation of the Bankruptcy Law. It is conceded that they held the money for several days, during which the attorneys for petitioning creditors and the attorney for Cox-Rackley Company were debating whether the petition should not be abandoned. They were, it appears, considering a proposition of compromise, to which respondents were not parties. No application was made for an injunction, or the appointment of a receiver, nor were the respondents requested to retain the money. As was their duty, and without any purpose of committing a contempt of the court, they remitted the amount, less their commissions, to their clients. Whether the sheriff, or the other respondents, are liable in a plenary action to the trustee for the value of the property sold, or for its proceeds as for a conversion, is not before the court. The decision of this question "may depend upon many other considerations."

The sole question presented and decided is that, upon the facts certified by the referee, the court is without jurisdiction to entertain the summary proceeding.

THE ADAH.

(District Court, E. D. New York. July 31, 1917.)

1. SHIPPING ⟸121(2)—SINKING OF SCOW—SEAWORTHINESS.
A deck scow, which sinks while being loaded by reason of ordinary leaking through open seams, although she is listed, so that one rail is even with the water, is unseaworthy, and may be liable for the cargo lost.

2. SHIPPING ⟸62—CHARTER OF LIGHTER—RESPONSIBILITY FOR MASTER.
A charter of a scow with her captain for lighterage purposes is not a demise, in a complete sense of making the captain the servant of the charterer for all purposes.

3. SHIPPING ⟸58(2)—CAPSIZING OF LIGHTER—SEAWORTHINESS.
The capsizing of a deck scow, just after the completion of her loading from a steamship, *held*, on the evidence, not due to leaky condition or unseaworthiness in any other respect for which the owner was liable.

4. SHIPPING ⟸123—CAPSIZING OF LIGHTER—NEGLIGENT LOADING.
The capsizing of a lighter and loss of her cargo *held* due to the negligence of the contracting stevedore in failing to properly trim the cargo.

5. SHIPPING ⟸123—STOWING CARGO—DUTY OF STEVEDORE.
Stevedore is liable to deposit cargo safely, even if not under contract to trim.

6. SHIPPING ⟸209(3)—LIMITATION OF LIABILITY.
The respondents may so raise affirmative issues as to try the issues between each other in a liability limitation, which would otherwise not raise the question of negligence.

In Admiralty. Petition of Charles A. Fox, as owner of the deck scow Adah, for limitation of liability. Decree for petitioner.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for petitioner.

Burlingham, Montgomery & Beecher, of New York City (B. W. Wells, of New York City, of counsel), for the Uller.

Alexander & Ash, of New York City, for Jacobus & Grauwiller.

Harrington, Bigham & Englar, of New York City, for Beer, Sondheimer & Co., Inc.

Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey and Robert S. Erskine, both of New York City, of counsel), for Brady & Goie, Inc.

CHATFIELD, District Judge. The deck scow Adah capsized, with a cargo of copper concentrates, on the morning of April 24, 1915. By petition to limit liability, the owner of the Adah has brought all the parties concerned into court, and the various issues have been completely tried. The relations of the various parties and the determination of responsibility will be reserved until the cause of the capsizing and the primary responsibility therefor have been considered.

The Adah was a new deck scow, 112 feet long by 33 feet beam, and having an outside depth amidships of 10 feet. She had been well constructed, of good material, by competent builders, and finished in December, 1914. She lay in the water at a dry dock in Brooklyn, protected by other vessels from exposure to storm and wind, until about the 10th of April, 1915, when she was chartered by Jacobus & Grau-

willer to carry cargoes of copper concentrates from steamships which were to dock at Freeman street, Greenpoint. From this point the ore was to be taken to the reduction plant at Chrome, N. J. This ore is of a consistency resembling moist clay, or sticky, damp, hard mud. It is extremely heavy and sluggish in movement, being so solid as to be only plastic, and is brought from Cuba in the holds of cargo vessels, from which it is removed in buckets slung overboard at the end of a derrick boom.

The Adah was being loaded alongside the steamship Uller, which had much higher sides than the lighter, even when the loading was started. The derrick was lashed firmly in place, and the stevedores moved or caused the scow to be moved along the side of the vessel, in order to bring the place where the load from the bucket was to be dumped under the fall. The testimony is that this bucket could be swung some 5 feet from one side to the other; but the loads were dumped so as to continually create a ridge about one foot to port of amidships. The Adah was fastened to the vessel by two spring lines and two breast lines, the breast lines running to the starboard or outer side of the scow; and some two hours before the loading was finished the Adah had a list to port, or toward the vessel, sufficient to bring her rail down to the surface of the water.

Cargo was placed on during those two hours at the rate of about 25 tons per hour. According to the figures of the Adah, obtained by subtracting the amount delivered from the amount tabulated and billed as going into the Uller, the Adah then had on board a load of 745 long tons. Figuring from actual displacement, the Adah was able to carry, before her decks would be awash, an amount of 770 odd tons, and if, as some of the witnesses testify, the port rail was even with the water amidships, while the starboard rail was 2 feet or 2½ feet out of water, the load, if the boat were floating freely in that position, would amount to about 650 tons.

It is thus certain that the Adah must have been supported by something besides her own displacement, if she was carrying 745 tons and displacing but 600-odd tons of water. Further, it has been proven beyond dispute that a load of 650 tons would not render the Adah unstable, even if so placed as to bring one rail, at amidships, even with the surface of the water. In fact, the load of 745 tons, with one rail even with the water, would not put the Adah in unstable equilibrium. There is no dispute about the foregoing propositions, nor is there any great dispute as to the movements of the boat herself, but the principal contradictions occur with respect to the actions and statements of the witnesses at the time.

The captain of the Adah testifies that he objected to the way the Adah was being loaded, that the stevedore paid no attention to his objections, that he thought the list dangerous, and ultimately went on board another barge to avoid accident. The stevedores used a steel cable fastened to a winch upon the vessel to start the Adah forward when she was fully loaded and when the lines were cast off. This was the method in which the scow had been moved previously. The tide at the time was running to the north under the dock alongside which the

Uller was moored; the steamship being bow in and having her starboard side to the wharf. The tide was thus running through the piling of the wharf, past the bow of the steamer, and also under the steamer, before reaching the Adah, while she was lying alongside. One of her lines was carried to the pier ahead of the steamer, and then around the bulkhead, so as to draw the Adah a little upstream and to shore after she was started by the cable from the steamer. As she moved out ahead of the steamer, and was caught by the tide sweeping past the bow of the steamer, she began to go under at the stern port corner.

Evidently the shifting of her load and the effect of water running in over the side capsized her almost immediately, for in so doing she turned bottom up; but, while turning, her starboard rail went high enough out of water to land up over the rail on the deck of the Uller, and the starboard rail was evidently torn off as the boat slid down into the water. One of the witnesses testifies that she rocked both ways; but, if so, it does not change the testimony as to the cause of the occurrence, and all of the other witnesses agree that, when the boat started to turn to port, she continued until she went clear over.

Much testimony has been introduced as to whether a boat of this age could have become unseaworthy through deterioration of the caulking in her seams above the water line. The testimony is all to the effect that the Adah had not been leaking up to a very short time before the accident. Her captain testifies that he tried with a pump in the stern port corner a very short time before the accident and could get no water. If leaking occurred, it must have been because of opening of the seams above the ordinary low-water line, under the influence of the heavy deck load and the list to port.

[1] A seaworthy boat is intended to undergo such loads and lists, and if the accident occurred from ordinary leaking through open seams, the Adah would be responsible herself for the results of the accident. U. S. Metals Refining Co. v. Jacobus, 205 Fed. 896, 124 C. C. A. 209; The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644. The question of right to limit liability would then arise. The Loyal, 204 Fed. 930, 123 C. C. A. 252; Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349. If this defense to the present action had been insisted upon in limine, the issues as to fault might have been postponed until its determination. But all the parties have joined in the hearing on the merits, and, if the fault be not laid upon the Adah, the right to limit liability is of no importance.

A number of witnesses have testified that no such accident could happen unless water were present in the hold of the vessel, and no explanation of the presence of water has been suggested, except from possible leaking, or from the situation presented by the list, and the consequent handling of the boat in removing her from the side of the Uller. Those witnesses who testify that such an accident could not happen from overloading, and that a boat could not turn turtle without the presence of water in her hold, draw the conclusion that the boat must have leaked, as they exclude in their premises any other source for the water which they conclude must have been present.

The owner of the Adah seeks to deny the presence of water from leaking, and also denies the presence of any water in the hold, unless it came there after the deckload had brought the port rail to the surface of the water, and after the captain had sounded with his pump, but half an hour before the accident.

The weight of the load of concentrates is, of course, inclusive of any additional water absorbed by the concentrates, if the port rail was below the surface to a sufficient extent to allow the water to reach the ore. In this way some additional weight could have been added to the cargo before the ore became wet enough to slide. The testimony of all the witnesses is to the effect that the port stern corner of the Adah was low from the load at the stern, but that the hatchways in the stern deck, which were open, would not be reached by water coming over the rail, until the boat had listed to a point where she would ordinarily dump her cargo. In fact, some of the experts testify that the boat could not list to a sufficient extent to put either stern hatch under water before the cargo would be substantially dumped off. But this cargo was sticky, and would not slide, and the witnesses agree that the boat went on over before the load moved.

A remarkable piece of testimony was given by one of the stevedores, who said that, just as the accident happened, he was called by the captain to come and listen at the rear hatch. He heard water running with a "terrible noise." The sound so alarmed the captain that he went to call the stevedore. The witness, however, stayed on the vessel, which almost immediately turned over, and he had to jump into the water. The evidence shows that the lighter, when it overturned, went up over the side rail of the vessel at such a point that the end of the scow could not have moved much beyond the bow of the vessel, up to that time. The witness, who testifies to the sound of water running in, was looking in the port hatchway in the stern deck. He states that at that time no water was running over the deck, and yet, according to all the witnesses, the vessel already had a heavy list, and, immediately on being moved, settled at the stern so that she was apparently tripped; that is, her stern port corner went under the water, which then poured into the hatchway and caused the overturning.

If, as stated by the experts for the respondents, the load would have dumped before the vessel rolled over, unless water in the hold caused the stern to settle so as to let water in the hatch, it is impossible to conclude that water from leaking was just running aft. The vessel had been down at the stern and listed to port for two hours, and during that time had been pumped, and no water found. Either something happened from the strain caused by the different conditions already described, so as to let in water in large quantity, or the water poured into the hatch. In either way a condition might be created which would have the effect of tripping the vessel and rolling her over before the cargo could dump, so as to allow the boat to come back to an even keel.

While the Adah was resting alongside the vessel in the water, the effect of the breast lines to the outside of the scow would be merely to hold up the outer or starboard side of the lighter, and her displacement would cause her to roll; but, if the port rail did not go under

water, the total displacement by the load, if the boat were free in the water, would still be less than sufficient to cause an overload. The only explanation, which is possible, of sustaining a greater load than would be indicated by the displacement in the water, is that the strain of the lines produced friction against the side of the vessel, and that the port side of the lighter may have caught upon the side of the vessel, so as to hold the scow suspended until the lines were cast off.

Doubt is sought to be thrown upon the strength of these lines to sustain such a weight as would create any appreciable overload. But the actual parting strength of the lines in use cannot be accurately estimated, and in the face of the testimony that the boat had not been making water, and that the deckload was actually sufficient to put the boat below the point where she rested before being moved, no other explanation has been suggested. It will be observed that, if the upper seams of the vessel had opened, so that water came in before the vessel was moved, it would have added weight, so as to cause greater displacement, and would have the effect of causing the scow to settle lower in the water than has been shown by the testimony, before the scow moved, unless even in this case the lines and the contact with the side of the vessel had held her up.

It will be held, therefore, that the evidence does not show the presence of any water in the scow, which would indicate leaking, before she was moved from the side of the vessel. It will also be held that the scow was overturned by the presence of a load which actually weighed more than the scow could carry under the circumstances, and with which she could be safely moved in the manner described, from the side of the vessel and across the swiftly running tide. If water then rushed into the vessel, it must have entered, either from the position in which the port rail was allowed to remain awash, or from the change in the equilibrium which was occasioned by the release of the vessel's support and the sudden movement given her by the wire cable, which started her quickly astern. It is argued that the tide did not run fast, as the boat was not carried to the other side of the slip. Evidently the Adah met some tide as she went by the end of the Uller, and this may have aided in the tripping. But, if not, we have no different problem.

[2] The captain of the scow cannot be held responsible for the existence of the conditions shown, nor the manner in which the vessel was handled thereunder. The owner of the scow is responsible for the care of the scow by his captain, so far as the loading or observation of her carrying capacity depends upon matters peculiarly within his knowledge, and not ascertainable by ordinary observation of the charterers or of the stevedore. The charter is not a demise, in the complete sense of making the captain the servant of the charterer for all purposes. Hastorf v. F. R. Long-W. G. Broadhurst Co., 239 Fed. 852, —— C. C. A. ——. But in this case the captain was in no way negligent, and neither the owner nor the charterer is made liable by his acts.

[3] The owner of the scow has sustained the burden of showing seaworthiness and proving a sufficient explanation of the accident, and upon the whole testimony the respondents have not established un-

seaworthiness or a leaky condition for which the owner is responsible. The matter has passed beyond the stage of presumption. The overturning without explanation might of itself raise a presumption of unseaworthiness or of tenderness. U. S. Metals Refining Co. v. Jacobus, supra; The Kathryn B. Guinan, 176 Fed. 301, 99 C. C. A. 639. But the testimony presented by the owner has more than rebutted such presumption, and has overcome even the evidence offered to show the presence of water in the vessel, for which the owner could be held responsible.

[6] The petition to limit liability should generally, therefore, result in a dismissal of the claims to the fund created and a finding in favor of the petitioner as to his right to limitation. But the various parties have made it necessary to consider their relations to the matter and to each other. Instead of disavowing responsibility and urging seaworthiness of the vessel, the charterers have contested the petition and the right to limit liability, and have sought to pass on the claim which they would naturally deny, as if they were responsible therefor. The Uller has fought the petition, in order to claim damages from the Adah, and thus has in effect excused the stevedores and cargo owners, but does not absolve the charterers. In fact, the steamer and cargo owners have begun actions in admiralty against the stevedores and the charterers, who in turn brought in the owner, and thus caused him to limit liability. But, as has been already stated, in order to contest the petition to limit liability by raising all issues, the entire question has been tried in this case. The parties have all opposed the petitioner as if liable themselves, and have in addition compelled him to prove for them the issues raised in the damage suits.

[4, 5] The scow was chartered by Jacobus & Grauwiller, who furnished her to Beer, Sondheimer & Co. to carry this particular cargo. Beer, Sondheimer & Co. were under contract with the owners of the cargo to transfer this cargo, when received over the side of the vessel, and to deliver it at Chrome, N. J. The vessel was under agreement to furnish certain tackle and power for use of the stevedores, and there is no evidence in the case that there was any negligence on the part of the vessel, or defect in its furnishings, for which the vessel should be held responsible. In making the contract with the stevedores, Beer, Sondheimer & Co. refused to allow an extra charge for trimming the cargo, as the cargo was to be delivered from the buckets in such a way that trimming was thought to be unnecessary. The stevedores, therefore, undertook to do no trimming beyond that of dumping the cargo upon the deck. But such a contract carries with it responsibility to so dump the cargo as to safely load the vessel. The testimony in the case indicates that the lashing of the derrick boom in a fixed position, and the rigging of the boom so that the load was deposited in a ridge to one side of the center, and so as to cause a list, proves a violation of the implied warranties created by the agreement to deliver the load safely upon the deck of the scow in such a manner as to enable the scow to safely receive and carry the amount which should be expected on observation to be a proper load.

The testimony shows that this was the first scow loaded from the vessel, and the first load of this material which these stevedores had handled. The load was of such a nature that it would not roll or fall as far from the line of dumping as would occur with dry material, like gravel or ordinary dirt. The material was plainly heavier and stickier than the ordinary material. For the handling of such material, and for its placing in the proper position, the stevedores were responsible. The captain of the scow protested against the manner of delivery and the resultant position of the load. The stevedores paid no attention to this protest. The stevedores, also, were responsible for the maintenance of the lines from the vessel and the use of those lines in moving the scow from the side of the vessel.

No negligence has been shown on the part of Jacobus & Grauwiller in the carrying out of their contract, and if their refusal to pay for trimming resulted in the creation of conditions which made it unsafe for the stevedores to carry out the contract literally, the remedy would not be a reckless continuance of loading, without regard to consequences. The stevedores, upon observing such a situation, should have discontinued operating under the contract, or should have performed the extra work necessary and settled responsibility therefor with the parties concerned.

Considering the privities involved in the particular contract shown, responsibility must rest primarily upon the stevedores, and secondarily upon Beer, Sondheimer & Co., who hired the stevedores to do the work. As the stevedores appear to have been in all respects independent contractors, to an extent sufficient to cover responsibility for the accident, the damage to the Uller can result only in a claim against the stevedores, and, if they are unable to respond to the same, against Beer, Sondheimer & Co. as surety therefor; but no claim is proven against Jacobus & Grauwiller or the Adah, and hence none against Fox, whose petition to limit should be granted, if liability did exist.

The petitioners may have costs against all the parties, except the Uller. No costs to any other party as against the other respondents.

WHITEHEAD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 4, 1917.)

No. 2942.

1. POST OFFICE ⟸48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—DESCRIBING FRAUD.

Indictment under Pen. Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1916, § 10385), for the use of the mails to defraud, need not state the fraud with the technical details required when swindling or a like crime is the subject of an indictment; a fraudulent design, while essential, being only an element of the crime, and the gist thereof being the use of the mails, though not necessarily with the result of consummating the design.

2. POST OFFICE ⟸48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—NEGATIONS.

The quoted language of the indictment for fraudulent use of the mails, charging that the scheme involved the misleading and deceiving of the person into the belief that he would, after a stated period, become entitled to and receive a loan, "when in truth and in fact" (1) "the loan or reserve fund would not be sufficient to provide said loan for said contract holder in said period of ——— months"; (2) "and that he could not and would not, at the expiration of said time, receive said loan"; or (3) "it was altogether uncertain whether said contract holder would, at the expiration of said period of time, be able to obtain said loan on offering said security"—is intended to and does indicate wherein and how the scheme devised was fraudulent, and satisfactorily supplies a necessary element in the description of the device, and is not open to objection of constituting negations which are negative pregnants, conjunctive negations, and literal negations, and therefore void.

3. POST OFFICE ⟸48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—DE MINIMIS.

The indictment for using the mails to defraud, alleging that the contract holder was fraudulently misled into the belief that the contract provided that he could secure a loan in six months, and negativing such an effect for it, need not allege that he could not get his loan in a greater period, to escape the rule of de minimis.

4. POST OFFICE ⟸48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—QUALITY OF SCHEME.

Ordinarily, at least, an indictment for using the mails to defraud is not subject to demurrer on the ground that the scheme is not apparently adapted to the accomplishment of the crime intended to be committed, but the quality of the scheme is for the jury; and such is the case where the scheme has the appearance of legality, is embellished with the legal phraseology and formality efficacious in concealing consequences and creating confidence, uses language excellently conceived to mean one thing and create the impression that it means something else, and important provisions, expressed in obscure language, are inconspicuously printed in small type on the back of the signed contract.

5. POST OFFICE ⟸48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT—DESCRIBING FRAUD.

The indictment for using the mails to defraud, in describing the fraudulent scheme, need not mention all the auxiliary devices, and so, though the contract used recites that an application is a part of it, the indictment need not set forth the application, which does not change the legal effect of the contract.

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

6. POST OFFICE ⟸48(4)—USING MAILS TO DEFRAUD—INDICTMENT.
There is no conflict between "tenor" and "in substance," in an indictment for fraudulent use of the mails, introducing a contract with the words, "a contract of tenor in substance as follows," but "in substance" modifies "tenor," and indicates that the contract is substantially as set forth.

7. CRIMINAL LAW ⟸1186(4)—HARMLESS ERROR—INDICTMENT—IMPERFECTIONS IN FORM.
Rev. St. § 1025 (Comp. St. 1916, § 1691), providing that an indictment presented in federal court is not to be deemed insufficient because of any defect or imperfection in matter of form only, which shall not tend to the prejudice of defendant, authorizes observance of the dictates of common sense.

8. POST OFFICE ⟸49—USE OF MAILS TO DEFRAUD—CHARACTER OF TRANSACTIONS—EVIDENCE.
The circumstances in evidence on prosecution for use of the mails to defraud, the terms of the contract, the character of the advertising, the conduct of agents of the company, and correspondence between the company and persons misled by the agents *held* sufficient to establish the fraudulent character of the transactions, intended to give the appearance of being in general those of a building and loan association.

9. CRIMINAL LAW ⟸410—EVIDENCE—DECLARATION OF AGENTS—SCOPE OF BUSINESS.
As establishing fraudulent intent on prosecution of a company and its managers for use of the mails to defraud, statements of agents of the company to prospective purchasers of contracts are admissible; the evidence clearly indicating an established course of business, and that the agents were expected to follow up the misleading advertising and contract by suppression of facts and misrepresentations.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Lee A. Whitehead and others were convicted under Pen. Code, § 215, and bring error. Affirmed.

Walker Percy, Augustus Benners, and E. N. Hamill, all of Birmingham, Ala., and Wm. S. Forrest, of Chicago, Ill., for plaintiffs in error.

Oliver D. Street, of Guntersville, Ala., for the United States.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. Lee and F. A. Whitehead, L. F. Harris, and the Standard Home Company were indicted for fraudulent use of the mails. Each of the 42 counts of the indictment charged that the defendants devised a scheme involving "the sale of contracts"; the contracts having pertinent features as follows:

(1) The purchaser paid at the time of the application $6, and was thereafter to pay $6 per month for 80 months. The first $6 were retained by the agent, and the first, second, and third monthly installments by the company; $4.75 of each subsequent monthly installment became a part of what was called a "loan and reserve fund," from which loans and cash settlements were made and certificates paid.

(2) After the payment of 6 monthly installments the owner became "eligible" for a loan "in the order of his application"; but if a loan were made before 12 monthly installments had been paid in, the bor-

rower would have to advance a sum to make the total equal to 12 installments.

(3) "When the owner is entitled to a loan or funds to purchase a home," he furnishes the abstract, executes a mortgage, and pays thereafter $7.50 per month and interest.

On the back of the formal contract were "Benefits, Provisions, and Requirements." Of these the following may be pertinent:

Section 6 gave the company 60 days to approve the property. Section 11 provided that "no officer or agent of the company, general, special, or state agent, has any authority to promise a loan." Sections 13, 14, and 15 provide, after 12 consecutive monthly payments had been made, the owner might secure certificate for the amount which he had paid into the loan and reserve fund, together with 3 per cent. interest for the average time of the payment, which certificate would mature after 80 months, and draw 5 per cent. interest. After 12 months the contract has a cash surrender value of 50 per cent. of the amount paid to the loan and reserve fund, together with 3 per cent. interest on the average time of payment. After 24 months the cash surrender value was 75 per cent. of the amount paid into the loan and reserve fund, together with 3 per cent. interest on the average time of payments. After 80 payments, the owner, "having refused the acceptance of a loan, or not having received a loan," was entitled to withdraw "the amount of his credit" from the amount paid to the loan and reserve fund, with "his pro rata earnings" therein, not to be less than $528, nor more than $720. Not wishing to accept this, he might wait until the amount to his credit reaches $720.

In 7 counts the indictment charged that the device described was for the purpose of defrauding persons unknown. Upon these counts the defendants were found not guilty and they will not again be referred to. In the others of the 42 counts it was charged that the design was against named individuals. With reference to them severally it was charged that the defendants would fraudulently, and with intent to induce the purchaser to buy said contracts and pay money therefor, conceal the fact that the loan was promised only in the order of its number and when a sufficient fund had accumulated, but would pretend to him and thereby fraudulently mislead and deceive him into the false and mistaken belief that if he would comply with the contract for 6 months (or some other period) he would become entitled to, and at his option would receive, the loan; when, as defendants knew, the loan fund would not be sufficient to provide for said loan at the expiration of the period, and that he could not and would not, at the expiration of the time, receive the loan, or (in another count) when it was altogether uncertain whether he would be able to obtain the loan. The use of the mails in carrying out the scheme was set forth.

The indictment covers 91 pages of the printed record. Notwithstanding the apparent completeness of the statement of the design and of the method by which it was to be carried out, the defendants each primarily filed 67 demurrers to each count. After judgment, by assignments of error, the attacks on the sufficiency of the indictment were increased to 85. It is not fair to assume from the number of the assignments that all of them are without merit, and each has been

examined with the same care as if this evidence of lack of confidence did not exist. Each assignment has been carefully considered, and none has been found which would appear to warrant a reversal of the case.

Embellished with an erudition almost innocuous because almost obsolete, and expressed with a clarity characteristic of the dialectical tergiversations of the medieval theological controversialists, some of the objections to the indictment and the argument in their support, involve processes of mental ratiocination not easily within the capacity of persons accustomed to deal with the law in its practical phases only. The conclusion, therefore, that the assignments are without merit is reached with diffidence. It is not more practicable for the court in the opinion to discuss each assignment than it was for counsel in the brief, and controlling conclusions only will be stated.

[1] As to a large number of propositions, the authorities invoked are cases of embezzlement, swindling, obtaining money by false pretenses, and the like. The difference between these offenses and the crime denounced by section 215, P. C., is very substantial. A prime purpose of the latter is to prevent the prostitution of the mail service. The incidental protection of the public from frauds supplements a service usually performed by the state. The devising of a fraudulent design is not enough to constitute the offense. The formulation of such a design, the scheme involving the purpose to use the mails, is insufficient. The offense involves the use of the mails in the consummation of, or in the effort to carry out, the fraudulent design. The gist of the offense is the improper use of the mails. While the fraudulent design is essential, it is merely an element of the crime. As where an indictment charges burglary to commit theft, the theft is not described with the same particularity as if theft were the offense, so, in charging the use of the mails to defraud, the fraud need not be stated with the technical details required when swindling, or a like crime, is the subject of the indictment. The consummation of the crime is not dependent upon the success of the scheme. The crime is complete before the letter designed to mislead or otherwise used in carrying out the scheme, is received by the intended victim. The person addressed may have the shrewdness to detect the fraud; or, being misled, he may be in such financial condition as to be proof against fraud. Neither fact will affect the crime. Neither the mental nor financial condition of the person against whom the fraud is directed, nor any action on his part or failure to act, will increase or diminish a crime completed when, a scheme to defraud having been devised, the mails have been used in an effort to make it effective. A consideration of these principles will render unnecessary a discussion of most of the propositions urged by defendants.

[2] A reference to the fundamental character of the offense will also be a sufficient commentary on defendants' dissertation upon negations. The indictment charges that the scheme involved the misleading and deceiving of the person named in the count into the belief that he would, after a stated period, become entitled to and receive a loan "when in truth and in fact" (1) "the loan or reserve fund would not be sufficient to provide said loan for said contract holder in said

series at the expiration of said period of ——— months"; (2) "and that he could not and would not, at the expiration of said time, receive said loan"; or (3) "it was altogether uncertain whether said contract holder would, at the expiration of said period of time, be able to obtain said loan upon offering said security."

The three quotations last made are called by counsel negations 1, 2, and 3. Of these it is said that they are "negations which are negatives pregnant," and therefore void; "conjunctive negations," and therefore void; and "literal negations," and therefore void. Whatever may be the technical learning with reference to the negations in indictments for obtaining money by false pretenses, perjury, and like offenses, there is no present occasion for its application. The language used is intended to and does indicate wherein and how the scheme devised was fraudulent. It satisfactorily supplied a necessary element in the description of the device.

[3] A contention to this effect seems to be made: The indictment alleging that the contract holder was fraudulently misled into the belief that the contract provided that he could secure a loan in six months, and negativing such an effect for the contract, did not allege that he could not get his loan in six months and one day; that the maxim de minimis would apply to one day; that one might do the things charged, and yet not be subject to the law. If this proposition were meritorious, it would not be possible to draw an indictment that would properly charge the offense here involved. Whatever period might be given to cover the additional time required to escape the rule de minimis would have another little period following it, which could just as well be the basis for an invocation of the rule.

[4] It is insisted that the indictment is insufficient because the scheme described is "not apparently adapted to the accomplishment of the crime intended to be committed." It could just as well be contended that, if it were apparent that the scheme was fraudulent, an indictment charging it would be void. It is scarcely practicable for a court, in determining a demurrer, to pass upon the feasibility of a scheme to defraud. Before hearing the evidence, the court would, perhaps, be warranted in acting upon the assumption that, if it had not been effective, no complaint would have been made.

It may also be well to concede to persons engaged in a line of business superior knowledge of its requirements for success. It is probable that no one who has not given the matter serious study for practical ends can fully realize the different degrees of ignorance and gullibility represented by the population of America. No scheme to defraud, however well conceived for evil results, would probably reach all of the people; and few schemes, however transparent, would fail to find some victims. Nor is the fact to be ignored that many persons, the subjects of suspicion, have, in the development of their enterprises, been themselves the victims of a dangerous combination of arithmetic and imagination. Without suggesting that it would be impossible for the scheme to defraud to be so entirely incapable of that end that a demurrer to an indictment describing it would have to be sustained, a

consideration of the quality of the scheme would ordinarily be within the province of the jury.

But, if the abstract legal proposition made by defendants were unquestioned, the ruling in this case would not be disturbed. A careful study of the elements of the scheme would premise the success it attained. The scheme had the appearance of legality. It was embellished with all the legal phraseology and formality so efficacious in concealing consequences and creating confidence. The language used was excellently conceived to mean one thing and create the impression that it meant something else. The contract used the standard device of referring to the application and making it a part of the contract—a part not within the custody of the owner. Important provisions of the contract, expressed in obscure language, were inconspicuously printed in small pica on the back of the signed instrument. These are favorite devices for businesses whose prosperity depends upon overreaching, and are not less useful to those who pass the hazy border into criminal fraud. The scheme primarily devised, improved by the suggestions of experience, was apparently well adapted to effecting an exchange of valueless promises for money. The indictment is not subject to the objection that the scheme it describes is not apparently adapted to the accomplishment of the crime intended to be committed.

[5] The contract recites that the application is a part of the contract. The application is not set forth in the indictment, and this fact is the basis of several assignments. It was not necessary that the contract be set forth in full or stated as completely as it was. The application did not change the legal effect of the contract. Its omission did not affect the validity of the indictment, nor was it in any way disadvantageous to defendants. While trapping the applicant into signing something which could subsequently be used in an effort to confuse him was evidently a part of the general scheme to defraud, there is no rule requiring that the description of a fraudulent scheme should mention all the auxiliary devices.

[6] In setting forth in the indictment the contract, the pleader introduced it with: "A contract of tenor in substance as follows." Many assignments are predicated on this clause, and in their support are lengthy arguments. The propositions might be condensed into this syllogism:

(1) Contradictory statements in an indictment render the indictment void.

(2) The words "tenor" and "in substance" are contradictory.

(3) The words "tenor" and "in substance" are used together in the indictment.

(4) The indictment is void.

The logic is perfect. If the premises were not erroneous, the conclusion would be unassailable. Neither etymologically, philologically, nor legally is there any necessary conflict between the words; and, as used in the indictment, the words "in substance" modify "tenor," and indicate that the contract is substantially as set forth.

Most of the attacks upon the indictment are apparently predicated upon the postulate that an indictment requires a character of English

composition entirely different from that used for any other purpose, and that, in a determination of its meaning, all the ordinary rules of interpretation are abrogated. With reference to every other instrument which comes before a court, an effort is made to ascertain the meaning intended by the writer. As to an indictment it is insisted that every possible effort should be made to divest it of meaning. A word too many avoids it; a word omitted is fatal. If a word or clause may be given a possible meaning antagonistic to another word or clause, that meaning must be given, rather than an obvious meaning which would be consistent.

Even when perversion of the language is not undertaken, perfection of expression is insisted upon. Many English words have more meanings than one, and a writer whose thoughts are entirely clear and logical must be content sometimes to have a question raised as to the meaning of the language in which he undertakes to give them expression. There is little in literature beyond the reach of the hypercritical. The Lord's Prayer and the Commandments have not escaped. One who can find 85 objections to the indictment in this case could probably suggest improvements in the Gettysburg speech. It is not quite reasonable to demand of prosecuting attorneys that they should show a talent for lucid and accurate expression, not expected of any other person. We shall decline to give aid in the maintenance of rules so manifestly in conflict with good sense, and so potently subversive of efficient administration of the law. The time of a court may be more profitably used than in the perpetuation of absurdities.

The objections which may properly be urged to the indictment are not such as may be charged to the representative of the government who drew the indictment. As heretofore stated, the indictment covers 91 printed pages. Every essential fact could probably have been stated in one-tenth of that space, except that it was conceived necessary to follow well-established forms and time-honored phraseology. It is to be regretted that prosecuting officers cannot feel safe in so drawing an indictment as to make it a simple and straightforward statement of the facts upon which the government depends for conviction. It is to be regretted, too, that the useless repetition in the counts cannot be obviated. Each of the 85 objections to the indictment is lacking in merit. But, if it had been suggested that the charges against defendants are obscured by excessive verbiage, the proposition would be considered with sympathy, because of inherent merit, and overruled with regret, because the forms used are sustained, perhaps required, by precedent.

But, if we have little sympathy with the effort to defeat the law by verbal gymnastics, there is every inclination to see that defendants are not deprived of any substantial right by any technical rule. On this account, we have examined all the assignments, notwithstanding some of the objections to the indictment were not properly raised in the trial court, and notwithstanding counsel for the government have made exceptions to the assignments and brief that may be meritorious.

[7] On the oral submission of the cause, counsel for defendants were called upon to point out wherein any harm or disadvantage or

prejudice had resulted to defendants from the assumed defects in the indictment. Nothing more specific was indicated than that the defendants had been deprived of legal rights. If they were deprived of a legal right by any ruling, the case should be reversed. They are entitled to be tried in accordance with law. They are entitled, however, to no more than a trial by law as the law is. They cannot invoke the law as it might have been, if the tendency to permit absurd technicalities to defeat the purposes of the law had not been checked by persistent public protest and stopped by tardy, but wise, legislation. In some of the states it is still possible for an omitted letter or a misspelled word to cancel a judgment of conviction. But this court is given statutory authority to observe the dictates of common sense. Rev. St. § 1025 (Comp. St. 1916, § 1691).

Not infrequently unsound propositions have become so incorporated into the jurisprudence as developed by the courts that they have become rules of property rights. They become the basis of legal advice. The lawyer considers it safer to follow a poor opinion than a good reason. In such case, disregard of, or change in, the rules as applicable to past transactions, might bring about unjust and inexcusable results. But no one ought to be held to have a vested right in the veteran absurdities of criminal procedure; no one should be permitted to plead that he would not have violated the laws of his country, except for his confidence that foolish and illogical rulings would continue to be observed, whereby he would have acquired immunity. The trial judge properly disposed of all issues made with reference to the indictment.

[8] In 479 additional assignments of error, the rulings of the trial judge in the admission of testimony and upon other matters are assailed. The excellent briefs enable us quickly to ascertain the limited number of real questions involved. The most important issue is whether the evidence is sufficient to sustain the verdict of the jury. There is very little conflict in the testimony; and, after the somewhat prolonged delay incident to the reading of the 4,000 pages of the printed record, the issue may be passed upon without hesitation. The circumstances depended upon by the government to establish the fraudulent character of the transactions of the defendants are the terms of the contract, the character of the advertising, the conduct of agents of the company, and correspondence between the company and persons misled by the agents.

Counsel for defendants make the proposition that the scheme or device evidenced by the contract is not open to more criticism than some of the insurance contracts, and other financial transactions in which the mails are used, indulged in from day to day all over the country. This proposition could, perhaps, be acquiesced in without absolving defendants of guilt. The statement may be less an exoneration of defendants than an attack upon the officers charged with the enforcement of the law. Certainly, the contract of the Standard Home Company is not the only contract in use in which excessive and involved verbiage is used to conceal its character and to induce the careless or credulous to part with money upon the assumption that they are securing something which they do not get. It is even conceived possible that defend-

ants believed that that which they were doing was not in violation of law. There is evidence to indicate that they had the law before them always, and it may be they did not realize that they had crossed the ill-defined boundary line that lies between nonpunishable overreaching and criminal fraud. Whoever approaches the line, approaches at his peril.

The contract covers 24 pages of the record. In the form in which it reached the purchaser, the body of the contract, surrounded by a colored margin and ornamented by a big red seal and the cut of a palatial home, was made up of provisions which cover 4 of the 24 pages. The balance of the contract, covering 20 pages, is printed under the title "Benefits, Provisions, and Requirements," in small type on less than three-fourths of the other side of the paper. The difficulty of reading, however, is not comparable to the difficulty of understanding. Practically every paragraph is obscure and involved. Cognate matters are considered in paragraphs remote from each other. When otherwise difficult to prevent, clearness is obviated by referring to sections "on the back hereof." Every paragraph, except one, in the main part of the contract, refers to the loan. This deals with the maturity of the contract holder's obligations. The first 7 sections of the "Benefits, Provisions, and Requirements" are with reference to the loan, as are section 17 (two paragraphs), section 18 (three paragraphs), sections 19, 20, 21, and 22. Sections 13, 14 and 15 deal with settlements which may be made "provided no loan has been made or home has been purchased." Only after reading the main contract and 18 sections of the "Benefits, Provisions, and Requirements" will the contract holder find the provisions by which it is apparently determined whether he shall have a loan. Sections 19 and 20 provide for classes, series, and issues of contracts, determined by a process within the control of the "company." When an applicant for a contract is accepted, a contract will be issued in a "series and issue" then open, and receive "the next number in the order to the contract last before issued." "It is expressly agreed that the numbers given at the home office to applications and contracts shall be held and taken to be the proper numbers of the same." The owner of the contract, "in the order of his application," "out of the funds of the particular series," is entitled to a loan "immediately upon the receipt of such funds available for his contract." The sections from which these provisions are taken are long and the language obscure.

Any person, including one accustomed to reading and considering legal instruments, would, from a reading of the contract, assume that the business of the company was loaning money, and that the purpose of the purchaser of the contract in acquiring the contract was obtaining a loan. All the provisions with reference to cash settlements and certificates of payment, upon any except a most careful reading, would appear to be effective only when the purchaser shall have exercised an option not to take the loan. Repeated and careful readings of the contract will leave in the mind of a capable lawyer doubts as to its meaning in a number of respects. The language of the contract is well adapted to mislead persons not accustomed to considering legal in-

struments, and persons not familiar with business matters into assuming that they had, by purchase of the contract, acquired an opportunity of obtaining a home by paying monthly installments. Except for the misleading character of the contract, it would probably have been impossible for the company to have secured any degree of success. The business involves the idea of the contract holders' paying in money, a portion of which is to be put into the fund from which a small per cent. of them might borrow. The first payment of $6 is compensation to the agent for misleading them. The next three payments of $6 each were appropriated by the persons who devised and carried out the scheme. Out of each $6 thereafter paid, some of the persons who paid it in are permitted to borrow $4.75, under a scheme leaving it entirely within the control of the managers of the concern as to who the borrowers should be.

The experience of the company indicates that a large per cent. of purchasers, when they first see the contract, realize the improbability of securing a loan or getting any returns from their investment, and simply lose the first $6 paid in. Another large per cent. of the victims do not pay beyond the second or third installment, and do not reach the installment from which loans are made. Another considerable percentage of the contract buyers pay up to the time when they become "eligible" for a loan, when, realizing the difference between eligibility for a loan and securing the loan, they sacrifice all or a part of what they have paid. There is no probability that any person would have purchased the contract as an investment. The minimum maturity value was possible only by giving to some a part of that which others lost. The time of the payment was indefinite, the security was inadequate, and the amount payable contingent. If the contract holder considered the matter from the standpoint of securing a future cash settlement the best that he could hope for was to receive, after having made 12 payments, a little more than half of such part of the amount paid in by him as was permitted to reach the loan and reserve fund. Upon the payment of $78 by him, which would be the initial payment and 12 monthly installments, he would receive 50 per cent. of the 9 amounts, of $4.75 each, applied to the loan and reserve fund from the installments after the third, and he would be permitted to receive 3½ per cent. interest on the average time of the payments. His total return on an investment of $78 would be $27.70. If he were induced to keep his money in the enterprise for as much as two years, his losses would be only the initial payment, the first three installments, $1.25 out of each subsequent installment, 25 per cent. of what was left, and the difference between 3½ per cent. interest and the current rate.

In another connection some of the features of the contract suggesting fraud were mentioned. Other provisions, which could have been, and apparently were, improperly used, include one precluding inquiry as to whether a proper number had been given the contract; another, permitting temporary loans and other diversions from the funds pertaining to an issue; another, retaining control of transfers; another, giving the company control of the numbering of the contracts by authorizing it to determine the number to be placed in an issue,

and when and how they are to be filled. Notwithstanding all the money is furnished by the contract holders, they are entirely without a voice in its administration; and notwithstanding 20 pages of provisions, not one furnishes them any degree of protection.

The advertising of the company was not less misleading than the contract. In few instances only are there affirmative misstatements. The mendacity involved was more efficacious and less dangerous. The part of it which went into the papers was substantially confined to an announcement that the company was lending money at 5 per cent. The statement was untrue; but, even if it had explained that payments were monthly, and that interest was calculated on yearly balances, the rate was sufficiently under the current rate in the section in which most of the business was conducted to attract attention and excite inquiry. Another part of the advertising which preceded the sale of the contract was an appeal to the homeless who desired homes. The appeal was peculiarly to those who could hope to own a little home only. The loan unit was $1,000. It is true there were a number of loans for larger sums. So far as the facts were developed, these larger borrowers were connected in some way with the company. But, without reference to who was to get the money, it was evidently expected that persons of small means should furnish it. This was, perhaps, not because of any peculiar partiality for the money of any particular class, but indicated an appreciation of the fact that the easiest approach was to those whose aspirations for homes exceeded their experience in business.

Some of these cases presented heart-breaking experiences. Even church organizations were made to suffer—churches of the poor where contributions meant, not alone devotion, but sacrifice. The case of Alice Holman was not typical, because the entire pound of flesh was not exacted. She paid in $144, and $100 was returned to her, an amount sufficient to cover, not only all that she had contributed to the loan and reserve fund which the company held in trust, but $14.50 of the $58.50 charged by the agent and the company for receiving the $144. She was evidently of that class of colored women, held all over the South in affectionate esteem, who, big of heart and strong of arm, knowing no lines of race and having no thought of self, love and serve children and the sick, the weak and all who suffer. "I generally take care of the sick," she said. "I keep the home for orphan children at Ensley." Once a kindly one in the company's office said to her: "Woman, I want to tell you this; don't you turn loose that $12; if you do, it will be the last you see of it." She paid the $12 every month until one of the little girls became ill. "After the little girl was taken down," she testified: "I had to stop work. I told him (the president) about the little girl being down, and I could not work, and of course he said he could not do me any good, and he said, 'You will have to pay in for 12 months.' * * * When the little girl kept getting worse, I kept pushing them for the money, and the day she was a corpse I wrote him a letter that morning. I went to see him afterwards. * * * I told him the little girl died, and I had to get two white men to stand for me to bury the girl. * * *"

The following is a part of the advertising, directed evidently at persons whose income placed very humble homes only within their reach:

"You can lose $2,932.35. If you rent a $1,000 home for 10½ years and do not take advantage of the offer presented to you by the Standard Home Company, you certainly will not have the amount above mentioned. It does not seem possible that you would lose such large amounts just by renting a $1,000 home for 10½ years at $12.50 per month; however, we will show you the actual results in figures: Ten and one-half years' house rent at $12.50 per month is a loss of $1,575. You don't own the house, valued at $1,000. You have lost the difference between buying and renting, $357.35. Then you have certainly lost a total of $2,932.35."

Contemporaneously a bathetic appeal is made, which as ruthlessly attacks the English as the loss statement assaults the truth:

"The mother goes about her daily tasks with a song in her heart, serenely conscious that no grim stranger will throw the little ones and she out into a cold world, and that every loving touch she places upon things within its sacred walls is there to stay as long as she wills."

The advertising which followed purchase and disappointment will be referred to in another connection.

[9] The evidence principally depended upon by the government to establish a fraudulent intent were the statements made by the agents of the company to prospective purchasers of the contract. More than 100 witnesses were introduced, each of whom testified that the agent had, by statements, led him to believe that he would, at the end of six (or eight or some other number of) months, be able to secure a loan of $1,000 from the company at 5 per cent. interest. The introduction of this evidence was strenuously objected to by the defendants. The objection was upon the ground that the representations were not the representations of the defendants or the company. If there had been evidence of a single transaction only, or of isolated and occasional transactions, the contention might have appeared meritorious. But the accumulated evidence, aided as it was by evidence of the subsequent conduct of the company, and by the correspondence with which the misrepresentations were always followed up, clearly indicates an established course of business, an important feature of which was systematic misrepresentation by agents. It is apparent that the agents were expected to follow up the misleading advertising and misleading contract by suppression of the facts that should have been disclosed, and misrepresentations as to terms and effect of the contract. The agents realized, as the company realized, that the persons with whom they were dealing were not, in most instances, in a position to make investments, and that they were, in order to acquire homes, paying each month no inconsiderable part of their small incomes. They knew, and the managers of the company knew, that unless these persons were misled the contracts could not be sold.

A frequent course of events was that, after the agent, by his misrepresentation, had secured an application for a contract, and 6 months of installments had been paid, the contract purchaser would indicate to the company that he was ready for his loan. Thereupon the company would write him that it was true that he had now become "eligible" for a loan, but that he had not been reached in the order in which loans

were made. The purchaser would then make a statement of what had been said to him by the agent. Thereupon the company would express surprise that he had been misled, and would call attention to the fact that he, the purchaser, had made an application in which he had stated that he had read the contract and understood its terms. A response from the victim is to the effect that it is impossible for him to continue the payment of the installments upon the uncertainty of securing a loan; whereupon the company begins to send literature entirely new to the contract buyer, supplemented by letters, in which the purchaser is urged to continue his payment. It is argued, and many figures are used to establish, that the person who receives his loan last is really the one who gets most benefit from the contract. If this fails as a soporific, and the contract buyer undertakes to secure a cash settlement, the company expresses regret (no doubt, with all sincerity) that the contract holder has determined to stop payment of installments, and tries to show him that, outside the loan feature, the investment is a good one.

It is at this point that the example in compound interest is usually introduced. Among "the profits of the company and investors" is (says the advertisement):

> "(2) Compounding or reloaning both principal and interest as paid monthly."
> "The compounding of the interest and principal is not paid by a borrower, for few men are good enough financiers to compound their money, nor is it paid by the investor. It is simply made by the good plan of the company, and its able financiering. The illustration below shows $1,000 compounded at 5 per cent. interest per month for every month in the year for one year, which will verify our statement."

A table follows which shows that the $1,000 at that modest rate, compounded monthly for one year, will amount to $1,795.8320158071-29150348625. The company frankly acknowledges that it "does not have the advantage of compounding the entire thousand dollar loan every month." It abstains from suggesting that it does not get 5 per cent. per month for any part of it. If, notwithstanding the impressive figures quoted, the contract owner insists upon a cash payment, the next interesting fact developed by the correspondence is that he is not to receive even 50 per cent. of what he has paid in, but 50 per cent. of what he has paid in that has been appropriated to the loan and reserve fund, and that he would not get back any part of the $6 primarily paid in, any of the first three payments, or any part of $1.25 out of each of the subsequent payments. At this point the victim ordinarily takes what he can get.

The initial correspondence in most cases calls attention of the purchaser to the fact that he has signed an application in which it is stated that he has read the contract and understands its terms. The evidence shows that the agents, in many cases, would state to the prospective buyer that he did not happen to have a copy of the contract with him; and, in most instances, the first time the contract buyer sees the contract is when, after having made his initial payment, the contract is sent to him by the company. The application is signed by the purchaser, as applications ordinarily are, after having been prepared by the

agent, and after its terms have been explained to him by the agent. In very few cases was it the fact that the purchaser either saw the contract or had any knowledge of the provision in the application that stated that he had read and understood it.

The purchaser had a right to depend upon the statements of the agent, and a right to assume that the application and the contract were as represented by the agent. This right was not destroyed by the circumstance that the company undertook to relieve itself of responsibility for the acts of its "agents, general, special, and local." The course of business and uniform correspondence indicates that the provision referred to in the application, to the effect that the purchaser had read the contract and understood it, was put there as part of the scheme to defraud and as tangible defensive matter when correspondence became necessary, rather than for the purpose of having the purchaser know the character of the obligations he was assuming, and of the rights which he was acquiring.

Notwithstanding the large number of instances called to the attention of the company of misleading statements by agents, the record does not show a case in which such agent was discharged or reprimanded by the company for his misconduct, or compelled by the company to make restitution to the defrauded person. Nor is there a single case in which, after ascertaining that the purchaser had been defrauded, the company undertook to make him whole. The defendants who have been convicted were in active control of the affairs of the company. The representations made by the agents came to their attention. They permitted money to be taken by their agents with knowledge of the fact that the purchasers would not have parted with the money if they had not been deceived. In many cases they got the benefit of the first three payments with the knowledge that misrepresentations had been made; or, having gotten the benefit of these payments, and having the fact of misrepresentation brought to their attention, made no effort of any kind to restore the purchaser to his original condition. The correspondence brought to their attention in a very large number of cases the fact that application had been made by persons who had not read the contract, and, further, that in many cases where purchasers had read the contract they had misunderstood its terms and effect. The contract, as heretofore suggested, is calculated to mislead, and defendants knew that fact, because they knew that in a very great number of instances it had had that effect. It is apparent, not only that defendants knew that large numbers of persons were being misled by the agents, by the advertising and by the contract; but it is also apparent that they knew, and relied upon the fact, that many of the purchasers would soon realize that they had been defrauded, and would forfeit what they had paid in, or accept whatever they could get and surrender the contract. They knew, also, that many of the purchasers who might never realize that they had been defrauded would stop payment when they ascertained that being "eligible" for a loan had the same relation to securing a loan as being eligible to the presidency had to holding that high office. They knew, too, that the incomes of many of the

purchasers were not equal to paying rent and to paying installments while waiting for a loan.

Even if there were absence of evidence of specific cases of misrepresentation brought to the attention of defendants, familiarity with the general course of business would negative a claim of innocence. The contracts issued covered classes "A" and "B." In class "A" 11,804 contracts were written, covering business for five years, ending June 29, 1912. In this class 543 loans were made. One out of every twenty-one purchasers received a loan. Eighty-nine contracts were carried to maturity. Assuming a separate purchaser for each contract, 632 purchasers were permitted to get what all expected. Each of the other 11,172 purchasers lost all or a part of what he paid in.

Up to June 29, 1912, the company had sold 34,607 class "B" contracts. On 13,430 of these no payment was made except the first. These payments were made before the delivery of the contract. These persons, having paid $80,580, lost this amount and quit. No part of this went to the loan or reserve fund. At the time of the examination 8,643 of the 34,607, or just one-fourth, had forfeited their contracts after paying one or more installments, in addition to the first $6. Assuming only one installment by each of them, these persons paid in $103,816, receiving therefor no benefit of any kind, and no part of the money going to the loan or reserve fund. Nearly 64 per cent. of the purchasers having suffered a total loss of what they had paid in, another 5 per cent. took the partial loss of cash settlement. A fortunate 2.55 per cent. received loans; 2.16 per cent. obtained paid-up certificates, and the remaining one-fourth continued to hope and pay. Those who received loans waited an average of 25.16 months.

These facts of the business render unnecessary any further comment in support of the verdict of the jury. No error that would justify a reversal has been found in any ruling of the court.

The judgment is affirmed.

CLALLAM LUMBER CO. v. CLALLAM COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

Nos. 2905–2908.

1. TAXATION ⟸338—ASSESSMENT—MODE OF ASSESSMENT—TIMBER LANDS.
The action of the assessor of a county containing large tracts of timber lands in dividing such lands into zones for the purposes of assessment *held* not illegal, under the laws of the state requiring equality in the assessment of all property, where the zones were determined by the character and value of the timber in each, and its location with reference to the cost of marketing.

2. TAXATION ⟸494(3)—LEGALITY OF ASSESSMENT—REVIEW BY COURTS.
Owners of timber lands *held* not entitled to relief in equity against the assessment of their lands, affirmed by the board of equalization after hearings, in the absence of proof establishing fraud, or discrimination against any class or owner, or showing the violation of any fundamental principle of uniformity, and where the testimony as to value, while conflicting, fairly sustained the assessment made.

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3. TAXATION ⟸494(3)—ASSESSMENT—EFFECT OF ERROR IN ASSESSMENT OF OTHER PROPERTY.

Error in the assessment of a certain class of property through a misapprehension of the law will not invalidate the assessment of other property.

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

Suit in equity by the Clallam Lumber Company against Clallam County and Clifford L. Babcock, Treasurer, heard with suits by the Clallam Lumber Company against Clallam County and Herbert H. Wood, Treasurer, and by Charles H. Ruddock and Timothy H. McCarthy against Clallam County and Clifford L. Babcock, Treasurer, and against Clallam County and Herbert H. Wood, Treasurer. Decrees for defendants, and complainants appeal. Affirmed.

The above-entitled four cases were consolidated for trial in the District Court, and as they are controlled by substantially the same evidence and by the same principles of law they may be considered in one opinion. They are suits in equity against Clallam county, Wash., and the treasurer of the county, to vacate and set aside the taxes levied upon certain lands by the county, or such amount of taxes as may be found to have been unjustly levied, and to enjoin the issue of delinquency certificates against lands levied upon, and sale by the county treasurer based upon alleged fraudulent and unlawful assessment and equalization of taxes.

Case No. 2905: The Clallam Lumber Company, appellant, to be called plaintiff, is a Michigan corporation owning 41,000 acres of timber lands in Clallam county. The complaint is elaborate, but in substance charges that in 1913 the assessor of the county and the board of equalization, in equalizing, arbitrarily and unlawfully overvalued the lands in pursuit of a policy begun and followed by the tax officials for years prior to 1913, whereby timber lands belonging to nonresidents and situate principally in the western portion of Clallam county were assessed at grossly higher values in proportion to their true value in money than all other classes of property in the county, particularly agricultural and town lots in Port Angeles, the county seat; that in the eastern district are well-settled farming communities, the voting power of the county being in the east and the middle districts; that in 1912 and 1913 the board of equalization was composed of five members, three residing in Port Angeles, one in the eastern and one in the western district; that the members of the board of equalization who resided at Port Angeles owned property at Port Angeles, and that to favor Port Angeles and themselves, and to put the burden of taxation upon timber lands owned principally by nonresidents, the assessor and the members of the board of equalization residing at Port Angeles conspired with the east end commissioner to value property in and about Port Angeles at a low sum, but to value timber lands in the west end, and particularly the timber lands of plaintiff, at high figures; that the citizens of Port Angeles desired timber owners to build railroads into the interior and to bring their logs from the interior to Port Angeles to develop that city; that the assessing officers of the county meant to assess timber lands in the west end of the county at exorbitant sums to compel the owners to cut timber and build railroads and mills and aid the development of the county; that the lands of plaintiff are without facilities for transportation, most of them being cut off from the Straits by mountains, and that it is beyond the means of plaintiff to build railroads to transport the logs; that on the Straits of Fuca there lie fine bodies of timber which can be and are logged to the Straits; that in assessing the timber lands the officers divided the lands into zones, assessing all timber lands in one district at the same valuation per thousand feet; that the zones were laid off

without reference to the real value of the timber lands within them, or to the elements which would go to make up uniformity of value, and without regard to the system of cruises adopted by the county on its timber lands, with the result that plaintiff's and other interior timber lands were valued higher in proportion to their real value than the timber lands lying along the Straits tributary to tidewater and operating railroads and presently marketable, the object being to compel plaintiffs and other owners of idle timber lands to cut and operate; that the custom in the state of Washington was to assess property at from 35 to 50 per cent. less than its actual value, and that while the assessing officers of Clallam county claimed for 1913 that they assessed and equalized on a basis of 53 per cent. of its true value, in fact, property at Port Angeles was assessed and equalized at not to exceed 10 to 20 per cent., that farming lands in the eastern end of the county were assessed at not to exceed 25 to 30 per cent., while timber lands in the interior were put at sums greatly in excess of 53 per cent., and plaintiff's lands, being in the interior, at nearly 83 per cent., of their fair value. Plaintiff further alleges that it appeared before the county board of equalization in 1912 and 1913, and protested, but without avail, and that the protests of plaintiff were arbitrarily overruled; that at the time of the assessment the fair value of the plaintiff's lands did not exceed $2,050,000, and that under the custom prevalent should not have been valued at more than $1,025,000, but that the lands were wrongfully assessed at a sum exceeding 50 per cent. of their true value; that the levy for 1913 aggregated $50,049.59, whereas a fair levy would not have exceeded $30,000; and that by the fraudulent practices followed there were unlawfully imposed upon the lands described in a schedule, which is attached to plaintiff's bill, taxes for 1913 to the amount of at least $20,049.59 in excess of taxes which might be lawfully imposed. Plaintiff avers that in 1914 it tendered and paid into court $30,000. The defendants answered, denying all charges of conspiring, discrimination, partiality, injustice, and fraud, denying that it was the custom of assessing and taxing boards to assess property at from 35 to 50 per cent. of its true value, or that any different basis than the true value of plaintiff's property was employed, and set up that the lands of plaintiffs bear timber of exceptionally high grade and are proportionally more valuable than smaller or isolated tracts in the same localities; that in 1908 the county employed proper timber cruisers, who made detailed estimates of character and quality of timber standing upon the various legal subdivisions of land in the county, and that all lands in private ownership were cruised and platted into tracts and zones, with plats and detailed reports concerning physical characteristics, agricultural possibilities of lands, and other matters, which were filed, by which the assessing officers could determine the value for assessment and taxation; that the assessments made were the result of honest and deliberate judgment, after careful investigation and fair hearing, as required by the laws of the state of Washington in force in 1912 and 1913 (Laws of 1897, chapter 71). After trial the District Court held that plaintiffs had failed to make a case entitling them to relief, and the complaints were ordered dismissed. The decree provided for a credit by the county upon the taxes levied upon the plaintiff's land in the sum of $29,400, to be apportioned among the lands in the specific manner set forth in the decree. The credit matter presented itself in this way: The plaintiff had paid into court $30,000 on November 7, 1914, as a tender. This sum, less $600 clerk's commission was by stipulation of the parties paid into the county of Clallam and receipted for as a payment into the county of Clallam, and receipted for as a payment pro tanto without prejudice to the contention of either party.

Case No. 2907, Clallam Lumber Company v. Clallam County and Wood: Relates to the same lands as in No. 2905, but the taxes involved are 1914. It is claimed that, if properly assessed at a value of not more than 50 per cent., the tax would not have exceeded $25,466, but that they were taxed $42,960, or an unlawful excess of $17,494.78. Tender of $25,466 was made, and the decree ordered the suit dismissed, without credit for any payment.

Case No. 2906, Ruddock and McCarthy v. Clallam county and others: In this action the assessment of lands for the taxes of 1913 is involved. The plaintiff's lands, consisting of 7,941.06 acres, were situated in zone No. 2.

The aggregate assessment for 1913 was $479,990, and it is claimed that the total assessable value of the lands on March 1, 1912, did not exceed $550,000, and that under the law and practice the assessment should not have been more than $275,000. The tax amounted to $15,809, as against $9,250, which plaintiffs say should have been the maximum assessed. The tender in this case was $9,250, and the decree ordered the county to credit this sum, less clerk's commission, toward the taxes on plaintiff's land for 1913 pro tanto.

Case No. 2908, Ruddock and McCarthy v. Clallam County and Wood: The taxes involved in this suit were upon the same lands as in case No. 2906, but were those assessed for 1914. The contention here is that, while the aggregate value of plaintiff's land did not exceed $550,000 on March 1, 1914, and should not have been assessed at more than 50 per cent. of this value, they were in fact assessed at $561,395, or 102 per cent. of their actual value; that the taxes ought not to have exceeded $6,905, but they amounted to $14,095. Tender of $6,905 was made, and the decree ordered the suit dismissed, without credit for any payment.

Earle & Steinert and Peters & Powell, all of Seattle, Wash. (Butterfield & Keeney, of Grand Rapids, Mich., of counsel), for appellants.

Frank L. Plummer, of Port Angeles, Wash., and John E. Frost, Edwin C. Ewing, Richard Saxe Jones, and C. F. Riddell, all of Seattle, Wash., for appellees.

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

HUNT, Circuit Judge (after stating the facts as above). The briefs and arguments of appellants are addressed principally to these points: (1) The practice of the assessor in dividing the timber lands into zones and the classification by zone system for the purpose of assessment and valuation; (2) the measure of value adopted by the defendants for assessment and for taxation; (3) the question of the existence of a conspiracy and fraudulent combination of tax officials to discriminate unjustly against plaintiff's lands and in favor of other property.

The Constitution of Washington provides that all property not exempt shall be taxed in proportion to its value, to be ascertained as provided by law, and that uniform and equal rate of assessment and taxation on all property according to its value in money shall be provided, and that the law shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property. Article 7, §§ 1 and 2, Constitution of Washington.

In 1912 the laws of Washington provided that real property subject to taxation should be listed and assessed biennially on every even-numbered year with reference to its value on the 1st day of March preceding the assessment, that real property should be listed according to the largest legal subdivision as near as practicable, and that all property should be assessed "at its true and fair value in money"; the true cash value being that at which the property would be taken in the payment of a just debt from a solvent debtor. It was further provided that, in assessing any tract of real property, the value of the land exclusive of improvements should be determined, and the value of all improvements and structures thereon. 2 Remington & Ballinger's Code, §§ 9101, 9112, 9113.

In 1913, section 9112 was amended by provision that all property should be assessed at not to exceed 50 per cent. of its true and fair value in money. Laws of Washington 1913, p. 438, § 1. It is provided that, when the assessor shall begin his work, that official is required to determine as near as practicable the true or fair value of each tract of real property listed for taxation and shall enter the value thereof in proper books. Section 9102. Section 9200 makes the county commissioners, the county assessor, and the county treasurer, or a majority of them, a board of equalization of the assessment of the property of the county. The board is required to examine and compare the returns of the assessment of the property of the county and proceed to equalize the same so that each tract or lot of real property and each article or class of personal property shall be entered upon the assessment list at its true and fair value according to the measure of value used by the county assessor in such assessment year and subject to certain rules. The rules authorized the raising of value of real property, which in their opinion is returned below its true and fair value, to a sum believed to be the true and fair value, after notice to the owner or agent, or they may lower values to what is fair, and they may raise the value of each class of personal property after notice, and they may reduce the valuation of personal property which in their opinion is rated above its true and fair value. By section 9212 county taxes are levied in specific amounts, and rates per centum determined from the amount of property as equalized by the board of equalization each year, except such general taxes as may be definitely fixed by law. All taxes are payable on or before the 31st of May in each year; but one assessment may be paid before that date, and time for the payment of the balance extended to the 30th of November following.

It can be said generally that, under the system prevailing in the state, taxes are assessed on property as of the value of March 1st, equalization by the board of equalization is had in October, and taxes upon real property are payable on May 31st. Inasmuch as assessment on real property was made biennially in the even-numbered years, taxes upon real property for 1913 were payable in May, 1913, based upon the assessments of 1912, equalized in October, 1912, while taxes for 1914 were based upon an assessment value as of March 1, 1914, equalized in October, 1914, and became payable in May, 1915. The evidence is that in 1908, under authority of the county officials, a cruise of the timber lands and a survey of other lands in the county was begun. The cruise was not finished until 1914, but the data obtained were full, and made part of the public records of the county, and were used by the assessor when he made assessments of timber lands for 1913 and 1914.

The maps accompanying the record show that Clallam county is long and narrow, bordered on the east and south by Jefferson county, on the west by the ocean, and on the north by the Straits of Juan de Fuca. In the eastern end of the county is the small town, Sequim. Port Angeles, a city of more than 4000 inhabitants, lies on the Straits, approximately one-third of the distance from the easterly line of the county. A large part of the county is included in a forest reserve,

but in round numbers there are 529,920.06 acres of taxable land, of which over 356,000 acres are timber lands. In 1914 the total assessed valuation of the county was $14,576,197, of which more than $10,000,000 was the assessment on timber lands. Real estate in cities was assessed in 1914 at $2,114,957, and unimproved land, excepting timber lands, at $901,475, and improved land, with improvements, at $746,305.

The zones as created by the assessor for assessment purposes may be briefly described as follows: Zone No. 1 abuts upon the Straits, and extends east and west along the Straits for approximately 65 miles, and back from the Straits into the interior at distances from 1 to 8 miles. Zone No. 2, situate in the interior, is generally south of and adjoining zone No. 1 in part, and runs toward the westerly part of the county, extending southerly to the line of Jefferson county. The most southerly point in zone 2 would be about 30 miles from the Straits, and the most northerly point approximately 5 miles. Appellant Lumber Company owns 18,707 acres in zone 2. Zone No. 3, of much smaller area than zone 2, lies west of Lake Crescent, and is also in the interior and south of the easterly part of zone 1. In this zone appellant Lumber Company owns approximately 3,207 acres. Zone No. 4 lies south of zone 5, and is in the south central part of the county with a northerly line about 8 miles from the Straits. In this zone appellant Lumber Company owns 18,588 acres. Zone No. 5, also in the interior, is situated north of the Soleduck valley and on the westerly slope of a range of mountains, which separates the valley and the lands of plaintiffs from the Straits. Plaintiffs own about 798 acres in this zone. Zone No. 6 adjoins Jefferson county, and is situate south of zone 3, and about midway between the east and west ends of Clallam county. Plaintiffs own 80 acres in this zone.

It is conceded that upon the Straits and immediately adjoining the tidewater (zone1) there are large bodies of fir, cedar, spruce, and hemlock, and it is beyond dispute that in this zone the lands were properly assessed. It would extend this opinion too far to give the testimony about the topography of the several zones. We gather that, from the east end of the county back to Twin Rivers, which flow to the straits, there was a sloping bench for some 3 miles; the bench being elevated about 100 feet on the shore line and as much as 500 feet 6 miles back. The country from Twin Rivers is broken, some of it being at an elevation of 2,000 feet. The country included in the several zones is in part broken by mountain ranges. The Hoko river flows northerly into the Straits through the western portions of zones 2 and 1. South of the broken elevated portion along the Soleduck river, which flows westerly from Lake Crescent through much of the timber lands of plaintiffs, in zones 3 and 4, 6 and 2, is a valley for some 20 miles. Still further south of the Soleduck river is the Calawa river and valley, which is separated from the Soleduck by mountainous ridges. The elevations of the ridges vary from 2,500 to 6,000 feet. In zone 4 there are some level benches and rolling country, with higher lands in the northwestern part and mountains toward the Hoko river. There is evidence of feasible railroad routes from the several sections to deep water.

The plaintiff introduced testimony of men of experience in buying and selling timber and conducting logging operations in Washington and other sections. A number of them testified to the effect that land with timber upon it had depreciated since about 1910, and that in 1913 and 1914, upon the interior lands involved herein, $1 per thousand for the fir, spruce, and cedar would be high value, but that such timber upon the Straits might be worth $2 per thousand and hemlock 75 cents, because of its being close to the water. Some of these gentlemen put the value of hemlock in the interior sections at 50 cents per thousand in 1912 and at lower valuations in 1913 and 1914. The higher value which the witnesses put upon the Straits timber was, as indicated, because of superior logging conditions. E. C. Duvall, an expert timber cruiser of long experience, and who knew the country, put the value of fir, spruce, and cedar on plaintiff's lands at $1 per thousand in 1913 and 1914, and of hemlock at 50 cents per thousand, except along the Pysht and Hoko rivers (Straits timber), where fir, spruce, and cedar was worth $2 per thousand and hemlock 75 cents.

On the other hand, the defendants offered evidence from men well qualified to testify concerning the value of timber, and who were in some instances specially familiar with the timber lands of the appellants, as well as with those in the Straits timber zone. Some of these witnesses said that they considered the fir, spruce, and cedar on the appellant's land in the interior as worth $2 per thousand feet in March, 1912 and 1914, and that the price of hemlock varied from $6 to $11 per thousand, and that the timber in the interior zones was worth as much as in the Straits zone. One of the witnesses said that, owing to the character of the land, it would be no more expensive to log into the waters of the Straits from zone No. 1 than from the other zones, and for 1912 and 1914 he put a value upon fir timber in the zone at $1.50 per thousand but that spruce and cedar ought to be worth $2 to $2.50 per thousand. A witness (Newbury), who had been 25 or 30 years in the logging and timber business, said he had been across a portion of the lands of the plaintiffs in Clallam county, and made investigation concerning the value of timber and the conduct of logging operations therein; that he knew the lands along the Straits, and had examined the county cruises in Clallam county; that in examining the timber of the plaintiff he had used an aneroid barometer, and had carefully studied the physical characteristics of the country in the respective zones; that in some instances he had taken up an acre, and counted and measured it, and that as a result his opinion was that on March 1, 1912, 1913, and 1914, the value of the plaintiff's timber was from $1.75 to $2 per thousand, and that the value of the Straits timber was about the same, but he thought hemlock was of no value whatsoever, except for use in logging operations; that he believed that the interior timber could be logged for less than in front—that is, fir, cedar, and spruce. Another qualified witness, Merrill, an owner of timber in Clallam county said he was familiar with timber in the Straits zone and with the timber land owned by the appellants. He considered quality of timber, cost of logging and operating, soil, etc., and thought the timber

in the interior was worth fully as much, if not more, than the timber upon the Straits, and that in 1912, 1913, and 1914 the timber in the interior could have been operated at a profit at $1 per thousand, stumpage, basing that at $2 per thousand. During that time his own business had been operated at a profit at Gray's Harbor and Everett, and his own operations had been profitable more than 25 miles away from market or salt water. There was other evidence, but it is unnecessary to refer to it.

We concede that the witnesses for the appellants had sufficient familiarity with the country and the timber upon the lands of the appellants and the general conditions to entitle their judgments upon values to very high respect, and yet witnesses for the appellees equally well qualified in knowledge and experience have expressed opinions sustaining the values made by the officials.

Turning to the specific figures, we find this: In 1912 the fir, spruce, and cedar timber of the appellants was assessed at 70 cents per thousand feet in one zone, and at 60 cents in another zone. Now, taking the evidence as sustaining a conclusion that the market value of fir, spruce, and cedar at that time was $2 per thousand, we have the assessment made at approximately 35 per cent. of the value. The assessor himself has testified that in putting value upon timber he believed that the sums adopted were about 50 per cent. of the true value of the lands involved; that in 1914 he raised the assessment on fir, spruce, and cedar 10 cents a thousand, from 70 to 80 cents and 60 to 70 cents in certain zones, because he believed that previous assessments had been too low; that he had made an error in the assessments of 1912 because at that time he had had very little information. We then have the result that, with an established value of $2 per thousand feet, the assessment made was 40 per cent. of the market value for 1914. It is also proven that, when the assessed value was raised, it affected all timber lands in Clallam county.

Appellants argue that the evidence shows that their lands are without conveniences for transportation and access to markets, and it would cost a great deal to construct and operate a railroad to transport the timber from the interior lands of the appellants to tidewater. But there was much evidence introduced by the defendants to show that it would cost but little more to construct a railroad in the interior and to log the interior timber than to move and log the Straits timber. The evidence of freight tariffs on logs to be transported by transcontinental railroads does not furnish great aid in estimating the fair cash market value of the timber lands. It is the value of the land with the timber on it in the timber land market that primarily must govern, and the value from that standpoint is not to be controlled by the value of manufactured sawlogs made from the timber after it is felled. There is evidence, however, to the effect that timber, when it reaches Clallam Bay and certain other water points, has a value of $6, $8, and $11 per thousand feet as against the value of $2 per thousand in the tree growing on the lands in the interior zones. The evidence of the assessor was in substance that for 1914 he had used and considered the timber cruises which divided the timber lands into 10-acre tracts and gave the number of trees on each 10 acres,

the average number of thousands of feet, amount of fir, spruce, cedar, and hemlock on each 10 acres, the character of ground, dead timber, burned lands, and also showed character of logging conditions on each 40-acre tract. ' In 1912 he says that he used the information then at hand, as to kind of timber, surface, and everything of a physical character, and in fixing zones he used his best judgment as to estimated values for timber assessment purposes. The members of the board of equalization were rigidly examined and also testified that in 1912 and 1914 they approved of the assessment rolls prepared by the assessor; that in 1914 they had the cruise books before them; that they weighed the timber estimates and always exercised their best judgment. Appellants have vigorously attacked these statements of the assessor and members of the board of equalization, but we think they have overlooked the whole of the testimony of the officials. We do not controvert the argument that, if there were nothing of substance except mere statements by the officials that they used their best judgment, such statements ought not to count for much against evidence of circumstances and facts which would show that there was no fair ground upon which they could have formed the judgments they did. But, as pointed out, such is not the case here.

[1] We fail to see that in the adoption of the zone system as a basis for assessment and taxation there was inherent error. Of course, an assessor must always be guided by the purpose that the tax levied upon each tract shall be relatively according to its real value. But if he proceeds in good faith on this principle and after examination of the physical location of the lands with reference to the advantages or disadvantages of situation of each tract, contour of the land, the quality and quantity of timber standing thereon and facility for logging, there can be no well founded objection to a classification by convenient area of growth, whether called zones, districts, or tracts. It is easy to understand how differences in value in several areas will arise and must be recognized as of practical importance. We all know, too, that an assessor is oftentimes confronted by a very difficult task in making distinctions in values of unoccupied lands; however, he must make the assessments as the law requires and must do the best he can, and although he has the rules of law to guide him, to a great extent he must use hard-headed judgment, which presumably he will be able and ready to apply to his task. In Doty Lumber & Shingle Co. v. Lewis County, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912B, 870, the Supreme Court of the state considered an attack upon an assessment of lumber lands, where, before formal equalization was proceeded with, tentative bases of value had been put upon timber with relation to distances from a commercial railroad. The board of equalization, after hearing, raised the assessments of the lands, not adhering strictly to the tentative bases but considering distance of the property from a logging stream or commercial railroad and the contour of the land as affecting the expense of getting the lumber to market. The court held that establishing the limits in miles as bases of value was not action upon a fundamentally wrong principle, and distinguished the case of Hersey v. Board of Supervisors (decid-

ed in 1873) 37 Wis. 75, cited to us by appellant, by carefully pointing out that in the Wisconsin case a fixed value was placed on standing timber within limits fixed by the authorities, without reference to statutory requirements in Wisconsin concerning logging conditions, quality of timber, or character of soil.

[2] As peculiarly appropriate to the case before us, we quote what the Supreme Court said:

"There is a marked divergence in the opinions of the respective witnesses as to the value of the timber land, but the law put the burden upon the appellants, and the trial court who saw and heard the witnesses concluded that they failed to meet the burden, and we are inclined to take the same view."

And in Louisville & Nashville R. R. Co. v. Greene et al. (decided since the present case was submitted) 244 U. S. 522, 37 Sup. Ct. 683, 61 L. Ed. 1291, we have the last expression of the Supreme Court of the United States, where it was said:

"The findings of an official body, such as the board of valuation and assessment, made—as was the case here—after a hearing and upon notice to the taxpayer, are quasi judicial in their character, and are not to be set aside or disregarded by the courts, unless it is made to appear that the body proceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise or unless fraud appears. Pittsburgh, etc., Railway Co. v. Backus, 154 U. S. 421, 435, 436 [14 Sup. Ct. 1114, 38 L. Ed. 1031]; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 596 [27 Sup. Ct. 326, 51 L. Ed. 636]."

Our conclusion is that the evidence of the appellee meets any fair criticism of the zone method and that there is no reason for disturbing it. The assessments in the several zones are as follows:

Zone No. 1—1912–1913, fir, spruce, and cedar, 80 cents; hemlock, 40 cents. 1914, fir, spruce, and cedar, 90 cents; hemlock, 40 cents.

Zone No. 2—1913, fir, spruce, and cedar, 70 cents; hemlock, 35 cents. 1914, fir, spruce, and cedar, 80 cents; hemlock, 40 cents.

Zone No. 3—1913, fir, spruce, and cedar, 70 cents; hemlock, 35 cents. 1914, fir, spruce, and cedar, 80 cents; hemlock, 30 cents.

Zone No. 4—1913, fir, spruce, and cedar, 60 cents; hemlock, 30 cents. 1914, fir, spruce, and cedar, 70 cents; hemlock, 30 cents.

Zone No. 5—1913, fir, spruce, and cedar, 40 cents; hemlock, 20 cents. 1914, fir, spruce, and cedar, 50 cents; hemlock, 25 cents.

Zone No. 6—1913, fir, spruce, and cedar, 40 cents; hemlock, 20 cents. 1914, fir, spruce, and cedar, —— cents; hemlock, —— cents.

The Ruddock and McCarthy lands, which were in zone 2, in 1913, were assessed at 70 cents for fir, spruce, and cedar, and hemlock, 35 cents; in 1914, fir, spruce and cedar, 80 cents, and hemlock, 40 cents. Appellants have made a much stronger showing of possible overvaluation of hemlock than of fir, spruce, and cedar. There is much evidence tending to show that valuations of hemlock timber were high, but there is no substantial evidence that any discrimination against the lands of the appellants was had, and there is evidence to sustain the assessment of the hemlock as made by the assessor and sustained by the board of equalization. We are thoroughly satisfied that, if there was any overvaluation, it was due to honest mistake of opinion, and not to fraud. As was said in Olympia Waterworks v. Gelbach, 16 Wash. 482, 48 Pac. 251:

"It is a well-known fact that there is often a wide difference of opinion as to the values of property among persons acting honestly and endeavoring to get at the true value, and, as this question must be settled somewhere, the law has reposed it in the board of equalization, and made their action final."

We understand, of course, that the court, in using this language, did not intend to commit itself to the doctrine that, where the action on the part of the officials was fraudulent, the courts would not interfere. It appears that the value of the hemlock in Clallam county was the same as the value put upon hemlock in other portions of the hemlock belt, or what is spoken of as the "Olympia peninsula timber." Again, appellant's assessment for 1914 was upon a valuation of $1,667,000, which included a value put upon hemlock of $223,426, which is less than 13.5 per cent. of the value of the total valuation put upon the property of the appellants.

Appellants offered much evidence, principally opinions from men versed in realty values, in support of their contention that a fraudulent combination of tax officials existed with the purpose of discriminating against the lands of these several appellants and in favor of other classes of property in Clallam county and in favor of timber lands which were being operated. To meet this, appellees also produced much evidence, but relied largely on the showing of just what prices were paid where actual sales had been had. With respect to real estate in Sequim, comparisons between prices at which a number of lots sold in 1913 and 1914 and the assessed values imposed in 1914 showed that the assessment was 48 per cent. Much other property in the town in 1914 was assessed at 58 per cent. of sale contract prices. There was sharp conflict as to some of the values; but, in the light of the evidence of the actual sales had, it is not for us to substitute our judgment for that of the lower court and the county officials. And like position must also hold in relation to the evidence concerning assessment of farm lands.

It is said that the assessment of Port Angeles real estate was dishonestly made and that values grossly below true values were imposed. The town, so the evidence discloses, had more or less of a boom in 1912, when prices rapidly increased, and considerable property was transferred. But witnesses tell that a change came soon after 1912 when prices fell. Opinions of witnesses as to values in 1914 are radically divergent and wholly satisfactory judgments are not easily arrived at. But the tabulated statements of assessed valuations for 1914, when compared with the valuations placed by several witnesses upon the town property, show that an average assessment of about 50 per cent. was had.

Complaint is made against the assessment of certain personal property—shingle mills, bank stock, and property of power companies. The assessor testified in detail about the condition of the several mills, their machinery, sizes, capacities, age, and locations, and said that he tried to make his assessments on the basis of 50 per cent. of actual market value. Appellants introduced testimony that his assessments were too low, but we find no solid ground upon which to rest a reversal of his judgment.

[3] There was not a proper assessment of the banks in 1914. This was admitted upon the trial. Under the statute of the state (section 9134), the assessment should have been upon the shares of stock at the full and fair value, whereas it was made upon the basis of a per cent. of the capital stock. The chairman of the board of equalization admitted at once that the assessment was wrong, and said the error was because the board did not know any better, and was unable to construe the statute properly, and was never advised of its error by counsel until after the board had acted. The error does not invalidate the assessment. In Doty Lumber & Shingle Co. v. Lewis County, supra, the court said:

"The omission of the assessor to assess property, under a misapprehension of the law, will not invalidate the assessment list. It is the same in legal effect as the casual omission of property through a mistake."

It may be that there was some undervaluation of the plant of the Olympic Power Company; there probably was. The plant was built in 1910, but in 1912 the dam was broken and partly carried away, and as a result the value of the property was much impaired. However, there is nothing of substance to show that the assessment of the authorities was fraudulently made; and surely, when we consider the difficulty of valuing property in the condition existing when the assessment was made, the courts should not disturb the judgment of the local authorities.

We are not at all satisfied by the evidence that there was any corrupt combination between the assessor and the members of the board of equalization for the purpose of overvaluing appellants' lands, or discriminating in any way against them and in favor of other property. The appellants went to the pains of sending an agent from Portland to Port Angeles in 1914 to inquire into real estate values thereabouts. He went and talked with the county assessor and other officials and persons, and assumed to narrate many conversations with the officials, wherein they made statements to the effect that timber was assessed more than any other property, and town property at less than half its real value, which it is now sought to use as admissions by them of intentional undervaluations of town and other property. The officials positively deny many of the statements attributed to them, and declare that they never made statements intending to convey the meanings which the investigating witness gave to them. The District Court rejected the theory of conspiracy, and, without elaborating the evidence introduced by the several parties, our opinion accords with that of the lower court. Granting that, unexplained, much of what the main witness for the plaintiffs testified to tended to show wrongful concert of action, nevertheless the officials met the issue of intentional wrong in a way which dispelled any fair inference of corruption on their part. Olympia v. Stevens, 15 Wash. 601, 47 Pac. 11.

What we have said pertains sufficiently to the more important features of the appeal, and leads us to the conclusion that, while the evidence abounds in diversity of opinions as to correct values, those adopted by the officials are sustained as true to a greater or less de-

gree. Appellants went before the board of equalization, and must now abide by their judgment. If there were some overvaluations or undervaluations, they are to be attributed to mistakes of judgment, and, in the case of the bank stock values, to honest misconstruction of law, but not to intentional, or arbitrary, or fraudulent, overvaluation or omission.. And as the evidence fails to show discrimination against the property of any class or owner, or that any fundamental principle of uniformity was violated, the appellants are not entitled to relief in equity. C., B. & Q. Ry. Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636; Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553; Vancouver Waterworks v. Clark County, 55 Wash. 112, 104 Pac. 180; N. P. R. Co. v. Pierce County, 55 Wash. 108, 104 Pac. 178; Mercantile National Bank v. New York, 172 N. Y. 35, 74 N. E. 756.

The decrees are affirmed.

VEZINA v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. August 15, 1917.)

No. 4725.

1. INDIANS ⟸1—PERSONS ENTITLED TO ALLOTMENTS AS INDIANS—EVIDENCE. In a suit to establish plaintiff's right to an allotment of land in the White Earth Indian reservation, evidence *held* to show that plaintiff was by blood a member of a band of the Chippewa Indians of Lake Superior.

2. INDIANS ⟸1—PERSONS ENTITLED TO RIGHTS OF INDIANS—ABANDONMENT. Under Act June 7, 1897, c. 3, 30 Stat. 90 (Comp. St. 1916, § 4106), providing that all children born of a marriage between a white man and an Indian woman by blood, where such Indian woman is, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belonged as any other member of the tribe, where plaintiff's mother, until her marriage to a white man, was fully recognized as a member of a band of Chippewa Indians, and there was nothing to indicate that she ceased to be so recognized up to the time of her death, plaintiff was entitled to be recognized and treated as a member of such band of Indians, though she did not remain with the tribe on their reservation, especially as an Indian, who has abandoned his tribe and taken up his abode among the white race, and recognizes no authority over him except that of the United States and the state in which he resides, cannot become a citizen of the United States, in the absence of a statute or treaty, and forfeiture of tribal citizenship by one who cannot acquire any other citizenship should not be found upon light and trifling circumstances.

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

Suit by Elizabeth Vezina against the United States and S. E. Mooers. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

F. H. Peterson, of Moorhead, Minn., for appellant.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for the United States.

R. J. Powell, of Minneapolis, Minn., and Clayton C. Cooper, of Mahnomen, Minn., for appellee Mooers.

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

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

SMITH, Circuit Judge. On August 15, 1894 (28 Stat. 286, 305, c. 290, § 1), and on February 6, 1901 (31 Stat. 760, c. 217, § 1 [Comp. St. 1916, § 4214]), Congress enacted:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."

This action was brought under that statute.

The plaintiff on March 15, 1889, moved to the Chippewa reservation at White Earth, Minn., and took up her home at the town of White Earth in a house erected by her husband, and there remained until about 1902 or 1903. Her husband moved back to Minneapolis and died there, but she remained on the White Earth reservation. In 1903 she moved to the west half of the northeast quarter, and the southeast quarter of the northwest quarter, and the south half of the north half of government lot 3 in section 2, township 146, range 40 west of the fifth principal meridian. She there made improvements, consisting of a house and two barns, which have been burned down, built a barbed wire fence, and grubbed the timber and brush from about 1½ acres of land. Her improvements were worth about $800. She has remained on these lands ever since. About 1909 the said lands were allotted to one Pah-dub, and were subsequently patented to him and sold to the defendant S. E. Mooers. The plaintiff is now 88 years old, and was 85 at the time of the trial.

Bearing in mind her life and attainments, it is manifest that as to the proof of her pedigree and family history the rule as to hearsay has been greatly relaxed. Jones on Evidence, §§ 312 to 318; chapter 43, Chamberlayne on the Modern Law of Evidence, p. 4037; Greenleaf on Evidence (16th Ed.) vol. 1, pp. 197–203; Abbott's Trial Evidence (1st Ed.) p. 90 et seq.; Rice on Evidence (1st Ed.) pp. 413–419; 10 Ruling Case Law, 963–966; 16 Cyc. 1223–1235.

The case has under a special order of the court been submitted on a typewritten transcript. It is difficult to determine the exact facts. The transcript is filled with typographical errors. Many mistakes have been made in the examination of the witnesses. For example, one of the questions refers to Commissioner Fletcher whereas it is quite manifest it was meant to refer to Congressman Fletcher; but greater difficulties than these are found in the transcript. Plaintiff does not speak the English language and testified through an interpreter. Many of the witnesses are in part of Indian blood, and their English is not of that clearness which could be desired; but, bearing the rules in the authori-

ties cited in mind, we have no doubt the evidence shows the plaintiff was born on the Red river, in Canada, near Ft. Garry or Winnipeg, to Michael Delaney and his wife, Isabel Delaney; her mother, Isabel Delaney, was born about the first of the nineteenth century at Fond du Lac, Minn.; Mrs. Delaney's maiden name was Isabel Bazille; the maiden name of the plaintiff's grandmother, the mother of Mrs. Delaney, was Therease Cotte; she was married to a full-blood Indian named Kah-we-tah-wah-mo, a member of the Fond du Lac band of the Chippewas of Lake Superior. See 10 Stat. 1109, 1110, subd. 4, art. 2. For aught that appears he and his wife were always fully recognized as members of that band and tribe. It seems probable that Mrs. Bazille had Indian blood as well as her husband. She looked like an Indian woman; she had black hair, which she wore down her back, wore moccasins, and, besides doing her domestic duties, did a great amount of bead work and was an Indian doctor. They lived in a tepee. Mrs. Bazille died at Fond du Lac. Their daughter, Isabel, was at the age of 14 married to Michael Delaney, a Canadian Frenchman, who was by occupation a mason. Mrs. Delaney was one-half to three-fourths Chippewa of Minnesota. She wore her hair down her back, made moccasins for sale, did bead work and sold the same, and like her mother, aside from domestic duties, was an Indian doctor and midwife; she walked pigeon-toed, as most Indian women do; she frequently went from Fond du Lac to the Red river to make maple sugar before and after her marriage; she lived in a tepee. Shortly after her marriage, there being substantially no work in Mr. Delaney's line in Fond du Lac, they went up on the Red river in Canada near Ft. Garry or Winnipeg, and he worked there on the fort and made some tombstones. When they started from Fond du Lac to Red river, they first traveled with a dog team, and when they came to the river they crossed it in bark canoes, and then carried the canoes to the next lake until they got through. Eight children were born to them while they were living in Canada; the plaintiff being probably the third. She was born about 1828 or 1829. When plaintiff was about 19 her father moved back, about 1850, to Minnesota and secured work on Ft. Snelling. Two years later his wife joined him and there bore him two more children. Plaintiff remained about two years longer with her aunt, until her parents were settled at St. Paul. and then by their direction she joined them and remained with them a couple of years, when she was married to Joseph Vezina, a Canadian Frenchman, a carpenter, millwright, railroad bridge builder, and farmer, and they moved to Mendota, and later to Minneapolis. In the meantime, and about ten years after they had settled at St. Paul, the Delaneys moved to Rice Lake, about 18 miles from St. Paul, and to a farm. There they remained several years, when they moved to Minneapolis, where Mr. Delaney died, and his wife followed him about 1875. She also looked like an Indian squaw; she wore no stockings, but in winter wore cloths wrapped about her legs to protect her from the inclemency of the weather. While the plaintiff and her family were living at Mendota, her mother received an allotment of goods from the government, consisting of blankets, gingham, and calico, which she divided with the plaintiff. One witness says Mrs. Delaney

was about three-fourths Indian by blood, more like a full-blood than three-fourths, and she acted like a squaw. At one time Mrs. Delaney showed Louis Hamlin what she claimed was some scrip issued to her by the government. Nearly all of Mrs. Delaney's and the plaintiff's brothers and sisters married Indians or mixed-bloods. In her youth Mrs. Delaney frequently went out with others on buffalo hunts, carrying a pack on her back; she smoked a red clay pipe. Through their lives, and in the various places where they have lived, Mr. and Mrs. Delaney and Mr. and Mrs. Vezina lived the greater portion of the time since they quit the tepee stage in log cabins.

Prior to October, 1863, there was issued to the plaintiff, under the seventh clause of the second article of the treaty of September 30, 1854 (10 Stat. 1109), as a mixed-blood Chippewa of Lake Superior, scrip for 80 acres of land, certificate No. 119. This scrip was located in October, 1863, on land in the Stockton land district in California by William S. Chapman, attorney in fact. A patent was issued on this land, but on May 8, 1879, the same was canceled. A careful reading of subdivision 7 of article 2 of the treaty (10 Stat. 1109) will show it did not contemplate the issuance of scrip at all. There was issued, however, to 278 persons what was known as "Gilbert scrip." On March 19, 1872, the Secretary of the Interior ruled that:

"All the so-called scrip issued under this treaty, except such as is denominated the 'Gilbert scrip,' is so tainted, by the actual and clearly established frauds practiced in issuing it under the construction before referred to, as, in my opinion to deprive these certificates of any value or validity, even for the purpose of determining the identity of the persons entitled to the benefits of the treaty. Therefore, besides reversing the construction of the treaty under the decision of Secretary Usher as aforesaid, I have to direct that all the so-called 'scrip' forming the subject of your report and that of the commissioners before referred to, except the 'Gilbert scrip,' be declared illegal, fraudulent, and void, and all entries of land made with such scrip and unpatented should be canceled."

While certificate No. 119 was declared illegal and void, there is no finding that plaintiff was personally guilty of any fraud; but it clearly appears that as early as 1863 the plaintiff claimed to be a mixed-blood of the Chippewas of Lake Superior, and, although it had no right to issue any scrip upon such a claim, the government recognized the truth of her claim that she was a mixed-blood Chippewa of Lake Superior, and in declaring the scrip void did not declare otherwise. Mrs. Delaney talked Chippewa and broken French, while Mrs. Vezina talked French and broken Chippewa.

On January 14, 1889, Congress passed "An act for the relief and civilization of the Chippewa Indians in the state of Minnesota." 25 Stat. 642, c. 24. This act provided for the appointment by the President of three commissioners to negotiate with all the different bands and tribes of Chippewa Indians in the state of Minnesota for the relinquishment of all their interest in the state, except in the White Earth and Red Lake reservations. Section 3 of this act provides that after the compliance with certain specified terms all of the Chippewa Indians of Minnesota, except those in the Red Lake reservation, be removed to and take up their residence on the White Earth reservation and that they should be allotted lands in severalty in conformity with

Act Feb. 8, 1887, c. 119, 24 Stat. 388. The act (25 Stat. 642), in its first section, provides that, for the purpose of making the allotments and for other purposes, the commissioners should make a census of the Indians. The President appointed under the act the following persons, who served as commissioners for the time indicated: Hon. Henry M. Rice, February 26, 1889, to May 29, 1891. Bishop Martin Marty, February 26, 1889, to June 22, 1893. Hon. Joseph B. Whiting, February 26, 1889, to January 10, 1891. Hon. Darwin S. Hall, May 29, 1891, to April 15, 1893. Hon. Francis Campbell, January 10, 1891, to April 22, 1892. Hon. Rockwell J. Flint, April 22, 1892, to September 22, 1893. Hon. William M. Campbell, April 15, 1893, to November 30, 1894. Hon. Benjamin D. Williams, June 22, 1893, to June 10, 1896. Hon. J. Montgomery Smith, September 22, 1893, to June 10, 1896. Hon. Melvin R. Baldwin, February 15, 1895, to July 28, 1897. Hon. Darwin S. Hall, July 28, 1897, to December 31, 1899.

On November 21, 1889, the commissioners, then consisting of Hon. Henry M. Rice, Bishop Martin Marty, and Hon. Joseph B. Whiting, and 123 adult Indians of the Fond du Lac band of Chippewas of Minnesota, by agreement ratified the act of January 14, 1889 (25 Stat. 642), and the Indians ceded to the United States all of their former reservation in Minnesota. As already stated, between the passage of this act of Congress and the making of this treaty or agreement, the plaintiff, on March 15, 1889, moved to the White Earth reservation, and she has lived there ever since, more than 25 years at the time of the trial of this cause in the District Court, and now more than 28 years.

The law did not call for the consent of the Indians to the making of the list for allotment. That power was solely vested in the commissioners, but they wisely in the main decided to take the advice of an Indian council, not with the old White Earth Indians, but of the new and old occupants of that reservation. There was considerably more land in the reservation than was required for allotment. The act (25 Stat. 642) provided for the sale at public auction of the pine lands of the reservation, at not less than their appraised value, and the entry of the agricultural lands under the homestead law, but required each homesteader to pay $1.25 per acre for his land. The act further provided that the proceeds of the sale of pine lands and agricultural lands should all be to the ultimate benefit of the Chippewas of Minnesota. Thus every member of the council acquired a direct personal interest adverse to any claimant to an allotment in the loss which would result to the residue if allotments were allowed which would reduce the lands which belonged under the act to the Indians in common. The Indians were much divided as to Mrs. Vezina's claim to be listed with the commissioners and to giving her an allotment. White Cloud, the principal chief, after making personal investigation, was in her favor, as were many more of the Indians, and the proceedings of the first council, if ever recorded, are not in evidence. Suffice it to say they never voted to recommend that Mrs. Vezina be put upon the list. The council of June 1, 1907, rejected her, and in later years the council constantly referred the matter back to the government. After liv-

ing at the town of White Earth on the reservation, in a house which they had been expressly permitted to build by the chief, and apparently at least with the acquiescence of the Indian agent and commissioners, for 13 years or more, she moved to the land in question about the time of her husband's death. The description of the land upon which she located was furnished her by Joseph Perrault, who was employed at the government agency.

On September 2, 1892, Chairman Hall of the commission, and on June 20, 1894, Chairman Campbell of the commission, reported adversely on Mrs. Vezina's claim, and these decisions were sustained by the Indian Office. On May 27, 1895, Chairman Melvin R. Baldwin of the commission reported he believed the plaintiff's mother was a member of the Chippewa tribe, and that the chiefs and head men of the Mississippi band had petitioned for the enrollment of plaintiff, and recommended that she be enrolled and allowed all the rights and privileges granted the Chippewas of Minnesota under the act of January 14, 1889. On June 8, 1895, the Acting Commissioner of Indian Affairs overruled the chairman of the commission in this regard.

Without stopping to discuss whether under the act of Congress in question he had any such power, at about this same time, but possibly before the action of the department, Mr. Baldwin told the plaintiff to go back to her land and she would never be molested. On December 21, 1898, the plaintiff having made application under clause 2 of the second article of 10 Stat. 1109, the Commissioner of Indian Affairs submitted the claim to the Secretary of the Interior, who disallowed her claim upon the ground of an absence of evidence, rather than upon a finding adverse to her upon affirmative evidence. On January 27, 1899, the Assistant Commissioner of Indian Affairs wrote Hon. Darwin S. Hall, who was, it will be remembered, a member of the commission from May 29, 1891, to April 15, 1893, and from July 28, 1897, to December 31, 1899, and who was at the time in question chairman of the Chippewa Commission. In this letter it was recited:

"As you are aware, Mrs. Vezina's claim for enrollment and for an allotment under the act of January 14, 1889, has three times been investigated by the Chippewa Commission and as a result of these investigations the commission has each held that Mrs. Vezina was not entitled to enrollment. In this conclusion the office concurred each time."

The letter further recited that Congressman Loren Fletcher had written the Indian Office about the matter and it had been decided to consider his letter as an appeal. It will be observed that this letter stated that the commission had each of three times held that Mrs. Vezina was not entitled to an enrollment. It will be remembered that this is an inaccurate statement. It is true the commission had twice so reported, but the last report had been favorable to her claim and been overruled by the Indian Office. On March 24, 1900, upon an application for a rehearing all the papers in the case were referred to Commissioner Hall, who, it will be recalled, had made the first investigation in which a report was made adverse to her claim. On July 18, 1900, Commissioner Hall made a report, reversing the former one and recommending that Mrs. Vezina be enrolled. His new report was

overruled by the Indian Office and the Acting Secretary of the Interior. On June 20, 1903, Simon Michelet, United States Indian agent at the White Earth reservation, gave a certificate that he was satisfied that Mrs. Vezina was entitled to locate lands under the seventh clause of the treaty of September 30, 1854. On May 6, 1904, the office of Indian Affairs wrote to Mr. Michelet that the claim of the Vezinas had been several times passed upon, and it had been determined that they were not entitled to enrollment, and that "no countenance or sanction whatever must be given to their pretended claim or right to occupy lands on the White Earth reservation." In October, 1907, the Acting Commissioner of Indian Affairs wrote to the superintendent in charge of the White Earth agency that a petition for rehearing had been filed in the Vezina matter through the President, and added:

"In view of the facts stated in the petition, that these people have actually resided on the lands they are claiming as allotments for 17 years, and have added much value to them by cultivation and improvements, the office feels disposed to again let their cases be presented to a general council of the White Earth Indians. The papers are accordingly sent to you herewith. You are instructed to present the Vezina cases to the next general council of the White Earth Indians. You are requested at your earliest convenience to notify Mrs. Vezina and the members of her family (not including grandchildren) who have made actual settlement in the White Earth reservation of the action taken, and warn them that they should be prepared to properly present their case to the next general council. You are instructed further that you should seasonably notify the Vezinas of the date when the council will convene. As far as practicable you should co-operate with these claimants in a proper presentation of their case to the council when it convenes. These instructions do not mean that a special council shall be called to hear these cases, but simply that they should be presented at the next general council that is convened."

On January 20, 1908, the Acting Commissioner of Indian Affairs wrote to the superintendent in charge of the White Earth agency:

"I send you herewith, for proper action, a letter from Mrs. Elizabeth Vezina and family, dated Langby, Minn., January 8, in relation to the enrollment of herself and children with a view to procuring allotments under the provisions of the act of Congress of January 14, 1889 (25 Stat. 642). The case is an old one, as you know; considerable correspondence having passed between the Chippewa Commission and the office and your agency and the office in relation thereto. With your letter of July 12, 1907, you transmitted to the office a certified copy of the proceedings of a general council of the White Earth Band of Chippewa Indians held on June 1, 1907, to take action on matters of general interest to the tribe, and to pass on the rights of applicants for enrollment, etc. Included in the list were the applications of the Vezina family, which had been rejected by the council. The Acting Secretary of the Interior approved the action of the council, and you were so advised on August 22. It appears that these people have lived on the reservation for 18 years. It is assumed that they are now in possession of the lands originally chosen as their allotments. After all these years of residence on and improvement of the lands selected, it would be a great calamity to them to have to surrender the lands. Mrs. Vezina is now 79 years of age and getting quite feeble. The office feels much sympathy for her, and believes she and her children—but not her grandchildren—should be enrolled and allotted the lands they have so long occupied. You are therefore requested to present the application of Mrs. Vezina and her family for enrollment for the action of the next general council of the White Earth Indians, and urge favorable action thereon."

On January 28, 1908, Simon Michelet, superintendent of the White Earth agency wrote the Commissioner of Indian Affairs as follows:

"In reply to office letter of January 20, 1908, marked 'Land Office 2562–1908, File 053,' subject 'Relative to enrollment of Mrs. Elizabeth Vezina and family,' in which you inclose a letter from Mrs. Vezina to the President of the United States, I have the honor to report that I called a general council of all of the Indians of the White Earth reservation, to be held at White Earth agency on December 28, 1907, for the purpose of passing upon applicants for enrollment, of which I had a number on file awaiting a hearing at the general council. I stated in the notice that the council was called for the purpose of passing on applicants for enrollment. In order that you may know how the Indians feel regarding enrollment, I will say that no one attended this council, or appeared, except one or two chiefs. Those two present agreed to call a council a few days later; these two chiefs notified all of the other chiefs and head men who generally attended the councils to be present but they failed to put in an appearance at the second called council. On Saturday, January 11, 1908, the Indians held a council at White Earth, and when I learned of it I sent word to the council that I desired to present a number of applications for enrollment. I was advised that they did not care to take up any of these applications and I have to state frankly that I do not believe that this old woman (Mrs. Vezina) should receive any encouragement whatever, if you intend to leave this matter to the council. They are so prejudiced and biased in acting upon these applications that it is simply impossible for any of these applicants to receive a fair hearing in regard to enrollment. It seems to me that your office has treated the Indians with courtesy when opportunity is granted for them to pass upon these applications, but when the Indians, in council, refuse to act, it seems to me that the obligation to treat with them further upon the subject ceases. I am fully satisfied that this old woman has rights on this reservation; there is no doubt about her Indian blood, and it is my humble opinion that she is entitled to enrollment, whether the Indians consent to her enrollment or not. It seems to me that it would be a good lesson to the Indians to enroll this woman, when they refuse to give her case the consideration it should have."

On December 1, 1908, John R. Howard, United States Indian agent, wrote to the Commissioner of Indian Affairs as follows:

"I have the honor to submit the minutes of a general council of the tribes of Indians belonging to the White Earth reservation, held, pursuant to call on October 1st and 2d for the purpose of acting upon the applications of various persons for enrollment on the tribal rolls, and for transacting any other business that might lawfully come before it. A number of applications were placed before the council and acted upon as follows: * * * Case No. 10. Elizabeth Vezina, This application has been rejected by a former council. The applicant and members of her family were all present with her attorney, but notwithstanding the order contained in your office letter of October 25, 1907 (Land 75, 755–1907), directing me to submit the matter to another council, and which letter was before them, the council absolutely refused to permit the matter to be brought before them. I understand that this matter is now definitely settled, so far as this office is concerned."

December 30, 1908, the Commissioner of Indian Affairs wrote the Secretary of the Interior as follows:

"This office is in receipt of a letter from John B. Howard, United States Indian agent, White Earth agency, dated December 1, 1908, submitting the minutes of a general council of the White Earth Chippewas of October 1 and 2, 1908. The council was called to consider the matter of the applications of various persons for enrollment as members of the tribe, with a view to procuring annuities and allotments under the provisions of the act of Congress of January 14, 1889 (25 Stat. 642), and the act of April 28, 1904 (33 Stat. 539, c. 1786). * * * The cases not receiving the sanction of the council are as follows: * * * Elizabeth Vezina and family. * * * In each of the

above cases, from 8 to 12, inclusive, the agent recommended that the action of the council in rejecting the application, or applications, be approved. This recommendation is concurred in by the office. The action of the council in each of the cases referred to above, from 1 to 7, inclusive, seems to be justified by the facts developed by the evidence. It is thought, also, that the council was entirely justified in taking unfavorable action on each of the cases from 8 to 12, inclusive."

October 28, 1909, the Acting Commissioner of Indian Affairs wrote to Henry Vezina, son of plaintiff:

"Referring further to your letter of June 24, 1909, regarding the application of Mrs. Elizabeth Vezina for rights with the Indians of the White Earth reservation, you are informed that the superintendent of the White Earth reservation, in accordance with the request of this office, has made a further investigation with regard to the matter. In the report which has been submitted to the office, no additional evidence is submitted that would in any way modify or change the attitude of the department and the office with regard to the application of the members of the Vezina family for enrollment with the White Earth Bands of Chippewa Indians. The office would not be justified in recommending to the Secretary of the Interior that the case be reopened. In this connection your attention is called to the act of Congress of February 6, 1901 (31 Stat. 760), which provides: [Here follows a transcript of the statute in question under which this suit was brought, and the letter proceeds:] It appears to the office that this would be the simplest and most direct way of having the rights of your family determined to the White Earth reservation, and no objection would be interposed to a determination of your rights in the manner provided by this law. Members of your family have resided on the reservation for more than 18 years and the White Earth bands of Chippewa Indians claim that you should be excluded from the reservation, because you have not been enrolled with the tribe and therefore have no rights on the reservation. The question of the removal of the members of your family from the reservation has been considered several times, and unless your rights are determined without further delay it may be necessary to take such action in the near future. It is hoped, therefore, that this course will not be necessary, when there is ample opportunity for a determination of your rights in the manner indicated by the act of February 6, 1901, above cited."

On December 13, 1911, there was filed in the office of Indian Affairs the affidavit of Margaret Roy, 93 years old, a cousin of plaintiff, swearing that from common report in the family plaintiff was a mixed-blood Indian belonging to the Mississippi band of Chippewas of Minnesota and a granddaughter of Kah-we-tah-wah-mo, who was a full-blood member of said tribe.

[1] We are clearly of the opinion that the plaintiff is by blood a member of the Fond du Lac band of the Chippewas of Lake Superior. The evidence shows a considerable number of persons born off the reservation, and who reached middle life before the treaty of January 14, 1889, and who then moved to the reservation, were recognized, enrolled, and secured allotments upon the reservation. Two out of three of the commission reports were finally in her favor, and the Indian Office on January 20, 1908, urged favorable action upon her case. Simon Michelet, the Indian agent, reported in her favor.

[2] But it is contended that she and her mother abandoned their membership in the tribe. This is not specially pleaded by either of the defendants; but, even if it were pleaded, we have reached the conclusion that it is not sustained. The act of the Fifty-Fifth Congress (Act June 7, 1897, c. 3, 30 Stats. 62, 90 [Comp. St. 1916, § 4106) provides:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right."

Mrs. Delaney was up to at least her marriage fully recognized as a member of the Fond du Lac band of the Chippewas of Lake Superior and there is nothing to indicate that she ceased to be so recognized up to the time of her death. Under this statute Mrs. Vezina is clearly entitled to be recognized and treated in all respects as if she had remained upon the reservation. It is true that, if Mrs. Delaney was now living, under our decision in Oakes v. United States, 97 C. C. A. 139, 172 Fed. 305, Mrs. Vezina would not be entitled to be enrolled under this statute. That decision would probably exclude the children of Mrs. Vezina from the right to enrollment and from allotment. As there is no case before us now, except the case of Mrs. Vezina, we do not care to express a more definite opinion upon the question of her children. The Oakes Case, in place of being in favor of the defendants, is, in our view, directly against them. It is true that the Oakes Case held, and many statutes of the United States prior thereto recognized, that Indian citizenship could be abandoned; but it should be borne in mind that the inference of such abandonment should not be drawn from light and trifling circumstances. The Indians were a nomadic people, and a member temporarily absent from the reservation would not forfeit the right of an Indian as a member of the tribe. In the absence of a treaty or an act of Congress, Indians were not citizens of the United States; and, even though one has abandoned his tribe, and taken up his abode among the white race, and recognized no authority over him except that of the United States and the state wherein he resides, he is not, and cannot become, a citizen of the United States, in the absence of a statute or treaty to that effect. Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643; Famous Smith v. United States, 151 U. S. 50, 14 Sup. Ct. 234, 38 L. Ed. 67.

The court should not find upon light and trifling circumstances that an Indian has forfeited his citizenship in his tribe and in no method acquired any other citizenship, but has become literally a man without a country. It should take especially strong evidence that an Indian woman has abandoned her tribe simply by living with her husband, which she ought to do by the laws of both God and man.

It is ordered that the decree of the District Court be reversed, and the cause remanded, with directions to enter a decree in harmony with this opinion in favor of the plaintiff.

SOUTHERN PAVING CONST. CO. et al. v. CITY OF KNOXVILLE, TENN.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 2968.

1. INSURANCE ⟸618—FOREIGN INSURANCE COMPANY—ACTION AGAINST—VENUE.

Under Shannon's Code Tenn. 1917, § 3292, subsec. 3, providing that a foreign insurance company, as a prerequisite to doing business in the state, shall file with the state insurance commissioner an instrument appointing him its attorney, on whom all lawful process in any action against it may be served, that the authority shall continue as long as any liability against the company remains outstanding in the state, and that any process issued by any court of record in the state, and served on the commissioner by the proper officer of the county in which the commissioner has his office, shall be deemed a sufficient process on the company, the company, after it has ceased to do business in the state, may, by process served on the commissioner, be sued in a county other than that in which the commissioner has his office.

2. INSURANCE ⟸618—FOREIGN COMPANY—PROCESS—COUNTERPART SUMMONS—VENUE.

Under Shannon's Code Tenn. 1917, § 6115, providing that suit in chancery court may be instituted wherever the defendant, or any material defendant, is found, unless otherwise prescribed by law, and section 6116, providing that counterpart summons may be issued to any other county for defendants not to be found in the county in which the suit is properly brought, neither of the defendants need be found in the county in which the suit is brought, if it is authorized by statute against one of the defendants in that county; so action in any county against a foreign insurance company, with service of process on the state insurance commissioner as its attorney, being authorized by section 3292, subsec. 3, suit on bond of a contractor to repair street in K. county, with a foreign insurance company as surety, may be brought in that county, and the contractor served with counterpart summons in another county, after the insurance company has ceased to do business in the state.

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

Suit by the City of Knoxville, Tenn., against the Southern Paving Construction Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 220 Fed. 236.

W. L. Frierson, of Chattanooga, Tenn. (Lewis M. Coleman, of Chattanooga, Tenn., of counsel), for plaintiffs in error.

W. T. Kennerly, Wm. Baxter Lee, and J. Pike Powers, Jr., City Atty., all of Knoxville, Tenn., for defendant in error.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The city of Knoxville commenced suit in the chancery court of Knox county, Tenn., December 30, 1913, against the Southern Paving Construction Company, a West Virginia corporation having its principal office in Chattanooga, and the Ætna Indemnity Company, of Hartford, Conn., as surety of the paving company, to recover upon a guaranty which the latter had given to the city

to keep one of its paving districts in repair for a certain number of years. February 3, 1914, on petition of both defendant companies, the cause was removed to and docketed on the equity side of the court below. Prior to removal, on February 2, 1914, the paving company filed in the chancery court a plea in abatement, and after the removal, on March 28, 1914, the Ætna Company filed a similar plea in the court below. These pleas presented issues as to the right to commence or maintain the suit in Knox county, and so involved a question of jurisdiction in the court below. A number of steps were taken by the parties respectively in bringing this question to decision, and in the course of the proceedings the learned trial judge filed several carefully prepared opinions. It is enough to say of the proceedings that the cause was transferred from the equity to the law side of the court; that on January 13, 1915, the parties filed a written stipulation setting out the facts involved in the issues presented under the pleas in abatement, waiving a jury and agreeing to submission to the court; the pleas were overruled, on the ground that they were not sustained by the facts. The city thereupon changed its pleading into the form of a declaration, and to this the paving company demurred. The Ætna Company did not join in this demurrer, or appear again in the case until the petition in error herein was filed; judgment by default was entered against it on April 14th, subject to ascertainment of damages later; and on the 19th of that month, in accordance with an opinion of the trial judge, the demurrer of the paving company was overruled. Thereupon that company presented ten pleas to the declaration, to which the city filed replication in the following July. The cause was tried to the court and a jury in January, 1916, and a verdict rendered upon the issues joined in favor of the city and against both defendants, but assessing the damages against the paving company in the sum of $5,507.35 and against the Ætna Company as surety for $5,027.80, thus holding the paving company for $479.55 in excess of the sum assessed against its surety. Motion by the paving company for new trial was overruled in accordance with an opinion of the trial judge, and judgments against both defendants jointly for $5,027.80, and against the paving company for the further sum of $479.55, with interest, were entered upon the verdict. Both defendant companies prosecute error.

[1, 2] 1. Could the suit be maintained in Knox county? This must depend on the contractual relations of the parties to the suit, and certain statutory provisions of Tennessee. In 1906 the city and the paving company entered into a written contract for the improvement of certain paving districts of Knoxville, some with asphalt, and some with brick and asphalt, at specified prices payable according to approximate monthly estimates and ultimately upon final estimate. Among these districts was Park avenue (paving district No. 16), which was to be paved with asphalt (except between the outer rails of an existing double-track street railway and two strips of brick paving next to the outer rails) from Gay street to the Southern Railway bridge or viaduct, a distance of about 3,200 feet. The paving company agreed, for the considerations mentioned, to keep the pavement "in good repair at its own expense and free of all charge" to the city "for a period of five

years from the date of the completion" of the improvement; and at the same time the paving company, as principal, and the Ætna Company, as surety, executed and delivered to the city a bond in the sum of $15,000, subject to a condition that should the paving company "guarantee, maintain, and keep repaired under the direction of the city engineer, for a period of five years, the paving done by them under said contract, then this obligation to be void; otherwise, to remain in full force and effect." Upon the claimed completion of the work on Park avenue, a controversy arose between the city and the paving company with reference to the work, which was settled and compromised on February 28, 1908, whereby it was agreed that the paving company's period of guaranty should be extended for an additional three years, thus making the entire repair period eight years; and a further bond in the sum of $10,000 was then executed and delivered to the city by the paving company, as principal, and the Ætna Company as surety, subject to condition similar in terms and additional to that mentioned in the first bond. The Ætna Company is a corporation of Connecticut, and concededly at the times the improvement contract and the two indemnity bonds mentioned were delivered, as stated, the Ætna Company was authorized by its charter and qualified under the statutes of Tennessee so to obligate itself; but when the present suit was begun the Ætna Company had withdrawn from business in Tennessee and had no agent in that state, except, as shown below, the state insurance commissioner of Tennessee.

In 1901 the Ætna Company was admitted to do business in Tennessee, and as a condition precedent it filed with the insurance commissioner of that state a power of attorney, dated May 21, 1901, authorizing the insurance commissioner or his deputy—

"to acknowledge service of all legal process * * * for and in behalf of it * * * in said state of Tennessee, in any judicial proceeding which may, within the state of Tennessee, be instituted against it, the said company, or to which it may be a party; and the said * * * company does hereby, in consideration of the privilege of doing business in said state, * * * consent to and with said state of Tennessee, for the benefit of all persons concerned, that service of any such process upon such insurance commissioner or deputy * * * shall be taken and held to be as valid as if served upon" the company, "according to the laws of said state of Tennessee, or of any other state; and the said * * * company does hereby further consent that in case it * * * shall cease to transact business in the said state * * * said insurance commissioner and deputy * * * shall be considered and held as continuing to be attorney" for the company "for the purpose of process * * * in any action against it * * * upon any policy or liability issued or contracted during the time the said company transacted business" in the state.

This power of attorney has not been revoked; and it was given and received pursuant to paragraph 3 of section 9, chapter 160, Tennessee Acts of 1895 (page 327; see, also, section 3292, par. 3. Shan. Code [Ed. 1917]). This statute provides among other things:

"Any process issued by any courts of record in this state, and served upon such commissioner by the proper officer of the county in which said commissioner may have his office, shall be deemed a sufficient process on said company, and it is hereby made the duty of the insurance commissioner, promptly,

after such service of process by any claimant, to forward, by registered mail, an exact copy of such notice to the company."

Concededly the chancery court of Knox county is a court of record, and, apart from the question whether the present suit could be maintained at all in Knox county, its jurisdiction embraces such suits as this. See Shan. Code, § 6109. Section 6115 provides:

"The court of chancery acts ordinarily in personam, and suit may be instituted wherever the defendant, or any material defendant, is found, unless otherwise prescribed by law."

Section 6116:

"Counterpart summons, accompanied by copies of the bill, may be issued to any other counties of the state for defendants not to be found in the county in which the suit is properly brought." [1]

As we have seen, the original bill was filed in the chancery court of Knox county on December 30, 1913. January 2, 1914, process issued to Hamilton county for the paving company, and both to Knox and Davidson counties for the Ætna Company, and was served on the former in Hamilton county, January 6th, and on the insurance commissioner of Tennessee, in Davidson county, January 7th; the commissioner acknowledging and accepting such service. As already stated, the paving company filed its plea in abatement in the chancery court of Knox county February 2, 1914. It was in substance alleged in the plea that neither the paving company nor any other defendant resided in Knox county or had any office or agency there; that counterpart summons for the paving company issued to Hamilton county and was served upon it there; that original process was issued in Knox county for the Ætna Company and subsequently served upon one McMillan, who was described in the sheriff's return as "the last agent and officer" of the Ætna Company "to be found in my county"; that McMillan was not, however, when the bill was filed or when the process was served, an agent or officer of the Ætna Company; that counterpart process for the Ætna Company was issued to Davidson county and service thereof acknowledged in that county by the insurance commissioner of Tennessee, who assumed "to act under a power of attorney for that purpose." The prayer was whether, since the suit "was not brought in a county in which this defendant or any other material defendant was found," the paving company should answer further. The Ætna Company, appearing only for the purpose of its plea in abatement, presented in its plea allegations substantially like those contained in the plea of the paving company, except that the Ætna Company alleged "that process issued for it, at the same time, to both Knox and Davidson counties," and, it is to be particularly noticed, this exception is in accord with the

[1] This section being limited to suits "properly brought" renders it unnecessary to consider the broader section (4526) cited by counsel. Section 4526 provides as follows: "When there are two or more defendants in any suit in courts of law or equity, or before justices of the peace, the plaintiff may cause counterpart summons or subpœna to be issued to any county where any of the defendants are most likely to be found, the fact that the counterpart process is issued in the same suit being noted on each process, which, when returned, shall be docketed as if only one process had issued."

stipulation; hence the allegation of the paving company that counter summons for the Ætna Company was issued to Davidson county is to be treated as a mistake.

It is true that McMillan had not been an agent of the Ætna Company since March 12, 1908, and it must be conceded that service upon him was not effective; but it does not seem to us that this is decisive of the question whether the suit was rightly instituted in Knox county. When the suit was begun the paving improvement contract and the indemnity bonds were subsisting obligations of the two defendant companies as respects the guaranty repair period; and we do not see how the Ætna Company can be heard to say that the admitted service of process on the insurance commissioner was not binding upon it in the present suit. It was required under the statute of 1895, as a condition to its right to do business in Tennessee, to constitute and appoint the insurance commissioner or his successor its true and lawful attorney upon whom lawful process in any action against it might be served, and also to agree that such service "shall be of the same force and validity as if served on the company" and that the authority so given should "continue in force, irrevocably, as long as any liability of the company remains outstanding" in Tennessee. The statute simply requires that the process so issued shall be by a court of record of the state; it does not prescribe the county in which the suit shall be brought; it requires only that service shall be made upon the commissioner of insurance by the proper officer of the county in which he may have his office, and this would seem to have been in effect carried out. As Judge Sanford said, when considering this feature of the case upon demurrer to the replication of the city to the plea in abatement:

"It having been conceded at the hearing that the indemnity company is a foreign insurance company within the meaning of that act (Acts 1895, c. 160, par. 3, pp. 322, 327), this question is, I think, ruled by Patton v. Casualty Co., 119 Tenn. 364, 373, 104 S. W. 305, in which it was held that a nonresident holder of an insurance policy might, under this act, sue in Tennessee a foreign insurance company upon a foreign cause of action, and, further, that in such suit brought in Washington county, Tenn., the acknowledgment of service of the process by the insurance commissioner residing in Nashville, Davidson county, Tenn., 'was properly made, and the company was brought before the court.'"

To the same effect is the ruling in Mutual Reserve, etc., Ass'n v. Phelps, 190 U. S. 147, 149 top, 157, 23 Sup. Ct. 707, 47 L. Ed. 987.

True, it is strenuously urged that the essential basis for issuing counterpart summons, say as here to the paving company, is the commencement of a suit in a county where a necessary defendant is "found." This overlooks important parts of sections 6115 and 6116 above quoted. The first of these sections provides that the suit may be brought where any material defendant is found, "unless otherwise prescribed by law," and the latter authorizes the issue of counterpart summons to any other county for a defendant not found in the county where the suit is "properly brought." If any effect is to be given to the words "unless otherwise prescribed by law" (section 6115), it is plain that where a suit is instituted and process served in accordance with another statute of the state the suit must be treated as "properly brought" within the

meaning of section 6116; and enough has already been pointed out to show that the procedure taken against the Ætna Company was sanctioned by the insurance act; in other words, such procedure was "otherwise prescribed by law." It hardly need be added that if the suit was "properly brought" in Knox county, the paving company was open to counterpart summons in Hamilton county; the law (section 6116) is so written. This harmonizes all the statutory provisions alluded to, while any other interpretation would frustrate the manifest object of the mode of service prescribed by the insurance act. Furthermore, we agree with Judge Sanford, who said of this feature of the case:

"The effect of the insurance act of 1895 is, as stated, to permit the suit to be 'properly brought' against the indemnity company in Knox county, although apparently not technically 'found' therein. And this being so, the suit was hence not only 'properly instituted' in that county against the indemnity company, but under the express provision of section 4306 (now 6116) counterpart summons may issue to another county for the construction company, the condition of the issuance of such counterpart summons not being that another material defendant is 'found' in such county, but that the suit was 'properly brought' in such county. This question is, I think, also ruled by University v. Cambreling, 6 Yerg. (Tenn.) 79, 85. This was a suit in chancery brought in Maury county against two defendants. The one, the University of North Carolina, a foreign corporation, entered its appearance. The other, an individual defendant, was served with a subpœna in Weekly county, outside of the chancery district. It was held that under these circumstances the court had acquired jurisdiction over the resident defendant. Catron, Judge (afterwards Mr. Justice Catron), delivering the opinion, said: 'But the university appeared. This was equal to service of a subpœna within the jurisdiction. The court, having power over one defendant, of course, has jurisdiction of all other material parties, no difference in what part of the state they reside; were it not so, justice would be defeated in most cases for want of parties necessary to a final decree.' The second ground of this opinion is, I think, in exact accord with the provisions of section 4306 (6116) of the Code, and is not a mere dictum, but one of the grounds of decision, and hence conclusive of the present question. And I find nothing to the contrary in Carlisle v. Cowan, 85 Tenn. 165, 2 S. W. 26, involving merely the general rule that the right of suit in transitory actions follows and does not precede the person of the defendant, a rule necessarily abrogated by the act of 1895 in suits against foreign insurance corporations."

Moreover, when speaking of the right to issue counterpart summons, the trial judge further held:

"Thus a statute providing for suit in any district gives, by necessary implication, the right to issue process beyond the district. United States v. Congress Const. Co., 222 U. S. 199, 203, 32 Sup. Ct. 44, 56 L. Ed. 163. And this construction is in accordance, not only with Life Ins. Co. v. Spratley, 99 Tenn. 332, 335, 42 S. W. 145, and Patton v. Casualty Co., 119 Tenn. 364, 373, 104 S. W. 305, but, as I think, with the uniform practice in Tennessee, and the view generally entertained both by the bar and the bench since the passage of the act of 1895. And the fact that the bill alleged that McMillan was an agent of the company in Knox county does not, I think, militate against the validity of the service of process upon the indemnity company by service upon the insurance commissioner, the insurance act of 1895 providing an additional mode of obtaining jurisdiction over the defendant. See, by direct analogy, Mutual Reserve Ass'n v. Cleveland Mills (6th Circt.), 82 Fed. 508, 511, 27 C. C. A. 212, involving the effect of the Tennessee act of 1875 (chapter 66)."

The weight of Judge Sanford's opinion is augmented by his familiarity with the practice prevailing, as he says, in Tennessee; even then, if counsel for the companies be right in saying that the Supreme Court

of the state has not distinctly passed upon the precise question involved here, still in such a situation, the consensus of opinion of the bar and the *nisi prius* courts may generally be accepted as a safe guide in the construction of state statutes. Upon the whole, we conclude that the suit could be maintained in Knox county as against both defendant companies.

2. Upon careful study of the merits of the case we are convinced that it is ruled by the decision of this court in City of Akron v. Barber Asphalt Paving Co., 171 Fed. 29, 96 C. C. A. 271. The controlling facts of the two cases are in principle the same, and a discussion here either of the facts or the applicable law can serve no useful purpose. We do not overlook the insistence that the excess, $479.55, with which the paving company is charged, is without evidential support. We are satisfied that this view cannot be sustained; and it scarcely need be said that this court cannot weigh the evidence.

The judgment must be affirmed.

WESTWATER v. MURRAY.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 3010.

1. JUDGMENT ⊂=818(6)—FOREIGN JUDGMENTS—ACTION ON—INQUIRY INTO JURISDICTION.

In an action to recover upon a judgment rendered by a court of another state, inquiry may be made into the court's jurisdiction over the person of the defendant; but such inquiry involves all the usual tests for determining such jurisdiction.

2. COMPROMISE AND SETTLEMENT ⊂=20(2)—PERFORMANCE OR BREACH OF AGREEMENT.

An action by the receiver of a national bank was settled by a cash payment and the execution of a cognovit note for $3,000, under an agreement that, if defendant failed to make the payments called for, the receiver might forfeit the first payment and prosecute the original suit to final judgment, but that, if both payments were made, he should apply to the court for ratification and approval of the settlement, and, if approved, have the case marked "Settled and discontinued," or, if not approved, refund the money paid. *Held* that where defendant did not pay the note, it was not a violation of the agreement for the receiver to secure the court's approval of the settlement and have judgment entered on the note.

3. JUDGMENT ⊂=817—FOREIGN JUDGMENTS—FULL FAITH AND CREDIT—PUBLIC POLICY.

An Ohio court will enforce, and under the full faith and credit clause of the federal Constitution must enforce, a judgment rendered in Pennsylvania on a cognovit note made and payable in Pennsylvania, though the note contained a provision for an attorney's fee, and though such fee is included in the judgment; such a provision being valid in Pennsylvania, though against public policy in Ohio.

4. BILLS AND NOTES ⊂=113—DEFENSES—LACHES IN PRESENTING DEFENSE.

Defendant was sued in Pennsylvania by the receiver of a national bank; the petition setting out what purported to be a complete copy of the note sued on. Defendant filed pleadings in effect admitting the genuineness of the note. The case was twice tried, and twice passed on by the

court on appeal, and defendant testified at each trial without raising any question or claim of forgery. After the case was sent back for a third trial, it was settled by the execution of a cognovit note, on which judgment was entered nearly a year later. When sued on such judgment in Ohio, defendant for the first time, nearly seven years after the claimed execution of the note, alleged that it was a forgery, claiming that he executed a note of a different date, that a number of other notes were forged, and that he believed that the note sued on was the genuine note. *Held*, that this defense was barred by laches; no excuse being given for defendant's obvious negligence in not discovering the alleged forgery.

5. JUDGMENT ⊂=822(3)—FOREIGN JUDGMENT—MATTERS CONCLUDED.
The judgment rendered upon the cognovit note by a court having jurisdiction was conclusive on the issue of forgery, in view of defendant's laches.

6. PLEADING ⊂=214(7)—ADMISSIONS BY DEMURRER—FACTS NOT WELL PLEADED.
Fraud in obtaining the judgment on the cognovit note was not well pleaded, so as to be admitted by demurrer, where there was no allegation that the receiver had the slightest knowledge of the charge of forgery, or that he resorted to any deception or other act inconsistent with fair dealing.

7. ABATEMENT AND REVIVAL ⊂=41—TRANSFER OF JUDGMENT SUED ON.
Under Gen. Code Ohio, § 11261, providing, relative to the abatement of actions, that on any transfer of interest, other than those specified therein, the action may be continued in the name of the original party, or the court may allow the transferee to be substituted, an action on a judgment did not abate because of a sale and transfer of the judgment during the pendency of the action.

8. APPEAL AND ERROR ⊂=1041(3)—PLEADING ⊂=236(6)—AMENDMENTS—DISCRETION OF COURT—HARMLESS ERROR.
In an action on a judgment on a note given in settlement of an action on a larger note, the refusal to permit an amendment to the answer and cross-petition, to allege that the original note had not been returned to defendant, was at most harmless error, and was within the discretion of the court.

In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Action by Charles C. Murray, receiver of the Cosmopolitan National Bank of Pittsburg, against James Westwater. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

Murray Seasongood, of Cincinnati, Ohio, and Smith W. Bennett and J. G. Westwater, both of Columbus, Ohio, for plaintiff in error.

L. F. Sater and Vorys, Sater, Seymour & Pease, all of Columbus, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action to recover upon a judgment rendered by the District Court of the United States for the Western District of Pennsylvania in a suit commenced January 2, 1909, wherein Robert Lyons, as receiver of the Cosmopolitan National Bank of Pittsburg, Pa., was plaintiff, and James Westwater defendant. That suit was brought upon a promissory note executed in Pittsburg, June 15, 1908, payable to the order of H. R. Bean, for $37,500, at the Cosmopolitan National Bank, signed by James West-

water and indorsed in blank by Bean. Among the defenses set up by Westwater was that the note was a renewal of another one made by him "as an accommodation note" for the bank. A directed verdict was entered in favor of defendant. Lyons v. Westwater (C. C.) 173 Fed. 111, 114. On writ of error the judgment was reversed, and the record remanded, with instructions to award a venire de novo. Lyons v. Westwater, 181 Fed. 684, 104 C. C. A. 663 (C. C. A. 3). The second trial resulted in a verdict and judgment in favor of the receiver for $43,425. This judgment was also reversed with a venire de novo. Westwater v. Lyons, 193 Fed. 817, 818, 824, 113 C. C. A. 617 (C. C. A. 3). The issues and the facts developed on such hearings are sufficiently shown in the citations just made.

On June 20, 1912, shortly after the last-cited decision was rendered, an agreement under seal was executed in Pittsburg by the receiver of the bank and Westwater, in which Westwater agreed to pay the receiver $4,500 "in compromise and settlement" of the original suit, payable $1,500 on or before June 24, 1912, and $3,000 in four months from that date, with interest; the last payment being represented by a cognovit note likewise executed in Pittsburg on the same date, payable to the order of the receiver, and signed and sealed by Westwater. The agreement contained another provision to which allusion will be made later.

Meanwhile Charles C. Murray had been appointed and qualified as the successor of Lyons in the bank receivership, and, under an order of the court in which the original suit was pending, had been substituted as plaintiff in the place of Lyons; accordingly Murray signed this compromise agreement, and the cognovit note was made payable to his order. Westwater paid the $1,500, but failed to meet the note. Afterwards, on April 4, 1913, the receiver by his counsel gave written notice to Westwater, through the latter's counsel, that the plaintiff (the receiver in the original action) had presented a petition to the court praying for approval of the compromise agreement and for judgment against Westwater for the balance due under the agreement, $3,000, with interest from June 20, 1912, and also for an attorney's commission of ten per cent. and costs; that the court had thereupon granted a rule on Westwater, returnable April 18, 1913, to show cause why the prayer of the petition should not be granted and judgment entered against him. April 4th, service of this notice was accepted by Westwater's counsel; and on the 25th of the month action was taken on the rule so granted, the court finding that the rule had been "duly served upon counsel for" Westwater, "and no answer having been filed by" him "or cause shown why the prayer of said petition (for approval of the compromise agreement, etc., as stated) should not be granted, on motion of * * * attorney for plaintiff, the prayer of said petition is granted"; whereupon the court entered an order approving and ratifying the agreement and also rendering judgment in favor of the receiver and against Westwater for $3,467.20, which included accrued interest, $152, and an attorney's commission, $315.20. This is the judgment upon which the present action is based; and an authenticated transcript of the proceedings had in the court rendering the judgment is attached as an exhibit to the petition in the

action below. On June 29, 1916, recovery was allowed below for the full amount of the judgment sued on, with interest; reversal is sought under the present writ of error.

[1, 2] 1. A general demurrer to the petition was interposed in the court below and overruled. Westwater thereupon filed an answer and cross-petition admitting in the first defense the appointment of a receiver of the Cosmopolitan National Bank and the bringing of the original action by the receiver in the federal court of Pennsylvania, but alleging that the judgment herein sued on was rendered by that court upon a cognovit note, and that no notice of the judgment was given to Westwater and no appearance made by him or by his counsel when the judgment was rendered; and still another defense was set up and also made the subject of the cross-petition. To this pleading the defendant in error filed a demurrer, which was sustained. Assignments of error are made to the rulings upon the two demurrers; and it is contended that these rulings present an important question: Whether the District Court of Pennsylvania had jurisdiction to enter the judgment sued on herein. While it does not appear that any such question was raised in the court below, we are disposed to consider the matter. It is of course a general rule that in an action to recover upon a judgment rendered by a court of another state, inquiry may be made into the jurisdiction of the court over the person of the defendant against whom the judgment was rendered; but such an inquiry involves all the usual tests for determining such jurisdiction. Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 29, 37 Sup. Ct. 492, 61 L. Ed. 966. Here Westwater was already a party to the suit in which the judgment was rendered. He had become a party to that suit upon service of summons accepted for him by the same attorney who accepted service of notice of the fact that in that suit a petition had been presented to the court praying for approval of the compromise agreement and for judgment on the note given by Westwater to carry out such compromise and settlement, as already stated; he had empowered any attorney and of course his own attorney to appear for him and to confess judgment against him on the note, and this seemingly was done to put an end to the suit which had been tried four times—twice in the court of first instance and twice in the Circuit Court of Appeals. It is said, however, that the ultimate action so taken was in violation of the compromise agreement. The agreement in substance gave to the receiver the right of election, in effect an option, to treat the compromise agreement as null and void and to forfeit the first payment made under it in case Westwater failed to meet both the payments called for, and then to prosecute the original suit to final judgment. True, in case both payments were made the receiver was required to apply to the court for ratification and approval of the agreement and, if approved, to have the case marked "Settled and discontinued," or, if not approved, to refund any money paid; but there was nothing in terms to prevent him from taking the course here complained of. Surely it was not to violate any provision of the agreement to apply for its ratification and approval upon Westwater's failure to pay the note for $3,000; and it was simply to surrender a privilege of the receiver when he chose to waive forfeiture of Westwater's payment of $1,500 and to rely on the enforcement of

the unpaid note; in other words, instead of resuming the litigation upon the old note for $37,500, the receiver sought the court's approval of the compromise and settlement of the suit and the enforcement of Westwater's promise to pay the $3,000. Stated in still another way, the receiver had the right under the compromise agreement either to treat it as void or to enforce its performance; no other inference can fairly be drawn from the right of election vested in the receiver by the agreement. Further, it is not alleged or claimed that Westwater ever revoked the power he had given to his attorney, as well as any other attorney, to appear for him and confess judgment upon the note; and it is not perceived how Westwater can question the course in fact taken by the attorney any more than he could be heard to say that the attorney exceeded his power in accepting service of summons in the original suit. Still further, the court's approval of the compromise agreement and allowance of the judgment entered in pursuance of it would seem to have been a proper step in the original suit and, sanctioned as it seems to have been by Westwater's attorney in that suit, was a proceeding of which Westwater cannot rightfully complain. Eden v. Naish, 7 Ch. D. 781, 782, 786; Ward v. Wilson, 92 Tex. 22, 27, 45 S. W. 8; Smythe v. Smythe, 18 Q. B. D. 544, 546. The objection then to the jurisdiction of the District Court of Pennsylvania must fail.

[3] 2. Another objection is urged under one of the assignments of error concerning a matter which does not appear to have been presented in the court below, and as to which no exception was specifically reserved. It is contended that the provision made in the cognovit note for allowance of an attorney's fee is contrary to public policy and void. As respects the state of Ohio, this would be true if the note had been purely an Ohio contract (Miller v. Kyle, 85 Ohio St. 186, 192, 97 N. E. 372, and citations); but it will be recalled that the note was executed and made payable at Pittsburg, and so was exclusively a Pennsylvania contract. It is a settled rule of judicial decision in Pennsylvania that provision may be made in promissory notes for the payment of reasonable attorney's fees for services required for their collection (McAllister's Appeal, 59 Pa. 204, 206; Imler v. Imler, 94 Pa. 372, 375; Walter v. Dickson, 175 Pa. 204, 207, 34 Atl. 646); though such provisions are enforced only to the extent of allowing reasonable compensation (Scott v. Carl, 24 Pa. Super. Ct. 460, 461, and citations). A contract made in and intended to be performed in accordance with the law of another state will be enforced in Ohio, although it may contain a provision, say for payment of a rate of interest, that is opposed to the law of the state (Scott v. Perlee, 39 Ohio St. 63, 67, 48 Am. Rep. 421; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306); the same rule has been applied in respect of a contract exempting a carrier from liability for its own negligence (Knowlton v. Erie Railway Co., 19 Ohio St. 260, 263, 2 Am. Rep. 395), and also as to the fellow-servant doctrine (Alexander v. Pa. Co., 48 Ohio St. 623, 636, 30 N. E. 69); the case of Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670, differs so far in its facts from those of the instant case as to be inapplicable here; and we see no reason why this provision for the attorney's fee should not be enforced in Ohio. Indeed, under the full faith

and credit clause of the federal Constitution, the courts of Ohio would be bound to enforce such a judgment as the one sued on in the court below, in spite of the fact that the provision of the cognovit note for allowance of an attorney's fee is opposed to the declared policy of the state. Fauntleroy v. Lum, 210 U. S. 230, 236, 237, 28 Sup. Ct. 641, 52 L. Ed. 1039; Beal v. Carpenter, 235 Fed. 273, 278, 280, 148 C. C. A. 633 (C. C. A. 8).

[4] 3. The main contention urged in the court below in behalf of Westwater arose upon the receiver's demurrer to the answer and cross-petition. It was in substance alleged in the second defense that fraud was practiced on Westwater in obtaining the judgment sued on herein, in that on February 20, 1907, he gave a note "without consideration and purely for the accommodation" of the Cosmopolitan National Bank for $37,500; that thereafter the note was paid by one McKinnie, who was a director and vice president of the bank; that "thereafter without the authority, direction or consent" of Westwater "some person" to him unknown "forged his name to a number of said notes of like amount, made payable at different dates" to the bank, "the various dates of the execution thereof, and of the times of payment thereof were and are to this defendant unknown." It is further alleged in this defense that the original suit in the District Court of Pennsylvania was based on one of these alleged forged notes and which bore date June 15, 1908; that he (Westwater), believing that this note bore his genuine signature and that it was the note which he had previously executed without consideration and delivered to the bank, made the compromise agreement and gave the cognovit note, upon which the judgment sued on in the court below was based; and that at the time he made the settlement he did not know that "the note upon which said original action was based was a false and forged instrument," but that after the judgment sued on herein had been entered, and "having discovered the facts," he notified the receiver that the note sued on in the original action had been forged. This defense is made the basis of the cross-petition, and it is there sought to recover the $1,500 payment made under the compromise settlement and, in case of recovery upon the judgment sued on below, also a judgment equal in amount to the one herein sued on and as an equitable set-off thereto.

The learned trial judge distinctly found, and we think rightly, that Westwater was guilty of laches in setting up this defense. Nearly seven years elapsed between the execution of the note and the claim here made that it was a forgery. Many things happened in that period which were calculated to advise Westwater of the forgery, if there was one. He was sued on the note in the federal court of Pennsylvania on January 2, 1909. The petition in that suit set out what purports to be a complete copy of the note, including signature. Westwater caused an original and an amended answer to be filed in the cause, in each of which he in effect admitted the genuineness of the note. He testified at each of the trials in the court of first instance; and, although the docket entries and the pleadings in the original suit appear as an exhibit to the petition in the case below, yet neither this exhibit nor the reports of the decisions of the Circuit Court of Appeals disclose anything like a question or claim of forgery. The vital

question of fact to be determined at the third trial of the case was, as Judge Gray stated, whether Westwater had "any knowledge of the facts in regard to the use to which his paper (the note in suit) was to be put, as would make him a participant in the deception undoubtedly practiced by the officers of the bank upon the Comptroller of the Currency. Westwater v. Lyons, 193 Fed. 823, 113 C. C. A. 617 (C. C. A. 3). The suit stood for trial upon this issue of fact for more than two months, when, on June 20, 1912, the compromise agreement and settlement was made. The case remained in this situation for nearly another year before proceedings were begun to enforce the settlement. It is difficult to conceive of conditions which more certainly than these would occasion unremitting search into the origin of a note that was giving so much trouble; indeed, it almost surpasses belief that both Westwater and his counsel should have suffered the suit to progress for years without discovering the forgery of Westwater's name on the only instrument upon which the suit was founded, if such forgery in truth existed; but while it is true we are considering the answer and cross-petition under the receiver's demurrer, yet we are convinced that the instrument contains no allegations tending to excuse the obvious negligence of Westwater in discovering the alleged forgery. Brown v. County of Buena Vista, 95 U. S. 157, 159, 24 L. Ed. 422; Case of Broderick's Will, 21 Wall. (88 U. S.) 503, 512, 22 L. Ed. 599.

[5] Furthermore, it is to be remembered that the charge of forgery of the note in issue in the original suit is in effect aimed, not only against the cognovit note that was given in settlement of that suit, but also against the judgment rendered upon the cognovit note. We have already overruled the objection made to the jurisdiction of the court rendering that judgment. The charge of forgery then, as well as of fraud in obtaining the judgment, must be tested by the same rules that would be applicable to any properly entered judgment. It is not pretended that Westwater has taken any steps to obtain direct relief in the District Court of Pennsylvania, and, in view of the laches with which he is chargeable as before stated, the judgment must under long-settled rules be regarded as conclusive of the issues here sought to be raised. Thus in Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195, when speaking of the effect of a judgment, Mr. Justice Field said:

"A judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

And again, in United States v. Throckmorton, 98 U. S. 61, 68, 25 L. Ed. 93, Mr. Justice Miller, adopting language of Chief Justice Shaw in a case there cited, said:

"The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might

have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted."

See, to same effect, Covington & Cincinnati Bridge Co. v. Sargent, 27 Ohio St. 233, 238; Board of Com'rs v. Platt, 79 Fed. 567, 571, 25 C. C. A. 87 (C. C. A. 8); Rauwolf v. Glass, 184 Pa. 237, 241, 39 Atl. 79; Long v. Bank, 211 Pa. 165, 168, 60 Atl. 556.

[6] It is to be added that so far as the charge of fraud in obtaining the judgment sued on is concerned, there is no allegation that the receiver, the plaintiff in the original suit, had the slightest knowledge of the charge of forgery here in question, or that he resorted to any deception or other act that was inconsistent with fair dealing; in short, this feature of the fraud complained of is lacking in specific statement of facts and so is not well pleaded in the sense that it falls within the admission of the demurrer. Wood v. Carpenter, 101 U. S. 135, 140, 25 L. Ed. 807; Hardt v. Heidweyer, 152 U. S. 547, 559, 14 Sup. Ct. 671, 38 L. Ed. 548.

[7] 4. After judgment of the court below was entered, Westwater moved to set it aside on the ground that on June 20, 1916, the receiver of the bank "publicly sold and set off" the judgment in suit here to one Kirschler, and that on June 23d the District Court in which the original suit was brought entered an order approving and confirming the sale and directing the receiver to assign and transfer the judgment to the purchaser; it is stated on information that the transfer was made on June 26th. The order of sale was made after the opinion of the court below was announced, though six days before the judgment was entered. The motion to set aside the judgment was denied, upon which error is assigned. It is insisted that the transfer operated to abate the suit. We cannot assent to this. Whatever might have been the precise stage of the suit at the time of the transfer, it could have been prosecuted to an end either in the name of the receiver or in that of the purchaser if substitution had been made. Section 11261, O. G. C.; Lowry v. Anderson, 57 Ohio St. 179, 48 N. E. 810; Dundee Mortgage & Trust Investment Co. v. Hughes (C. C.) 89 Fed. 182, 184, per Gilbert, Circuit Judge; Cloquet Lumber Co. v. Burns, 222 Fed. 857, 861, 862, 138 C. C. A. 283 (C. C. A. 8); Standard Bag & Paper Co. v. Cleveland, 25 Ohio Cir. Ct. 380, 386; Ill. Cent. R. Co. v. Turrill, 110 U. S. 301, 304, 4 Sup. Ct. 5, 28 L. Ed. 154. Since the judgment must be affirmed, we are disposed to remand the cause with direction to grant leave, before enforcement of the judgment, upon motion and proper showing of either the purchaser or Westwater to have substitution or other order entered which will fully protect the rights and interests of all parties concerned.

[8] 5. Error is assigned to a refusal of the court below to permit amendment to the answer and cross-petition by alleging that the note for $37,500 upon which the original suit was based has not been returned to Westwater. This at most was harmless error; but we think the matter was clearly within the discretion of the court.

The judgment is affirmed, subject to the modification above stated.

ROBBINS v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1917.)

No. 2972.

1. MASTER AND SERVANT ⊂⊃328—ACTIONS FOR SERVANT'S TORTS—PARTIES.
A joint action cannot be maintained against a master and servant for an injury and death occurring in Ohio, where the master's liability arises solely under the doctrine of respondeat superior.

2. APPEAL AND ERROR ⊂⊃1039(9)—HARMLESS ERROR—COMPELLING ELECTION.
In an action for the death of a person struck by a railroad engine, any error in requiring plaintiff to elect between paragraphs alleging a failure to sound the whistle or bell, or to stop the engine after discovery of decedent's peril, and a paragraph alleging that defendant carelessly, and recklessly, willfully, and wantonly caused the locomotive to strike and kill decedent, was harmless, where plaintiff was practically allowed to introduce all testimony presented having any pertinency to the several charges of negligence, and no exceptions were reserved to the giving or refusal of instructions having any bearing on the excluded paragraph.

3. RAILROADS ⊂⊃401(9)—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS—LAST CLEAR CHANCE DOCTRINE.
In an action for the death of a person struck by a railroad engine as he was starting to cross a bridge customarily used by the public in connection with a footpath along the right of way, the evidence showed that the engineer and decedent were both familiar with the bridge and its surroundings and were acquaintances; that as the engine approached the bridge the engineer saw decedent turn his head and look toward the engine; that it was decedent's usual course to stop on a platform at the entrance to the bridge and wait until the engine passed; that the engineer thought he would do this, but instead he started to cross the bridge in front of the approaching engine when it was too late to stop the engine. There was no evidence that the engineer had any reason to anticipate decedent's sudden turn into the zone of danger, or that the injury could have been avoided; but it appeared that he did not sound the bell or whistle. *Held* that the refusal of instructions on the subject of last clear chance was not error, as the most that could be said of the evidence was that it was open to the jury to find that both the engineer and decedent were guilty of negligence directly concurring in bringing about the injury.

4. NEGLIGENCE ⊂⊃83—CONTRIBUTORY NEGLIGENCE—"LAST CLEAR CHANCE" DOCTRINE.
The doctrine of "last clear chance" takes account of the acts and omissions of both the person injured and the defendant, and applies only where the defendant has either actual notice or is fairly chargeable with notice of the peril of the person injured, and negligently fails to avoid the injury, and the rule never applies where the concurrent neglect of both directly contributes to the injury.

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

5. APPEAL AND ERROR ⊂⊃1059—HARMLESS ERROR—EXCLUSION OF EVIDENCE.
In an action for the death of a person, struck by a railroad engine while crossing a bridge customarily used by the public in connection with a footpath along the right of way, the exclusion of evidence to show that the place of the accident was part of an ordinary highway was immaterial, where the evidence was undisputed that decedent was familiar with its dangers, and it appeared that no use had been made of the land as an ordinary highway, or street, for many years, and that no such use had ever been made of the railroad bridge, and the court ruled in effect

that the rights and obligations of the parties were the same as though the footpath formed part of the highway.

6. RAILROADS ⊜356(3)—DUTIES AT PLACES CUSTOMARILY USED BY PUBLIC.
Where a footpath along and adjacent to railroad tracks and a board walk across a bridge, constituting a continuation of the footpath, had been customarily used for years by people residing or working in the vicinity, the rights and obligations of the railroad company and a person struck by an engine were no greater or less than they would have been, had the footpath formed part of a public highway.

7. RAILROADS ⊜370—INJURIES TO PERSONS ON TRACK—SIGNALS.
Under Gen. Code Ohio, § 12549, requiring the person in charge of a locomotive engine, when approaching a road crossing, to sound the whistle or ring the bell, there was no obligation to give such warning in approaching a railroad bridge across which was a board walk customarily used by persons residing and working in the vicinity.

8. RAILROADS ⊜381(4)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.
The failure to ring the bell or sound the whistle in approaching such bridge, even if required, did not relieve a person starting to cross the bridge from the necessity of taking ordinary precautions for his own safety.

9. APPEAL AND ERROR ⊜1052(8)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
The admission of evidence as to the reason for omitting to sound the bell or whistle in approaching such bridge was harmless, where the evidence showed contributory negligence.

10. RAILROADS ⊜384—INJURIES TO PERSONS ON TRACK—MAINTAINING DANGEROUS PLACE.
Any negligence on the part of a railway company in maintaining a narrow board walk 72 feet long across a bridge customarily used by the public in connection with a footpath along the right of way gave no right to recover for the death of a person struck by an engine while on the board walk, where the danger was manifest and decedent understood the situation perfectly.

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

Action by Mary A. Robbins, administratrix of Henry H. Robbins, deceased, against the Pennsylvania Company and another. Judgment for defendant company, and plaintiff brings error. Affirmed.

Charles Koonce, Jr., and Guy T. Ohl, both of Youngstown, Ohio (McKain & Ohl, of Youngstown, Ohio, of counsel), for plaintiff in error.

Fred J. Heim, of Youngstown, Ohio (Arrel, Wilson, Harrington & De Ford, of Youngstown, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action by an administratrix against the Pennsylvania Company to recover damages for alleged negligence in causing the death of Henry J. Robbins. By an amended petition the charge of negligence was made jointly against both the Pennsylvania Company and its engine driver, John Lang, who was in charge of the locomotive through which decedent received his injuries. Lang made separate answer, admitting that he was operating

the engine at the time of the injuries, but denying the negligence charged against him, and alleging distinct acts of negligence on the part of decedent. The company sought and obtained removal of the cause to the court below, on the grounds of diversity of citizenship, as between plaintiff and the company, and also separable controversy, and alleging further that the recovery originally claimed was for $2,500, that by the amended petition this sum was increased to $25,000, and that the plaintiff had fraudulently and improperly joined Lang, a citizen and resident of the state of Ohio, for the sole purpose of defeating jurisdiction of the United States court and so preventing removal. Motion to remand, supported by affidavit, was overruled. Separate answer was subsequently filed by the company, admitting that Lang was in its employ in the capacity of a locomotive engineer and in charge of the locomotive in question, and alleging, among other things, the exercise of due care towards decedent and acts of contributory negligence on his part at the time of the injury. The case was heard on evidence offered by both sides; at the close of plaintiff's evidence, and again after all the evidence had been received, the company moved that a verdict be directed in its favor, which in each instance was overruled; the cause was submitted to the jury upon an extended charge of the court, and verdict was rendered for the company. Motion for new trial was overruled. Five assignments are relied on under the writ of error.

[1] 1. It is claimed that the court erred in denying the motion to remand. It is enough to say of this that, if the company can be made liable under the issues and the facts presented, it is because of the relation of master and servant which existed between it and the engineer in charge of the locomotive. The injury and death occurred in Ohio; and, according to the rule of decision prevailing in the state, a joint action cannot be maintained against a master and servant where the master's liability arises solely under the doctrine of respondeat superior. French v. Construction Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N. S.) 669. It may be well to point out one of the reasons expressed in the opinion (76 Ohio St. 518, 81 N. E. 752):

"It is, and since the decision by this court of Clark v. Fry, 8 Ohio St. 358 [72 Am. Dec. 590], has been, the settled rule and law in this state that a joint action cannot be maintained against master and servant, in any case where the master's liability for the wrongful and negligent act of the servant arises solely and only from the legal relationship existing between them under the rule of respondeat superior, and not by reason, or because of, the master's personal participation in such wrongful or negligent act."

The rule thus existing in the state is controlling here. Ches. & Ohio Ry. v. Cockrell, 232 U. S. 146, 152, 153, 34 Sup. Ct. 278, 58 L. Ed. 544; Chi., R. I. & Pac. Ry. v. Dowell, 229 U. S. 102, 113, 33 Sup. Ct. 684, 57 L. Ed. 1090; Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308, 318, 30 Sup. Ct. 101, 54 L. Ed. 208; Veariel v. United Engineering & Foundry Co. (D. C.) 197 Fed. 877, 878.

[2] 2. One of the assignments is that the court erred in compelling plaintiff "to elect upon which averment [of negligence] she would proceed to trial." During the opening statement of plaintiff's

counsel a question arose between counsel and the trial judge as to paragraph 5 of the amended petition, in which it is alleged that the company and its engineer, Lang, "carelessly, recklessly, willfully, and wantonly" caused the locomotive "to strike, wound, and kill the said Henry J. Robbins." The trial judge thought this was inconsistent with the first four paragraphs of the amended petition, in which the acts of negligence charged in substance were failure to sound the locomotive whistle or bell or to stop the locomotive after discovery of decedent's peril and before the engine struck him; and so the court required plaintiff to elect whether she would proceed under the allegations of paragraph 5 or those of the preceding four paragraphs. We do not find it necessary to pass upon this ruling, for it was not prejudicial. Counsel for plaintiff said in contending against the court's view as to inconsistency between the degrees of negligence alleged:

"The same evidence will go in, of course, under any circumstances, and what inference is to be drawn from it the jury only can determine."

And it is plainly to be inferred from the record that all available testimony on the subject of alleged negligence, regardless of degree, was introduced through the engineer, Lang; he was called by both sides as a witness and exhaustively examined; indeed he was the only person claimed to have witnessed the accident; in short, despite the election, plaintiff was practically allowed to introduce all the testimony she presented which could have any pertinency to the several charges of negligence. Requests were made for special instructions to the jury upon the subjects of paragraphs 1, 2, 3, and 4, but not of paragraph 5. These special requests were refused, and of this we shall speak later. The general charge treats extensively of the subject of negligence, and while exception was reserved to denial of the requests mentioned, yet none was taken to the general charge on the subject of negligence which has any bearing upon paragraph 5. The question then of inconsistency between allegations of "negligence" and "wanton negligence" is not important here.

3. Coming now to the requests denied, they were three in number and designed to present a question claimed to arise under the first four paragraphs of the amended petition in substance above stated. The exception was reserved at the close of the general charge, counsel stating that his exception was aimed at the court's refusal "to charge the doctrine of the last clear chance." The trial judge, however, stated in substance that it had been his purpose to include the requests in the general charge and that he believed this had been done.

In order rightly to understand this feature of the case it will be necessary to make a further statement of facts disclosed by the record. The defendant company maintains a double-track railroad at the place of the accident, which tracks may for present purposes be said to lie in an east and west direction. The west-bound trains move on the northerly track and the east-bound trains on the southerly one, and the tracks are accordingly distinguished as west-bound and east-bound. The accident occurred on the west-bound track and upon a bridge owned and maintained by the company across Mosquito creek in the city of Niles, Ohio. A path extended for some considerable distance

along and adjacent to the northerly side of the west-bound track and to the Mosquito creek bridge, and many people residing or working in the vicinity of the track and bridge had been accustomed for years to walk upon this path and across the bridge upon a board walk maintained between the north rail of the west-bound track and a solid metal railing forming the northerly side of the bridge. The distance between the north rail of the track and the path which lay east of the bridge was such as to afford entire safety to pedestrians during the passage of trains; but, except as to a platform presently to be described, the space between the metal railing of the bridge and the overhang of a locomotive was admittedly not sufficient to enable a person passing along the board walk to avoid collision with a locomotive crossing on the west-bound track. The platform mentioned was maintained at the easterly end of the bridge between north and south lines intercepted by the east end of the metal railing and the west end of the path leading to the bridge as stated. The dimensions of this platform were such as to furnish complete safety to foot passengers who would remain at or near its northerly end during the passage of trains along the west-bound track. Persons moving from the west end of the path leading to the platform and bridge were accustomed to pass southwestwardly over the platform and into the board walk extending across the bridge.

The decedent was struck by the locomotive just as he was entering, perhaps he had taken a step or two, upon the easterly end of the board walk next to the metal railing of the bridge. We have seen that the engineer, Lang, was the only person who saw the accident or testified on that subject. Concededly both the engineer and the decedent were familiar with the path, the platform, and the board walk before described. The engineer had been engaged in operating a locomotive for switching purposes in the vicinity, and was so engaged at the time of the injury. The decedent had lived and had been working in the neighborhood for many years; it was his custom to pass over this path and platform and board walk several times almost daily; and he and the engineer were acquaintances. The accident occurred on the morning of a clear day. As the engine approached the bridge and Robbins was walking west on the path leading to the platform and board walk, Lang says he saw Robbins turn "his head to the left, over his left shoulder, and as he turned his head that way I was able to look right at his face." This satisfied Lang that Robbins saw the engine coming, and, referring to Robbins' usual course in such instances, he said Robbins "would come up to the end of the bridge, and then he would stop and wait until I got past, a great many times." He thought Robbins would in this instance follow the same course; instead of doing so, Robbins turned southwardly toward the board walk, when, as Lang testified, it was too late to stop the engine or avoid the accident. Lang said that he had Robbins in view from the time he became satisfied that Robbins knew the engine was approaching, and that immediately upon observing Robbins turn toward the board walk he employed all the means, such as reversing the engine, and did all within his power to avoid the accident. True, Lang did not sound the bell or whistle, and there was also an east-bound train passing over the bridge at the time of the injury; but

the testimony is undisputed that, unlike the course pursued at street crossings, it was not customary here to give the signals alluded to upon approaching the bridge, and that Robbins' sudden turn from a place of safety to one of danger prevented giving either of such signals, and, as already stated, that the engineer was satisfied that Robbins knew the engine was approaching; still further, Lang testified without dispute that Robbins did not look for the approaching engine after his turn toward the board walk, and that he (Lang) then "yelled at Mr. Robbins" twice. The trial judge stated the situation thus pointed out in considerable detail, instructing the jury under what circumstances recovery should be allowed or disallowed, and in the course of the charge stating:

"Under the circumstances developed by the testimony introduced on this trial with respect to the use made by the public of the bridge where the accident complained of occurred, I charge you, then, the kind and degree of care which the engineer, Lang, was obliged in law to exercise to avoid injury to Robbins, was precisely the same degree and kind of care as that which Robbins himself was obliged in law to exercise in order to avoid suffering injury to himself."

To this plaintiff's counsel reserved exception and presented an assignment; but they make no contention here in respect of either. The court also instructed the jury that if it should be satisfied by a preponderance of the evidence that—

"* * * Engineer Lang did not exercise such care as men of ordinary care and prudence would ordinarily have exercised, if placed in his position, under the circumstances and conditions surrounding him just before and at the time of this accident, then he was negligent and the defendant company was negligent, and if this negligence contributed directly to cause the accident to decedent, then the plaintiff in this action would be entitled to recover, unless Robbins himself at the time of the accident was negligent in failing to exercise ordinary care for his own safety under the circumstances in which he was placed."

[3, 4] Considering the foregoing instructions in connection with the rest of the charge, we are convinced that the merits of plaintiff's case were fully and fairly explained to the jury under clearly stated and pertinent rules of law. The most that can be said of the applicable evidence is that it was open to the jury to find that both the railroad company, through Lang, and Robbins himself, were negligent, and that their negligence directly concurred in bringing about the injury. It results that no error was committed in refusing plaintiff's requests on the subject of last clear chance. There is no evidence tending to show that Lang had any reason to anticipate Robbins' sudden turn into the zone of danger or that thereafter the injury could have been avoided. On the contrary, Robbins' previous conduct warranted the engineer in believing that, in view of the knowledge Robbins had already shown of the approaching locomotive, he would await its passage instead of making the fatal turn, or at least that he would again look for the locomotive's approach and regulate his movements accordingly (Illinois Central R. Co. v. Ackerman, 144 Fed. 959, 961, 962, 76 C. C. A. 13 [C. C. A. 8]; St. L. & S. F. R. Co. v. Summers, 173 Fed. 358, 360, 97 C. C. A. 328 [C. C. A. 8]); and the testimony is positive that Robbins' turn and movement into danger occurred too late to enable the engineer to avoid the injury. The vice, then, of the requests was that

they would open the company to a charge of negligence, regardless of the showing of concurring negligence in the decedent. The doctrine of last clear chance takes account of the acts and omissions of both the person injured and the defendant, and applies only where the defendant has either actual notice or is fairly chargeable with notice of the peril of the person injured, and negligently fails to avoid the injury; but the rule never applies where the concurrent neglect of both directly contributes to the injury. Gilbert v. Erie R. Co., 97 Fed. 747, 752, 38 C. C. A. 408 (C. C. A. 6); Winters v. Balt. & O. R. Co., 177 Fed. 44, 49, 100 C. C. A. 462 (C. C. A. 6); Dickson v. Chattanooga Ry. & Light Co., 237 Fed. 352, 353, 150 C. C. A. 366, L. R. A. 1917C, 845 (C. C. A. 6); Chicago, M. & St. P. Ry. Co. v. Bennett, 181 Fed. 799, 801, 104 C. C. A. 309 (C. C. A. 8); Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 533, 63 C. C. A. 27 (C. C. A. 8); Atchison, T. & S. F. Ry. Co. v. Taylor, 196 Fed. 878, 880, 116 C. C. A. 440 (C. C. A. 8); Northern Pac. Ry. Co. v. Jones, 144 Fed. 47, 51, 75 C. C. A. 205 (C. C. A. 9); Drown v. Traction Co., 76 Ohio St. 234, 247, 81 N. E. 326, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844. And see Davies v. Mann, 10 M. & W. 545, 548, which is generally regarded as the "origin of the doctrine of 'last clear chance.'" 55 L. R. A. 418, note. The real trouble with plaintiff's case is the difficulty of explaining decedent's action on reaching the platform; no explanation of this is given which is consistent with any right of recovery. Whether decedent then knew or was chargeable with knowing that the locomotive was approaching, was clearly the ultimate question of fact. This question was made prominent in the evidence and in the general charge, and must be regarded as concluded by the verdict.

[5, 6] 4. The assignment of error concerning exclusion of evidence offered to show that the place of collision was part of an ordinary highway seems to us to be immaterial. The evidence was undisputed that the public had for years been permitted to pass along the footpath before described, and that the decedent was quite as familiar with the dangers attending such passage as the company was itself. Whether the footpath thus used was or was not part of a highway, it is certain that no use had been made of the land as an ordinary highway or street for many years, and that no such use had ever been made of the railroad bridge. However, in view of the long and continued use proved to have been made of the footpath, the rights and obligations of the parties were no greater or no less than they would have been had the footpath admittedly formed part of an ordinary public highway. Northern Pacific Ry. Co. v. Jones, 144 Fed. 47, 49, 75 C. C. A. 205, and citations (C. C. A. 9). And this in effect was the ruling below.

[7-9] 5. The last assignment relied on concerns the admission of testimony to the effect that the reason for omitting to sound the bell or whistle as a warning of the locomotive's approach was that the approach did not lead to a highway crossing. What is said in the last two paragraphs would seem sufficient to answer this objection. Further, however, the company was under no statutory duty to give this warning in approaching a bridge such as the one here involved. See section 12549, Ohio G. C. But even if the injury had occurred at a road crossing and

the railroad's failure to give the warning were treated as negligence, this would not have relieved Robbins from the necessity of taking ordinary precautions for his own safety. Schofield v. Chicago & St. Paul Railway Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 28 L. Ed. 224; Gilbert v. Erie R. Co., 97 Fed. 749, 38 C. C. A. 408 (C. C. A. 6); Chicago, M. & St. P. Ry. Co. v. Bennett, 181 Fed. at 802, 803, 104 C. C. A. 309 (C. C. A. 8). And certainly the duty of the railroad was not greater, nor that of Robbins less, because of the fact that the injury occurred at the entrance to the bridge. If, then, it be assumed that the testimony as to the reason for omitting to sound the bell or whistle was inadmissible, the error was harmless.

[10] Stress does not seem to be laid in the brief, as it was in oral argument, upon the claim that it was negligence in the railroad company simply to maintain this very narrow board walk—it is 72 feet long—for foot travel over the bridge; but, since the danger is manifest, it is plain that relief cannot be obtained in a case such as this, and especially as respects one who, like decedent, understood the situation perfectly.

The judgment is affirmed.

CLARK v. JOHNSON et al.

In re OZARK LAND & LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. July 25, 1917.)

No. 4838.

1. BANKRUPTCY ⟸52—COURTS OF BANKRUPTCY—EQUITABLE NATURE OF PROCEEDINGS.

Bankruptcy proceedings are in the nature of proceedings in equity, and bankruptcy courts administer the law according to the spirit of equity.

2. CORPORATIONS ⟸243(1)—STOCKHOLDERS—LIABILITY OF INNOCENT PURCHASERS OF UNPAID STOCK.

Bankrupt, an Arkansas corporation, issued stock, which was delivered to the purchaser of its bonds, without other consideration. All of the stock was placed for 10 years in the hands of voting trustees, who issued certificates which recited that the holder at the end of 10 years was entitled to full-paid stock to the face value, and prior to that time to any dividends declared on the certificate. Claimants purchased certain of the bonds in the open market in New York, and received with them a proportionate amount in the voting trust certificates; they had no knowledge of the stock, nor the manner of its issuance. *Held* that, as bona fide purchasers of the bonds with the certificates, they did not become liable as subscribers for unpaid stock to assessment for the benefit of creditors of the bankrupt.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

In the matter of the Ozark Land & Lumber Company, bankrupt. From an order allowing the claims of James D. Johnson and others, bondholders, Perry N. Clark, trustee, appeals. Affirmed.

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

F. M. Etheridge, of Dallas, Tex. (W. N. Ivie and Duty & Duty, all of Rogers, Ark., and Etheridge, McCormick & Bromberg, of Dallas, Tex., on the brief), for appellant.

Henry L. Fitzhugh, of Ft. Smith, Ark. (Joseph M. Hill and John Brizzolara, both of Ft. Smith, Ark., on the brief), for appellees.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from an order of the District Court allowing claims of appellees against the estate of the Ozark Land & Lumber Company, a bankrupt. The facts which condition the validity of the claims are as follows:

The Ozark Land & Lumber Company was incorporated under the general law of the state of Arkansas, November 26, 1910, with a capitalization of $150,000, divided into 6,000 shares, of the par value of $25 each. It was represented in the articles of incorporation that the following named persons had subscribed for shares of stock in said corporation as follows: George D. Locke, 4,000 shares; J. W. Walker, 200 shares; J. S. McCleod, 200 shares; R. C. Hobbs, 1,400 shares; and W. W. Moody, 200 shares. None of these subscribers ever paid anything on his stock subscription. The certificate of incorporation recited that the stock "is to be paid by installments, in such proportion and at such time as the directors shall think proper."

On November 29, 1910, W. R. Felker sold to the corporation 12,152.37 acres of land in the counties of Benton, Madison, and Washington, Ark., for $150,000 and 5,950 shares of its capital stock. As payment therefor the corporation gave Felker six notes, for $25,000 each, and secured the payment of the same by a mortgage on the land, and thereafter, on May 18, 1912, issued certificates of stock to Felker, amounting to 5,950 shares. The other 50 shares were disposed of by donating 10 shares to five individuals to qualify them as directors. In the latter part of 1911, or the early part of 1912, Felker and George D. Locke, president of the corporation, entered into negotiations with Smith & Potter, dealers in investment securities in New York City, which resulted in an agreement that the corporation should increase its capital stock from $150,000 to $300,000; that it should issue 150 bonds, of $1,000 each, secured by a first deed of trust to the Mississippi Valley Trust Company of St. Louis, Mo., upon all of the land purchased by the corporation from Felker; that Smith & Potter should buy the bonds at 90 cents on the dollar for those delivered by the Trust Company prior to March 1, 1912, and 90 cents with accrued interest for those delivered subsequent to said date; that the corporation should donate to Smith & Potter the increased capital stock of $150,000, and in addition thereto Felker should donate to them 50 shares of the original issue of stock, the proceeds arising from the sale of the bonds to be received and accepted by Felker in discharge of the notes given for the purchase price of the land.

This agreement was carried out. The corporation amended its charter, increasing its capital stock from $150,000 to $300,000. The stockholders and directors voted the increase, and resolved that for

the purpose of facilitating the sale of the bonds the $150,000 increased capital stock be distributed among the subscribers and purchasers of said bonds as they were paid for, allotting to each subscriber 40 shares of stock, of the par value of $25 each, to each bond, which were of the denomination of $1,000 each. At the stockholders' meeting Felker voted 5,950 shares and the other five stockholders 10 shares each.

On January 25, 1912, a deed of trust to the Trust Company, as trustee, was executed, and the 150 bonds were issued, but dated January 2, 1912. They were deposited with the Trust Company, which upon the order of George D. Locke, president of the corporation, transmitted them to the Standard Trust Company of New York, to be delivered to Smith & Potter upon payment by them therefor. Smith & Potter paid for the bonds at various dates between February 6 and July 2, 1912. The proceeds of the bonds were appropriated by Felker, in consideration of which he canceled the six $25,000 notes and his mortgage to secure the same. The bonus stock was not issued at the time of the execution of the bonds or the deed of trust to secure the same; it being agreed apparently that the bonus stock was not to be issued until the bonds were paid for. The bonus stock was issued in May, 1912, to Smith & Potter. Prior to the issuance of the bonus stock to Smith & Potter, the stockholders of the corporation, including Smith & Potter, entered into a "voting trust agreement," dated May 1, 1912. By virtue of this trust agreement the stockholders placed their stock irrevocably for a period of 10 years in the hands of voting trustees.

It was further provided in the trust agreement that the stock held by any stockholder who should become a party to the trust agreement should be deposited with the Trust Company hereinbefore mentioned, and that the stockholders should receive in exchange therefor voting trust certificates to be signed by the voting trustees and the Trust Company; that all shares of stock should be transferred upon the books of the corporation to the voting trustees. Pursuant to this agreement Smith & Potter with other stockholders transferred the stock held by them to the voting trustees and received therefor voting trust certificates corresponding with the amount of stock transferred.

It is claimed that the transfer of stock was made by canceling the original certificates of stock and issuing new certificates direct to the voting trustees. The voting trust certificates recited on their face that on the 1st day of May, 1922, the holder of any certificate would be entitled to receive a certificate or certificates of stock for the number of shares of fully paid stock in the corporation called for by the trust certificate or the proceeds thereof if the same had been sold as provided in the voting trust agreement dated May 1, 1912, and that in the meantime each holder should receive payment equal to the dividends, if any, declared by the voting trustees upon a like number of shares standing in their names, and that until the actual delivery or sale of such certificates of stock the voting trustees should possess and should be entitled to exercise all rights of every name and nature, including

the right to vote thereon in respect to all such stock. The voting trust certificate provided that it should be transferable by the registered holder thereof, either in person or by an attorney upon surrender thereof at the office of the Trust Company only on the books of the voting trustees and in accordance with the rules and regulations established for that purpose, and that until so surrendered the voting trustees might treat the registered holder thereof for all purposes as the owner of all right, title, and interest of every character therein. Between February 6, 1912, and July 2, 1912, Smith & Potter sold the bonds purchased by them and a portion of the trust certificates representing shares of increased stock to appellees in the following amounts:

Purchasers.	No. Bonds.	Par Value.	V. T. Cert.	Par Value.
D. L. Whitmore	40	$40,000	800	$20,000
J. H. Birch	40	40,000	1,068	26,700
H. G. McFaddin	10	10,000	300	7,500
G. W. Carroll	10	10,000	200	5,000
F. C. Foster	10	10,000	200	5,000
James D. Johnson	15	15,000	300	7,500
John L. Bassett	7	7,000	140	3,500
John H. Folk	7	7,000	280	7,000
Sidney Thursdy	3	3,000	60	1,500
R. A. Powers	2	2,000	100	2,500
W. G. French	6	6,000	160	4,000
	150	$150,000	3,608	$90,200

The evidence for appellees is to the effect that the bonds and voting trust certificates were purchased by them as one transaction, and that the money paid by them was for the joint purchase of the bonds and voting trust certificates. It appears, however, that Smith & Potter, although they were entitled to the stock by agreement, did not receive the same until some time in May, 1912, and did not receive all of the voting trust certificates until some time in July, 1912. This, however, would not show that the trust certificates were not in fact purchased at the same time as the bonds, as the trust certificates could have been sold to be delivered when Smith & Potter should receive them. The amount which each appellee paid for his bonds and trust certificates does not appear, but it is safe to presume that they paid more than Smith & Potter. Johnson and Powers, two of the bondholders, testified that they purchased the bonds held by them and the voting trust certificates on the open market in New York City, without knowledge that the stock represented by the voting trust certificates had not been paid for; that at the time of purchase nothing was said about this matter one way or the other. Frank A. Potter, of the firm of Smith & Potter, testified that he had heard the testimony of Johnson and Powers, and that all the bonds and stock in controversy were sold in the same manner. The referee found also that the corporation sold the bonds to Smith & Potter.

Appellees' claims are based upon the above-mentioned bonds. The referee in bankruptcy, on objection of the trustee, decided that the allowance of the amount due upon the bonds should be stayed until it might be determined what assessment was due from appellees to

the creditors of the bankrupt on the stock held by them; the appellees being regarded by the referee as subscribers to the capital stock of the corporation in the amount of the trust certificates, whose subscriptions had not been paid, thereby invoking the doctrine that unpaid stock subscriptions pass to the trustee in bankruptcy and that the stock of an insolvent corporation is a trust fund for the benefit of the creditors of the corporation. The record shows that the indebtedness of the corporation is in round numbers $311,000 and the appraised value of its assets $212,000.

On petition for review the District Court reversed the order of the referee, and decided that, if appellees could be considered as subscribers for the capital stock of the corporation under the circumstances, nevertheless, under the Constitution of Arkansas, the stock was null and void and conferred no rights or imposed liabilities. From this decision the trustee appealed.

The claim of counsel for appellant may be stated in this way: Appellees purchased the voting trust certificates, or received them as a bonus, with knowledge that the stock represented thereby had not been paid for, or with knowledge of facts which, if investigated, would have led to such knowledge; that under such circumstances the law would imply a contract on the part of appellees to pay for the stock represented by the voting trust certificates; and that, therefore, appellees are liable to be assessed in such an amount upon their stock that, when added to the total assets of the corporation in the hands of the trustee, would pay the creditors of the corporation in full.

Counsel for appellees claim that their clients purchased the voting trust certificates in the open market under such circumstances as would constitute them bona fide purchasers of the same from Smith & Potter, to whom they had been issued by the voting trustees, and therefore they are not subscribers for unpaid stock and not liable to any assessment in behalf of the creditors of the corporation. They also maintain, and this view seems to have been adopted by the trial court, that by virtue of section 8 of article 12 of the Constitution of Arkansas the shares of stock represented by the voting trust certificates were null and void, and therefore no rights or liabilities can arise thereon. The section of the Constitution above referred to reads as follows:

> "No private corporation shall issue stocks or bonds, except for money or property actually received or labor done, and all fictitious increase of stock shall be void."

The increase of the capital stock of the corporation seems to have been regularly made under the laws of Arkansas. The corporation had power to increase its stock as it did, and, if it is null and void, it must be by virtue of the section of the Constitution above quoted. Section 8 has not been construed, so far as we are advised, with reference to the conditions existing in the present case, by the Supreme Court of Arkansas; but the Supreme Court of the United States in Memphis & Little Rock Ry. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595, used the following language in reference thereto:

"Recurring to the language employed in the Arkansas Constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper, provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden."

[1] In view of the above language and the case of Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, we are not prepared, nor do we find it necessary, to decide that the increased stock was fictitious within the meaning of the Constitution. We prefer to place our judgment upon the proposition that appellees are not, and never have been, subscribers to the capital stock of the corporation. 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, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Lockman v. Land, 132 Fed. 1, 65 C. C. A. 621; In re Broadway Savings Trust Co., 152 Fed. 152, 81 C. C. A. 58; Ogden v. Gilt Edge Mining Co. (8th Cir.) 225 Fed. 723, 140 C. C. A. 597.

Although we are obliged to deal in this case with the legal corporate entity called the Ozark Land & Lumber Company, still, when we look through the legal form of this entity, we can see no one but Felker. The money of appellees paid the notes of Felker to the amount of $150,000, and now it is proposed by the trustee in bankruptcy to compel them to pay to the estate of Felker in round numbers $90,000 more, in order that they may receive back from said estate the money which they advanced to pay said notes. Fair dealing would require, in our opinion, a very strong case to accomplish such a result, especially when the assessment to be levied would be used to pay indebtedness incurred by Felker before the issuance of the increased stock. Let us now see what the transaction was between appellees and Smith & Potter.

[2] Appellees did not purchase shares of stock. They purchased in the open market at the city of New York, in connection with the purchase of their bonds, certain voting trust certificates, issued by voting trustees and the Trust Company, wherein it was recited that in 10 years the holder of the voting trust certificate would be entitled to receive fully paid up shares in the corporation to the amount represented by the trust certificate; that in the meantime the holder of the trust certificate should be entitled to receive payments equal to the dividends, if any, collected by the voting trustees. The names of appellees never appeared upon the books of the corporation as stockholders, and the corporation never treated them as stockholders. What is a purchaser in New York City to rely upon, if he cannot rely upon the statements of the trust certificate? We do not think appel-

lees, or either of them, were compelled in order to be bona fide purchasers to travel to the state of Arkansas for the purpose of investigating the affairs of the corporation. The truth is they never intended to become subscribers for stock of the corporation.

It is urged that, when Smith & Potter transferred their stock to the voting trustees, the old stock was canceled and new stock was issued directly to the trustees, and that by virtue of the trust agreement the voting trustees were constituted the agents of the stockholders, and therefore appellees, when they purchased the trust certificates, stood in the same relation to the corporation as Smith & Potter; but, when the stock was issued to the voting trustees, the latter were the agents of Smith & Potter, not of appellees. It is not shown that appellees knew anything about how the stock was handled by Smith & Potter. We are clearly of the opinion that, so far as the record before us is concerned, appellees had a right to rely upon the statement in the voting trust certificate that the stock represented by the certificate was fully paid. The further statement that the holder of the voting trust certificate would be entitled to dividends during the 10 years was entirely contrary to the idea that it was unpaid stock. We find the law upon the subject under discussion stated in Cook on Corporations (7th Ed.) vol. 1, § 50, as follows:

"A bona fide purchaser for value and without notice of stock issued by a corporation as paid up cannot be held liable on such stock in any way, either to the corporation, corporate creditors, or other persons, even though the stock was not actually paid up as represented. Such a purchaser has a right to rely on the representations of the corporation that the stock is paid up. * * * Where, however, a statement is made on the face of the certificate that it is paid-up stock, the bona fide purchaser of the certificate need not inquire further, but may rely on that representation, and is protected thereby against liability. * * * The law goes still further, and holds that where a person in open market, in good faith and without notice, purchases certificates, such stock is to be deemed 'paid up' in his hands, and he is protected as a bona fide purchaser, even though there is nothing on the face of the certificates stating that they are paid up. This can now be laid down as the established rule. It is based on sound public policy, favoring, as it does, the transfer of personal property, and the quasi negotiability of stock, and discountenancing secret liens and constructive notice. A purchaser in open market of stock represented to be paid up by a statement to that effect on the certificate is presumed to be a bona fide purchaser. Hence there has arisen the well-established rule, both in America and England, that a bona fide purchaser for value, and without notice, of stock issued as paid up, is not liable for any part of the par value which may not have been paid. In a case where parties receiving stock and bonds from the corporation in payment for property sold the bonds with a bonus of stock, the Supreme Court of the United States held that the purchasers were not necessarily purchasers with notice."

Many authorities are cited in support of the above statement of the law. Thompson, Commentaries on the Law of Corporations, vol. 3, §§ 2934, 3223, states the law in the same way. See, also, section 177, Helliwell on Stockholders; Morawetz on Corporations, § 161; and Clark & Marshall on Private Corporations, 1741.

Counsel for appellant suggest that all this law may be eliminated by quoting the following lines from section 2934, vol. 3, Thompson on Corporations:

"But all these decisions assume that the stockholder sought to be charged purchased the shares after they had been issued and put on the market as paid-up shares. They have no application to the case of an original subscriber."

We may suggest that these lines may be eliminated by treating appellees as purchasers of stock, and not as original subscribers, which in our judgment the record clearly shows.

In our opinion, law and justice require the affirmance of the judgment below; and it is so ordered.

BADER GOLD MINING CO. v. ORO ELECTRIC CORP.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2966.

1. WATERS AND WATER COURSES ⊂=144—NATURAL WATER COURSES—OWNERSHIP IN WATER.
   There is no ownership in water flowing in a natural stream before it is diverted into a ditch, or at least restrained for such diversion by a dam or otherwise.
2. WATERS AND WATER COURSES ⊂=144—DIVERSION BY DITCH—OWNERSHIP OF WATER DIVERTED.
   That a complainant, by diverting water from a stream through a ditch, deprived defendant of water which it had a prior right to take from the stream at a point lower down, does not constitute a defense to a suit to enjoin trespass by defendant by opening the ditch and taking water therefrom without permission, or paying therefor.
3. WATERS AND WATER COURSES ⊂=144—EASEMENT FOR DITCH—RIGHTS OF SERVIENT OWNER.
   That the owner of a ditch having an easement to cross defendant's land was diverting into such ditch more water than it had the right to carry therein gave defendant no right as servient owner of the land to tap the ditch and withdraw the excess therefrom for its own use.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit in equity by the Oro Electric Corporation against the Bader Gold Mining Company. Decree for complainant, and defendant appeals. Affirmed.

R. H. Cross and Arthur H. Brandt, both of San Francisco, Cal., for appellant.

Charles P. Eells, Hugh Goodfellow, Stanley Moore, and W. H. Orrick, all of San Francisco, Cal., for appellee.

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

DOOLING, District Judge. Oro Electric Company, plaintiff herein, is the owner of a certain ditch in Butte county, known as the "Nickerson Ditch." This ditch crosses the land of defendant, Bader Gold Mining Company, some distance below its intake which is on

Little Butte creek, whence it derives the water which it carries. The water is used for irrigation and for the generation of electricity which is distributed to customers in Oroville and elsewhere. Plaintiff's bill avers its ownership and possession of the ditch, and complains that defendant asserts some claim to a portion thereof, and claims the right to enter thereon and take water therefrom without making compensation therefor, and has repeatedly and without right, and against plaintiff's command forcibly entered upon and opened the ditch, and injured the banks thereof, and taken the water therefrom without making or tendering any compensation therefor. The bill further avers that such claims are without right or foundation, but that defendant threatens to continue to assert them, and to continue to enter upon and interfere with the ditch and take water therefrom without compensation, and will continue to do so unless restrained by the court. The bill then avers the diverse citizenship of the parties, and that the matter in dispute, exclusive of interest and costs, exceeds the sum of $3,000, and prays a decree that the claims of defendant are without right; that it has no estate, right, title, or interest in or to the ditch, and no right to take water therefrom; and that it be enjoined from asserting such claim or interfering with the ditch or taking water therefrom.

That plaintiff has an easement right for the carriage of water through the Nickerson ditch across the lands of defendant is not denied, nor is its ownership of the ditch seriously questioned; but defendant does deny that such ownership confers the right to carry a greater amount of water than was carried by the ditch prior to 1906, at which time defendant claims the ditch was enlarged by plaintiff without right to do so.

The answer admits that defendant asserts a claim to a portion of the ditch, and has taken water therefrom, and will continue to do so. As a second defense the answer avers that, when the Nickerson ditch was enlarged in 1906, plaintiff's predecessors in interest took, by means of the enlarged ditch, from Little Butte creek 500 inches of water, which defendant had theretofore appropriated at a point some 2 miles below the intake of the Nickerson ditch, thus depriving defendant of the use of said 500 inches of water owned by it, and that immediately thereupon the defendant recaptured said water as it flowed through the Nickerson ditch, by opening a gateway therein and letting run therefrom water only sufficient for its use, not to exceed 500 inches; this being, according to defendant's contention, the trespass complained of.

The answer as a third defense alleges that plaintiff is in possession of the Nickerson ditch and is the owner of an easement to maintain the same across the lands of defendant and adjoining property owners, but owns no land across which the ditch runs, and that defendant has at no time used the ditch for a purpose inconsistent with the enjoyment of the easement possessed by plaintiff. For a fourth defense the answer avers that plaintiff's cause of action is barred by certain California Code provisions. A fifth defense avers that plaintiff has been guilty of laches in not bringing its action within a reasonable time. A sixth defense asserts defendant's right to use the

Nickerson ditch to carry the 500 inches of water, and its right to take the water therefrom; such rights having been acquired by adverse use.

A further and separate answer by way of counterclaim asserts defendant's right by prescription to use the Nickerson ditch for the carriage of water from its intake to the point where it has been taking water therefrom, avers that plaintiff claims some interest adverse to such right, and prays that defendant's asserted right be declared valid, and that plaintiff be enjoined from making any claim upon such use of the ditch by defendant.

From a decree awarding plaintiff the relief prayed for, the defendant appeals.

The trial court finds against defendant upon its general denials, and upon its fourth, fifth, and sixth defenses, and upon the separate answer and counterclaim. These findings, although vigorously assailed by defendant, are amply supported by competent evidence, and on well-settled principles cannot be disturbed. The court, however, deeming them immaterial, made no findings on the matters set up in the second and third defenses, which may be briefly characterized as the defense of recapture of water, and the defense of the use of the ditch by defendant for a purpose not inconsistent with the enjoyment of the easement possessed by plaintiff.

[1, 2] The theory of the first of these defenses is that defendant may justify the tapping of plaintiff's ditch and the taking of water therefrom by showing that it is entitled to have certain of the water carried therein flow down Little Butte creek to the point two miles below, where by appropriation it was entitled to divert it by means of another ditch belonging to itself. In other words, the contention is that, because plaintiff has diverted water which defendant would be entitled to divert if and when it reached a point on Little Butte creek two miles below, it may remedy the injury suffered by it from such diversion on the part of plaintiff, by a continued trespass upon plaintiff's ditch; such remedy being analogous to the common-law remedy of recaption of personal property. To extend the right of recaption, so as to make it embrace water running in the ditch of another, is to lose sight of the nature of the remedy and the character of the property to which it is applicable. In the first place to be subject to recaption the property must be the property of the "recaptor," and must also be the identical property taken by another, capable of identification, and not other property however similar. But one has no ownership of water flowing in a natural water course before it is diverted into his ditch, or at least restrained for such diversion by his dam or other diverting means. Parks Co. v. Hoyt, 57 Cal. 46; Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. 338.

In the second place the recaption must be such a retaking as transfers the possession at once to the owner, and not a continued action extending over months, and perhaps years, and inviting at every moment a conflict. It must be borne in mind that it is not sought by the present action to recover the water already "recaptured" and reduced to possession by defendant in the past, but to prevent the constant and continued "recapture" which is threatened in the future.

If such an extension of the doctrine of recaption were sanctioned by the courts, it would be an invitation to every individual, who claims that water belonging to him has been taken by another, to invade the other's ditch, for it is not a court remedy for which defendant is contending, but what counsel styles "a self-remedy immediately available." Nor is it material here that plaintiff's ditch crosses defendant's land, because recaption, if available at all, is available wherever the property may be found, so it be not accompanied by a breach of the peace, or by undue force. And indeed it does not appear by any averment in either the complaint or the answer that the trespass complained of here occurred on that portion of plaintiff's ditch which is upon the defendant's land. Furthermore, if defendant's claim of right to recapture were sound, it must follow, as contended for in the defense under consideration, that defendant would be entitled to enforce it in the courts; that is to say it would have the right to come into court and secure a decree compelling plaintiff to deliver to it, at a point on plaintiff's ditch to be selected by itself, the water which it would have been entitled to divert, had such water reached its own point of diversion in the original watercourse. In this way it would, of course, secure, not only the water to which it laid claim, but also the use of plaintiff's ditch for whatever distance it desired the water to be carried therein. Such a doctrine, applied to appropriated water, which never becomes the property of any appropriator until reduced to possession in his own ditch, was repudiated by the Supreme Court of California in the case of Silver Creek & Panoche Land Co. v. Hayes, 113 Cal. 142, 45 Pac. 191. The plaintiffs in that case owned a canal and sued defendant alleging that they were in possession of the canal, and that defendant without their permission had entered upon the same and taken water therefrom. The water from the canal came from Panoche creek. In a cross-complaint the defendant averred that he owned a large tract of land which it was necessary to irrigate, and that the only waters available were the waters of Panoche creek. It was further averred that the rights of defendant were superior to the rights of plaintiffs therein. The case in all essentials seems to be parallel with the present one. In holding that the facts stated would not justify the acts complained of by plaintiffs, the Supreme Court said:

"If the cross-complaint can be held to state a cause of action which might be the basis of an independent suit, it does not state a cause of action which is the proper subject of cross-complaint in this case. * * * No right of water is asserted, nor was it necessary for plaintiffs in order to make a case to show any. The court so held in giving them the relief demanded, while finding that they had no right to the water in the creek. The trespass charged did not consist in destroying or injuring the dam or other means by which the water was diverted from the creek, nor in diverting the water in the creek to other uses, but was an injury to the embankments of the ditch, and a taking of the water from the ditch itself. Had the alleged trespass consisted in an attempt to prevent the flow into the ditch from the stream possibly the assertion of a right to have the water flow would be considered, but no such defense could be made here. The cause of action set up by plaintiffs and the rights asserted by defendant have no reference to each other. True, there was water in the ditch, and the evidence shows that it came from Panoche creek. But the fact that defendant had a superior right

to the water flowing in the creek would not justify him in destroying the ditch, or in taking what water he needed from the ditch at points were it passed over or near his land."

Defendant urges that the portion of the decision above quoted is mere dictum and entitled to little consideration. But such is not the case. It was one of the reasons upon which the court based its judgment, is no more to be rejected than any other one, and in any event is a clear and correct statement of the law. However vigorously urged and skillfully presented, the defense of "recapture" is unsound, and was properly rejected by the trial court.

[3] Equally unsound, as attempted to be applied here, is the third defense; that is to say, the defense of a use of the ditch by defendant not inconsistent with the easement right of plaintiff across its land. What is sought by this defense is to compel plaintiff, before it can prevent defendant from tapping its ditch and taking water therefrom, to establish definitely the quantity of water which it has an easement to carry in its ditch across the defendant's land, on the theory that all in excess of that quantity may be taken from the ditch by defendant as the owner of the servient estate. In this defense, of course, logically, the question of the ownership of the excess water does not figure. "On what theory" asks defendant's counsel, "can the mere taking by a servient owner out of the conduit through which the owner of the easement exercises his right constitute a violation of the easement, unless the water taken is water which the dominant owner is entitled to carry across the lands of the servient owner?" This means, of course, that the servient owner, finding more water flowing in a ditch across his lands than the owner of the easement is entitled to carry therein, may confiscate the excess water, as an alternative remedy to the ordinary one of preventing the dominant owner from turning such excess into the ditch at all. Defendant is not really attempting to establish here by this defense a right to have its own water flow in the ditch along with that of plaintiff, but a right to take from the ditch, as the servient owner, water already reduced to possession by plaintiff and brought for a considerable distance through a portion of the ditch to which it has no possible claim. As by the defense of reception, so here, it is endeavoring to substitute for the right which it may have to compel plaintiff to permit the water to which it lays claim to flow uninterruptedly down Little Butte creek to its own point of diversion, a right to have such water delivered to it by plaintiff at such point as it may select where plaintiff's ditch crosses its land.

Nothing in the case of Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569, relied upon by defendant, supports such a substitution. Even if the court had found that defendant had the right to use, jointly with plaintiff, that portion of the ditch which crosses its lands for the carriage of water to which it was entitled, such finding would not justify the acts complained of here. If plaintiff has taken from Little Butte creek water to the flow of which to its own land defendant is entitled, or if plaintiff, by enlarging the ditch, has imposed a greater burden on the servient estate than it should rightfully bear, defendant is not now, nor has it ever been, without remedy. But

such remedy is not the tapping of plaintiff's ditch and the taking of water therefrom, whether such taking be called recaption or consistent use.

These considerations dispose of defendant's contention that the master erred in holding that a prima facie case was established in favor of plaintiff when, from the pleadings and from the admissions of defendant, it appeared that plaintiff was the owner of the ditch in question and that defendant was taking the water therefrom, and would continue to do so unless restrained by the court. The same is true as to the contention that the master erred in sustaining objections to certain questions propounded to the witness McCoy. The testimony sought to be elicited by the questions had to do with the alleged enlargement of the ditch in 1906, and was relevant only to the defenses held to be unsound. As to the alleged error in sustaining objections to the testimony of the witness Newman, it is sufficient to say that such testimony might well have been rejected because of the time at which it was offered, and in any event, even if admitted and given full credit, it could not have affected the finding of the court that defendant's taking of water from the ditch was not open, uninterrupted, and of such a character as to raise a foundation for prescription.

Though there are 55 assignments of error, there is no point made by any of them that is not disposed of by what has been said above.

The decree of the District Court is affirmed.

NORTHERN PAC. RY. CO. v. VAN DUSEN HARRINGTON CO.

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

No. 4960.

COURTS ⟸262(2)—FEDERAL COURTS—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill to compel a railroad company to issue a bill of lading requiring it to carry and deliver at a place on the line of another road a single carload of wheat owned by complainant does not state a cause of action within the jurisdiction of a federal court of equity, there being an adequate remedy at law by an action for damages.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit in equity by the Van Dusen Harrington Company against the Northern Pacific Railway Company. From an interlocutory order granting a mandatory injunction, defendant appeals. Reversed.

B. W. Scandrett, of Omaha, Neb. (C. W. Bunn and Charles Donnelly, both of St. Paul, Minn., on the brief), for appellant.

Harold G. Simpson, of Minneapolis, Minn., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from an order of the District Court assuming to act under its equitable jurisdiction, com-

manding the appellant to forthwith sign, issue, and deliver a bill of lading to appellee under which Northern Pacific car No. 19482 will move to Evansville, Ind. The order appealed from, while for all practical purposes a final order, was really an interlocutory mandatory injunction. The procedure leading up to the making of the order was as follows:

Upon the filing of a complaint on May 11, 1917, a subpœna was issued and served requiring the appellant to appear on May 19, 1917, to answer the same, and also to show cause why an order should not issue commanding the appellant to issue, sign, and deliver to the appellee a bill of lading as prayed for in the complaint. On the return day appellant appeared and filed a motion to dismiss the complaint, upon the ground, among others, that the subject-matter of the action was not within the jurisdiction of a court of equity, for the reason that the complaint showed that appellee had a plain, adequate, and complete remedy at law. Affidavits were also filed by both parties in opposition to and in support of the order to show cause. After hearing argument the court granted the order from which an appeal has been taken. So far as the record shows the main case is still pending in the court below on complaint and motion to dismiss. This statement is made for the purpose of showing that the case is not before us on pleadings and proofs, so that the merits of the controversy can be finally determined. We may, however, in determining the validity of the order appealed from, inquire as to whether the complaint states a cause of action cognizable in equity, as the objection made below that it does not is insisted upon here. The appellee states his cause of action as follows:

I. "That the complainant, the Van Dusen Harrington Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota. That it is engaged in the business of buying, selling and shipping grain."

II. "The defendant herein is a duly organized and existing corporation. That it operates lines of railroad in this state and other states. That it is a common carrier for hire."

III. "The complainant shows that on or about the 8th day of March, 1917, Mark P. Miller Milling Company delivered to the Northern Pacific Railway Company, the defendant herein, at Moscow, Idaho, Northern Pacific car No. 19482, loaded with wheat consigned to Mark P. Miller Milling Company, Minneapolis, Minn. That the defendant accepted said car and undertook to transport the same in accordance with its duty as a common carrier and in accordance with all its duly filed and published rates and tariffs. That the defendant issued and delivered to said Mark P. Miller Milling Company its negotiable order bill of lading whereby it agreed to transport said car to Minneapolis, Minn., and there to deliver the same to the owner and holder of said bill of lading, or to deliver said car to such person or such place as the owner and holder of said bill of lading should duly designate, and that the defendant agreed and undertook to transport the said car in accordance with its duly filed and published tariffs and in accordance with all the rules and provisions contained in said tariffs."

IV. "That said Mark P. Miller Milling Company sold said car to the Van Dusen Harrington Company, the complainant herein, and indorsed, delivered, and transferred to the complainant the aforementioned order bill of lading. That the complainant is now the owner of the contents of said Northern Pacific car No. 19482, and is the owner of said negotiable order bill of lading."

V. "Complainant further shows that it desires to forward said car to Evansville, Ind., over the lines of the defendant herein and over the lines of other carriers that connect with defendant's lines."

VI. "That Northern Pacific Railway Company's Tariff No. 11–E, I. C. C. No. 6127 duly filed, published, and in effect under Index 520, page 23, provides rates from Moscow, Idaho, to Minneapolis, St. Paul, East St. Louis, and other points beyond Minneapolis and St. Paul. That rule 46 of said tariff, found on page 22, provides as follows: 'Shipments may be diverted, reconsigned in transit, or held in transit for orders at points on the Northern Pacific Railway, Great Northern Railway, or Minneapolis, St. Paul and Sault St. Marie (at rate in effect on date of shipment from original point to final destination), it being understood that point at which diversion is accomplished must be on direct line of movement point of origin of final destination.' "

VII. "That Northern Pacific Railway Company's Tariff No. 770–H, I. C. C. No. 5898, provides as follows: 'A change in destination, consignee, or routing will be permitted on *all carload freight* whether in transit or after arrival at original destination.' "

VIII. "That the Southern Railway Company's tariff issued by W. A. Cameron, Agent, No. 401–A, I. C. C. D–85, provides for proportional rates from St. Louis, East St. Louis, and other points to Evansville, Ind., and that said Southern Railway Company connects with said defendant's rails and receives from defendant and transports freight delivered to it by defendant from St. Louis, East St. Louis, and other points to Evansville, Ind., and other points, and that said Southern Railway Company is now and at all times has been ready and willing to receive this particular car as well as other cars from said defendant at East St. Louis and transport the same to Evansville, Ind."

IX. "Complainant further shows that it has repeatedly requested and demanded that the defendant sign, issue, and deliver to the complainant a bill of lading in the form and with the provisions and contents of Exhibit A, hereto attached and hereby made a part of this complaint, or a bill of lading in any proper or lawful form under which said car will move to Evansville, Ind."

X. "Complainant further shows that the tariffs and rules of the defendant provide and agree that said car may be reconsigned at Minneapolis, Minn., to Evansville, Ind., via East St. Louis or to such other point as the owner may duly designate. That the defendant agreed to allow said car to be reconsigned at Minneapolis to Evansville, Ind."

XI. "Complainant further shows that it has done all things necessary and in compliance with the published rules, regulations, tariffs, and provisions of the defendant in order to entitle complainant to reconsign and forward said car to Evansville, Ind."

XII. "That the defendant, contrary to its duty as a common carrier, contrary to its contract, arbitrarily, illegally, and contrary to the laws and statutes of the United States and the state of Minnesota, has repeatedly refused and still refuses to sign, issue, or deliver to the complainant a bill of lading in the form and with the contents and provisions as shown in Exhibit A, or a bill of lading in any proper form under which said car may move to Evansville, Ind.

"In consideration whereof, and forasmuch as the complainant is remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity, where this matter is properly cognizable and relievable, the complainant prays that your honors will order the defendant to forthwith issue, sign, and deliver to this complainant a bill of lading in the form and with the contents and provisions as in Exhibit A, or bill of lading in such other proper form that this car may move thereunder to Evansville, Ind. [Here follows prayer for subpœna and general relief.]"

Exhibit A, referred to in the complaint, was an ordinary bill of lading, whereby, if issued, the appellant agreed to carry the car of wheat mentioned in the complaint to Evansville, Ind. We assume, without deciding, that the trial court had jurisdiction of the case as a

federal court under the proviso of section 24 and paragraph 8 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1092 [Comp. St. 1916, § 991, par. 8]). Coming to the question of the jurisdiction of the court below as a court of equity, we may quote the language used by Justice Van Devanter in Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288:

"In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law. The statute so declares (Rev. Stat. § 723), and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection sua sponte, and in other cases it is treated as waived, if not presented by the defendant in limine. Reynes v. Dumont, 130 U. S. 354, 395 [9 Sup. Ct. 486, 32 L. Ed. 934]; Allen v. Pullman's Palace Car Co., 139 U. S. 658 [11 Sup. Ct. 682, 35 L. Ed. 303]. There was no waiver here. The objection was made by the demurrer, and again by the answer; and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them there as it was in the Circuit Court. Boise Artesian Water Co. v. Boise City, 213 U. S. 276 [29 Sup. Ct. 426, 53 L. Ed. 796]."

In New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484, the Supreme Court, in referring to Revised Statutes, § 723, now section 267, Judicial Code (Comp. St. 1913, § 1244), said:

"This enactment certainly means something."

We think it can be safely said that it means at least that the courts have not the power to dispense with the ancient rule of equity jurisdiction which prohibits suits in equity where a plain, adequate, and complete remedy may be had at law. An inspection of the complaint fails to disclose a single ground of equitable jurisdiction. Reduced to its lowest terms, the complaint charges that the appellant is in possession of a carload of wheat belonging to appellee, which it refuses to transport to Evansville, Ind. The real nature of the case cannot be disguised by the fact that appellee is simply demanding the issuance of a bill of lading, for the reason that the bill of lading, once issued, would oblige the appellant to transport the car of wheat. It cannot be disputed but that an action at law for damages is a complete and adequate remedy for the refusal by a common carrier to transport a single carload of wheat. The damages to be recovered are easily ascertainable, and in the present case would be the difference between the value of the wheat at Minneapolis and at Evansville, Ind., less expense of carriage. People v. New York, etc., R. R. Co., 22 Hun (N. Y.) 533.

Counsel for appellee in his brief, not content with sustaining the theory upon which the present action was brought, seeks to demonstrate that the action could have been brought and maintained on any one of four theories. The third theory advanced by counsel is stated in his brief as follows:

"Thirdly. The complainant could have asked for a straight writ of mandamus to compel the issuance of the bill of lading under the provisions of section 23 of the Interstate Commerce Act."

If the theory so stated is correct, then the question as to whether appellee had an adequate remedy at law is not open to question, as the proceeding by mandamus is a proceeding at law.

Counsel further states as the fourth theory on which the action might have been brought that appellee could have asked for a mandatory order to compel the issuance of a bill of lading in compliance with section 20 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), as amended (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]), commonly known as the "Carmack Amendment," and then he states that appellee adopted the fourth or possibly a combination of the third and fourth remedies. What is known as the Carmack Amendment is a part of section 20 of the Interstate Commerce Act, and it does provide for the issuance of a receipt or bill of lading by the receiving carrier, but no form of procedure is mentioned in section 20, except the District Court is given jurisdiction upon the application of the Attorney General of the United States at the request of the Interstate Commerce Commission, alleging a failure to comply with, or a violation of any of the provisions of the act to regulate commerce, to issue a writ or writs of mandamus commanding the carrier to comply with the provisions of the act. This proceeding in equity finds no support in any of the provisions of the Interstate Commerce Act, and as we have before said, if section 23 applies, then the remedy at law is adequate.

Counsel for appellee further insists that a court of equity has jurisdiction to enforce a plain duty imposed by statute, and as he claims the Carmack Amendment imposed a plain duty upon the appellant in this case to issue a receipt or bill of lading, a court of equity in a proper case may compel it to do so. We think counsel has confused the jurisdiction of a court of equity to issue a mandatory injunction to enforce a plain statutory duty, where the court for other reasons has equitable jurisdiction, with the question as to whether the court in the present case had any jurisdiction in equity at all. A court of equity has no more authority to enforce a duty imposed by statute than it has to enforce a moral of contractual duty. It will enforce either or all in cases where it has jurisdiction.

We will now notice some of the cases cited by counsel for appellee which it is claimed decide that the present case is one of equitable jurisdiction. In the first place it may be said that this is not a case where a statute has given a right without furnishing a remedy. According to counsel's own argument, he had a remedy by mandamus. The case of Wiemer v. Louisville Water Co., 130 Fed. 251, is cited. This was a case where the court issued a mandatory injunction compelling the water company to furnish the complainants with water in accordance with its duty. We have no doubt but that the jurisdiction of a court of equity was properly exercised in this case; but it is no authority for the exercise of equity jurisdiction in the case at bar, as the facts are entirely different.

The case of Coe & Milson v. Louisville & Nashville R. R. Co. (C. C.) 3 Fed. 775, is cited as being in point. This was a case where Coe & Milson applied to the court for a mandatory injunction compelling the

railroad company to accept and deliver any shipments tendered to it; but that is not the present case. There is only one car involved here, and no allegation that there will ever be another.

The case of C., B. & Q. Ry. Co. v. Burlington, C. R. & N. Co. (C. C.) 34 Fed. 481, is also cited. This was an action by one railroad company to compel another railroad company to handle its cars. Manifestly there was no adequate remedy at law, and the case furnishes no support for the position of appellee in the present case.

The case of Covington Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73, is cited. In this case Keith, who was engaged in buying and selling live stock on commission as well as on his own account, brought the same to and shipped them from the city of Covington, Ky., over the Central Railroad. He owned certain live stock lots and yards in Covington, which were provided with all the necessary means of receiving, feeding, and caring for such stock as he purchased, or as might be consigned to him by others for sale; the receiver of the railroad tore up and rendered unsafe for use the connections which the railroad had with his stockyards. It was held that it was the duty of the railroad company to maintain these connections, and that a mandatory injunction would issue to compel the performance of the duty; but here the whole business of Keith was in jeopardy from day to day. Manifestly there was no adequate remedy at law.

The case of Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Ry. Co., 54 Fed. 738, 19 L. R. A. 387, was a case where the Pennsylvania Railroad Company, a connection of the Toledo Railroad, refused to accept cars for transportation tendered it by the Toledo Railroad on the ground that the Pennsylvania employés, being union men, refused to handle cars from a nonunion railroad. Manifestly this case is not authority for appellee. All the cases cited by the learned counsel are to the effect that, if a court of equity has jurisdiction of a case, it may in a proper case issue a mandatory injunction. It is further insisted that this court will take judicial notice of the fact that the refusal to forward the car in question, as well as many other cars, will cause a multiplicity of suits, which in itself is sufficient to sustain equitable jurisdiction. We have no reason to take judicial notice that there is or will be a refusal by appellant to forward any other cars of appellee, and, if we had, we cannot enlarge the facts stated in the complaint, and, thereby enlarge the judgment which the court may render. The trial court dealt with one car, and that is all there is in the case. Moreover, the successful prosecution of the present action would not save a multiplicity of suits, any more than an action at law, for the reason that the relief asked only affects one car, and the decree could not be broader than the complaint; so there is no merit in this contention.

The court below having no jurisdiction as a court of equity, we may not consider whether the complaint otherwise states a cause of action.

The order appealed from is reversed.

BLACK v. YOUMANS, District Judge.*

(Circuit Court of Appeals, Eighth Circuit. August 2, 1917.)

No. 179.

EXCEPTIONS, BILL OF ⊂=53(3)—MANDAMUS TO COMPEL SETTLEMENT.

A trial judge cannot be compelled by mandamus to sign a bill of exceptions, purporting to contain a summary of the testimony of the witnesses in narrative form, unless it contains the substance of all the material testimony given on the trial, and his return that it does not do so is conclusive; but he may be required to settle such portion of the proposed bill, aside from the testimony, as correctly sets forth the proceedings.

Petition by Lon W. Black for a writ of mandamus to F. A. Youmans, United States District Judge. Writ denied.

Ira D. Oglesby, of Ft. Smith, Ark., for relator.

J. H. Evans, of Booneville, Ark., for respondent.

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

MUNGER, District Judge. Petition for writ of mandamus to compel respondent to settle and sign a bill of exceptions. The relator instituted an action for slander, claiming recovery on 11 causes of action. The defendant had verdict and judgment in his favor. The plaintiff requested and was allowed 100 days in which to prepare and file a bill of exceptions. This period extended 37 days after the expiration of the term. The defendant employed a stenographer, who made full notes of the testimony and proceedings at the trial. The trial consumed 6 days, and the testimony, if it had been extended into typewritten form, would have embraced 700 to 800 pages. The plaintiff prepared a draft of a proposed bill of exceptions, consisting of 46 pages of testimony in narrative form, of 7 pages of exhibits, and of 12 pages relating to the giving and refusal of instructions and proceedings at the trial. This draft was prepared from recollection of the evidence and from notes of the testimony made by relator's counsel. The stenographer was ready to prepare a transcript of his notes for the use of the plaintiff; but plaintiff was unable to avail himself of this assistance, because of lack of means.

The proposed bill of exceptions was presented to the trial judge for allowance, but he refused to sign it. The relator alleges in his petition that this bill "contained the substance of all the material testimony given in the trial." The respondent gave as a reason for his refusal to sign the bill, and avers in his return, that the bill did not present the testimony of any witness as it was given at the trial, either in substance or form.

At the hearing of the application to settle the bill of exceptions, the trial judge called in the stenographer and had him estimate the number of pages that the testimony of each witness would embrace, if the notes were extended, as compared with the proposed narrative statements of the witnesses' testimony. The relator contended that it was the duty

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

*Rehearing denied January 7, 1918.

of the defendant to suggest any amendments or corrections necessary to make the bill a complete record of the testimony; but the court found that the bill was so abbreviated, disconnected, and incomplete that amendment was impracticable and it would have to be entirely rewritten.

As the case is presented, no question is made of the correctness of that portion of the proposed bill which relates to the proceedings on the trial, other than the record of the testimony. The plaintiff requested some instructions that were refused, and excepted to portions of the court's charge to the jury. That portion of the proposed bill which does not involve the testimony, or as to which the testimony stated is correct, should have been settled by the court, as a review may be asked of rulings which do not involve the sufficiency of the evidence.

The arguments in the briefs center about the allowance of the bill as a record of all the testimony on the trial; but this contention is not open, as the petition alleges no more than that it contains the substance of the material testimony. This allegation is denied in the return made by the trial judge. He was in a position to know what testimony was given, and he refreshed his recollection by the aid of the stenographer's notes. This court cannot say that the proposed condensation of the testimony states the substance of the testimony given on the trial, because we are not advised as to the testimony that was received, and opinions may differ widely as to what constitutes the substance of witnesses' testimony. Gulf, C. & S. F. R. Co. v. Washington, 49 Fed. 347, 1 C. C. A. 286. Moreover, the return of the judge that the proposed bill is not the substance of the testimony is a statement with reference to facts occurring before him, and within his personal knowledge, and his return is conclusive. In re Streep, 156 U. S. 207, 15 Sup. Ct. 358, 39 L. Ed. 399; Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544; 9 Sup. Ct. 150, 32 L. Ed. 508; Ex parte Bradstreet, 4 Pet. (29 U. S.) 101, 7 L. Ed. 796; Thatcher v. Killits, 195 Fed. 471, 115 C. C. A. 373; Shepard v. Peyton, 12 Kan. 616; Orr v. Judge, 23 Mich. 536; Sansome v. Myres, 77 Cal. 353, 19 Pac. 577; State v. Small, 47 Wis. 436, 2 N. W. 544; State v. Hawes, 43 Ohio St. 16, 1 N. E. 1; Benedict v. Howell, 39 N. J. Law, 221; Sikes v. Ransom, 6 Johns. (N. Y.) 279.

The tender of a bill of exceptions which is proposed in good faith as a summary of the material testimony ordinarily requires that the opposite party be called upon to make any objections he may have to its insufficiency, and the court may require amendments to make the bill complete; but, while mistakes can be corrected and omissions supplied, the party proposing the bill must use good faith to make it full and fair, so that the burden is not cast upon the court or opposite counsel of preparing a new bill. The trial judge found that this bill was so seriously defective that it did not present the testimony of any of the 40 witnesses as it was given, either in substance or in form. The very brief narratives exhibited in the proposed bill as the testimony of the several witnesses, without any designation of direct or cross examination, tend to substantiate the view of the trial judge. He found that it would be necessary to have the testimony entirely rewritten; but this suggestion met no favorable response, as the relator stood upon his insistence of the bill as then proposed. Under these circumstances a writ should not

be awarded to require the judge to certify to the testimony as the substance of all the evidence introduced.

The judge should settle such portion of the proposed bill of exceptions as conforms to the facts as heretofore stated, and it is presumed that the judge will proceed in accordance with the views here announced. The issuance of the writ, therefore, will be withheld. No costs will be allowed against the respondent. In re Haight & Freese Co., 164 Fed. 688, 90 C. C. A. 285.

TODD v. ALDEN.

In re MOTOR TRUCK SALES CO.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1917.)

No. 4843.

1. BANKRUPTCY ⟸461—TIME FOR APPEAL FROM ORDER—EFFECT OF REHEARING.

   Where, after an order allowing a claim in bankruptcy, a rehearing is granted, the time for taking an appeal is extended, and runs from the time the order is made final.

2. REVIEW OF FACTS.

   Facts considered and orders affirmed.

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

In the matter of the Motor Truck Sales Company, bankrupt. W. W. Todd, trustee, appeals from an order allowing the claim of W. A. Alden. Affirmed.

Allen & Fletcher, of Minneapolis, Minn., for appellant.

George S. Grimes, of Minneapolis, Minn., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from two orders of the bankruptcy court, made on January 6, 1916, and May 18, 1916, which allowed the claims of W. L. Alden, based upon four promissory notes given by the Motor Truck Sales Company to said Alden for the following amounts: Claim No. 31, $3,300; No. 33, $3,100; No. 34, $1,500; and No. 35, $1,300.

[1, 2] It is urged that the trial court erred in deciding that these notes represented loans made to the bankrupt corporation, and were not subscriptions for, or contributions to, the capital stock of said corporation. The question for consideration is entirely one of fact. The referee in bankruptcy in a well-considered report found that the amounts represented by these notes were loans to the corporation. The District Judge, upon review of the report of the referee, although not wholly satisfied, did not disturb the finding of the referee, as the latter had heard and seen the witnesses.

We have carefully read the evidence, and are of the opinion that the orders, in so far as they are complained of, should be affirmed.

The evidence fairly sustains the position of the referee. There was a motion filed to dismiss the appeal upon the ground, among others, that the order appealed from was made January 6, 1916, and that no appeal was taken therefrom until May 26, 1916. If this was the true state of the record, the appeal should be dismissed, as not taken in time. An inspection of the record, however, has convinced that a rehearing of the order of January 6, 1916, was granted, and the matter was not finally disposed of until May 17, 1916. The granting of a rehearing operated to extend the time of the taking effect of the order of January 6th, and therefore we conclude that the appeal was taken in time.

The motion to dismiss is denied, and the orders appealed from affirmed.

WESTINGHOUSE MACH. CO. et al. v. C. & G. COOPER CO.

(Circuit Court of Appeals, Sixth Circuit. August 4, 1917.)

No. 2916.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—VALVE MOTION FOR GAS MOTORS.

The Mees patent, No. 921,864, for a valve motion for gas motors, claim 5, is void for lack of invention in view of the prior art. Claims 6, 7, and 8 *held* not anticipated, valid, and infringed.

2. PATENTS ⊂=176—WORDS AND PHRASES—"SIMULTANEOUS."

The word "simultaneous," as used in a patent claim, does not imply absolute synchronism from beginning to end, but has some elasticity. Events may be substantially or relatively simultaneous, although not absolutely so.

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

3. PATENTS ⊂=174—CLAIMS—CONSTRUCTION.

Though it be conceded to be a close question whether invention was involved in adding another element to an existing combination, yet, if invention is found, this concession does not lead to any particularly narrow construction.

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 Westinghouse Machine Company and others against the C. & G. Cooper Company. Decree for defendant, and complainants appeal. Reversed and remanded.

This is a suit for infringement of patent No. 921,864, for a valve motion for gas motors, issued May 18, 1909, to Gustave Mees, and assigned to appellants (hereafter called plaintiffs). The court below held that the structure made by the appellee (hereafter called defendant) did not infringe, and dismissed the bill.

Engines of the type here involved are operated by successive explosions of a mixture which is a combination of air and a gas of sufficiently constant quality. Increased power from the explosion may be had by changing the proportions of gas and air, so as to give a more highly explosive mixture, or by increasing the quantity of the mixture for one explosion. The former method may be designated as quality control; the latter, quantity control. By the use of either, the speed of the engine revolutions may be varied; but for some purposes—and, typically, for driving a dynamo—it is important that

the speed be constant, and since the load varies from time to time, and the increased load tends to decrease the speed, it is essential in such engines that there should be some automatic control through the aid of a governor which will increase the power to meet an increased load, and vice versa, so that the speed may be constant.

Generally speaking, this result had been fairly accomplished in various ways, before Mees' invention. It had been most common to mix the air and gas in a mixing chamber at some distance from the inlet valve in the engine cylinder, and to allow the governor to operate a throttle in a passageway from the mixing chamber to the inlet valve. This was quantity control. Devices had also been applied in which the governor regulated the size of the gas ports opening into the mixing chamber, thus effecting quality control of the mixture therein. From these more common plans, Mees departed considerably. Instead of having merely a pipe leading from the mixing chamber to the inlet valve, he constructed a cylindrical chamber mounted on the (vertical) cylinder, and in which chamber the vertical operating rod or stem of the inlet valve was axially located. In the wall of this chamber, he provided, toward the upper part, one or more ports for admitting air, and in the lower part one or more entrance ports for gas. He then mounted upon this valve stem, so as to reciprocate therewith, an open-ended, hollow piston sliding in this cylindrical chamber and having ports registering with those in the chamber wall, whereby the longitudinal reciprocation of the valve rod as the valve opened and shut, would open and shut the air and gas ports, and the piston became properly called a piston valve. As the inlet valve was opened inwardly into the cylinder by the suction stroke of a four cycle engine, the piston valve would be drawn downwardly and the air and gas ports opened to an extent determined by the prearranged adjustment of the parts, and the air and gas, in the predetermined proportions, would pass together through the inlet valve into the engine cylinder. As the inlet valve was released by its cam and seated by its spring in the usual way, the piston would rise and the gas or air ports both would be shut off.

As so far described, the element of automatic control is not involved, there being merely a permanent or semi-permanent adjustment; but Mees also made his piston revoluble upon the valve stem, and provided a suitable governor and connection to give it automatic revolution through a fraction of its circumference. If ports in the chamber wall and in the piston were of the same width (circumferential extent), the result was that when the governor, by increased speed, caused the piston to be revolved from that rotary position where the ports in the piston and in the chamber wall precisely registered, these ports were partly cut off and became of less width, so that their opening by the reciprocating motion of the piston provided a smaller area than before, and admitted less air and less gas; hence there was a smaller quantity of explosive mixture, less compression, less force in the explosion, and an automatic tendency to diminish speed. The slowing down of the engine would carry the reverse result through the governor to these ports and tend to increase the speed.

In his drawings and specification, Mees showed and described three alternative forms. In one of them, the gas ports and the air ports were of the same circumferential width, and so placed that both began to close at the same instant, and the rotary motion of the piston would, therefore, close both air and gas ports in precisely the same proportion, from the beginning to the end of the closure. This was quantity control. In another form, the piston was shorter and its reciprocation did not reach or affect at all the air ports, which remained constantly open, but in this longitudinal motion it opened and closed the gas ports, and in its rotary motion it throttled them. This gave a quality control. In still other drawings and descriptions, Mees showed a third form which combined the two control methods. The piston opened and closed simultaneously the air and gas ports, but the latter were circumferentially wider than the former, whereby the throttling action was exerted first upon the gas ports alone and then upon both simultaneously. In this form, as the speed became too great, the gas supply would first be lessened and the quality and explosive power of the mixture diminished; and

after this quality regulation had taken due effect, if the speed were still too high, both air and gas would be simultaneously reduced and the quantity of the charge lessened.

With this description of Mees' invention, his claims will be intelligible. There are nine. The first four and the ninth call for many details and seem to be specific in form. Only the remaining claims, 5, 6, 7, and 8, are in suit. They are as follows:

"5. In a valve motion for gas motors an inlet valve, a piston valve *K*, controlled simultaneously with the said inlet valve by a cam making an invariable stroke and revoluble by the governor of the motor.

"6. In a valve motion for gas motors an inlet valve, a piston valve *K* controlled simultaneously with the said inlet valve by a cam and revoluble by the governor of the motor, said piston valve having gas ports and air ports and adapted to throttle the air and gas supply for the cylinder simultaneously.

"7. In a valve motion for gas motors, a piston valve *K* moved simultaneously with the inlet valve *E* and revoluble by the governor of the motor said piston valve having gas ports *m'* and air ports *i'*, and being adapted to throttle the air and gas supply for the cylinder simultaneously and in equal parts.

"8. In a valve motion for gas motors an inlet valve, a piston valve *K* controlled simultaneously with the said inlet valve by a cam making an invariable stroke and revoluble by the governor of the motor, said piston valve having gas ports and air ports and adapted to throttle the air and gas supply for the cylinder simultaneously, the said gas ports being constructed to be closed before the closing of said inlet valve, whereby the piston valve acts simultaneously as a regulating device and as a mechanically controlled closing means for the gas ports."

For convenience, we call the longitudinal motion of the piston "reciprocating" and the rotary motion "revolving," though neither term is exclusively accurate.

J. S. Green, of East Pittsburgh, Pa., and E. W. McCallister, of Cincinnati, Ohio (Paul Synnestvedt, of Pittsburgh, Pa., of counsel), for appellants.

Isaac B. Owens, of New York City (Patrick A. Bolger, of New York City, of counsel), for appellee.

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

DENISON, Circuit Judge (after stating the facts as above). [1] When we remember that Mees' device involves three functions, that of a cylinder inlet valve, that of a reciprocal slide valve cut-off for the gas or for the gas and air, and that of a rotary slide valve throttle for the gas or for the gas and air, the distinctions between these four claims are apparent. Claim 5 has no reference to throttling both air and gas. In effect, it calls only for a piston shut-off valve reciprocating simultaneously with the inlet valve and revolving to throttle either gas or air. Claim 6 further specifies that the controlling means should act simultaneously upon the air and gas supply. Claim 7 is like claim 6, but it has the further limitation that the simultaneous throttling of the air and gas supply shall be in equal parts. Claim 8 also provides for simultaneous throttling of air and gas (like 6) but contains an additional limitation pertaining to the longitudinal or shut-off motion of the valve, viz. that the gas ports should be closed before the closing of the inlet valve.

We have to meet the usual questions of validity and scope, and we may go at once to that one of the earlier patents which, when

each one is considered by itself, most closely approximates Mees' general thought. This is the German patent to Grohmann, of October 11, 1890. This regulated the speed of the engine by a method not yet mentioned, known as the "hit and miss" method, in this variety of which, when the engine speed became too high, the governor caused the gas ports to be wholly closed, whereby the suction stroke took in air only, and an explosion was cut out. Grohmann has a cylindrical chamber with air and gas ports in its walls, and which is located in close proximity to what is claimed to be the inlet valve, and through which chamber the stem of this valve passes axially. He also has a piston valve carried by and reciprocating with the inlet valve stem, having ports registering with the gas ports in the chamber wall and opening and closing them, and being revoluble on the stem under governor control. The differences between Grohmann and Mees are four: (1) The so-called inlet valve does not open directly into the working cylinder but into a supplementary chamber, the passage between which and the working cylinder is a part of the time closed by another valve so that the charge may receive compression in this supplementary chamber, but which other valve is open at the moment of explosion, the supplementary chamber and the working cylinder then being one continuous space. Plaintiffs' counsel insist that this Grohmann valve, the stem of which carries the piston, is not the inlet valve of Mees. (2) The gas ports are either wholly opened or wholly closed by the governor action, thus making "hit and miss" control as above stated. (3) The cylindrical chamber, in which the piston reciprocates and revolves, is a short distance above the inlet valve, instead of extending thereto, and is separated by a perforated diaphragm from the space immediately above the inlet valve. The result is that gas only is received into this cylindrical chamber, which does not serve as a mixing chamber at all, and that the gas passes into the mixing chamber through the perforations in the diaphragm which are never closed, but the air passes into the mixing chamber through always open ports. (4) The gas and air are not simultaneously throttled.

It is insisted that claim 5 reads upon Grohmann, and is therefore invalid. Plaintiffs' counsel is charged with admissions to this effect; but, on the contrary, the record shows that, while frankly conceding the language of the claim to be capable of such a reading, he contended that it should not be so interpreted, and that, when rightly construed, it was valid. The file wrapper history almost compels the conclusion that this claim should not be read upon Grohmann, because Grohmann was cited and considered, and, in spite of this reference, the claim was allowed. It follows that both the Patent Office and Mees must have joined in the intent that the claim should not be so read as to make a device like Grohmann an infringement; but this conclusion does not necessarily imply that the claim is valid. If we say that its calls for the inlet valve and the piston valve rightly imply any one of the first three distinctions above recited, we must think that no one of the three involves invention in any sense sufficient to sustain claim 5, with any construction of which the language of claim 5 is capable. To change from the hit and miss method is only to

close the ports gradually instead of quickly, and the gradual closing was very common; in every substantial sense Grohmann's so-called inlet valve is the equivalent of that valve in Mees—that is, in every sense which pertains to the substantial utility of Mees' conception; and the entrance of the gas to the mixing chamber is both shut off and throttled by Grohmann's piston valve, in spite of the presence of the perforated diaphragm between the piston and the inlet valve. Each of these changes is, and all put together are, so unsubstantial in form and so negligible or so old in result that invention cannot be predicated upon them alone. We conclude that claim 5 is invalid.

The remaining question of validity is whether the limitation to a simultaneous throttling of air and gas ports, as found in claims 6, 7, and 8, imparts patentability. It plainly would, if it was new in itself, but since it had been accomplished in other associations, the question becomes more doubtful. The record presents several earlier patents which throttled air and gas simultaneously. In one (Crossley, British), there was a piston valve in a cylindrical casing with registering air and gas ports, the valve was rotated continuously through connection with a rotating part of the engine and it was reciprocable slightly under governor control, this longitudinal motion throttling both air and gas ports. This piston valve was not on or associated with a cylinder inlet valve, but was constantly open into a mixing chamber, from which passages extended to the various cylinder heads. In another (Tangyes, British), a valve of this form was rotated under governor control and thereby throttled air and gas ports simultaneously, but it had no reciprocating motion, and it also was always open into mixing chambers at a distance from the cylinder inlet valves. In others (e. g., Klein), air and gas were both throttled, not by any rotary motion of the piston, but by regulating the extent of its longitudinal stroke. It would not be demonstrably wrong to say that there was no invention in adding to the Grohmann device the additional and known modifications by which a piston valve would throttle both air and gas instead of gas alone; but we cannot be satisfied to adopt that conclusion. It is not merely a substitution of an equivalent for one element of Grohmann; adding this function to Grohmann involves considerable reorganization. His diaphragm will be unnecessary and naturally discarded. His cylindrical chamber must be extended so as to receive the air ports, the piston correspondingly extended and provided with ports and the air entrance passages rebuilt. This combination in one structure, unquestionably first made by Mees, of the inlet valve and its stem, the piston valve in immediate association with it, reciprocating with it to open and shut both air and gas ports with each suction stroke and revoluble under governor control to throttle both air and gas ports, had considerable theoretical operating advantages over any previous combination, and at least some practical advantages; the Grohmann patent was published in 1890, and, although there was great activity in this art during the intermediate 13 years, no one before Mees had thought of modifying it as he did; the plaintiff, a large manufacturer of gas engines of this general class, has either found this device desired or has thought proper to supply it in some of the largest in-

stallations in the country; and all competing manufacturers, until defendant's appearance, had acquiesced in the monopoly. In the light of these things, we think claims 6, 7, and 8 are valid. The distinctive feature of claim 8, as compared with 6, is the advance closing of the gas port. It is a mistake to suppose that the "whereby clause" of 8 refers alone to this advance closing; it refers to the whole claim, and might as well have been used on claim 6. Since this distinctive feature was not new, and is not more appropriate to the combination of claim 8 than it is to old forms, we are not clear that there is patentable distinction between 6 and 8. However, this seems of no practical importance.

In the conclusions so far stated, we concur with the court below. It remains to consider those limitations of claims 6, 7, and 8 which affect the question of their application to defendant's device. We find nothing in the specification or claims or state of the art requiring that the air ports should be of the same longitudinal extent as the gas ports, or that the air ports should separately or collectively have the same area as the gas ports.[1] Some figures of the drawing show only two air ports and two gas ports and all seem to be of the same size, but the specification says nothing about this. Obviously they would not be of the same size, unless it was desired to have one-half gas and one-half air. It appears that, in order to get an explosive mixture, these proportions must be varied according to the richness of the gas, and it is not to be supposed that Mees was ignorant of what everybody knew. His invention had nothing to do with the initial or predetermined proportions of gas and air, there was no occasion for him to describe or show anything on that subject and there can be no reasonable inference, except that he contemplated that the engine builder would proportion or adjust the relative areas of air inlets and gas inlets as the builder might think best.

It is not directly important if the suction stroke does not open or close air and gas ports at the same instant or to the same extent. The mixture is formed by all the air and gas entering through all the ports uncovered during the whole stroke. The word "simultaneously" in its first use in each of these three claims, has no reference to air and gas ports, but only to the concurrent reciprocation of inlet valve and piston valve.

[2] Nor can we imply this limitation (to simultaneous and equal uncovering by each stroke) from the stated limitation to simultaneous throttling of air and gas. The word "simultaneous" does not imply absolute synchronism from beginning to end; it has some elasticity. Events may be substantially or relatively simultaneous, although not absolutely so. It could hardly be denied that racing horses go around the track simultaneously, although a stop watch may show slight differences between them on the way and at the finish. In these engines, the reciprocating opening motion is very rapid; the rotary

[1] It is said that the examiner's letter stated that Mees' air and gas ports must be "formed in a certain way," and that Mees did not protest; but this was with reference to a specific claim and construction, later abandoned and canceled from the drawings.

throttling motion is relatively slow. It is true that if the gas ports are not all opened at the same time and to the same extent as the air ports are, but the two are so arranged longitudinally that the reciprocating action opens one, wholly or partly, before it does the other, there will be an instant when rotary motion of the piston may be throttling one but not the other, because at the other there will not, at that instant, be registration. But this is only in theory, and we can almost say only in imagination. Assuming (perhaps not with perfect accuracy) that the opening motion of the inlet valve occupies one-fourth of the time between explosions, and that 600 revolutions per minute is an ordinary speed, this opening motion will consume one-fifth of a second. If we further assume that during some fraction of the opening stroke the throttling action was affecting air ports and not gas ports, we have a very minute period of time during which the throttling is proceeding nonsimultaneously; and even when the port that was not rotarily throttled because it was longitudinally closed is later opened, it opens into a throttled condition; in a very fair sense, it had been throttled while closed. It is to be observed, also, that during three-fourths of the time, all the ports are closed, and yet, the throttling action to which the specification and claims refer as "simultaneous" is proceeding. This observation confirms the conclusion that completely and constantly concurrent throttling from beginning to end was not contemplated.

Comparison of plaintiffs' patent with the specific form used by defendant also confirms this same conclusion. The patent drawings show some instances where air and gas ports will have the same open area all the time, and show another form where they will not, but where the throttling motion in its rotary progress will be closing an open air port both before and after it is closing an open gas port. It is true this alternative construction may have special reference to claim 5, but at least it illustrates that Mees intended to adjust the longitudinal position of air and gas ports as might be advisable. Defendant's form made express provision for such adjustment manually. His air and gas ports in his piston valve were of the same longitudinal extent, but in his stationary cylindrical chamber the gas ports could be varied from nothing up to a size as large as ports in the piston. It follows that the effective gas and air ports (the registering areas of chamber ports and piston ports) in defendant's device might be of precisely the same size, or that the gas ports might be of much less size, according to the quality of gas that was to be used in a given installation. The particular use which was proved was with a rich gas, and the adjustment was such that a vertical stroke took in 19 parts of air to 1 of gas; but Mees, who specifies nothing on this subject, could just as well build his device to take in 19 parts of air and 1 part of gas (as defendant did), and the defendant could just as well adjust its existing device to take in equal parts of air and gas (as Mees did). It is not reasonable to suppose that a dissimilarity so fortuitous can be vital.

[3] While we have conceded that the question whether there was invention in bringing into an existing combination the simultaneous throttling function was a close question, that concession does not

lead to any particularly narrow construction of the word "simultaneous." Mees did not invent some novel supersynchronism in the place of an imperfect one theretofore existing, so that he should be confined to that extreme degree of perfection. He first disclosed—in this combination—any kind or degree of simultaneous action. Since a single suction stroke and the following single explosion could have no appreciable effect upon the engine's speed and the reflex action of the governing devices, but any such effect must come from a considerable number of successive strokes and explosions, it is additionally clear to us that the patent does not contemplate a single stroke as the unit concerning which simultaneous throttling must exist, but contemplates rather that substantial or appreciable period of time during which a rotary piston motion is in progress, or that part of the circle covered thereby, and that if during or by that completed unit both air and gas ports have been throttled so that the total area of each is less for those reciprocating strokes made thereafter than it was for the reciprocating strokes made theretofore, the throttling of both has been simultaneous, and Mees' invention, in this respect, has been appropriated.

"In equal parts," as used in the specification and in claim 7, necessarily means "in equal fractions" or "in equal proportions," and not "in equal area." It is the whole theory of the patent, so far as it pertains to a throttling "in equal parts," that this is for the express purpose of maintaining a constant quality; and if it were considered that whenever two square inches are throttled off on the air ports two square inches must also be cut off on the gas ports, it will result that the quality would always be changed—excepting in the one possible, but rather improbable, instance where air and gas ports were of the same initial total area.

Giving to claims 6, 7, and 8 the construction which we have approved in the foregoing paragraphs, infringement by the defendant is not to be questioned.

If, within a time to be fixed by the District Court, plaintiffs disclaim claim 5 and file in that court certified copy of such disclaimer, they may have the usual decree for injunction and accounting on claims 6, 7, and 8. They will recover the costs of this court, but not of the court below. Herman v. Youngstown (C. C. A. 6) 191 Fed. 579, 587, 588, 112 C. C. A. 185.

The decree is set aside, and the case remanded for further proceedings in accordance herewith.

HARLEY v. FIREMEN'S FUND INS. CO.

(District Court, W. D. Washington, N. D. October 22, 1913.)

No. 2394.

1. REMOVAL OF CAUSES ⟸111—JURISDICTION OF FEDERAL COURT—OBJECTIONS TO JURISDICTION.
   Under Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1916, § 1019), providing that if, in any suit commenced in or removed to a District Court, it shall appear to the District Court at any time that such suit does not really involve a dispute properly within its jurisdiction, it shall proceed no further, the court's jurisdiction of a cause removed from a state court is always open to challenge.
2. REMOVAL OF CAUSES ⟸74—AMOUNT INVOLVED—EFFECT OF COUNTERCLAIM.
   Plaintiff may voluntarily and conclusively determine the amount to which his recovery shall be limited, and where his initial pleading, and the only pleading filed in the state court other than the petition for removal fixed the amount in controversy at $2,950, and there was no inconsistency between the statement of the amount due and the prayer, the cause was not removable, though defendant pleaded a small counterclaim, the amount of which, with the amount sued for, by plaintiff exceeded $3,000.
3. REMOVAL OF CAUSES ⟸75—AMOUNT INVOLVED—WAIVER OF PART OF CLAIM.
   Though plaintiff's pleading shows more than $3,000 due him, he may waive the excess of federal jurisdiction, and sue for a less sum, thereby preventing removal.
4. REMOVAL OF CAUSES ⟸102—REMAND—DOUBT AS TO JURISDICTION.
   It is the duty of a federal court, where doubt exists as to jurisdiction, to remand a cause removed from a state court to such state court.
5. EVIDENCE ⟸234—ADMISSIONS BY FORMER OWNERS OF CAUSE OF ACTION.
   Where, in an action in which plaintiff claimed less than $3,000, it was asserted that a prior action by plaintiff's assignor on the same subject-matter, in which a larger sum was demanded, showed a fraudulent reduction of the amount of the claim to prevent removal to a federal court, plaintiff was not bound by the statements of his assignor in the former action.

At Law. Action by C. S. Harley against the Firemen's Fund Insurance Company. Action remanded to the state court.

Hastings & Stedman, of Seattle, Wash., for plaintiff.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendant.

NETERER, District Judge. This is an action commenced in the state court in which the plaintiff alleges, in substance, that prior to December 27, 1910, the Kitsap County Transportation Company was the owner of a certain steamship, known as Kitsap; that said steamship was insured against fire and marine perils by the defendant; that during the month of December, 1910, the said steamship collided with the steamship Indianapolis in the waters of Elliott Bay, which collision caused said steamship Kitsap to sink in the waters to the ocean bed; that thereafter the Elliott Bay Dry Dock Company, a corporation, entered into a contract with the defendant to raise said steamship Kitsap for 60 per cent. of the value of the vessel when so raised as its compensation; $35,000 was determined to be the value of said steamship when raised,

and that from the said sum should be deducted the cost of repairing said steamship; that the cost of repairing said steamship was $9,500; that the net salved value of said steamship was $25,500; that the Elliott Bay Dry Dock Company became entitled to $15,300; that it received from the defendant the sum of $12,350, leaving a balance of $2,950 owing; that for a valuable consideration, and prior to the commencement of this action, the Elliott Bay Dry Dock Company sold, assigned, and transferred the amount due from the defendant to it on account of the performance of said contract to this plaintiff, who is now the owner and holder thereof. The defendant, within the time required by law, filed its petition for removal to this court, in which it alleges, in substance, that the matter in dispute exceeds, exclusive of interest and costs, the sum of $3,000; that the controversy is between citizens of different states, plaintiff being a citizen of this judicial district, and the defendant a citizen of the state of California; that the plaintiff seeks to recover a balance claimed to be due under the contract referred to. It is further stated that the amount bid for repairing said vessel was $12,313, but that the company claimed that $8,068 was the amount for repairing the vessel, and the balance was for replacing the furniture and equipment; that only $8,068 should be deducted from said agreed value of $35,000, which would leave $26,932 as the salved value of which the Elliott Bay Dry Dock Company should receive $16,159.20; that on the 19th day of September, 1911, the Elliott Bay Dry Dock Company commenced an action in the state court against the Kitsap County Transportation Company, in which it was sought to recover $3,809.20; that said cause was tried on the 18th day of December, 1912, and that the testimony introduced upon said trial proved that there was no balance due to the said Elliott Bay Dry Dock Company on said salved contract, but that it had been overpaid the sum of $158.40; that after the evidence of both parties had been introduced at the trial, and before said cause was submitted to the jury or judgment entered, the said Elliott Bay Dry Dock Company moved the court for a dismissal of said action, which motion was granted; that thereafter on the 26th day of December, 1912, the defendant commenced a suit in admiralty in the United States District Court against the said Elliott Bay Dry Dock Company to recover the sum of $158.40; that the statement of the plaintiff in his complaint in which he states that the cost of repairing the steamship was $9,500, and the amount to which the Elliott Bay Dry Dock Company became entitled under its salvage contract to be $15,300, leaving a balance of $2,950, is fraudulently made for the purpose of attempting to deprive the defendant of its right to remove said cause to this court.

A bond was filed with the petition for removal, but the judge of the state court denied the said petition. Thereafter the defendant obtained a certified copy of the record and filed the same in the office of the clerk of this court, and thereafter filed its answer to the said complaint, and on the 27th day of February, 1911, filed a motion for judgment as prayed for in its counterclaim in said answer in the sum of $158.40 against the plaintiff. On March 1, 1913, the plaintiff filed objections to the judgment on the pleadings under special appearance for that purpose, as follows:

"Comes now the plaintiff in the above-entitled cause, and, without entering a general appearance herein, and limiting his appearance to the purpose of this objection, and in resistance to the pretended motion of the defendant for judgment on the pleadings herein, and not consenting to the jurisdiction of this court, and entering a special appearance only for the purpose of this objection, and reserving all objections to the jurisdiction of this court to entertain this cause, hereby objects to the consideration of defendant's pretended motion, as it appears that this court has no jurisdiction of this cause, and further that it appears that this action is now at issue in the superior court of King county, and is set for trial before a jury in said court on April 28, 1913, all of which appears from the record in this cause and from the affidavit of H. H. A. Hastings hereto attached."

Attached to the objections is an affidavit. After reciting the history of the proceedings in removal, and the order denying the same, the affidavit recites:

"That thereafter the plaintiff filed and served a reply to said answer, which reply only controverted the allegations of the answer, and thereafter the plaintiff filed its demand for a jury trial and paid the jury fee, and that said cause is now regularly assigned for trial before a jury in department No. 3 of the superior court of King county, Wash."

On March 3d the following order was entered by the then presiding judge:

"The above-entitled cause having come duly and regularly on to be heard before the court, upon the motion of defendant herein for judgment on the pleadings against the said plaintiff, for the sum of one-hundred fifty-eight and 40/100 dollars ($158.40), together with its costs and disbursements as prayed for in the answer herein, said defendant appearing by Messrs. Bogle, Graves, Merritt & Bogle, its attorneys herein, and said plaintiff appearing specially by Messrs. Hastings & Stedman, his attorneys, in opposition to said motion; and it appearing to the court that said action was commenced in the superior court for King county, state of Washington, by the service of summons and complaint on January 8, 1913, and that thereafter, and within the time provided by law, the said defendant duly filed in said superior court of King county, Wash., its petition and bond for a removal of said cause into this court, and that said petition and bond were in all things regular and sufficient to entitle said defendant to a removal of said cause into this court from said superior court; and it further appearing to the court that thereafter, and on the 4th day of February, 1913, the said defendant duly filed in the office of the clerk of this court a transcript on removal of said cause, which transcript had been duly issued out of the office of the clerk of said superior court, and on said 4th day of February, 1913, said defendant caused due written notice of the filing of such transcript on removal to be served upon said plaintiff as provided by law; and it further appearing to the court that thereafter, and on the 13th day of February, 1913, said defendant duly served its answer to the complaint herein upon the said plaintiff, which answer was duly filed in this court on the 13th day of February, 1913, and that in said answer so served and filed herein in said cause, it is alleged as an affirmative defense and counterclaim to the cause of action alleged in the complaint herein that only the sum of twelve thousand one hundred ninety-one and 60/100 dollars ($12,191.60) ever became due or payable upon the contract alleged in the complaint herein, and upon which the cause of action alleged in said complaint is based; and it being further alleged in said affirmative defense and counterclaim that said defendant, prior to the commencement of this action, had advanced and paid the sum of twelve thousand three hundred and fifty dollars ($12,350.00) on account of said contract, which payment is admitted in the complaint herein, and the said defendant having alleged in said affirmative defense and counterclaim that such payment was an overpayment, through mutual mistake of the parties to said contract, in the sum of one hundred fifty-eight and 40/100 dollars ($158.40), for which sum of

one hundred fifty-eight and 40/100 dollars ($158.40) said defendant prayed judgment against the said plaintiff; and it further appearing to the court that no reply in this action has ever been served or filed to said answer, or the affirmative defenses or counterclaim therein contained, within the time provided by law, nor has the time to file such reply ever been extended, or any application ever been made for an extension of time in which to serve or file such reply; and it further appearing to the court that this cause was duly and regularly removed into this court from said superior court of King county, Wash., and that this court acquired, ever since has had, and now has, jurisdiction of said cause, and the subject-matter thereof, and the parties thereto, and no motion to remand said cause has ever been made, and that the said motion for judgment on the pleadings in favor of said defendant and against said plaintiff, should be granted, and the court having thereupon announced that it would grant said motion, and said plaintiff, by its said attorneys, having thereupon in open court requested leave to reply to said answer, and offered, if given permission to reply to said answer, to agree that neither said plaintiff nor the Elliott Bay Dry Dock Company, a corporation, would proceed in any manner in this action in the superior court of the state of Washington, for King county, until this action be finally determined in this court, or on appeal, and the court being of the opinion that such oral application for leave to serve and file such reply upon said condition should be granted:

"Now therefore, it is hereby ordered as follows: (1) That the objections and exceptions of said plaintiff to the granting of the motion of defendant for judgment on the pleadings, on the ground that this court has no jurisdiction of this cause, be and the same are hereby in all things overruled and denied. (2) That the request of said plaintiff for leave to serve and file a reply to the answer of defendant herein in this court be and the same is hereby granted upon plaintiff's express agreement and stipulation that neither he nor the Elliott Bay Dry Dock Company, his assignor, will in any manner proceed in this action in the superior court of the state of Washington, for King county, until the final determination of this action; such reply to be served and filed within five (5) days from the entry of this order. (3) That the motion of said defendant for judgment on the pleadings against said plaintiff be and the same is hereby denied, for the sole reason and upon the sole ground that said plaintiff has so requested leave of the court to serve and file such reply to said answer, and has agreed and will not, either by himself or said Elliott Bay Dry Dock Company, proceed further in this cause in the superior court of King county, Wash., until the final determination of this cause in this court.

"Plaintiff excepts to the portion of this order overruling its exceptions and objections to the jurisdiction of this court, which exception is allowed. Done in open court this 3d day of March, 1913. Clinton W. Howard, Judge."

Thereafter, on March 8th, the plaintiff filed his reply, and included the following affirmative reply:

"(1) That this is an action seeking to enforce a common-law remedy for recovery of the balance due on a contract, which amount has been duly assigned to this plaintiff; that this plaintiff is entitled to a determination of said action by a trial by jury.

"(2) That the defendant in this action collusively, and for the purpose of endeavoring to prevent this plaintiff from having this action tried by a jury, and with the sole intention of endeavoring to prevent the superior court of King county, Wash., from adjudicating and determining this action, did on or before December 26, 1912, enter a pretended action in the admiralty jurisdiction of this court, by filing a pretended libel against the said Elliott Bay Dry Dock Company and causing a citation to issue therein, for the purpose of bringing said Elliott Bay Dry Dock Company under the jurisdiction of said court. That plaintiff was not made a party thereto, and that said libel suit only sought to recover a small amount on account of an alleged overpayment. That this plaintiff was not a necessary or proper party thereto.

"(3) That the amount in controversy in this action is less than $3,000, exclusive of interest and costs, and that the petition filed by defendant for the removal of this cause from the superior court of King county to this court was false and untrue in its allegation that the true amount in controversy was more than $3,000, exclusive of interest and costs, and was further false and untrue in its statement therein that the matter in controversy in the former action, which was waged in this court by the Elliott Bay Dry Dock Company against the Kitsap County Transportation Company and the Firemen's Fund Insurance Company, and that in truth and in fact this plaintiff is not seeking to recover in this action from the defendant for the same items and all of the account that was sought to be recovered by the Elliott Bay Dry Dock Company in said action against the Kitsap County Transportation Company and the Firemen's Fund Insurance Company, and that said petition for removal and the allegations therein contained were made fraudulently and collusively, and solely for the purpose of preventing plaintiff from having this cause adjudicated and determined by the superior court of King county, Wash.

"(4) Plaintiff further alleges that said pretended admiralty suit, instituted by the Firemen's Fund Insurance Company against the Elliott Bay Dry Dock Company, as alleged in the third affirmative defense of its answer in this cause, is not waged in good faith, but was instituted for the sole purpose of endeavoring to prevent plaintiff from obtaining an adjudication and determination of his rights in the superior court of King county, Wash."

The defendant moves to strike the further and affirmative reply. No motion has at any time been made to remand this cause to the state court. The plaintiff contends that he has never consented to the jurisdiction of the court, and the court, being without jurisdiction, should at this time search the record and determine such fact. The defendant contends that the amount in controversy is the amount claimed by plaintiff, $2,950, and the counterclaim of the defendant, $158.40, which would make $3,108.40, and further contends that the amount in controversy in the former action referred to, based upon the contract and the unpaid balance to which the plaintiff claims to have succeeded, is more than $3,000, to wit, $3,809.40. It is further contended that the question of jurisdiction has been passed upon by the former judge of this court, and that further examination is precluded.

[1] Section 37 of the Judicial Code provides, among other things:

"If * * * it shall appear * * * to * * * the said District Court, at any time * * * that such suit does not really and substantially involve a dispute * * * properly within the jurisdiction of said District Court, * * * the said District Court shall proceed no further."

District Judge Bourquin, in Gaugler v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 79, 81:

"The court's jurisdiction is always open to challenge, and while the judge, who must try a cause, if tried, reluctantly reviews intermediate matters disposed of by his predecessor, if it appears there is no jurisdiction, it must be so determined, though in effect it sets aside the ruling of a former judge."

That the court's jurisdiction is always open to challenge is supported by a long line of authorities, among which are Gaugler v. Chicago, M. & P. S. Ry. Co., supra; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81; New Chester Water Co. v. Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399; Plant v. Harrison (C. C.) 101 Fed. 307; Groel v. U. S. Elec. Co. (C. C.) 132 Fed. 252; Harrington v. Great Northern Ry. Co. (C. C.) 169 Fed. 714.

[2] The initial pleading, and the only pleading filed in the state court other than the petition for removal, fixes the amount in controversy in this case at $2,950, and no greater sum can be recovered. The Circuit Court of Appeals of the Fifth Circuit in Coyle v. Stern, 193 Fed. 582, 113 C. C. A. 450, in a well-considered case, holds that the amount in controversy must be determined from the initial pleading, and this holding is supported by the great weight of authority. The plaintiff may voluntarily and conclusively determine the amount to which his recovery shall be limited. Barber v. Boston & M. R. Co. (C.C.) 145 Fed. 52; Simmons v. Mutual, etc., Ins. Co. (C. C.) 114 Fed. 785; Western Union Tel. Co. v. White (C. C.) 102 Fed. 705. That a counterclaim cannot be considered as increasing the amount in controversy, so as to bring it within federal jurisdiction, would seem to be the reasonable and logical conclusion, and is sustained by Yankaus v. Feltenstein & Rosenstein (May 21, 1917) 244 U. S. 127, 37 Sup. Ct. 567, 61 L. Ed. 1036; Falls Wire Mfg. Co. v. Broderick (C. C.) 6 Fed. 654; Groel v. U. S. Elec. Co. (C. C.) 132 Fed. 252; McKown v. Kansas & T. Coal Co. (C. C.) 105 Fed. 657.

The provisions of section 37 of the Judicial Code are substantially a re-enactment of the act of 1887 (24 Stat. 552, c. 373), and District Judge Rogers in McKown v. Kansas & T. Coal Co. (C. C.) 105 Fed. 657, in reviewing the decisions upon the right of removal where a counterclaim was filed in itself within the federal jurisdiction, at page 658 says:

"I have considered all these questions carefully, and I have examined every case cited by counsel, and I have reached the following conclusions: (1) That no suit can be removed, under the act of 1887, to the federal court, which could not have been originally instituted in that court."

[3] The complaint in this case shows no inconsistency between the statement of the amount due and the prayer of the plaintiff, and, conceding that it did, the following cases hold that the plaintiff may waive the excess of federal jurisdiction and sue for a less sum: Collins v. Twin Falls, etc., Co. (D. C.) 204 Fed. 134; Swann v. Mutual, etc., Life Ass'n (C. C.) 116 Fed. 232; Maine v. Gilman (C. C.) 11 Fed. 214; Waite v. Phœnix Ins. Co. (C. C.) 62 Fed. 769.

[4] It is the duty of the court, where doubt exists as to jurisdiction, to remand the cause to the state court. Plant v. Harrison (C. C.) 101 Fed. 307; Kelly v. Virginia Bridge & Iron Co. (D. C.) 203 Fed. 566; Fitzgerald v. Mo. Pac. Ry. Co. (C. C.) 45 Fed. 812; Johnson v. Wells, Fargo & Co. (C. C.) 91 Fed. 1; Groel v. U. S. Elec. Co., supra. Defendant has cited, and relies, as to the question of jurisdiction, upon, the following cases: Price v. Ellis & Co. (C. C.) 129 Fed. 486; Block v. Darling, 140 U. S. 238, 11 Sup. Ct. 832, 35 L. Ed. 476; Harten v. Löffler, 212 U. S. 397, 29 Sup. Ct. 351, 53 L. Ed. 568; Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895; Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; Peeler v. Lathrop, 48 Fed. 780, 1 C. C. A. 93; Swann v. Mutual, etc., Ins. Co., supra; Bank v. Bradley, 72 Fed. 867, 19 C. C. A. 206; Bowman v. Railway Co., 115 U. S. 611, 6 Sup. Ct. 192, 29 L. Ed. 502.

These cases in the main have no application here; and are distin-

guishable in this: That in this case the amount claimed is not within the court's jurisdiction, nor is the counterclaim, and thus cannot place the defendant in the light of a plaintiff and be considered in the nature of a new cause of action. Judge Jenkins, in La Montagne v. Harvey Lbr. Co. (C. C.) 44 Fed. 645, analyzes many of these cases and concludes against the right of removal.

[5] It is contended by the defendant that another action had been commenced on the same subject-matter, and a larger sum demanded, which is made the basis for a claim of fraud. That was not an action between the parties to the record here. The plaintiff here would not be bound by statements of another in a former action, even though the matter was properly before the court and could be considered here. Nor is the amount of the counterclaim due from the plaintiff. An action in admiralty is now pending, as disclosed in the petition for removal, against the Elliott Bay Dry Dock Company, to recover the sum of $158.40 alleged to be due. Clearly no liability exists from plaintiff to defendant on account of the counterclaim.

An order may be entered, remanding the cause to the state court.

UNITED STATES v. FISCHER.

(District Court, E. D. Pennsylvania. September 27, 1917.)

Nos. 145, 146.

1. CRIMINAL LAW ⊜481, 494—EXPERT TESTIMONY—ADMISSIBILITY AND WEIGHT.
   The admissibility of expert testimony, as dependent on the qualifications of the expert, is to be determined by the trial judge, and its probative value is to be appraised by the jury.
2. CRIMINAL LAW ⊜478(1)—EXPERT TESTIMONY—QUALIFICATIONS OF EXPERT.
   An objection that a witness, qualifying as an expert generally, lacks knowledge of the subject-matter of his testimony, is one going to the weight rather than to the admissibility of the evidence.
3. CRIMINAL LAW ⊜452(1)—OPINION EVIDENCE—ADMISSIBILITY.
   On a trial for using the mails in furtherance of a scheme to defraud, an increase in the volume of purchases on stock account between certain dates was properly permitted to be shown by the testimony of the manager of the business, who had a knowledge of the stock carried, though unable to give an inventory of the things of which the stock consisted and the value of each item.
4. CRIMINAL LAW ⊜510—TESTIMONY OF ACCOMPLICES—NECESSITY OF CORROBORATION.
   The jury might convict upon the testimony of a witness, if believed by them, though tainted by the fact that he was an accomplice, and the further fact that he had been guilty of other acts reflecting upon him, and justifying the finding that he had done what a man of truth and honesty would not have done, and the court could not peremptorily tell the jury that his testimony should not be considered, unless corroborated, and only to the extent to which it was corroborated.
5. CRIMINAL LAW ⊜825(1)—INSTRUCTIONS—REQUESTS—NECESSITY.
   Where the counsel for defendant had repeatedly and earnestly pressed the point upon the court's attention, he had a right to assume that words

of a charge as to facts discrediting a witness had been chosen with his request in mind, and he was not bound to request specific instructions on every feature of evidence going to the discredit of the witness.

6. CRIMINAL LAW ⊂⊃793—INSTRUCTIONS—CODEFENDANTS.
One of two defendants on trial could not complain of instructions favorable to the other defendant, simply because of the contrast therein.

7. CRIMINAL LAW ⊂⊃921—MOTION FOR NEW TRIAL—HARMLESS ERROR.
Defendant could not complain on a motion for a new trial that evidence to which he objected was admitted for a limited purpose, instead of generally.

8. CRIMINAL LAW ⊂⊃432—EVIDENCE—DOCUMENTARY EVIDENCE—RECEIPTS.
On a trial for conspiracy to use and for using the mails in furtherance of a scheme to defraud persons from whom goods were to be obtained without paying for them, where the persons to be defrauded were permitted to show the receipt of orders for goods, and that they were packed and taken to a carrier, who gave receipts or bills of lading therefor, the receipts or bills of lading were properly admitted, where they were not admitted to show what the goods were, or as evidence or what had been received by defendants.

9. CONSPIRACY ⊂⊃28—CONSPIRACY TO COMMIT CRIME—ELEMENTS.
Where defendants planned to defraud prospective creditors of G. by obtaining goods from them without paying for them, and to successfully accomplish the fraud it was necessary to conceal the goods from G.'s trustee in bankruptcy, if such trustee were appointed, it was not necessary, to support a charge of conspiracy to have the bankrupt conceal his assets, to prove that the crime had been actually committed, or that the conspirators verbally expressed their purpose to have the nominal purchaser become a bankrupt, nor was it material whether the bankruptcy proceedings were voluntary or involuntary.

10. CRIMINAL LAW ⊂⊃878(2)—VERDICT—CHARGES OF OFFENSE AND CONSPIRACY TO COMMIT OFFENSE.
A charge of conspiracy to commit a crime becomes merged in a charge of the commission of the crime when the latter is proven, and becomes of no moment when there is a general verdict of guilty, well supported by such proofs.

Philip Fischer was convicted of offenses. On motion for a new trial. Motion denied.

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

Wm. A. Gray, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The reasons for a new trial, outside of the purely formal ones, when analyzed, disclose complaints of rulings by the trial judge permitting certain witnesses to testify, rulings on evidence, and complaints of the instructions given to the jury.

One of the questions is the propriety of having permitted certain persons to testify as experts. The objection did not raise the question of the admissibility of expert testimony, but the objections were to the qualifications of the witnesses to so testify. In some cases the objection was that the witness, although properly accepted generally as an expert, lacked knowledge of the subject-matter of his testimony. In other instances, the objection was to the qualifications of the witness to testify as an expert. Of the former reasons, five may be taken as typical.

[1-3] Just here a distinction should be noted between the admissibility of such evidence and its probative value. The first must be determined by the trial judge and the latter appraised by the jury. The argument addressed to us against the admissibility of this evidence is disposed of by the comment that it goes to the weight of the evidence rather than to its admissibility. This is said, having in mind that evidence of this character may be so clearly worthless as to call for its rejection. The value of testimony of this character is, moreover, largely dependent upon, or at least affected by, the purpose for which the testimony is introduced. Such a distinction may well move a trial judge in the exercise of the discretionary powers committed to him. The same distinction has its influence in deciding whether a witness had qualified as an expert. The substantial purpose of the inquiries into the values of stock carried at different times was to establish, as a circumstance attending the carrying out of the fraudulent scheme, that there had been an increase in the volume of purchases on stock account between certain dates. This was permitted, and we think properly, to be shown by the testimony of the manager, who had a knowledge of the stock carried, without being able to give an inventory of the things of which the stock consisted and the value of each item, as if he were testifying in an action for the value of goods sold and delivered. The expert, whose competency is denied, was an accountant, who was merely asked to give the result of simple mathematical additions. The only service called for was that which might have been supplied by an adding machine. The objection to the witness was limited to this feature. We think the qualifications of the witness were within the discretionary powers of the trial judge to find.

[4] The real question now raised and emphasized is that stated in the opinion in Reagan v. U. S., 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709. It may be stated in the interrogative form of whether the jury should have been cautioned by being informed of the danger of crediting tainted testimony, or peremptorily instructed that it was a principle of law that no such testimony should be considered by the jury, unless it was corroborated, and to the extent to which it was corroborated. The jury was charged in accordance with the first view indicated. The other view is strongly pressed upon us as the correct view.

Two things may be stated expressive of the attitude of the trial court. One is (and to the full benefit of this the defendant is in fairness entitled) the instruction given to the jury, and what we are convinced the jury understood to be the instruction given them, was that they might convict upon the testimony of the witness Haftel, if believed by them, notwithstanding it was tainted by the fact that he was an accomplice, and the further fact that he had been guilty of other acts which reflected upon him, and would justify the finding that he had before done what a man of truth and honesty would not have done. The other thing to be said is that the question of the correctness of the view of the law as given to the jury was so presented as the view accepted in courts of federal jurisdiction, and as no longer an open one. If this be error, the error must be corrected by an appellate court. The trial judge did not feel at liberty to entertain the thought of disregard-

ing the thus settled law, or of weighing the argument that these controlling rulings were otherwise than as they had been construed to be.

The law so being, so far as affects this court, the only remaining question is whether the jury were cautioned as the rule of law requires. We do not understand any complaint to be made on this score, except the omission to call attention to certain admissions made by the witness, from which special culpability is charged to appear. If there was any real possibility that every reason for discrediting the witness was not in the mind of the jury, the appeal now made to us would be persuasive. The discussion of this feature of the case was, however, so full that the questions before the mind of the jury must have been the simple ones of (1) whether the jury could convict on the testimony of Haftel, if the jury credited his testimony, notwithstanding everything which had appeared to his discredit; and (2) whether they did so credit him.

[5] A careful review of the charge convinces us that it is rather open to the criticism of the duty of cautioning the jury being overdone than of being underdone. We pass upon the question now raised as if the court had been expressly requested to charge upon every feature of the evidence which went to the discredit of the witness, and had charged as it did charge. If the caution impressed upon the jury was less than was the right of the defendant, the charge was erroneous. The defendant should have the charge so read, because counsel for defendant did repeatedly and earnestly press this point upon the attention of the court, and had the right to assume that the words of the charge had been chosen with the request in mind, and was not bound to request specific instructions.

The further reason urged, that the parts of the charge which were favorable to the defendant, who was acquitted, by contrast bore hardly, although indirectly, upon the other defendant, who was convicted, may be well founded in fact. This possible unintended effect was in the mind of the trial judge as at least a possibility. The point now is: How could it have been avoided?

[6] Because of this difficulty, the expression of the thought that it was in the power of the jury to acquit one and convict the other was made in as general terms as possible. The inevitable effect was to make the thought obscure. The statement made by counsel seemed to be an invitation to make the instruction specific. This was accordingly done. We do not see that this defendant can complain of instructions favorable to the other defendant simply because of the contrast.

[7, 8] The rulings upon the admission of the bills of lading, etc., must be left to vindicate themselves. We see no error in admitting them for the limited purpose for which they were admitted. It may be they should have been admitted generally. The defendant, however, cannot complain of the limitation. The persons to be defrauded were permitted to show the receipt of orders for goods; that they were packed, and taken to a carrier, who gave for them receipts, which were produced and identified as the receipts given. They did not go in evidence to show what the goods were, or as evidence of what had been received by the defendants. Nor do we feel convicted of the er-

ror assigned in the supplemental paper book. The charge as made must, of course, be proved to justify a conviction. U. S. v. Greene (D. C.) 146 Fed. 803.

[9, 10] The things done of which defendants are accused justified the dual or quadruple charge that they had conspired to commit, and had committed, the offense of using the mails in furtherance of a scheme to defraud, and the other offense of having a bankrupt conceal his assets from his trustee. The persons to be defrauded were prospective creditors of Graboyes. The fraud consisted in getting things of value without paying for them. The concealing of the goods from the trustee in bankruptcy would become a necessity of the successful accomplishment of the fraud, if such trustee were appointed. Whether the bankruptcy proceedings were voluntary or involuntary made no difference. Nor would it be necessary, in order to support a charge of conspiracy to have a bankrupt conceal his assets, to prove that the crime had been actually committed, assuming, of course, overt acts. Nor would it be necessary to prove the verbal expression by the conspirators of their purpose to have the nominal purchaser of the goods become a bankrupt. Without any proof of the verbiage of the unlawful concert of the conspirators, the acts which were concerted would justify and support the charge that they had conspired to do what they in concert attempted to do. The real situation, of course, is that the charge of a conspiracy to commit a crime becomes merged in a charge of the commission of the crime as soon as the latter is proven, and becomes of no moment when there is a general verdict of guilty, well supported by such proofs.

The motion for a new trial is denied.

In re ATKINSON-KERCE GROCERY CO.

(District Court, N. D. Georgia. July 28, 1917.)

No. 885.

1. BANKRUPTCY ⊂=226—CLAIMS—PRIORITIES—EVIDENCE.
Evidence *held* sufficient to support referee's findings as to priority between claims against bankrupt's estate.

2. BANKRUPTCY ⊂=226—FINDING OF REFEREE—PRIORITIES—REVIEW.
The report of a referee in bankruptcy proceedings, determining the priorities between claimants, must be given weight, where supported by sufficient evidence.

In Bankruptcy. In the matter of the Atkinson-Kerce Grocery Company. Intervention of Wiley H. Trammell. On petition to review an order of the referee. Report confirmed.

Lipscomb & Willingham, of Rome, Ga., for trustee.
Eubanks & Mebane, of Rome, Ga., for intervener Trammell.
Barry Wright, of Rome, Ga., for intervener Selman.

NEWMAN, District Judge. This is a petition to review and revise the action of the referee in the bankruptcy proceeding. It is a

contest, as the referee states, between D. B. F. Selman and Wiley H. Trammell, who is attempting to set up a contractor's and materialman's lien on certain property of the bankrupt. The facts of the case and their legal status appear in the opinion of the referee as follows:

The trustee in bankruptcy in this case filed a petition for the sale of the real estate belonging to the bankrupt estate, freed from the liens; the liens attach to the money derived from the sale, in the same manner that they did to the property. The trustee's petition also asks that the priority of the several liens be fixed and determined. An order was passed by the referee on the 12th day of April, 1917, for the sale of the real estate in the manner requested by the trustee. In the meantime, all of the lienholders intervened and asked that their liens be set up and allowed.

There is a contest between D. B. F. Selman, who holds a claim for purchase money, and Wiley H. Trammell, who is attempting to set up a contractor's and materialman's lien for something over $1,200. This property was originally owned by Henry Powers, who borrowed $1,500 from Felix Corput, giving him a security deed to the property, to secure the loan, and vesting the legal title in said Corput. Powers then sold the equity in the property to D. B. F. Selman, who in turn sold it to W. C. Atkinson and W. T. Kerce, owners of the stock of the Atkinson-Kerce Grocery Company, who in turn transferred their interest to the Atkinson-Kerce Grocery Company. When Selman bought from Powers, he took a deed to his interest in the property; and when he sold to Atkinson and Kerce, he gave them a bond for title. The consideration in the sale from Selman to Atkinson is $4,000, and Selman, when he bought the property from Powers, having agreed to assume the Corput loan of $1,500, the amount due him is reduced to $2,500, and for this amount he claims that his lien should be fixed as second to the Corput lien.

After Selman sold to Atkinson and Kerce, and after the transfer to the Atkinson-Kerce Grocery Company it was decided to tear down the wooden building on the lot and build a brick building in place of it. Wiley H. Trammell was employed and contracted with to do this work. Trammell claims that during the progress of the work Selman claimed that he owned the property, consulted with him as to the front of the building, and agreed that, if the Atkinson-Kerce Grocery Company failed to pay for the work, he would. This claim Selman denies. The work on the building was finished in December, 1916, and on the 1st day of January, 1917, Trammell filed a lien in the office of the clerk of the superior court of Floyd county on this property, against D. B. F. Selman as owner, for $1,219.

The Atkinson-Kerce Grocery Company was adjudicated a bankrupt on the 16th day of December, 1916. Both Selman and Trammell then come into the bankruptcy court and seek to set up their liens, each claiming priority over the other. On October 12, 1916, Trammell took a note for $1,279.48, in full payment of his debt, which was signed by W. T. Kerce. This was introduced in evidence. Trammell's intervention seeks to set up a lien against D. B. F. Selman, who, he alleges, was at the time the work was done, and is now, the holder of the legal title to said property. During the course of the proceedings the trustee paid off the Corput lien, out of the funds of the estate, and had all of Corput's rights transferred to him. This places in the trustee the legal title derived from Corput, and the equitable title derived from the Atkinson-Kerce Grocery Company; Selman still retaining his claim for $2,500, the balance of the purchase money.

Counsel for the trustee filed an objection to Trammell's lien, asking that it be disallowed, because, in the first place, it does not set out against whom said lien was filed, and because his information is that the lien was filed against D. B. F. Selman, who is not a party to the bankruptcy proceeding, and because it should have been filed against the Atkinson-Kerce Grocery Company. In the opinion of the referee, the lien should have been filed against the holder of the legal and equitable title, and, both of these titles now vesting in the trustee, the lien should have been filed against the trustee; the trustee holding the legal title of Corput and the equitable title

of the Atkinson-Kerce Grocery Company. In support of this proposition, the referee cites Williams v. Chatham Real Estate & Improvement Co., 13 Ga. App. 46, 78 S. E. 871. I quote as follows: "Before the lien on the land could be established under the allegations of the petition, both the holder of the legal title, to wit, the Chatham Real Estate & Improvement Company, and the holders of the equitable reversionary title, to wit, the trustees, for the use of the church, would have to be joined in the suit. The legal title being in the realty company, and the equitable title in the trustees for the church, and the church itself having been built for the use of the Colored Methodist Episcopal Church, under the allegations of the petition there was a privity of interest between all the parties. Certainly the realty company was a necessary party, and its title could not have been incumbered in the suit without first having made it a party. The owner of the property, or of the interest sought to be charged, is a necessary party, without whose presence a valid judgment, foreclosing the lien, cannot be rendered." In this case, Corput takes the place of the realty company, and the Atkinson-Kerce Grocery Company is the holder of the equitable title.

In Reppard, Snedeker & Co. v. Morrison, 120 Ga. 28, 47 S. E. 554, the headnote says: "The title of the true owner of the land cannot be subjected to a lien for material, unless he expressly or impliedly consents to the contract under which the improvements are made. Where the owner did not consent to the alteration or improvement of the building, the land could not be subjected to a lien for material furnished under a contract made by the tenant with the contractor." In this case it is perfectly apparent that Corput is the true owner of the land, and that the equitable interest is vested in the Atkinson-Kerce Grocery Company.

In Carr & Co. v. Witt, 137 Ga. 374, 73 S. E. 669, section 2a of the headnote says: "A contractor furnishing material and making improvements under a contract with a tenant, upon the land occupied by the tenant, does not thereby acquire a lien as against the owner of the land, although the owner, with knowledge of the contract between the tenant and the contractor, consented for the improvements to be made." Paragraph "b" of the same section says: "The allegation that Carl Witt 'ratified and assented to the contract' means nothing more than that Carl Witt gave his consent that the improvements should be made under the contract between the tenant and the contractor, and does not mean that he adopted the contract as one made for him by the tenant acting as his agent, so as to bring him into contractual relations with the contractor making the improvements and furnishing the material." This case is a very similar one to this, and sustains the contention of counsel for Selman.

Jennings, Gresham & Co. v. Huggins, 125 Ga. 338, 54 S. E. 169, says: "On the trial of an action against a debtor, to enforce a materialman's lien for material sold to and used by him in the improvement of certain real esfate, of which he was in possession as the ostensible owner, the record of a claim of lien asserted by the plaintiff against the defendant's wife, as the owner of the property for material furnished to improve the same, is inadmissible in evidence, because of the obvious variance between the pleading and the proof offered to sustain it. Such an action cannot be converted into one against the wife by an amendment alleging that her husband acted as her agent in purchasing materials and using them in making improvements upon real estate belonging to her. The grant of a nonsuit was proper." (The above is a headnote.) It does not appear anywhere that Selman is the owner of the legal title to this property. It is admitted that Felix Corput held the legal title which is now vested in the trustee. The Atkinson-Kerce Grocery Company had bought the equitable title from Selman, were then in possession of the property, and made the contract with Trammell. I do not see, under the circumstances, that Trammell has any right to enforce his lien against Selman, who was not in possession of the property, and did not own the legal title, and had a mere claim of lien for purchase money due.

It is therefore ordered: First. That the lien of Wiley H. Trammell, as a contractor and materialman, be disallowed. Second. It is ordered that the

lien of D. B. F. Selman for $2,500, balance of purchase money, be fixed as standing second in dignity to that of Felix Corput for $1,500.

[1, 2] After considering the recent report of the referee, filed July 23d, in connection with his former report (above set forth) and the record in the case, I must agree with the referee about the conclusion he has reached. I think it is clear from this record that Selman's lien for the purchase money is sufficiently supported by the evidence and by the facts to make the report of the referee correct. At all events, the facts are not sufficient to justify me in differing with the referee under the well-recognized rule on that subject. He saw the witnesses and heard the case on the ground where the transactions occurred, and I must give that weight to his finding which is usually given.

The report of the referee is confirmed, and the priority of the Selman lien over that of Trammell, and the Selman lien being subject to the priority of the Corput lien, is hereby determined; and it is so ordered and decreed.

THE MEMPHIAN.

(District Court, D. Massachusetts. March 10, 1917.)

No. 1519.

1. ADMIRALTY ⇐123—PROCEEDINGS—COSTS.
   Under Sundry Civil Appropriation Act July 1, 1916, c. 209, § 1, 39 Stat. 313 (Comp. St. 1916, § 1630a), declaring that the courts of the United States shall be open to seamen without furnishing bonds or prepayment of, or making deposit to secure, fees or costs, for the purpose of entering or prosecuting suits for wages or salvage, foreign-born seamen need not prepay or make deposit to secure fees or costs, for they should be treated as on the same footing with those suing in forma pauperis under Act July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended by Act June 25, 1910, c. 435, 36 Stat. 866 (Comp. St. 1916, § 1626), and such costs, in accordance with the practice under the section, if not paid, become a lien on the recovery.

2. CLERKS OF COURTS ⇐61—DUTIES OF.
   There is no obligation on the clerk of the District Court to account for such fees until he has collected them; and so he is not responsible until collection for the payment of fees in actions by sailors which may be prosecuted without prepayment.

3. ALIENS ⇐16—ACTION IN FORMA PAUPERIS.
   Under Act July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended by Act June 25, 1910, c. 435, 36 Stat. 866 (Comp. St. 1916, § 1626), the privileges of action in forma pauperis are limited to citizens of the United States.

In Admiralty. Libel by Michol Christon and another against the Memphian. On motion of the clerk of the District Court, praying that he be directed to perform no service for which fee is required until accrued fees have been paid. Motion denied.

John J. O'Connor, of Boston, Mass., for libelants.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

MORTON, District Judge. [1] The libelants are two alien seamen, who shipped at Manchester, England, on the British steamship Mem-

phian, for a voyage to Boston. The steamer duly arrived in Boston, and the libelants, having demanded payment of one-half their wages and been refused, filed this libel against the vessel. The question now before the court relates solely to costs. The proctor for the libelants, before the libel was filed, notified the clerk that he would "not be responsible for clerk's fees to accrue from the filing thereof." The clerk of this court subsequently made demand on the libelants for 10 cents, being the statutory fee for filing in the case a certain paper offered by them. They refused to pay the fee, and insisted that the clerk was bound to file the paper without any fee. Their refusal is based upon the proviso in the act of Congress known as the Sundry Civil Appropriation Act (approved July 1, 1916), which reads as follows:

"Provided, that courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety." Act July 1, 1916, c. 209, § 1, 39 Stat. 313 (Comp. St. 1916, § 1630a).

The clerk has filed a motion praying that he be directed by the court to perform no further service in the case for which a fee is required, until the fees accrued have been paid. There is no dispute between the parties that the facts are as stated in the clerk's motion; and I so find. He has no personal interest in the matter, because the earnings of his office are largely in excess of his maximum compensation, and he has to account annually to the United States for a surplus.

[2] The privileges of the forma pauperis statute (Act July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended by Act June 25, 1910, c. 435, 36 Stat. 866 [Comp. St. 1916, § 1626]) are extended only to citizens of the United States. It provides in effect that the persons therein specified shall be entitled to sue or defend in a United States court "without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor." The similarity in these provisions with those of the proviso here in question is evident.

[3] Under this act it has been decided in this district that a plaintiff was not obliged either to prepay clerk's fees or to pay them concurrently with the doing of the work by the clerk. The clerk's right to the fees is not lost; they are a lien upon any judgment which the plaintiff may recover. Columb v. Webster Mfg. Co. (C. C.) 76 Fed. 198. Of course, there is no obligation on the clerk to account for the fees until he has collected them.

The motion filed by the clerk must be denied.

ORR v. ALLEN et al.

(District Court, S. D. Ohio, W. D. August 9, 1917.)

No. 134.

1. TAXATION ⟸24—POWER OF STATE—PURPOSES—LOCAL IMPROVEMENTS.
A state may require local improvements to be made, which are essential to the health, comfort, safety, and prosperity of the community, and may prescribe the way in which the means to meet the cost of the improvement shall be raised, whether by general taxation or by laying the burden upon the district specially benefited; the power of the state respecting the mode, form, and extent of taxation being unlimited, unless restrained by the federal Constitution, where the subjects to which it applies are within the state's jurisdiction.

2. DRAINS ⟸67—EMINENT DOMAIN ⟸31—ASSESSMENTS—PUBLIC PURPOSES.
Under the Ohio Conservancy Act (104 Ohio Laws, p. 13), authorizing the creation of conservancy districts for the purpose of preventing floods and protecting cities, villages, farms, and highways from inundation, the land to be taken and the assessments to be made for such an improvement are for a highly important public service and use.

3. STATUTES ⟸64(5)—PARTIAL INVALIDITY—PUBLIC IMPROVEMENTS.
Ohio Conservancy Act, §§ 53, 54, so far as they provide for attorney's fees as a part of the cost in certain cases, and section 6, so far as it provides for an appeal from an order refusing to establish a conservancy district to the court of appeals of the county, being void under the decisions of the Supreme Court of Ohio, are to be regarded as separable from the rest of the act, and in effect eliminated from it.

4. COURTS ⟸366(2)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
Whatever views a state court may have expressed regarding the validity of a state statute under the federal Constitution, the courts of the United States must decide the question according to their own convictions.

5. CONSTITUTIONAL LAW ⟸290(1)—DUE PROCESS OF LAW—ASSESSMENTS FOR LOCAL IMPROVEMENTS.
To constitute due process of law, it is only required that the costs of a local public improvement be apportioned in a just and reasonable mode according to benefits.

6. CONSTITUTIONAL LAW ⟸290(1)—DUE PROCESS OF LAW—ASSESSMENTS FOR LOCAL IMPROVEMENTS.
To constitute due process of law, an assessment upon private property for the cost of a local improvement must be for a public use, whether for the whole state, or for some limited portion of the community; but it is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in the improvement, to constitute it a public use.

7. CONSTITUTIONAL LAW ⟸290(3)—DRAINS ⟸2(1)—DUE PROCESS OF LAW—PUBLIC IMPROVEMENTS—FLOOD PREVENTION.
The Ohio Conservancy Act, authorizing the establishment of conservancy districts to prevent floods, etc., affords due process of law, as it carefully provides notice to the landowner and a hearing upon every essential question of fact involving the necessity for the proceedings under the act, the propriety of establishing the conservancy district, the amount of the benefits to accrue, and the assessments therefor, and provides a mode and form of testing all of the landowner's rights in the ordinary course of justice before a court of competent jurisdiction.

8. CONSTITUTIONAL LAW ⟸232—EQUAL PROTECTION OF THE LAWS—PUBLIC IMPROVEMENTS—FLOOD PREVENTION.
Ohio Conservancy Act, § 6, authorizing any petitioner for the establishment of a conservancy district to appeal to the court of appeals of the

county from an order refusing to establish such district, and section 38, authorizing the board of directors of the district to appeal from any order in any proceeding thereunder not requiring the intervention of a jury, does not deny the equal protection of the laws, though no provision is made for appeals by objecting landowners, as the Supreme Court of Ohio has held that the provision of section 6 for an appeal is invalid, and section 38 necessarily falls with section 6, and the right of review by proceedings in error is open to objecting landowners equally with petitioners and the directors.

9. CONSTITUTIONAL LAW ⊜290(3)—DUE PROCESS OF LAW—PUBLIC IMPROVEMENTS—FLOOD PREVENTION.

Ohio Conservancy Act, § 3, providing, relative to petitions for the organization of a conservancy district, that several similar petitions or duplicate copies of the same petition may be filed and regarded as one petition, and that all such petitions filed prior to the hearing shall be considered by the court as though filed with the first petition placed on file, does not, in connection with section 5, providing for notice of the pendency of the petition immediately after the filing of the first petition, deny due process of law, though a similar or duplicate copy of the main petition might be filed and considered at the hearing, without any notice of its filing being given, as the petitions would manifestly be all alike, or substantially alike, and notice of the pendency of the main petition is sufficient.

10. DRAINS ⊜67—EMINENT DOMAIN ⊜167(2)—ESTABLISHMENT OF DISTRICTS—ASSESSMENTS—STATUTORY PROVISIONS.

Ohio Conservancy Act, § 34, providing, relative to appeals from the award of compensation or damages or benefits, that the appeal shall be from the award, but from no other part of the decree, is not invalid: objectors being given an opportunity at an earlier stage of the proceeding of contesting the validity of the law and the propriety of establishing the district, and to prosecute error, if they so desire.

11. CONSTITUTIONAL LAW ⊜42—DRAINS ⊜40—RESTRAINING CONSTRUCTION—RIGHT TO COMPLAIN—"PERSON."

If, as claimed, Ohio Conservancy Act, § 12, authorizing "any person or persons" to object to the plan of improvement adopted by the directors of the conservancy district, denies the right to object to counties or cities against which assessments are made, in view of section 1, defining "person" as excluding counties, cities, or other political subdivisions, this does not authorize a property owner, against whom an assessment is made, and who also pays taxes in a city and a county subject to assessment, to enjoin the improvement, as he can recover for taxes illegally imposed, and will suffer no irreparable injury, and moreover, as he has a right to object, he is in no position to complain that the county or city is denied such right.

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

12. CONSTITUTIONAL LAW ⊜290(1)—DRAINS ⊜67—ASSESSMENTS—STATUTORY PROVISIONS.

Ohio Conservancy Act, § 43, providing for a levy upon the property in a conservancy district of a tax not to exceed three-tenths of a mill on the assessed valuation for the purpose of paying preliminary expenses, does not violate Const. U. S. Amend. 14, but is a proper exercise of the power of taxation, both under the federal Constitution and the Constitution of Ohio.

13. COURTS ⊜366(6)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS—"TAX"—"ASSESSMENT."

The decision of the Supreme Court of Ohio, that under the Conservancy Act, § 43, the word "tax" means "assessment," and is to be imposed with

reference to benefits and burdens upon real estate, must be followed by a federal court.

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

14. DRAINS ⊜67—ASSESSMENT OF BENEFITS—STATUTORY PROVISIONS.
Ohio Conservancy Act, § 46, providing that, when a landowner has paid the entire assessment in full upon an appraisement of benefits to his property, he may nevertheless be assessed for purposes of maintenance, and section 47, providing for additional levies as may be necessary to pay the principal and interest of bonds, are not open to any valid objection.

15. CONSTITUTIONAL LAW ⊜46(3)—OBJECTIONS TO VALIDITY OF STATUTE—PREMATURE OBJECTION.
An objection to the validity of Ohio Conservancy Act, § 47, providing that a party who has not sought a remedy against any proceeding thereunder until after bonds have been sold or the work constructed cannot for any cause have an injunction against the collection of taxes or assessments for the payment of such bonds, is premature, when made in a suit for an injunction before the improvement has been constructed or the bonds sold.

In Equity. Suit by Louis H. Orr against Harry M. Allen and others. Interlocutory injunction denied.

Long, Bell & Smith, of Piqua, Ohio, for plaintiff.

Brown & Frank and McMahon & McMahon, all of Dayton, Ohio, for defendants.

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

HOLLISTER, District Judge. This action, brought by Louis H. Orr, a citizen of California, owner of real estate in the city of Piqua, Miami county, Ohio, and farming land in Miami county, against the defendants individually and as the board of directors of the Miami conservancy district, challenges the constitutionality, both with respect to the Constitution of Ohio and the Constitution of the United States, of the act of the General Assembly passed February 5, 1914, entitled, "To prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conservation districts," known by legislative direction as the "Conservancy Act of Ohio."[1]

The purpose of this legislation was to provide against and to prevent the recurrence of such a calamity as befell the inhabitants of the valley of the Great Miami river in March, 1913, growing out of an unprecedented flood in that river and its tributaries, resulting, not only in the loss of many lives and the destruction of property, but, by possible recurrence, threatening the well-being and prosperity of the inhabitants and owners of property in that valley for all time to come. The menace of future similar disaster was a cloud upon the health, happiness, and prosperity of one of the most thriving and promising sections of the state. So threatening was the situation that the General Assembly of Ohio gave expression to public sentiment, not only in the

[1] 104 Ohio Laws, 13-64.

enactment of the provisions of this law with its appropriate title, but by declaring: [2]

"This act is hereby declared to be an emergency law, necessary for the immediate preservation of the public health and safety. Such necessity exists by reason of the inadequacy of the present drainage system of the state to carry off unusual rainfalls in a proper and safe manner, as shown by the disastrous floods of March, 1913, which may occur again at any time in the near future with a like unfortunate result in loss of life and property. The existing laws of the state are not adequate to meet this emergency."

While it is true that knowledge of a recurrence of such a disaster resides only with Omniscience, yet the finite mind, with knowledge gained by experience and observation, is endowed with sufficient foresight to seek to prevent and to insure against, if possible, a similar calamity in the future. Whether such legislation is an exercise of police power, or was enacted under express constitutional authority, is not important, and we agree with Judge Wanamaker in what he says in that behalf; [3] for the amendment of the Constitution of Ohio adopted September 3, 1912, with seeming prescience declared: [4]

"Laws may be passed * * * to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts. * * *"

[1] That it is in the power of the state to require local improvements to be made which are essential to the health, comfort, safety and prosperity of the community is not open to doubt, and for such purpose provision may be made for many such objects, including draining marshy and malarious districts, irrigating arid lands, and the construction of levees to prevent inundations, and the Legislature may prescribe the way in which the means to meet the cost of the authorized improvement shall be raised, whether by general taxation or by laying the burden upon the district specially benefited. [5]

The power of the state, unless restrained by provisions of the Constitution of the United States, as to the mode, form, and extent of taxation imposed to meet the cost, is unlimited, where the subjects to which it applies are within the state's jurisdiction. [6]

While no state conservancy act exactly like this has been passed upon by the Supreme Court of the United States, yet its general features and the method of operation under it have received the sanction of that court, [7] and the existence of the power has been affirmed in decisions too numerous to cite, though the method of its exercise has

[2] Section 79.

[3] Miami County v. Dayton, 92 Ohio St. 215, 224, 110 N. E. 726.

[4] Article 2, § 36.

[5] Hagar v. Reclamation District, 111 U. S. 701, 704, 705, 4 Sup. Ct. 663, 28 L. Ed. 569; County of Mobile v. Kimball, 102 U. S. 691, 704, 26 L. Ed. 238.

[6] State Tax on Foreign-Held Bonds, 15 Wall. 300, 319, 21 L. Ed. 179.

[7] O'Neill v. Leamer, 239 U. S. 244, 36 Sup. Ct. 54, 60 L. Ed. 249; Houck v. Little River District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266; Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569.

sometimes been successfully questioned, as being in contravention of some provisions of the Constitution of the United States.

While the existence of the emergency, as declared by the General Assembly, is not conclusive,[8] and the act itself provides how that question of fact may be raised, yet the opinion of the representatives of the people of Ohio has great weight. The act has been construed, and its validity, except as to certain clauses hereinafter referred to, has been upheld by the Supreme Court of Ohio, both from the view of the Constitution of Ohio and of the Constitution of the United States.[9] This was an affirmation of the original finding by the court of common pleas that the improvement contemplated was a public necessity, and that public safety, health, convenience and welfare would be promoted by the organization of the conservancy district substantially as prayed for in the petition authorized by the act to be filed in that court. While the views of the General Assembly and the decision of the Supreme Court are not conclusive upon the courts of the United States on the question of the public character of the use to which private property is to be appropriated and assessments made for the cost of public works, yet state action on the subject is accorded the highest respect.[10]

[2] From what we have said, it clearly appears that we are of opinion that the land to be taken and the assessments for the cost of this improvement are for a highly important public service and use, and we are in entire accord with the views of the General Assembly and of the courts of Ohio on the subject, and also, on the general subject, with the views of the Supreme Court of Nebraska,[11] approved by the Supreme Court of the United States:[12]

"In our opinion it is too late in the day to contend that the irrigation of arid lands, the straightening and improvement of water courses, the building of levees and the draining of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties and functions."

And we see no difference in principle between legislation such as this and legislation prescribing a system for reclaiming swamp lands, when essential to the health and prosperity of a community and laying the burden of doing it upon districts and persons benefited, or for draining low and marshy lands, or for irrigating large tracts of arid land, or for taking lands for public highways, or for constructing levees along the banks of rivers to prevent inundations.[13] In fact and in law,

8 Miami County v. Dayton, 92 Ohio St. 215, 110 N. E. 726.

9 Miami County v. Dayton, 92 Ohio St. 215, 110 N. E. 726.

10 Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369; O'Neill v. Leamer, 239 U. S. 244, 253, 36 Sup. Ct. 54, 60 L. Ed. 249.

11 Neal v. Vansickle, 72 Neb. 105, 100 N. W. 200; Drainage District v. Richardson County, 86 Neb. 355, 125 N. W. 796.

12 O'Neill v. Leamer, 239 U. S. 244, 252, 253, 36 Sup. Ct. 54, 60 L. Ed. 249.

13 Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569;

every substantial feature of this act as it is now before this court, so far as questions arising under the Constitution of the United States are concerned, has received the sanction of the Supreme Court of the United States in the cases referred to in the margin.

We have been content with referring to the volume of the Ohio Laws in which the act may be found, because its great length forbids detailed statement. A brief statement of the act and the parts particularly objected to may be made:

The court of common pleas of any county is authorized to establish conservancy districts for the purpose of preventing floods; of regulating streams and channels by changing, widening and deepening same; of reclaiming or of filling wet and overflowed lands; of providing for irrigation where it may be needed; of regulating the flow of streams; of diverting, straightening, widening, deepening and changing water courses; to build reservoirs, canals, levees, walls, embankments, bridges or dams, and to maintain, operate and repair any such construction; and to do all things necessary for the fulfillment of the purposes of the act. Before doing so, a petition shall be filed in the office of the clerk, signed either by 500 freeholders, or a majority of the freeholders, or by owners of more than half of the property in size, acreage or value within the limits of the territory to be organized into the district, and which petition may be signed by the governing body of any corporation within, or partly within, the proposed district, or by any city, or cities interested, in some degree, in the improvement. The petition shall contain, among other things, the statement of the necessity of the proposed work, and that it will be conducive to the public health, safety, convenience or welfare. Notice of the pendency of the petition and of the time and place of the hearing shall be given by publication and answers may be filed by objectors, and, when at issue, the case shall be advanced for hearing.

If the court is of opinion that the purposes of the act would be subserved by creating a conservancy district, the court shall, after disposing of all objections as justice and equity require by its recorded findings and adjudication of all questions of jurisdiction, declare the district organized and give it a corporate name. The court shall thereupon appoint three directors, whose duty it is to formulate a plan, including maps, profiles, etc., so as to describe the work, furnish an estimate of cost, with specifications, and designate what land is to be taken. They must report what lands will be benefited. The plan is open to inspection, and a hearing is provided for upon notice given in each county. Upon the hearing the directors shall adopt the plan, if no valid objections appear. After its adoption any person may object and be heard by the court, which may adopt, reject, or refer the plan back for further action.

Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Goodrich v. Detroit, 184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627; O'Neill v. Leamer, 239 U. S. 244, 36 Sup. Ct. 54, 60 L. Ed. 249; Houck v. Little River District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266.

After the adoption of a plan, three appraisers, recommended by the directors, are to be appointed by the court, who shall value the land or other property to be acquired and appraise all benefits that may accrue to land by reason of the improvement. Appropriate hearings are provided for objections by any person or persons; counties, cities, villages and townships may be assessed as corporate bodies, and the assessments against them are to be collected and paid by general levy upon all the taxable property in the political subdivision as any ordinary debt. An appraisal record must be kept and show action of the appraisers and the amounts of damages awarded to each landowner whose property is appropriated and amounts assessed against each property benefited. Any person dissatisfied with the award of damages or the assessment of benefits may appeal to the court, and, upon an unsatisfactory finding, he may appeal to the court of common pleas of the county in which his land is situated. If the question of damages is involved, the directors shall file proceedings in condemnation, or, if the assessment for benefits is resisted, an inquiry into benefits in the county in which the land is situated, and the landowner is entitled to have those questions determined by a jury in his own county.

The land is not subject to a lien for the assessment until the owner's appeal has been determined and a certificate filed in the auditor's office, and the bonds to be issued are not a lien upon the land in the district, but upon the assessment as finally made and established. In the event that benefits are less than the costs, the court may reject the plan, or refer it back to the directors. Provision is made for the constitution of the court.

Before taking up the particular parts of the act claimed to be unconstitutional in themselves, as well as affecting the constitutionality of the entire act, it may be well to clear the way by disposing of some preliminary considerations:

1. Defendants' claim of want of jurisdiction on the ground that the amount involved is not sufficient to confer jurisdiction: Upon complainant's property in the city of Piqua, assessed for taxation at $49,850, the bill alleges that defendants have caused an appraisal of benefits to be made amounting to $2,988. Complainant says he owns farming property in Miami county assessed for taxation at $17,490, and that defendants have caused an appraisal of benefits to the county of $59,406, of which complainant's farming property must sustain its proportionate share. He does not set out what that share is. He alleges that the defendants have caused an appraisal of benefits to be certified against the city of Piqua in the sum of $324,500, of which his property must bear its proportionate share, amounting to $876.15, and that the item of three-tenths of a mill provided for in section 43 of the act upon his property in Miami county will amount to $20.20. These make a total of $3,864.15, together with such proportionate share his land may have to bear to the total amount assessed against Miami county. The defendants say that the assessment, when finally made, will not mount to over $1,500. It would seem that the bill of complaint shows a sufficient jurisdictional amount, and it is not denied that the apprais-

als as made by the appraisers of complainant's real estate in Piqua and the assessments made against the city of Piqua are as stated. We shall assume for the purposes of this case that the amount in controversy is sufficient to confer jurisdiction.

2. The defendants, while not denying that the appraisements are as stated, yet aver that the action is premature, in that under the provisions of the act the complainant, the city of Piqua, and Miami county can appeal to the court of common pleas from the decision of the appraisers; that their appeal is now pending, and that the court was, at the time this case was heard, engaged in hearing such appeals. Since the bill of complaint attacks the constitutionality of the whole act as against provisions of the Constitution of the United States, as, under the guise of taxation, assessing lands for other than a public use, and as everything done under the act would be futile if that contention prevails, and since the reports of the appraisers are good until set aside, we shall assume for the purposes of this case that this action has not been prematurely brought.

3. We shall also assume, upon the statement of counsel for the defendants at the trial that the averment in their answer that causes of action are improperly joined, and, if properly joined, there is a defect of parties defendant, is withdrawn, and is not open for consideration here.

[3] 4. Provisions, such as part of section 53 and part of section 54, for attorney's fees as a part of the cost in certain cases, the Supreme Court of Ohio condemned long before the act was passed,[14] and held since that the part of section 6 providing for appeal from an order refusing to establish the conservancy district to the court of appeals of the county is void, because repugnant to section 6, article 4, of the Constitution of Ohio of 1912.[15] But in all other respects that court has established the validity of the act with respect to the Constitution of Ohio, and also found the act not to be repugnant to the Constitution of the United States.[16] These parts of those sections having thus been declared to be repugnant to the Constitution of Ohio, they are to be regarded as separable from the rest of the act, and in effect as eliminated from it. As thus construed, therefore, the act stands established in its relation to the state Constitution.

[4] Required, as we are, to follow the decisions of a court of last resort in a state upon the construction of legislation of the state and its validity with respect to the Constitution of the State,[17] we hold the act as it now stands to be in conformity with the Constitution of Ohio, and now discuss it in its relation to the Constitution of the United States; for, whatever views the state court may have expressed on that subject,

[14] Coal Co. v. Rosser, 53 Ohio St. 12, 41 N. E. 263, 53 Am. St. Rep. 622.

[15] Snyder v. Deeds, 91 Ohio St. 407, 110 N. E. 1068.

[16] Miami County v. Dayton, 92 Ohio St. 212, 110 N. E. 726.

[17] Hagar v. Reclamation District, 111 U. S. 701, 704, 4 Sup. Ct. 663, 28 L. Ed. 569; Irrigation District v. Bradley, 164 U. S. 112, 154, 17 Sup. Ct. 56, 41 L. Ed. 369, and numerous cases. This is elementary. Sioux City, etc., Co. v. Trust Co., 173 U. S. 99, 111, 19 Sup. Ct. 341, 43 L. Ed. 628.

the courts of the United States must decide according to their own convictions.[18]

The claim, as we understand it, is that the act is in contravention of the Fourteenth Amendment of the Constitution of the United States, in that it is a taking of private property without due process of law, and that it denies the complainant the equal protection of the laws.

[5, 6] We have said, speaking generally of this act, that it was within the power of the state, for the purposes contemplated, to carry out a project such as this by appropriate legislation, to charge the cost against the property specially benefited, and to make that charge a lien upon the assessments for benefits. It is only required that the costs be apportioned in a just and reasonable mode according to benefits.[19] Respect must be had to the cause and object of the taking of private property. If palpably arbitrary and a plain abuse, oppressive and unjust, it may be declared to be not due process of law.[20] The assessment upon private property must be for a public use, whether it be for the whole state or some limited portion of the community.[21] And it is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use.[22]

[7] We regard the public nature of this legislation completely established under the decisions of the Supreme Court of the United States in analogous cases; but, were it not so, we would think, and now declare, that the public character of this act and benefits to accrue under the proceedings taken by virtue of it cannot be doubted. Such legislation is not arbitrary nor unjust to the individual, for his absolute right as owner of land must yield to a certain extent or be modified by corresponding rights of other owners, for what is declared upon the whole to be for the public use.[23] The act shows great care in providing notice to the landowner and a hearing upon every essential question of fact involving the necessity for the proceedings under the act, the propriety of establishing a conservancy district, the amount of the benefits to accrue to each parcel of land or governmental subdivision, and the assessment therefor. The law provides a mode and form of testing all of the landowner's rights in the ordinary course of justice before a court of competent jurisdiction. Respect is had to the cause and object of the assessment. The statute is applicable to all lands of the same general character. All the landowners in the district have,

[18] Irrigation District v. Bradley, 164 U. S. 112, 159, 17 Sup. Ct. 56, 41 L. Ed. 369.

[19] Hagar v. Reclamation District, 111 U. S. 701, 705, 4 Sup. Ct. 663, 28 L. Ed. 569.

[20] Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. Ed. 616; Houck v. Little River District, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266, and cases cited.

[21] Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 157, 158, 17 Sup. Ct. 56, 41 L. Ed. 369.

[22] Irrigation District v. Bradley, 164 U. S. 112, 162, 17 Sup. Ct. 56, 41 L. Ed. 369.

[23] Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 163, 17 Sup. Ct. 56, 41 L. Ed. 369.

to a certain extent, a common interest. The improvement cannot be accomplished without the concurrence of all, or nearly all, and the improvement is made useful to all at their joint expense. This is due process of law.[24]

We consider now the objections made to specific clauses claimed to be in contravention of the Fourteenth Amendment.

[8] 1. Section 6 provides for filing objections, on or before the date set for the hearing of the cause, by any owner of real property in the proposed district who has not signed a petition and who wishes to object to the organization and incorporation of the district, and further:

"If the court finds that the property set out in said petition should not be incorporated into a district, it shall dismiss said proceeding and adjudge the costs against the signers of the petition, in the proportion of the interest represented by them. Any petitioner may, within twenty days after the refusal, appeal from an order refusing to establish such district, to the court of appeals of said county, upon giving bond in a sum to be fixed by the court.

"After an order is entered establishing the district, such order shall be deemed final and binding upon the real property within the district and shall finally and conclusively establish the regular organization of the said district against all persons except the state of Ohio upon suit commenced by the Attorney General."

It is provided in section 38, among other things:

"The board of directors of any district organized under the terms of this act shall have the right to appeal from any order of the court of common pleas made in any proceeding under this act, not requiring the intervention of a jury."

The constitutional defect claimed in these provisions is that complainant is denied the equal protection of the laws, in that appeals by the petitioner, or the directors, as the case may be, are provided for, while no provision is made for appeals by an objector. This is not a question for our consideration, for the Supreme Court of Ohio has decided [25] that the portion of the sixth section which provides for appeal by petitioners from an order refusing to establish the district to the court of appeals of the county, upon giving bond, is repugnant to section 6, article 4, of the Constitution of Ohio of 1912. Necessarily the part of section 38 referred to falls within the condemnation of that part of section 6. That court also said [26] that, since the appeal clause in the act was unconstitutional, section 12247, Gen. Code Ohio, providing for reversals of judgments or final orders of the common pleas, for error appearing upon the record, was sufficient authority and was broad enough, under section 6, article 4, of the Constitution of Ohio of

[24] Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. Ed. 616; Hagar v. Reclamation District, 111 U. S. 701, 710, 4 Sup. Ct. 663, 28 L. Ed. 569; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658; Wurts v. Hoagland, 114 U. S. 606, 615, 5 Sup. Ct. 1086, 29 L. Ed. 229; Winona, etc., Land Co. v. Minnesota, 159 U. S. 526, 537, 16 Sup. Ct. 83, 40 L. Ed. 247; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 157, 158, 17 Sup. Ct. 56, 41 L. Ed. 369; Goodrich v. Detroit, 184 U. S. 432, 434, 22 Sup. Ct. 397, 46 L. Ed. 627; Houck v. Little River District, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266.

[25] Snyder v. Deeds, 91 Ohio St. 407, 110 N. E. 1068.

[26] Miami County v. City of Dayton, 92 Ohio St. 215, 218, 110 N. E. 726.

1912, to cover proceedings in error from decisions of the common pleas under the provisions of the conservancy act.

The result is that the clause in section 6, and necessarily that part of section 38 complained of, are of no more force than if they had never been enacted, and the right to proceed by error is open either to the petitioners or to the objectors. The objectors are not, therefore, denied the equal protection of the laws, and complainant's claim in that behalf is without foundation.

[9] 2. It is claimed that the fourth paragraph of section 3 of the act permits the taking of complainant's property without due process of law. Section 3 provides for the filing of a petition signed by 500 freeholders, etc., as hereinbefore stated, and—

"Several similar petitions or duplicate copies of the same petition for the organization of the same district may be filed and shall together be regarded as one petition. All such petitions filed prior to the hearing on said petition shall be considered by the court the same as though filed with the first petition placed on file."

Without discussing the reasons urged by complainant why this clause is fatal in itself and to the entire act, it is sufficient to say that what was contemplated by section 3 was evidently that, since it would obviously be important to obtain as many signatures to the main petition as possible, duplicates of the petition or similar petitions might also be filed and should be heard together as if they were one, and all of them filed prior to the hearing on the main petition should be considered the same as though filed when it was.

And section 5 provides that immediately after the filing of such petition (the main petition) notice shall be given, in the way and form provided, of its pendency and the time and place of hearing. Manifestly, the petitions are all alike, or substantially alike, and must set forth, among other things provided, a general description of the purposes of the contemplated improvement and what territory is to be included in the proposed district. It is true that a similar or duplicate copy of the main petition might be filed, say, the day before the hearing on the main petition, and no specific notice will be given on such a petition of its pendency, or the time and place of hearing thereon; but notice of the pendency of the main petition, and the time and place of its hearing, is notice to every landowner within the proposed district of the proceedings to include his land. It would make no difference whether he had notice on other petitions filed after notice on the main petition was given or not, for there can be no doubt that he had constructive notice when publication was made on the main petition, of its pendency and the time and place of hearing. Complainant's contention in this behalf is without merit.

[10] 3. The claim that section 34 of the act, second paragraph, providing:

"The appeal shall be from the award of compensation or damages or benefits, or one or more of them, but from no other part of the decree of the court"

—infringes some (not specified) constitutional right of complainant, has no foundation. Inasmuch as the objector has, as already shown,

the opportunity of contesting the validity of the law by hearing in the common pleas on the questions of public purpose and benefit of the act and the propriety of establishing the district, and may prosecute error if he desires, there seems to be no reason why he should have a further appeal on that subject when the award of damages or benefits, as the case may be, is made. He is given an appeal from such award, and may have a jury to determine those questions. This is a complete answer to complainant's contention.

[11] 4. The third paragraph of section 12 is complained of as being a denial of the equal protection of the laws in the provision that, if "any person or persons object" to the official plan, such person or persons may file their objections, for which a day for hearing before the court must be fixed, and the court shall hear the objections, and adopt, reject, or refer back the plan to the board of directors. The point is sought to be made that in the first section of the act it is said that the term "person," when not otherwise specified, shall mean person, firm, copartnership, association, or corporation other than county, township, city, village, or other political subdivision, and the right of objection is therefore denied all others except a person or persons.

Passing the fact that plaintiff in error in the case in 92 Ohio St. 215, 110 N. E. 726, hereinbefore referred to, was the county of Miami, in which case the validity of the act was sustained, showing that practically, at least, the county of Miami could and did prosecute error, if it thought, as it did, itself aggrieved, it is only necessary to say in disposing of this objection that the remedy of injunction in equity is extended only to one who may be injured if the remedy is withheld. Even if it were true (and we do not intend so to decide) that counties, townships, cities, and villages could not prosecute error, yet the complainant can do so. He can show no irreparable injury, for at law he can recover for taxes illegally imposed. The Supreme Court of the United States have declared it to be settled that, although a law may be unconstitutional, a party is not entitled to relief by injunction against proceedings in compliance therewith, unless it appears he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction. Inadequacy of remedy at law exists, they say, where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits or the prevention of irreparable injury.[27] Moreover, the complainant, at least, is amply protected under the act itself, and he is in no position to complain if somebody else is denied relief. Injunction will not issue at the instance of a complainant who will suffer no injury by the acts complained of.[28]

[27] Cruickshank v. Bidwell, 176 U. S. 73, 80, 81, 20 Sup. Ct. 280, 44 L. Ed. 377, and cases cited.

[28] Tyler v. Judges, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252; Cincinnati v. Dexter, 55 Ohio St. 93, 113, 44 N. E. 520; Goodrich v. Moore, 2 Minn. 61, 64 (Gil. 49), 72 Am. Dec. 74; Adler v. Railway Co., 138 N. Y. 173, 180, 33 N. E. 935; Bigelow v. Bridge Co., 14 Conn. 565, 580, 36 Am. Dec. 502.

[12] 5. The objection is made that section 43, third paragraph, providing for a levy upon the property in the district of a tax not to exceed three-tenths of a mill on the assessed valuation of the property for the purpose of paying the preliminary expenses, and if such expenses have already been paid in whole or in part from other sources they may be repaid from the receipts of the levy, is violative of the Fourteenth Amendment; but the basis of the claim does not appear. However, the straight levy of three-tenths of a mill on the real estate for the purposes indicated is a proper exercise of the power of taxation, both under the Constitution of Ohio [29] and under the Constitution of the United States.[30]

[13] 6. It is claimed that the word "property," in the third paragraph of section 43, necessarily means both real and personal property, and that personal property cannot be made the subject of an assessment for the purposes of such an act as this. We are not called on to determine the propriety of this contention, for the reason that the Supreme Court of Ohio,[31] construing the act, held that the word "tax," used in the act, was intended to be "assessment," as that is understood in Ohio when special and local improvements are contemplated, and that the assessment is to be made with reference to benefits and burdens upon real estate. If we were disposed to disagree, and we by no means intend to be so understood, we are required, nevertheless, to follow the state court in this construction.

[14] 7. We see no valid objection to that part of section 46 providing that, when a landowner has paid the entire assessment in full upon an appraisement of benefits to his property, he may nevertheless be assessed for purposes of maintenance, or that part of section 47 providing for additional levies as may be necessary to pay the principal and interest of bonds. In principle, this is the same as the three-tenths levy for preliminary expenses.

[15] 8. The objection to that part of section 47 which provides:

"A party who has not sought a remedy against any proceeding under this act until after bonds have been sold or the work constructed cannot for any cause have an injunction against the collection of taxes or assessments for the payment of said bonds"

—is premature. The work has not been constructed, nor the bonds sold. When they are, any one who has not sought a remedy against any proceeding under the act, and deeming himself injured, may then seek an injunction. The court could then determine whether or not, under the case made, an injunction should issue.

We have considered, also, the other objections made by complainant to the validity of the act, and are of opinion that they are without merit, and on the whole case we are satisfied that the interlocutory injunction sought by him should not be granted. It will therefore be denied, at complainant's costs.

[29] State ex rel. Franklin County Conservancy District v. Valentine, 94 Ohio St. 440, 114 N. E. 947.

[30] Houck v. Little River District, 239 U. S. 244, 254, 264, 265, 36 Sup. Ct. 58, 60 L. Ed. 266.

[31] Miami County v. Dayton, 92 Ohio St. 215, 110 N. E. 726.

THE RICHARD F. YOUNG.

(District Court, E. D. Virginia. June 16, 1917.)

1. TOWAGE ⊂⊃11(1)—LOSS OF TOW—LIABILITY OF TUG.
   A tug proceeding to sea from Norfolk in February with three heavily laden coal barges in tow *held* in fault for the loss of two of the barges, on the ground that: (1) She was not built nor equipped for ocean service of the kind undertaken; (2) she commenced the voyage in threatening weather with knowledge of storm warnings, and passed out to sea through the Capes when weather conditions were such that prudent navigation required her to seek shelter; (3) her officers and crew did not have the requisite knowledge, experience, and ability to handle such a tow in a safe manner; (4) those in charge did not exercise the degree of prudence and caution required by good seamanship after leaving the Capes, in that they took a course outside of that usually taken by coastwise vessels, when they should have kept as much as possible under the lee of the land in view of the northwest gale; and (5) at the time of the breaking of one of the steering cables from inherent weakness, which was the immediate cause of the disaster, they failed to exercise proper care for protection of the barges by anchoring the same and standing by, and that such faults were concurring causes of the loss and rendered the tug liable therefor.
2. TOWAGE ⊂⊃11(1)—LOSS OF TOW—DEFENSE OF INEVITABLE ACCIDENT.
   To enable a towing tug to successfully interpose the defense of inevitable accident in a suit for loss of its tow, it must itself have been free from fault.
3. SHIPPING ⊂⊃209(2)—LIMITATION OF LIABILITY—TUG OWNER—LOSS OF TOW.
   The owner of a tug *held*, under all of the facts, entitled to a limitation of liability as against claims for the loss of barges in its tow and their cargoes.
4. SALVAGE ⊂⊃34—COMPENSATION—SALVING OF BARGE ABANDONED BY TUG.
   A tug worth $70,000 *held* entitled to a salvage award of $1,450 for towing into port a coal-laden barge worth with its cargo $55,000, found anchored at sea after having been cast off by its towing tug, and in a perilous position; the services requiring 16 or 17 hours.

In Admiralty. In the matter of the petition of Henry Crew, owner of the steam tug Richard F. Young, for limitation of liability. Also, libel by the owner of the tug John F. Lewis against barge No. 7 for salvage services. Decree in favor of damage claimants, but granting limitation of liability. Also, decree in favor of the Lewis.

Foley & Martin, of New York City, and Hughes & Vandeventer, of Norfolk, Va., for petitioner Henry Crew.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for cargo owners and barge No. 7.

Lewis, Adler & Laws, of Philadelphia, Pa., and John W. Oast, Jr., of Norfolk, Va., for tug John F. Lewis.

Duncan & Mount, of New York City, for barge Shamokin.

Edward R. Baird, Jr., of Norfolk, Va., for barge J. Carlton Hudson.

WADDILL, District Judge. On the morning of the 18th of February, 1916, the tug Richard F. Young took in tow at Norfolk, Va., bound for Providence, R. I., the barges J. Carlton Hudson, the

Shamokin, and the Rockland, and Rockport Lime Company's barge No. 7, each laden with coal; the tow being made up in the order named. The tug and tow proceeded on their course, and encountered heavy weather early on the night of the 18th, which grew worse as the night advanced, and on the early morning of the 19th, when some distance off Hog Island, the weather increased in severity so much that the Young, in endeavoring to protect its tow, broke its port steering cable; whereupon, she signaled to the barges to anchor, which the two last named did, and, the Hudson failing to anchor, the tug endeavored to put into Hog Island with her, but, when some distance away, the barge while in a sinking condition was cut loose and suddenly foundered. The tug then returned to Newport News, and a revenue cutter towed the Shamokin into Lynnhaven Inlet, where she subsequently sank and proved a total loss, and barge No. 7 was towed into Newport News by the tug John F. Lewis.

Sundry libels were thereupon filed against the Young by the owners of the barges, the cargo owners, and for persons who had lost their lives by the sinking of the barge Hudson; and this proceeding, seeking to limit the liability of the tug, was duly filed.

The Young alleges that the accident happened without fault, neglect, or want of care on her part; that the loss, damage, and injury was occasioned without the privity or knowledge of the libelant-petitioner; and that claims filed, or to be filed, against the Young, growing out of the accident, exceed in amount her value and that of her pending freight money, and the value of petitioner's interest therein at the time of and immediately after the accident; and that the tug and freight money was not of greater value than $37,000.

Owners of the respective barges, of the cargoes, and for death losses, filed their claims and answers to the petition for limitation of liability, denying generally the averments of the said petition, and aver that the barges were seaworthy, well found and equipped, and were all without fault or negligence or want of care on their part, and that the loss in question was solely due to the fault and negligence of the tug Young, and those in charge of her navigation, and particularly that the Young was not in charge of a competent master, and was not properly officered, manned, tackled, appareled, and equipped; that she left Norfolk in threatening weather, and in disregard of storm signals; that she passed Old Point in threatening weather, and in disregard of the storm signals there; that she passed the Capes during a storm, and disregarded storm signals there, all of which good seamanship would have warned her navigators not to do; that she navigated on an improper and unsafe course, going outside of the usual track of coastwise vessels, and failed to keep under the lee of the land; that she did not proceed to a safe anchorage with the barges before the storm became too heavy; that she did not keep her tow under proper control; that her steering cable was not of sufficient power or strength; that her machinery was not in proper order and good condition; that she was unseaworthy; that she towed the barges in an improper, negligent, and careless manner; that she improperly abandoned her tow, and made no effort or attempt to safeguard the

barges and crews of the barges either before or after abandoning them; and that she took a towage service which the tug was incapable of performing; that, upon the Young's steering cable parting, she hauled around offshore, and the barges fell into the trough of the sea, endangering their colliding one with the other; that, while in this condition, she signaled for the hawsers to the barges to be cast off, and caused the Shamokin and barge No. 7 to be set adrift, and abandoned them without offering or trying to assist them in their extremity; that the tug and the Hudson in a little while disappeared, going in the direction of the Capes, and the Nepos, a Norwegian steamship, took off the crew of the Shamokin, and safely landed them in Norfolk, and the barge was picked up by a revenue cutter and taken to Lynnhaven Inlet, where she sank, and was a total loss; that, after barge No. 7 was abandoned, she anchored near where she was cast off, and there remained until the morning of February 20th, when she set her sail, and sailed in towards the land, and again anchored, and in the afternoon of that day she was taken by the tug John F. Lewis and towed to Norfolk; and while proceeding towards the Capes, in tow of the Young, the Hudson foundered and became a total loss, and all of her crew were drowned.

[1] An unusual amount of evidence was taken, both by deposition and orally before the court, and there is much conflict as to many material matters bearing upon the merits of the controversy. The court's conclusion, having regard to the measure of duty imposed upon the tug, namely, to exercise reasonable skill and care in everything relating to the work until it was accomplished (The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Alabama [D. C.] 114 Fed. 214), and to the fact that the burden of proof is upon the tow to establish fault on the part of the tug, is that the fault of the latter has been established, as shown by the following findings, viz.:

First. That the tug was neither built nor equipped nor intended for ocean service of the character in which she was employed at the time of the accident. That she was built as a pleasure or passenger boat, for harbor service, and towing in inland waters only. That the service in which she was engaged at the time was that of towing three ocean-going barges, heavily laden with coal, en route from Norfolk to Providence. That the tug was equipped with a bronze tiller or steering cable, instead of a steel one, which while useful in the harbor and inland waters, by reason of its durability, pliableness, and freedom from corrosion in salt water, was, by reason of its lack of strength, it being but one-half as strong as a steel cable, unsuited for a seagoing service of the kind in which it was being used, in a storm. That the bronze cable parted upon encountering a severe strain of considerable duration, such as might have been expected on a voyage of the character undertaken, which culminated in the breaking up of the tow, and in large measure caused the disaster complained of by the owners of the barges, and cargoes, and those affected thereby.

Second. That the tug took its tow out in threatening weather conditions, with knowledge of storm warnings, which at least showed the lack of prudence and caution that good seamanship required, and,

in the result of this case, cannot be said not to have entered into the causes that brought about the disaster. The barometer had been below normal for 24 hours. Storm signals at Old Point and the Capes were displayed, which, taking into account the size and character of the tow, and the power of the tug, should have admonished her navigators not to have gone to sea when they did, but to have exercised the prudence that many other masters did, by waiting with their tows until the weather conditions became more favorable.

Third. That the tug, at the time of the accident, was not in command of officers and a crew possessing the requisite knowledge, experience, and ability to handle in a safe manner a tug and tow of the size in question, in a storm at sea of the character encountered. Neither the master nor the mate of the tug were examined as witnesses, and the second mate, who was examined, seems to have been the special representative of the owner on board of the tug, and largely directed the ship's navigation. He held master's license for inland waters only, and he was technically acting in the capacity of second mate on the trip. Several of the crew were evidently unused to ocean voyages, and, when subjected to the hazards and hardships of the storm, became incapacitated, one from cramps, and several from seasickness.

Fourth. That those in charge of the navigation of the tug did not exercise the degree of prudence and caution that good seamanship required on the voyage after leaving the Capes, in that they navigated on a course which took them outside of the ordinary course for coastwise vessels, passing considerably to the outside of Winterquarter Light, and found themselves, at the time of the accident, some 32 miles or more to the eastward of the lightship, when they should, especially in view of the weather conditions, including a gale from the northwest, and the character of the tug and tow, have kept under the lee of the land, where they would have been subjected to much less hazard.

Fifth. That the navigators of the tug, at the time of the accident, failed utterly to exercise the degree of care required of them, in that, upon the indication of the violence of the storm becoming apparent, the tug should have headed to windward inshore, and, if possible, as could most probably have been done, taken the entire tow into smoother waters, and held it intact. That upon the steering gear parting, and finding themselves unable in any way to repair the break, either because of weather conditions, or failure to have an extra cable and other steering appliances at hand, they should have caused all three of the barges to be cut loose, and come to anchor, and attempted to stand by to protect them, which they could have done by keeping the Young's head to the wind, notwithstanding her broken steering gear; and certainly should not have attempted to take the Hudson in the trough of the sea, and tow her for two hours, until she foundered, after it was known she was disabled, and should have come to anchor.

[2] The contention that the occurrence was the result of inevitable accident cannot be maintained. To enable the tug to interpose this defense, it must itself have been free from fault. The Maryland (D.

C.) 182 Fed. 829, 831, 832, and cases cited. Nor does the evidence warrant the suggestion that the bronze tiller rope broke from latent defects; but rather, on the contrary, that it gave way from lack of inherent strength to withstand the strain made upon it.

The court's judgment is that the Young was clearly at fault in the particulars above enumerated; and that, while perhaps no one of them would of itself have brought about the disaster, combined together they clearly did so, without fault on the part of the tow, and, as a consequence, the Young should be held solely responsible for the losses sustained.

[3] This brings us to the question of the right of the owner of the tug to claim the benefit of limitation of liability prescribed by the act of Congress applicable in such cases; and the conclusion of the court is that, while there is considerable testimony tending to show that this exemption should be denied, still, upon the whole case, the relief sought should be granted. The negligence of the tug's navigators, and other acts and omissions of theirs, in connection with the voyage, and which entered into the happening of the accident, to which the owner was not privy, and of which he had no knowledge, and as to which knowledge should not be imputed to him (The Alola [D. C.] 228 Fed. 1006), entitled him to the exemption claimed.

[4] At the trial of this case, the claim of the owners of the tug John F. Lewis for salvage for bringing in barge No. 7 was by consent heard in this proceeding and submitted to the court. The petitioner claims $2,750. The value of the salved property was $55,000, and the value of the John F. Lewis, $70,000. The time taken in the service of towing her in consumed 16 to 17 hours. The barge at the time it was salved was in a perilous condition. The court believes, under the circumstances, that a fair award, having regard to the principles applicable to salvage, would be $1,450.

A decree in accordance with the foregoing views will be entered upon presentation.

In re BAIRD.

(District Court, D. Delaware. June 26, 1917.)

No. 291.

1. INSURANCE ⟸207(1)—LIFE INSURANCE—POLICIES—ASSIGNMENT.
A provision in a life policy that no assignment should be of any force or effect, unless made in writing and recorded by the company in its books, is intended for the protection of the company in making payments of insurance, but does not affect the force or validity, as against the insured, of any contract between the insured and a third person as to the ultimate receipt and enjoyment of the proceeds of the policy.

2. INSURANCE ⟸208—LIFE POLICIES—PLEDGES.
A policy of life insurance may be validly pledged by delivery, either with or without a written transfer.

3. BANKRUPTCY ⟸161(1)—ASSIGNMENTS—VALIDITY.
A bona fide assignment or pledge of life policies, executed by a bankrupt several years prior to the filing of a petition in bankruptcy, cannot be set aside, though he be adjudicated a bankrupt.

4. INSURANCE ⟸211—LIFE POLICIES—ASSIGNMENT—EFFECT.
Life policies declared that no assignment should be of any force or effect, unless in writing and recorded by the company on its books. Insured, who was indebted to his wife and sister, executed similar instruments, assigning or purporting to assign one policy to his sister and another to his wife. The two instruments were similar, being entitled "Assignment, Conditional upon Death Prior to Maturity of Policy and the Survival of the Assignee," and reciting that for value received the insured transferred and set over to his sister (or his wife) all his right, title, and interest in a numbered policy, provided that the policy should become payable by reason of his death prior to the date when the endowment should have matured, and that the assignee should survive the insured. The insured expressly reserved the right to revoke the assignments at any time by filing with the company an instrument of revocation duly executed under his hand and seal. The assignments were filed with the company and recorded on its books, but were not delivered to the assignees. Some time thereafter the insured delivered to his sister the two policies; the sister executing a receipt, reciting the delivery of the two policies as security for his indebtedness to her, and also as trustee for his wife. *Held*, that, though the receipt recited that the sister and the wife were beneficiaries of the policies, and though the assignments were invalid as against the insurance company, nevertheless, between the insured and his wife and sister, there was a valid pledge of the policies as collateral security.

5. EVIDENCE ⟸397(3)—PAROL EVIDENCE RULE—ADMISSIBILITY.
In such case, as the assignments were intended only to operate in case of the insured's death before maturity of the policies, and in event that the assignee survived him, parol evidence as to the giving of the pledge was admissible, not being offered to contradict or vary any written contract.

6. BANKRUPTCY ⟸250(1)—PROCEEDINGS—DUTY OF TRUSTEE.
As Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1916, § 9654), declares that, when any bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within 30 days after the value has been ascertained, pay to the trustee the sums so ascertained, and continue to hold and carry such policy free from the claims of creditors, but otherwise the policy shall pass to the trustee as assets, it is the duty of the trustee in such case, on delivery of the policies, to receive from the

bankrupt or collect from the insurance company the surrender value of the policies, which were payable to the bankrupt or his estate; the pledgees being unable to collect the same, but the pledge being valid as between the bankrupt and themselves.

In Bankruptcy. In the matter of the bankruptcy of Robert S. Baird. Petition by Grace Baird and the Wilmington Trust Company, trustee in lunacy of Mary H. Baird, to review orders of referee. Orders set aside.

Herbert H. Ward, of Wilmington, Del., for claimants.

William S. Hilles, of Wilmington, Del., for excepting creditors.

BRADFORD, District Judge. Grace Baird and the Wilmington Trust Company, trustee in lunacy of Mary H. Baird, have petitioned for the review of certain orders of the referee in the matter of Robert S. Baird, bankrupt. The petitioner Grace Baird made and filed November 11, 1915, a proof of claim against the estate of the bankrupt in the sum of $31,500. It is alleged in the proof of claim that the petitioner holds as partial security for the repayment of the said debt a paid up policy of life insurance of the Provident Life and Trust Company of Philadelphia on the life of the bankrupt of the face value of $10,000, but of a present surrender value of about $7,525, issued December 19, 1902, being No. 101,001. Exceptions were filed by a creditor of the bankrupt to the above proof of claim, in which it was in substance alleged that whatever value there might be in the said policy of insurance "belongs to the estate of the said Robert S. Baird, and not to the said Grace Baird," and further, that the said policy should be assigned to the trustee in bankruptcy. The referee, September 22, 1916, allowed the proof of claim made by the petitioner as an unsecured claim, but limited it to the sum of $16,010.42, being $14,500 together with interest thereon until the date of the filing of the petition in bankruptcy; and ordered that the petitioner deliver or cause to be delivered to the trustee in bankruptcy as part of the assets of the bankrupt's estate the said insurance policy. The referee failed to find that there was any pledge of the said policy of insurance to Grace Baird as collateral security for the indebtedness due to her from the bankrupt "sufficient to secure" to Grace Baird "the present value and benefits" of the said insurance policy. It appears from the findings of the referee and is admitted by counsel on both sides that Grace Baird has a valid claim against the estate of the bankrupt for the sum of $14,500, with interest thereon to the date of the filing of the petition in bankruptcy.

The petitioner Wilmington Trust Company, trustee for Mary H. Baird, made and filed December 24, 1915, a proof of claim against the estate of the bankrupt in the sum of $26,000, alleging a preferential right to the same as against general creditors as representing a trust fund belonging to Mary H. Baird, and further alleging that the petitioner holds as partial security for the repayment of the said debt a policy of life insurance of the above mentioned insurance company on the life of the bankrupt of the face value of $30,000, and of a present surrender value of about $19,906.76, issued August 13, 1903, being No. 105,-

850. Exceptions were filed by a creditor of the bankrupt to the above proof of claim in which the existence of the alleged preferential right was denied, and it was alleged that the last mentioned policy of insurance did not belong to Grace Baird or Mary H. Baird, but that the same and any amount due thereon should be turned over to the trustee in bankruptcy to be administered as part of the bankrupt estate. It further appears from the findings of the referee that it was agreed by counsel on both sides that no preference attached or applied to the claim made by the Wilmington Trust Company, trustee for Mary H. Baird, for the sum of $26,000, and that its status, if a valid demand, was that of a general claim. The referee has found that the Wilmington Trust Company, as such trustee, has a valid general claim against the estate of the bankrupt in the said sum of $26,000, amounting with interest to the date of the filing of the petition in bankruptcy to $31,078.66. The referee, however, failed to find that the life policy No. 105,850 had been validly pledged by the bankrupt as collateral security, and, as in the case of policy No. 101,001, he accordingly ordered that it be delivered by the Wilmington Trust Company, trustee as aforesaid, to the trustee in bankruptcy as part of the estate of the bankrupt. No exception has been taken to the finding by the referee of the validity of the two above mentioned claims of $14,500 and $26,000, with interest, as general claims against the bankrupt's estate; nor has there been any petition for review by the trustee in bankruptcy, or any creditor of the bankrupt. The validity of those demands as general claims, therefore, must be considered as admitted. The whole controversy in the case has in substance been narrowed to the question whether there was a valid pledge of the two policies of insurance or either of them as collateral security for the payment of the indebtedness of the bankrupt.

[1-4] The bankrupt, December 19, 1902, took out a life endowment policy, being No. 101,001 of the above mentioned insurance company, in the sum of $10,000, payable to the bankrupt or his assigns December 19, 1922, provided the bankrupt should be living at that date, but, in the event of his death before that date, to his executors, administrators or assigns, within sixty days after due notice and satisfactory proof of death. The policy called for the payment of ten annual premiums, December 19, in each year. The bankrupt, August 13, 1903, also took out a life endowment policy, being No. 105,850 of the same company, in the sum of $30,000, payable to the bankrupt or his assigns August 13, 1933, with a proviso and condition similar to that contained in the first mentioned policy. Each of the two policies contained a provision that when the policy

"becomes a claim either by maturity of the endowment or by prior decease of the person whose life is insured, the person entitled to receive it may elect to take the amount due under the policy at the time in one sum or have the amount paid to him or her in equal annual instalments for 10, 15, 20, 25 or 30 years, with the further privilege of terminating the payment of the instalments at any subsequent anniversary of the date of the instalment certificate issued in place of the original policy, and receiving in lieu of the instalments then unpaid the equivalent on the basis set forth in the following table, which is calculated as for $10,000 insurance."

Each of the policies also contained a "condition" or "agreement" that:

"No assignment of this policy shall be of any force or effect unless made in writing, and recorded by the company on its books."

This provision is intended for the protection of the insurance company in making payment of the insurance; but cannot affect the force or validity as against the assured of any contract between the assured or his representatives or assigns and a third person touching the ultimate receipt and enjoyment of the insurance moneys. It appears that the bankrupt signed, sealed and acknowledged, November 10, 1911, a paper in the following words, letters and figures:

"Assignment, Conditional upon Death Prior to Maturity of Policy, and the Survival of the Assignee.

"For value received, I hereby transfer, assign and set over unto my sister, Grace Baird, and her assigns, all my right, title and interest in Policy of Insurance issued by The Provident Life and Trust Company of Philadelphia, No. 101001 dated 12th mo. 19th 1902, and all adyantages to be derived therefrom: Provided, the said Policy shall become payable by reason of my death prior to the date when the endowment would have matured; and Provided also that the said assignee shall then survive me, otherwise all right, title and interest in the said Policy is to revert to me, as fully as if this assignment had never been made.

"I hereby reserve the right to revoke this assignment at any time during my life by filing with the Company an instrument of revocation duly executed under my hand and seal.

"Witness my hand and seal, this tenth day of November, 1911.

"The words 'I hereby reserve the right to revoke this assignment,' etc., inserted before signing. [Signed] Robert S. Baird. [Seal.]

"Sealed and delivered in presence of

"[Signed] Abbye Hornsby.

"[Signed] Thomas K. Porter.

"[Signed] Frank Sheppard."

It further appears that on the same day, November 10, 1911, the bankrupt signed, sealed and acknowledged another paper, purporting to be an assignment of policy No. 105,850 to Mary H. Baird, his wife. This paper contained conditions similar to those appearing in the paper purporting to be an assignment to Grace Baird and certain other conditions not material to consider in this connection. Both of these papers, termed assignments merely for the purpose of identification, were filed with the insurance company and recorded on its books November 13, 1911, and certified copies were delivered to the bankrupt and until July 3, 1912, were retained by him in his possession unknown to his sister and wife. At the time of the signing, sealing and acknowledgment of the assignments the bankrupt was indebted both to Grace Baird and to Mary H. Baird. The assignment to Grace Baird does not mention or suggest the idea of collateral security. It purports to be a conditional assignment, subject to revocation at pleasure, of the right to receive and enjoy the amount of the insurance, if the same should become payable by reason of the death of the bankrupt prior to the maturity of the same, and if his sister should survive him at the date of such maturity. Otherwise the assignment should have no effect. On its face it indicates an intention on the part of the bankrupt that his sister should have the benefit of only what he could

not personally enjoy under the terms of the insurance policy, rather than an intention to secure the payment of his indebtedness to her, and thus to deprive himself of the personal enjoyment of any right he might have under the policy during his lifetime. Should the conditions of the assignment be satisfied Grace Baird was to receive the amount of the insurance absolutely for her own benefit, and not merely by way of collateral security for the payment of his indebtedness to her. And the instrument contained an authorization and direction to the insurance company in that behalf. Its purpose, so far as the rights of the company were to be affected, was to protect it in making settlement of the insurance claim. But while the paper did not on its face either expressly or by implication refer to the subject of collateral security, it is beyond question that had a delivery of the insurance policy been made to Grace Baird under such an instrument coupled with an agreement or undertaking, oral or in writing, between the assignor and assignee that the policy should be held by way of collateral security, subject to the specified conditions for the payment of indebtedness of the former to the latter, the transaction would have constituted as against the assignor a valid pledge of the policy as collateral security, however inadequate by reason of such specified conditions such security might prove. Similar considerations apply to the assignment by the bankrupt to Mary H. Baird of policy No. 105,850. Until July 3, 1912, neither of the assignments nor a copy was delivered to Grace Baird or Mary H. Baird, nor did they have any knowledge of their execution or existence; nor until that time were the policies of insurance mentioned in such assignments delivered to them or either of them. The original assignments remained in the possession of the insurance company and until that time the copies together with the policies were retained by the bankrupt. It appeared from the record of the proceedings before the referee as certified to this court that July 3, 1912, Grace Baird gave to the bankrupt a receipt as follows:

"July 3rd, 1912.

"Received of my brother Robert S. Baird insurance policy #101,001 in the Provident Life and Trust Co. for $10,000, fully paid up and in which I am beneficiary as security for his indebtedness to me; also as Trustee for his wife, policy #105,850 in the Provident Life and Trust Co. for $30,000, fully paid as security for his indebtedness to his wife Mary H. Baird, in which policy she is beneficiary. [Signed] Grace Baird."

At the time of the signing of the receipt policy No. 101,001 together with the copy of its assignment was delivered to Grace Baird on her own account as collateral security, and policy No. 105,850 together, with the copy of its assignment was delivered to her as trustee for Mary H. Baird as collateral security. The receipt of July 3, 1912, indicates more than the mere fact of receipt of the policies. It was prepared or caused to be prepared by the bankrupt and was given to and retained by him, and is potent evidence that he delivered the policies as collateral security for the payment of his indebtedness to his sister and wife respectively. It is true that there was a literal inaccuracy in the statement in the receipt that his sister and wife were beneficiaries in the policies respectively; but I attach no importance

to this circumstance in view of the fact that, at the same time the policies were delivered by the bankrupt to his sister individually and as trustee for his wife, the certified copies of the assignments of November 10, 1911, were also delivered. It was not unnatural in view of those assignments to refer to his sister and his wife as beneficiaries in the policies. There was a further inaccuracy in the receipt in that it referred to the two policies as being fully paid up, the fact being that while policy No. 101,001 was then fully paid up, policy No. 105,850 then lacked one annual premium of being so paid. This error, however, was wholly immaterial, the receipt clearly identifying by number the policies intended to be pledged as collateral security. A policy of life insurance may be validly pledged by delivery, either with or without a written transfer. Jones on Collateral Sec. § 145. The delivery by the bankrupt July 3, 1912, of the policies of insurance to Grace Baird on her own account and in trust for Mary H. Baird respectively was not invalidated by the provisions of the bankruptcy act, as it occurred several years prior to the filing of the petition. The evidence excludes all idea of fraud in connection with such delivery of the policies. I find nothing in their terms or conditions to nullify the effect, as against the bankrupt, of a delivery of the policies in pledge as collateral security. Each of the policies contains various provisions that on non-compliance with certain conditions it shall be "null and void." But while it is provided that no assignment of the policy "shall be of any force or effect unless made in writing, and recorded by the company on its books," there is no provision expressly or by implication avoiding the policy for or by reason of the making of an assignment or pledge thereof not so recorded, or attempting so to do. On the assumption that an assignment or pledge of the insurance policies not in accordance with their conditions would not be valid as against the insurance company, I can perceive no ground on which it can be held that the bankrupt was incapacitated from delivering the policies to Grace Baird on her own account and as trustee for Mary H. Baird as collateral security for the payment of his indebtedness, thereby working an equitable assignment of them to her for that purpose, good as between him and her, though invalid as between the insurance company and him or her.

[5] Much stress is laid by the counsel for the trustee in bankruptcy upon the proposition that if the taking by the bankrupt of the receipt of July 3, 1912, and the delivery by him on that day to Grace Baird, individually and as trustee, of the insurance policies together with the assignments thereof of November 10, 1911, were intended to have any other effect than that of those assignments, it would constitute an attempt to vary instruments in writing by parol or oral evidence in violation of the rules of law. This position I deem untenable. The term "contract" is a misnomer as applied to either of the assignments of November 10, 1911, when viewed as between the bankrupt and Grace Baird or Mary H. Baird. They were executed by the bankrupt and recorded on the books of the insurance company without the procurement or knowledge of the assignee. The assignments were not, nor were copies of them, delivered to the assignees, nor had they or either of them any knowledge of their execution save as derived

from the copies handed to Grace Baird by the bankrupt together with the policies of insurance July 3, 1912. It is true there was a possibility that the assignments might have enured to the benefit of the assignees under and subject to the conditions and limitations expressed in them. But that result would not have been due to any contractual relations between the bankrupt and Grace Baird or Mary H. Baird with respect to the policies, but solely to the designation by the bankrupt to the insurance company of his sister and wife as the persons to whom, subject to such conditions and limitations, the insurance money should be paid, without liability on the part of the insurance company. To suppose that either the bankrupt or Grace Baird, with an understanding of the nature and provisions of the assignments of November 10, 1911, expected or intended that they should constitute the only collateral security for the payment of his indebtedness to her on her own account or to her as trustee for Mary H. Baird is to suppose a palpable absurdity. Grace Baird July 3, 1912, had no possible pecuniary interest in the assignment of policy No. 101,001 for the reason that the policy had then fully matured during his lifetime; the assignment, as before stated, containing the following provisos:

"Provided, the said policy shall become payable by reason of my death prior to the date when the endowment would have matured; and provided also that the said assignee shall then survive me, otherwise all right, title and interest in the said policy is to revert to me, as fully as if this assignment had never been made."

The assignment of policy No. 105,850 contained similar provisos. It is true that July 3, 1912, the later of the two policies had not fully matured; but it lacked the payment of only one annual premium, and in point of fact it fully matured during the lifetime of the bankrupt. It would be the height of unreason to attribute to the bankrupt or Grace Baird any idea that either of the assignments should or could be relied upon as constituting the only collateral security for the payment of the bankrupt's indebtedness. The inevitable conclusion in this connection is that when the two policies were received by Grace Baird from the bankrupt on her own account and as trustee for Mary H. Baird, the two assignments which had been preserved by the bankrupt together with the policies were incidentally handed by him to his sister at the time of the delivery of the policies. Had the assignments or either of them been deemed or intended to serve as collateral security, undoubtedly some reference would have been made in the receipt given by Grace Baird to the bankrupt on that occasion. But while the receipt is wholly silent upon that point, it expressly refers to the two policies as being received as collateral security. Some of the oral evidence touching the purpose and effect of the assignments of November 10, 1911, and of the delivery of the policies in connection with the taking of the receipt for them July 3, 1912, is not unnaturally lacking in scientific accuracy, coming as it did from the bankrupt and Grace Baird. But when considered as a whole and after due allowance for the absence of professional knowledge of the law on their part it is, I think, such as to leave no doubt of the correctness of the conclusions so far reached in this opinion relative to the giving

of collateral security. The evidences of indebtedness of the bankrupt to Grace Baird and Mary H. Baird changed in form after July 3, 1912, but its identity has not been affected, and it has been recognized and judicially established by the referee. Grace Baird holds in her own right her claim of $14,500, with interest, against the bankrupt and her equitable right, as against him, to policy No. 101,001, as collateral security. The claim of Mary H. Baird for $26,000, with interest, against the bankrupt and her equitable right as against him to policy No. 105,850 as collateral security, are represented by the Wilmington Trust Company as her trustee in lunacy.

[6] The Bankruptcy Act contains the following proviso to section 70a:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

On the assumption that under the conditions of the policies their delivery in pledge by the bankrupt July 3, 1912, was inoperative as against the insurance company, such pledge did not avoid the policy, and I perceive no reason why the pledge was not good as against the bankrupt by way of collateral security for his indebtedness, and equally as against the trustee in bankruptcy. The policies passed, subject to the provisions of section 70a, to the trustee in bankruptcy, but subject also to the indebtedness for which they had been pledged. The claimants, being unable to collect the surrender value of the policies from the insurance company, it is proper that the trustee in bankruptcy who represents his creditors and is subject to the direction of the court in the administration of the bankruptcy estate, be directed on the delivery to him by the claimants of the two policies for that purpose, to receive from the bankrupt or collect from the insurance company such surrender value and apply the proceeds to the payment of the indebtedness of the bankrupt to them. Grace Baird and the Wilmington Trust Company, trustee in lunacy for Mary H. Baird, are each entitled to an order setting aside and vacating the order of the referee requiring that the policies of insurance held by them respectively be turned over to the trustee in bankruptcy as part of the bankrupt's estate, and directing that the trustee in bankruptcy forthwith secure from the insurance company an ascertainment and statement of the cash surrender value of the policies held by them respectively as of the date of the filing of the petition in bankruptcy (Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. [N. S.] 154), and providing that unless the bankrupt shall within thirty days next after the trustee in bankruptcy shall secure such ascertainment and statement, pay or secure to the trustee in bankruptcy the sum so ascertained and stated, to be applied toward the payment of the demands of the claimants respectively, for the payment of which those policies were pledged as collateral security, the trustee in bankruptcy shall, with all conven-

ient speed, co-operate with the claimants in securing from the insurance company the cash surrender value of the two policies and apply the same to the payment of the said claims.

An order in accordance with this opinion may be prepared and submitted.

In re GOLUB.

(District Court, D. Massachusetts. July 23, 1917.)

No. 24451.

1. BANKRUPTCY ⟸228—REVIEW OF REFEREE'S FINDINGS.
On review of an order of a referee in bankruptcy, his findings, not apparently erroneous on the face of the report, are final, where the evidence is not reported.

2. SALES ⟸52(7)—FRAUD—EVIDENCE—INTENT NOT TO PAY.
While it will usually be inferred that a person, buying goods on credit when he knows he is insolvent, did not expect or intend to pay for them, the intention not to pay is a fact to be established, and the surrounding circumstances may show that the debtor expected and intended to pay for them.

In Bankruptcy. In the matter of Eoshea Golub, alleged bankrupt. On review of order of the referee. Order affirmed, and petition dismissed.

Stoneman, Gould & Stoneman, of Boston, Mass., for petitioner.
Harry E. Dubinsky, of Boston, Mass., for bankrupt.

MORTON, District Judge. [1] The referee has found that the alleged bankrupt "did not get this merchandise with the intent of not paying for it," and also "that the claimant had reason to know his [the alleged bankrupt's] situation, and that he took his chances in shipping part of the goods ordered." Certificate, p. 3. These findings do not appear on the face of the report to be erroneous, and, the evidence not being reported, are final.

[2] They dispose of the controversy. When it appears that a person who knew he was insolvent bought goods on credit, it would usually be inferred that he did not expect or intend to pay for them. But the intention not to pay is a fact to be established, and the surrounding circumstances may show that the debtor, when he bought the goods, expected to be able to pay for them, and intended to do so. If the seller is apprised of the buyer's precarious condition, but notwithstanding goes on and "takes a chance," a claim that he was defrauded is difficult to maintain.

Order of referee affirmed.
Petition dismissed.

GROSCHKE v. ARMOUR FERTILIZER WORKS.

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

No. 2307.

1. SALES ⟸32—CONTRACT BY CORRESPONDENCE—MEETING OF MINDS.
Correspondence between plaintiff and defendant concerning a sale of sulphate of ammonia, to be shipped from England to American ports, *held* to show no contract between the parties, because there had been no meeting of the minds respecting the length of notice to be given, when delivery was desired at certain ports to which there were no regular sailings.

2. SALES ⟸23(4)—OFFER TO BUY AND ACCEPTANCE.
A broker, after negotiations with plaintiff and defendant respecting a sale of sulphate of ammonia to defendant, to be shipped to American ports, sent defendant a "buyer note" for execution, and to be then sent to plaintiff for acceptance; it being contemplated that the acceptance would be evidenced by the execution of a complementary writing in the form of a "seller note" embodying the same terms. The buyer note provided for delivery at "current Atlantic ports," and stated that the buyer was to declare port of arrival 30 days prior to shipment, except ports to which there were no regular sailings, where buyers were to give 60 days' notice. Before this buyer note, as executed by defendant, could have reached plaintiff, the broker wrote defendant, stating that plaintiff did not consider Wilmington, N. C., and Jacksonville, Fla., as current ports, and defendant promptly replied, declining to accept this interpretation of the contract, and stating that they could not permit these two ports to be left out of consideration. Defendant's reply reached the broker, and plaintiff was informed of defendant's position, before plaintiff's execution of the seller note. *Held*, that there was no complete contract, as the minds of the parties never met on the question of deliveries to difficult ports, especially where plaintiff, after the execution of the seller note, continued negotiations respecting deliveries to such ports.

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit by Emil F. Groschke against the Armour Fertilizer Works. Judgment for defendant, and plaintiff brings error. Affirmed.

Vredenburgh, Wall & Carey, of Jersey City, N. J. (Albert C. Wall, of Jersey City, N. J., and Herbert Barry, of New York City, of counsel), for plaintiff in error.

Hartshorne, Insley & Leake, of Jersey City, N. J. (Eugene W. Leake, of Jersey City, N. J., of counsel), for defendant in error.

WOOLLEY, Circuit Judge. This is an action on a written contract. The question involved is whether the trial court erred in directing a verdict for the defendant on the ground that the instruments sued upon do not constitute a contract between the parties.

Groschke, the plaintiff, was an exporter of sulphate of ammonia, residing in England.

Armour Fertilizer Works was a corporation, with headquarters in Chicago, engaged in the manufacture and sale of fertilizers, with factories or warehouses at points of distribution on the Atlantic seaboard, including Wilmington, North Carolina and Jacksonville, Florida. The character of its business was such as to require it to purchase raw

material from distant and widely separated parts of the world and to cause it to be assembled in this country at different times and places with an especial regard to the seasons and crops in which its finished products were intended to be used.

Goldsmith was a fertilizer broker with offices in New York. So far as the record shows, his relation to the parties was nothing more than that of broker, being without authority as agent to speak for or bind either one or the other. His business was to bring the buyer and seller together and to transmit from one to the other the terms and conditions upon which a contract of sale is negotiated and concluded. He therefore appears in this case simply as the medium by and through which one party communicated with the other.

The subject matter of the negotiations or of the contract was the purchase and sale of a large quantity of sulphate of ammonia, a costly ingredient used in the manufacture of commercial fertilizers, involving terms as to price, periods of shipment, points of delivery and notice as to deliveries. The negotiations covered correspondence extending through several months, culminating in the execution of buyer and seller notes, a form of contract familiar in that industry. Groschke, under his interpretation of the alleged contract, refused to promise deliveries at two particularly named ports, thereupon Armour, acting upon an opposite understanding, declined to accept deliveries elsewhere, and withdrew its offer or repudiated the contract.

The case is pleaded, first, upon a contract made by the parties by correspondence, and, second, upon a formal contract concluded by buyer and seller notes. The answer recites the circumstances upon which the defendant relies to sustain the defense that the minds of the parties never met.

At the trial, the District Court found that no contract had been entered into between the parties, and directed a verdict for the defendant.

On writ of error the case was argued from many angles according to the positions and points of vantage of the different parties, namely, that a contract was made and completed by correspondence, and that nothing remained to be done but to embody its terms in a formal instrument; or, if it be found that no contract was made by correspondence, then a formal contract was made by the execution of buyer and seller notes; that the precedent, concurrent and subsequent correspondence was erroneously admitted to vary the terms of the contract thus made; Gross v. Lord Nugent, 5 B. & Ad. 58; Wigmore's Pocket Code of Evidence, 2425; that a complete and binding contract may be made, although one or more of its terms be not definitely agreed upon, as in the Grumbling Assent Case, Joyce v. Swann, 17 C. B. (N. S.) 84; and that the parties had a different understanding of the terms, therefore, a mistake, not a contract, was made when the parties in using the same language meant different things. Raffles v. Wichelhaus, 2 Hurlstone & Coltman, 906; Stix v. Roulston, 88 Ga. 743, 748, 15 S. E. 826; Mummenhoff v. Randall, 19 Ind. App. 44, 49 N. E. 40; Strong v. Lane, 66 Minn. 94, 68 N. W. 765; Anson on Contracts, p. 156; Kerr on Mistake, p. 492; Williston on Sales, § 654; 9 Cyc. 245,

398. Interesting as was the discussion of these propositions of law, yet as we view this case, there is but one matter submitted to us for decision, and that is, whether the minds of the parties met upon terms which were defined by the parties when they were expressed, and which did not involve a latent ambiguity in an essential term and a mutual misunderstanding of its meaning. The question, therefore, is, —was there a contract between Groschke and Armour, made and completed by correspondence, or made by the exchange of formal buyer and seller notes? The determination of this question requires a careful examination and a tedious recital of the correspondence of the parties.

Before pursuing this correspondence it is pertinent to note Groschke's attitude toward it. Counsel for Groschke treats Armour's buyer note as an offer (as doubtless it was) and the execution of Groschke's seller note as an acceptance of the offer. The buyer note was executed in Chicago, the seller note in England. Counsel therefore treats the offer as accepted in England and the contract therefore as made in England, and from that position contends that being an English contract it is to be interpreted by the rules of the English law. It is important to keep this position in mind, not as bearing upon a question whether English or American Law is applicable to this case or whether there is any difference between the laws of the two countries in requiring the minds of contracting parties to meet upon all terms before a contract is made, but as bearing upon the fact when, if ever, a contract was made, either by correspondence or by buyer and seller notes, and as bearing upon what intervened between the buyer's offer and the seller's acceptance in determining *as a fact* whether the minds of the parties ever met.

(1) Contract by Correspondence.

[1] In reciting the correspondence of the parties, only matters material to the issue will be given.

February 18, 1914—Telegram, Armour to Goldsmith, wherein Armour offered to buy 3,500 tons of sulphate of ammonia "at $2.75 per hundred C I F *American ports New Orleans New York Range* option port to be declared *thirty days* in advance," guarantee as to percentage, etc.

This offer was not made to Groschke; it was made generally through Goldsmith to any seller he could procure.

February 19—Telegram, Goldsmith to Armour. Goldsmith acknowledged Armour's offer, indicated its transmission abroad, and expressed a hope that it would lead to business.

February 19—Letter, Goldsmith to Armour. Goldsmith confirmed the receipt and dispatch of the two last mentioned telegrams, but requested Armour to arrange "for more than thirty days' advance notice, for if the port should be a difficult one, like say Norfolk or *Wilmington*, to which there are *no regular sailings*, the shipments may require more than thirty days' notice." Thus Goldsmith thought Wilmington, North Carolina, was included in "New Orleans New York Range."

February 20—Telegram, Goldsmith to Armour, stating that his foreign seller declined Armour's offer at $2.75, making counter-offer at $2.78, being silent on other terms.

February 20—Telegram, Armour to Goldsmith, wherein Armour directed Goldsmith to "book sulphate ammonia as per telegram February 18 at $2.78 * * * Please advise name of principal *Mail contracts.*"

Armour thus accepted the new price and renewed his original offer of February 18th as to all other terms and conditions. These had not yet been accepted by the foreign seller.

February 20—Letter, Armour to Goldsmith, reciting and confirming exchange of wires of February 18, 20 and 20.

Up to this point the name of the foreign seller had not been disclosed, but at this point it appears that his name was desired and that formal contracts were requested by Armour.

February 21—Letter, Armour to Goldsmith, in reply to Goldsmith's request of February 19 that Armour arrange for more than thirty days' notice for deliveries at difficult ports. Armour said:

"Note your letter 19th in reference to sulphate of ammonia bid. In all probability we would want sulphate of ammonia shipped to New York, Baltimore, *Wilmington,* Savannah, *Jacksonville* and New Orleans."

From this it appears that Armour's understanding was that Wilmington and Jacksonville were within "New Orleans New York Range." Alluding to its option of ports as stated in its original and renewed offer to be declared thirty days in advance, Armour continued in this letter:

"In case of Wilmington and Jacksonville port, we no doubt could arrange to give you more than thirty days' notice, if necessary, and will do everything in our power to facilitate prompt handling of charters."

This is merely an indication that Armour was disposed to be accommodating in exercising its option to designate ports and in giving notice of deliveries. It does not amount to a withdrawal from or a change of its original offer of thirty days' notice.

February 21—Telegram, Goldsmith to Armour:

"Telegram received. Many thanks. My principal Mr. Groschke cables confirmation 3500 tons S/ammonia at $2.78 C I F *current Atlantic ports* including New Orleans with thirty days' notice prior to shipping month. Would like *sixty days'* notice to such ports where there are *no regular sailings Mailing contracts.*"

An analysis of this telegram shows several things. It discloses Groschke as the seller. It confirms Armour's offer as to tonnage and price, introduces a new expression around which a controversy raged at the trial, namely "current Atlantic ports" for Armour's expression of "American ports New Orleans New York Range." It still left open the question of sixty days' notice of deliveries to ports to which there were no regular sailings (as Wilmington and Jacksonville); and lastly, it showed that Goldsmith was mailing contracts to Armour and mailing them at a time when no agreement had been reached as to sixty days' notice of deliveries to ports with non-regular sailings.

February 21—Telegram, Armour to Goldsmith, accepting sulphate

of ammonia at the price without naming any other conditions, and stipulating by a side contract participation in Goldsmith's commissions.

February 21—Letter, Goldsmith to Armour, confirming telegrams exchanged and extending congratulations upon the completion of the deal. In this letter Goldsmith said:

"My sellers would like to have sixty days' notice to such ports to which there are no regular sailings, as indicated in my Thursday's letter to you." (February 19.)

In such ports, as we have seen, Wilmington and Jacksonville were included. He also said:

"*I send you contract herewith covering the sale* and would thank you to kindly telegraph me on Monday that you are returning it with your acceptance so that I *can then mail duplicate to my sellers.*"

The "contract" mailed with the letter, the return of which was requested so that its duplicate could be mailed to the seller, was one end of the contract sued upon, namely the buyer note, in which there appeared the expression introduced into the transaction by Groschke "Current Atlantic ports including New Orleans, La." in lieu of the expression in Armour's offer—"American ports New Orleans New York Range." There also appeared for the *first time* a promise on the part of Armour to give sixty days' notice on difficult ports. It is in the following language:

"Buyers to declare port of arrival thirty days prior to the month during which shipment is to be made, except to such ports to which there are no regular sailings, where buyers are to give seller sixty days' notice."

The buyer note is one of two papers comprising the supposed formal contract. As the promise to give sixty days' notice of deliveries to difficult ports appeared for the first time in the buyer note, it follows that no such promise appeared in the antecedent correspondence. This was a material term of the proposed contract. It had never been agreed to by correspondence and therefore the parties had not reached the stage where their minds had fully met upon all terms of the proposed contract and where nothing remained to be done except to memorialize those terms by embodying them in a formal instrument. It is clear to us, for this reason if for no other, that no contract between the parties had been made by correspondence.

(2) Contract by Buyer and Seller Notes.

[2] The plaintiff declared upon a contract by buyer and seller notes as well as upon a contract by correspondence. Having found that there was no contract by correspondence, the contract by buyer and seller notes, if any, is to be found within those two instruments. In such a transaction, as conceded by the plaintiff, the buyer note constitutes the offer, and the seller note constitutes the acceptance. Therefore, in searching for a contract within these two papers, we lay aside the correspondence leading up to the date of the buyer note and begin our inquiry upon its date.

Both buyer and seller notes bear date February 21, 1914. It is manifest that neither was executed on that date. The buyer note was not executed on February 21 by Armour in Chicago, because on that date it was mailed from New York by Goldsmith. Its receipt was acknowledged by Armour in a letter dated February 24, in which Armour stated that "conditions seem satisfactory." Its return was hastened by a telegram and letter from Goldsmith to Armour on February 25, in the former of which he said:

"I hope that you have mailed accepted S/A contract as am desirous *forwarding same to seller* without delay."

By letter of the same date (February 25) Armour returned its buyer note to Goldsmith.

From the sequence of this correspondence it appears that Armour's buyer note was executed on February 22, 23, 24 or 25. Being mailed from Chicago on February 25, it was presumably received in New York February 26 or 27. At all events, its receipt was acknowledged in a letter by Goldsmith to Armour, bearing date February 27, in which he said:

"I am *forwarding* the same to my seller and will send you *his acceptance* as soon as received."

It is clear from this that the parties were giving to the buyer note the form of an offer made by the buyer, calling for acceptance by the seller. This theory of the transaction was carried into the trial of the plaintiff's case. When then did Groschke accept Armour's offer? He did not accept it until he performed some act with reference to it. Such an act may be his execution of the seller note or it may be the return of that note to the party offering, duly executed. Groschke signed the seller note upon some date. Upon what date did he sign it? Certainly not on the date it bore, February 21, for on that date the buyer note had just left New York for Chicago and had not been signed by the buyer. But Goldsmith had the buyer note in his hands on February 27. Assuming that he promptly mailed it to London on that date and that by the fastest mail it reached London in six days, Armour's buyer note did not reach Groschke until six days after February 27 at the very earliest, which was March 5. But before that date, Groschke began a new line of correspondence, as follows:

March 5—Letter, Goldsmith to Armour, stating that

"I am *today* in receipt of a *letter* from Mr. E. Groschke *confirming his acceptance* of your order for 3,500 tons sulphate of ammonia at $2.78 C I F current Atlantic ports, including New Orleans."

Goldsmith was quoting from a "letter" from Groschke, *that day* received (March 5). That letter could not have started from London any later than six days before March 5, which was February 27, at which time Armour's buyer note was still in Goldsmith's hands, and therefore had not reached Groschke. What acceptance did Groschke confirm by his letter? The transaction by correspondence? No, for the sixty days' notice of deliveries at difficult ports was still open and had not been agreed upon by correspondence. The acceptance of the contract tendered by Armour's buyer note? No, because that instru-

ment, not having left New York, certainly had not reached London. And furthermore, the acceptance of the formal buyer note contemplated an acceptance by executing a complementary writing in the form of a seller note embodying precisely the same terms. Groschke's seller note formally accepting the offer contained in the Armour buyer note was eventually returned to this country on March 20, as indicated by Goldsmith in a letter to Armour of that date. The letter containing Groschke's seller note therefore did not leave England before March 14. This being true, it is clear that the Armour buyer note, which counsel for Groschke terms an offer, did not reach Groschke until March 5 at the earliest and was not signed by Groschke until sometime between March 5 and March 14, and did not reach Goldsmith on its return until March 20. These dates are important, because by the letter received March 5 but written and mailed by Groschke to Goldsmith on February 27 or earlier, at a time before the Armour buyer note had been mailed from New York to London, Groschke was still negotiating with Armour as to terms of the proposed contract, as shown by Goldsmith's letter to Armour of March 5, wherein he stated that in a letter *that day* received from Groschke, "he (Groschke) pointed out that he does not consider Wilmington, N. C., and Jacksonville, Fla., as current ports. It goes without saying, however, that he will make shipment to these ports, *if freight opportunities offer.*" With this understanding of Groschke conveyed to Armour before Armour's buyer note had reached Groschke, which was the opposite of what Armour had insisted upon all along, and with Groschke's seller note still unsigned so far as any evidence shows, and before it was mailed from London for return to Armour, Armour repudiated the understanding by letter to Goldsmith of March 9, saying:

"We must decline to accept this interpretation of the contract, as we cannot permit these two ports to be left out of consideration."

This declination by Armour to accept Groschke's interpretation of the proposed contract as to notice of deliveries to difficult ports was mailed at a time prior to Groschke's acceptance of the offer of the Armour buyer note, as shown not only by the dates and the periods of time necessarily required for transmission by mail, but by another sentence in Goldsmith's same letter of March 5, in which he says:

"In the meantime he (Groschke) will shortly receive my letter advising him that you have agreed to give him sixty days' notice to the difficult ports, and I therefore look for his prompt acceptance of the contract forwarded him. This I will send you as soon as it is received."

This statement of Goldsmith contained in the letter of March 5 clearly shows two things: first, that as Goldsmith understood the situation, the parties had not to that date agreed upon the matter of sixty days' notice, and also that the contract was to be closed by Groschke's formal acceptance of Armour's offer and its return to Armour.

Armour's letter to Goldsmith of March 9, declining to accept an interpretation that excluded Wilmington and Jacksonville from ports of delivery, having been delivered to Goldsmith before Groschke had accepted Armour's offer, Armour's position as disclosed by that

letter must be read into the offer of its buyer note. That Groschke had been informed of this position before he executed the seller note is shown by a letter from Goldsmith to Armour of March 23, in which Goldsmith states:

"Mr. Groschke is now in receipt of your advices contained in your letter of the *9th*, and therefore understands that Jacksonville and Wilmington will have to be included as current Atlantic ports."

Therefore, Armour interpreting its buyer note in one way and Groschke interpreting it in another way, followed promptly by the buyer's explanation of its terms and a repudiation of Groschke's interpretation, establishes the fact that the minds of the two never met by the buyer and seller notes upon the question of deliveries to difficult ports.

And so thought Groschke, because it appears by later correspondence that Groschke pursued negotiations as to terms respecting deliveries to difficult ports through the month of March and well into the month of April. The last of these negotiations before the final rupture appears in a telegram from Armour to Goldsmith, April 2, as follows:

"If you will get cable from Groschke by noon tomorrow in confirmation of our understanding that we demand delivery any port New Orleans New York range including Wilmington and Jacksonville we will accept."

By this telegram, Armour went back to the terms of its original offer of February 18, except as to price. Groschke's reply, as shown by telegram from Goldsmith to Armour of April 4, was an entirely novel proposition. It is as follows:

"Am pleased to advise have cable from Groschke reading 'propose execute Armour contract mutually agreed Wilmington Jacksonville *accessible while season.*' "

From this telegram, two things appear on the date of April 4th; first, that the contract had not been executed with Armour, and, second, that Goldsmith was authorized to execute it upon terms that deliveries should be made at Wilmington and Jacksonville if accessible while season (indicating a season when charters are readily procurable). Thus it appears that negotiations were still being conducted and that Groschke was still insisting upon terms different from those offered by Armour. The desultory correspondence that followed resulted in nothing. It is therefore clear to us that no contract was made between the parties either by correspondence before the buyer and seller notes were signed or by the buyer and seller notes when signed, and therefore the trial court committed no error in directing a verdict for the defendant.

The judgment below is affirmed.

CONSOLIDATED MUT. OIL CO. et al. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

Nos. 2787, 2788.

MINES AND MINERALS ⊂=36—OIL PLACER CLAIMS—RIGHTS OF CLAIMANTS—EFFECT OF WITHDRAWAL ORDER.

An oil placer mining claim, located on surveyed land by an association of eight persons, pursuant to Rev. St. §§ 2329–2333 (Comp. St. 1916, §§ 4628–4632), and covering a quarter section, constitutes a single claim, and under Act Feb. 12, 1903, c. 548, 32 Stat. 825 (Comp. St. 1916, § 4636) development work done on any one of a group of such claims not exceeding five, lying contiguous and owned by the same person or association, inures to the benefit of all, where it tends to their development. The President's proclamation of September 27, 1909, withdrawing certain oil lands from entry provides that "all locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination," and Act June 25, 1910, c. 421, § 2, 36 Stat. 847 (Comp. St. 1916, § 4524) provides that "the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work." At the time of the withdrawal proclamation one of the defendants, who was the owner of four contiguous quarter section claims, was in possession of the same through his lessee, which was then diligently prosecuting the work of development, and had commenced a well on one claim and expended $20,000 in preparations for drilling on each claim. This work was continued, and oil was found in paying quantities. In 1914 defendant entered and paid for the land, and there was issued to him a final receipt. *Held:* (1) That the exception in the President's proclamation in favor of existing and valid locations did not apply to claims on which oil had been discovered and to which the claimants therefore had an indefeasible equitable title, but applied to all locations to which the claimants had some valid right; (2) that the work done inured to the benefit of all of defendant's claims, and that under the facts he acquired a valid title which could not be questioned by the United States.

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Maurice T. Dooling, Judge.

Two suits in equity by the United States against the Consolidated Mutual Oil Company and J. M. McLeod. Decrees for complainant, and defendants appeal. Reversed.

See, also, North American Oil Consolidated v. United States, 245 Fed. 533, — C. C. A. —.

U. T. Clotfelter, of Los Angeles, Cal., and A. L. Weil, Charles S. Wheeler, and John F. Bowie, all of San Francisco, Cal., for appellants.

E. J. Justice, F. P. Hobgood, Jr., Frank Hall, Jas. W. Witten, and A. E. Campbell, Sp. Asst. Attys. Gen., all of San Francisco, Cal., and

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

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The subject-matter of case No. 2787 is the northeast quarter, and of case No. 2788 the northwest quarter, of section 28, township 31 south, range 23 east M. D. M., and the oil contents of those lands. The facts in each case being substantially the same, the cases have been argued and submitted together.

The appellants, who were defendants in the court below, being in the possession of and claiming the right to the land and the oil it contained, which oil they were extracting by means of numerous wells, the government, on the 25th day of October, 1915, commenced the suits to recover both the lands and the value of the oil extracted, to quiet its title to the property, and also prayed for an injunction and the appointment of a receiver in each of the suits. A receiver having been appointed in each of them, the present appeals were taken from those orders.

Concerning the material facts, there seems to be no dispute; the differences between the parties involving only questions of law. Government lands, containing petroleum or other mineral oils, and that are chiefly valuable therefor, not withdrawn or otherwise reserved, may be entered and patented, and, indeed, only can be entered and patented, under the provisions of the laws relating to placer mining claims. 29 Stat. 526 (Comp. St. 1916, § 4635). It appears from the records that the predecessors in interest of the appellants located these lands, as also the other portions of the said section, under and by virtue of the laws governing placer claims.

Section 2329 of the Revised Statutes provides as follows:

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

Section 2331 of the same statutes, so far as pertinent, is as follows:

"Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant."

The provisions regarding veins and lodes are contained in sections 2320, 2322, 2323, and 2324 of the Revised Statutes (Comp. St. 1916 §§ 4615, 4618, 4619, 4620), and they include the requirement that the location must be distinctly marked on the ground so that the boundaries can be readily traced, and that a discovery of mineral be made within such boundaries. A location made by an association of persons, as said by Mr. Justice Henshaw, speaking for the Supreme Court of California in the case of Miller v. Chrisman, 140 Cal. 440, 449, 73 Pac. 1083, 1085 (98 Am. St. Rep. 63)—

"by the very terms of the law, is one location covering 160 acres, and not eight locations, each covering 20 acres. The boundaries required to be marked are the boundaries of the 160 acres, and not the boundaries of each separate 20 acres. The expenditure of $500 before patent issues is an expenditure required upon the whole land, and not an expenditure upon the 20-acre subdivisions thereof, and the only assessment work required is labor to the value of $100 upon the single location, and not upon any 20-acre subdivision thereof. Logically, therefore, since in marking boundaries, doing assessment work, and expenditure for patent the 160 acres are treated as an entirety under one location, for the purpose of discovery it should be treated in the same manner; and this is the ruling, with some conflict in its earlier decisions, which the Land Office of the United States has finally returned to and settled upon. In the case of Union Oil Co., 25 L. D. 351, it is explicitly declared: 'A placer location, if made by an association of persons, may include as much as 160 acres. It is nevertheless a single location, and as such only a single discovery is by the statute required to support it.' With this declaration we are in full accord."

Nor has Congress so far fixed any limit to the number of locations that may be made by the same person or persons—its policy having always been to encourage the exploration of the public lands and the discovery and development of such minerals as may be found in them. And it has long been the established law respecting such claims that, where two or more contiguous ones are held by the same person or persons, work done in good faith upon any one of them, or outside of the boundaries of either of them, which directly tends to the development or benefit of all of the claims for mining purposes, should be held applicable to each and all of such claims. Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205, 105 C. C. A. 45, decided by this court, where will be found cited many cases to the same effect.

But, as respects oil mining claims, Congress, by act approved February 12, 1903 (32 Stat. 825), limited the number of a group of claims on which the annual assessment work might be done on one of the group for the benefit of the whole group in these words:

"That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, that said labor will tend to the development or to determine the oil-bearing character of such contiguous claims."

In this connection reference may be made to the decision of the writer in the case of Gird v. California Oil Co. (C. C.) 60 Fed. 531, which case is cited and relied on in support of the contention of the government in the present cases. The inapplicability of that case to the present ones will clearly appear from the statement that the Whale Oil claim was there sought to be held by reason of work claimed to have been done on others of a group of 80 claims, and from this extract from the opinion of the court in that case (60 Fed. 542):

"In the case at bar, none of the work done or expenditures made by the lessees of the plaintiffs, relied on to sustain the claim to the Whale Oil, were done or made on any claim contiguous to it. It is true that the evidence shows that, prior to the making of the leases in 1886 and 1887, Udall from time to time, under and pursuant to the local rules of the district, did considerable work in building roads in the district, and on the road that led in

the direction of the Whale Oil claim. But the local rules, in so far as they conflict with the act of Congress, are of course, of no avail, and that, as has been repeatedly stated, requires an annual expenditure of $100 in work or improvements on each claim, provided that, where the claims are held in common, such expenditure may be made upon any one claim. But, to come within this latter provision, the claims so held in common must, as said by the Supreme Court in Chambers v. Harrington [111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452], be contiguous, and the labor and improvements relied on must, as held in Smelting Co. v. Kemp, 104 U. S. at page 655 [26 L. Ed. 875], be made for the development of the claim to which it is sought to apply them; that is in the language of the Supreme Court, 'to facilitate the extraction of the minerals it may contain.' This, I think, cannot be justly affirmed of any part of the large expenditures shown to have been made by the lessees of the plaintiffs in the development of some of the claims embraced by the leases, all of which are remote from, and none contiguous to, the Whale Oil. I have not overlooked the contention of plaintiffs' counsel that by the well the lessees of the plaintiffs commenced on the Kenyon claim they hoped and expected, in years to come, to draw the oil from the Whale Oil claim, which is distant from the Kenyon considerably more than a mile, and between which and the Kenyon is a mountain range. The time when this result might be reached was fixed by the plaintiffs' witness who advanced the theory at from 10 to 100 years. When to this is added the fact that the well that was thus expected to extract the oil from the Whale Oil claim was not commenced until 1891, which was after the location of the Razzle Dazzle claim, upon which the defendant relies, nothing more need be said to show that work upon the well upon the Kenyon claim cannot be counted to maintain the validity of the Whale Oil location."

It is also the well-established law that in the absence of any intervening bona fide rights—and there are none in either of the present cases—the order in which the statutory requirements concerning the making of the locations are complied with is immaterial; that the marking of the boundaries of a claim may precede the discovery, or the discovery may precede the marking, and, if both are complete before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522; Zollars v. Evans (C. C.) 5 Fed. 172; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.

Passing for the present any consideration of the act of Congress of June 25, 1910, known as the "Pickett Act" (36 Stat. 847), it is entirely true that until discovery the locator can acquire no right as against the government; but it is well settled that, while in the bona fide effort to make such discovery, the ground that he has marked in accordance with the provisions of the statute, and of which he is in the actual possession, will be protected by the courts against any forcible, fraudulent, surreptitious, or clandestine entry by any third party, although it is open to the entry of others by any legal means for the purpose of locating it under the mining laws. Sparks v. Pierce, 115 U. S. 408, 413, 6 Sup. Ct. 102, 29 L. Ed. 428; Belk v. Meagher, 104 U. S. 279, 287, 26 L. Ed. 735; Olive Land & Development Co. v. Olmstead (C. C.) 103 Fed. 568, 573; Cosmos Exploration Co. v.

Gray Eagle Oil Co., 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230; Rooney et al. v. Barnette et al., 200 Fed. 700, 119 C. C. A. 116; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197; Miller v. Chrisman, 140 Cal. 440, 447, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Smith v. Union Oil Co., 166 Cal. 217, 224, 135 Pac. 966; McCormick v. Varnes, 2 Utah, 355; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280.

That right of possession against all intruders this court in the case of Rooney v. Barnette, supra, expressly held is a right that the possessor can convey to another, as did the Supreme Court of California in Miller v. Chrisman, supra, and as have many other courts. The rights thus possessed by the locator to maintain his possession against intruders while in good faith seeking to discover minerals within the boundaries of his claim, and to convey such possession before discovery, are, as said in Miller v. Chrisman, rights of value. After discovery they manifestly become binding upon the government, and protected by the Constitution. While it is possible that at times oil may be found issuing from the surface of the ground (in which case discovery, of course, may be made without difficulty or expense), it is matter of common knowledge that almost always drilling is essential to such discovery, and in many sections—particularly in the region where the lands in question are situate—drilling to great depth, involving heavy costs.

The records show that the lands here involved are situate in an arid region, where water at the times in question was obtained with great difficulty and at heavy cost, and that drilling without some water was impossible; that in such circumstances the appellant McLeod, on the 25th day of June, 1909, leased upon a royalty basis to a corporation called Mays Oil Company, afterwards known as Mays Consolidated Oil Company, the south half of the northwest quarter, the north half of the southwest quarter, the northeast quarter, and the southeast quarter of the said section 28, under which lease the lessee entered into the immediate and exclusive possession of those tracts of land. The lease (subsequently acquired by the appellant Consolidated Mutual Oil Company) provided for the drilling of wells upon each of the quarter sections embraced by the lease, in the effort to discover and take oil therefrom, for continuous and diligent work by the lessee to that end, and for the working of all of the said claims as a unit. And it was shown in each case, upon the application for the appointment of a receiver, that during the brief period that intervened between the execution of the lease and the making by President Taft of the proclamation of September 27, 1909, entitled "Temporary Petroleum Withdrawal No. 3," the lessee built a two-inch pipe line more than three miles in length to connect with the main of a water company called Stratton Water Company, constructed a standard derrick on each of the claims, built on the northeast quarter of the section a water tank with pipe line connections, a bunkhouse and a cookhouse, containing a dining room sufficient for the seating of 40 men, a kitchen, and bedroom; on the northwest quarter of the section it built another bunkhouse 20x30 feet in size; and on the southeast quarter it built a stabling yard for its

freight teams and for a buggy and horses—in addition to which it built a boiler house and erected machinery for operating one full string of tools for drilling at the derrick on the southwest quarter of the section.

It further appears that, not only did the said lessee have, on the day of the issuance of the President's proclamation, the undisputed possession of all of the property covered by the lease, but was then actually drilling a well by means of the derrick on the southwest quarter of the section, having commenced to do so the preceding month, and which well was then about 830 feet in depth. Moreover, it is shown without conflict that the lessee had abundant means to carry out its undertaking, and but for the impossibility of securing the necessary water would have been sinking at each of the derricks on the other quarters of the section; that it intended and had directed the successive sinking of the other wells as soon as oil should be struck in the first one, and was so intent on the speeding of the work as to offer and pay a bonus to its employés for extra work.

It is not contended that the land in question was not subject to location under the mining laws by the predecessors in interest of the appellant McLeod, nor that the boundaries of the respective claims were not properly marked on the ground, nor that there was any intrusion upon the actual possession of the appellants or upon that of their predecessors in interest. Up to the time of the proclamation by the President, however, there had been no discovery of oil or any other mineral on any of the land, and consequently at that time the government was at liberty to at once withdraw it from any sort of disposition, either through act of the Congress or by order of the President, as was adjudged by the Supreme Court in the case of United States v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673—three of the Justices dissenting.

In pursuance of the power vested in him, President Taft on September 27, 1909, issued this proclamation:

"Temporary Petroleum Withdrawal No. 5.

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

It is insisted on behalf of the government that the exemptions from the effect of the order of the President therein provided for cannot be properly held to apply to any land upon which at the time of its promulgation no mineral had been discovered, even though, as in the present cases, the land had been located under and by virtue of the mining laws, its boundaries properly marked on the ground, and the assignees of the locators then in its bona fide actual possession, actively engaged in seeking mineral therein.

A discovery of mineral in the ground under such conditions would manifestly have perfected the locations, not only against third parties, but also against the government, and would have given to the owner of them an equitable title against the United States, and have entitled the

owner to the legal title upon compliance with the statutory requirements respecting annual assessment work and payment, which rights would have been secure under the provisions of the Constitution of the United States. Such locations upon which discovery had then been made needed no protection through any order of the President. Said the Supreme Court in Belk v. Meagher, 104 U. S. 279, 283 (26 L. Ed. 736):

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent."

It is not, therefore, added the same court in Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 434, 12 Sup. Ct. 555, 36 L. Ed. 214, "subject to the disposal of the government."

President Taft, who had himself been a distinguished federal judge, of course well knew this, and we think it altogether unreasonable to hold that the words employed by him in his order, "All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination," were intended, or can be fairly construed, to apply to lands upon which discovery had already been made and to which its locators had already acquired an equitable title, but, on the contrary, that they were intended, and should be held, to apply to all locations and claims existing at the time of the making of the withdrawal order to which the locators or claimants had some valid right. See United States v. Winona & St. P. R. Co., 165 U. S. 463, 478, 479, 17 Sup. Ct. 368, 41 L. Ed. 789.

That the appellants then had in the lands here in question valuable rights of possession and conveyance, which the courts of the country would protect and enforce, and consequently valid rights, has already been shown—rights, too, acquired by the license, if not by the invitation, of the government, and in the pursuance of which the lessee of this property had then, according to the records, already expended more than $20,000, and which land it continued to diligently explore and develop at very large additional expense for years, without objection by the government or by any third party so far as appears. And by its act of June 25, 1910 (36 Stat. 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," Congress expressly declared:

"That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work."

This was the first legislative recognition ever made by Congress of any right on the part of an occupant or claimant of oil bearing lands prior to the discovery of oil thereon. By that act, which was obviously a remedial statute, and therefore to be liberally construed to effect its object, Congress expressly gave to the good-faith occupant or claimant of either oil or gas bearing lands, who, at the date of the act, was "in diligent prosecution of work leading to discovery of oil or gas," a status. That the appellants were at the time of the passage of the act in the actual and exclusive possession of the lands here in controversy and in diligent prosecution of work on one of two contiguous claims for

the benefit of both, as well as other contiguous ones, in the effort to discover oil thereon, which continuous work resulted in the discovery of oil in each of the quarter sections here involved in large quantities, is clearly shown, and that the appellants continued from the date of the passage of the said act "in diligent prosecution of said work" is undisputed. We therefore regard it as clear that the appellants also come within the express provisions of the act of June 25, 1910.

In deciding adversely a much stronger case for the government than are the present ones, the Circuit Court of Appeals of the Eighth Circuit, in the recent case of United States v. Grass Creek Oil & Gas Co. and Ohio Oil Co., 236 Fed. 481, 487, 149 C. C. A. 533, 539, in speaking of the act of June 25, 1910, said:

"It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the act of Congress. We are of the opinion that this is too narrow a view to take of this statute. The enactment of this proviso by Congress could have had but one object in view, and that was to protect the rights of all persons who, at the date of an order of withdrawal, are occupying or claiming oil-bearing lands in good faith, for the purpose of acquiring them under the laws of the United States, and are diligently prosecuting the work leading to the discovery of oil. Before the enactment of this statute discovery of the mineral was essential to make a location. As frequently—in fact, in most instances—prospecting was necessary in order to determine whether oil or gas are on the public lands, and large sums of money were necessarily expended to ascertain this fact, Congress by this proviso in the act of 1910 extended its protecting arm to those acting in good faith in an effort to ascertain whether there was oil or gas under them. In our opinion, when a citizen of the United States in good faith enters upon public land for the purpose of discovering oil or gas, takes possession of the land by placing a caretaker thereon while he is taking proper steps to obtain the material necessary for the work of constructing the camps, enters into contracts for drilling, acting as expeditiously as possible in erecting camps and preparing for the drilling, spends money and enters into contracts whereby he becomes liable for sums of money to prosecute the work leading to the discovery of oil or gas, and as soon as it is possible, by the exercise of proper diligence, begins the work of drilling, and continues it diligently and expeditiously until oil is discovered in commercial quantities, he is within the protection of this proviso."

The facts in the cases of United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, were very different from those in the present cases, as will clearly appear from this excerpt from the opinion of the learned judge who decided them:

"No discovery of oil had been made on any of the lands at the date of the first withdrawal order, nor was any one in possession thereof at that time actually engaged in work looking to a discovery. In suits 47, A–2, A–3, and A–30 sundry parties had, prior thereto, posted on the land involved in each of the suits and caused to be recorded a notice claiming a location of the land as a petroleum placer mining claim under the mining laws of the United States; but no discovery of oil had been made or any work done thereon, except some so-called assessment work, which consisted in excavating sump holes, building small cabins, and the erection of a couple of derricks on one of the tracts, which derricks were never used or equipped for drilling, but were subsequently taken down and removed to other parts of the premises. After the first withdrawal order, parties claiming as lessees of the so-called locators in the four cases referred to, and in the other two without any previous notice of location, commenced drilling operations in each of the tracts

involved in the fall of 1909 or early in 1910, and continued thereafter until the discovery of oil, which they were extracting and disposing of when these suits were commenced against the parties in possession, the so-called locators, the purchasers of the oil, and others."

Moreover, Congress by its act of March 2, 1911 (36 Stat. 1015, c. 201 [Comp. St. 1916, § 4637]), gave statutory recognition of the right of transfer or assignment by the locator, under the mining laws, of any land containing oil or gas, to any qualified person, persons, or corporation "prior to discovery of oil or gas therein," provided "that such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry."

But, over and above what has been said, the records show that upon due application to the Land Office of the United States the appellant McLeod was permitted to enter the lands here in question, for which he paid to the government $1,600, receiving therefor its register's final certificate of entry, issued October 31, 1914, which certificate it appears remains uncanceled, and concerning which the bills in these suits, filed as above stated October 25, 1915, are entirely silent. In speaking of a similar receipt issued to the Brick Company in the case of El Paso Brick Co. v. McKnight, 233 U. S. 257, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113, the Supreme Court said:

"The entry by the local land officer issuing the final receipt was in the nature of a judgment in rem (Wight v. Dubois [C. C.] 21 Fed. 693), and determined that the Brick Company's original locations were valid and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claim existed and that the Brick Company was entitled to a patent. From that date, and until the entry was lawfully canceled, the Brick Company was in possession under an equitable title, and to be treated as 'though the patent had been delivered to' it. Dahl v. Raunheim, 132 U. S. 260, 262 [10 Sup. Ct. 74, 33 L. Ed. 324]. And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt as proof that it was entitled to a patent and to the corresponding right of an owner."

Not only has no attack, so far as appears, been made by the government on the register's final certificate of entry, but there is in these cases not the slightest showing of any fraud or lack of good faith at any time on the part of the appellants or of any of their predecessors in interest. True, the bills of the government, which were verified by an agent upon information and belief, alleged that the location notices under which the appellants claim were posted by "mere dummies" to enable "defendant McLeod or some one else" to obtain the land; but that allegation was put in issue by positive denial under oath and there was no undertaking whatever to sustain the charge. Among the affidavits filed in opposition to the appointment of receivers was one made by the president of the appellant company, stating as facts the following, which were uncontradicted:

"That the said Consolidated Mutual Oil Company acquired and entered into possession of said properties in the month of February, 1914, and from that time forward this deponent has been the president of said corporation, and has had the active management of its affairs; that at the time that the Consolidated Mutual Oil Company took possession of said section 28, as aforesaid, there were situate on the said section six completed wells in which oil had

been discovered in paying quantities, and there were two wells upon which drilling had been started, and which had been partially drilled; that since the said corporation acquired the said properties it has erected upon the said properties elaborate improvements and drilled three new wells, and has also proceeded with the drilling work that was in progress at the time that the said properties were acquired; that the said corporation has during the said period laid out and expended in improvements upon said property, and in drilling wells and in exploration and development work, a sum in excess of $150,000, and that the improvements now upon the said property are of a value in excess of $150,000; that the occupation of the said section 28 by the said corporation, and its predecessors in interest, were and have been at all times open, notorious, and were at all times actually known to the Land Department of the United States government, and that whatever activities in the way of development and improvement of the said property have taken place were with the full knowledge of the officers and agents of the Land Department of the United States; that during all of the said period of time the said corporation has given to the agents of the Land Department free access to its books and records of all kinds, and the said United States government has at all times during the said period had actual reports and knowledge of the improvements that the said corporation was making upon said property, and has had access to the books and papers of said corporation showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply; that during all of the said time the plaintiff, through its officers and agents of its Land Department, has had actual knowledge that the defendant Consolidated Mutual Oil Company was in possession of the said property under a claim of right, and it had during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money, and to extract oils from said properties, and to incur obligations in and about the development of said property, and to develop the said property to its present condition, and to extract therefrom the very oil the value of which it is here seeking to recover; that deponent is informed and believes, and on such information and belief avers, that similarly with full knowledge of the facts concerning the location and possession and the work that had been done upon the said section 28 on and prior to the 27th day of September, 1909, plaintiff stood by and knowingly permitted the predecessors in interest of the said Consolidated Mutual Oil Company to remain in undisputed possession of the said premises and to expend, in work and labor tending to the development of oil on said property, upwards of $200,000; that the money so expended had been expended in large part in developing the identical wells upon the said property which were producing oil at the time that the said Consolidated Mutual Oil Company purchased the said property, and that the purchase of the said property by the said corporation was largely induced by the said developments; that because of the said development the said corporation has paid to its predecessors in interest more than $500,000."

In each case the order appealed from is reversed.

GILBERT, Circuit Judge (dissenting). In the first place, I think it is error to hold that the land in question was occupied under a location or claim "existing and valid" within the language of the exception found in the withdrawal order of September 27, 1909. The reasoning in United States v. McCutchen (D. C.) 234 Fed. 709, and United States v. Midway Northern Oil Co. (D. C.) 232 Fed. 619, is, I think, convincing.

In the second place, I think it extremely doubtful whether an association claim, such as that which is involved in the present case, is

protected by the provisions of the Pickett Act of June 25, 1910, any further than that particular tract which may have been in the actual possession of a bona fide occupant or claimant, who, at the date of the withdrawal, was in the diligent prosecution of work leading to discovery of oil or gas. The notices of the location of the association claim involved in this case were filed in January, 1909. In June following the interests of all the persons who had filed the notices were transferred to McLeod. At that date no discovery had been made, and no work had been done. At the time of the withdrawal no work at all had been done on either of the quarter sections involved in these two suits, and no one was in diligent prosecution of work thereon leading to discovery of oil or gas. See United States v. Stockton Midway Oil Co. (D. C.) 240 Fed. 1010. An important distinction between these cases and the case of United States v. Grass Creek Oil & Gas Co., 236 Fed. 481, 149 C. C. A. 533, decided by the Circuit Court of Appeals for the Eighth Circuit, is that in the latter case, at the time of the withdrawal, all of the original locators of the association claim were in the actual possession by their lessee.

In the third place, the appeal presents the single question whether the court below, in appointing a receiver, abused the discretion which was vested in it. In Bosworth v. Terminal Rd. Ass'n, 174 U. S. 182, 186, 19 Sup. Ct. 625, 627 (43 L. Ed. 941), Judge Brewer said:

"But the appointment of a receiver is a matter resting largely in the discretion of the court—not, of course, an arbitrary, but a legal, discretion—and depending, not simply upon the breach of a condition in the mortgage, but also upon the question of relative injury and benefit to the parties and the public by the taking of the property out of the possession of the mortgagor, and placing it in the hands of a receiver."

In Hutchinson v. American Palace Car Co. (C. C.) 104 Fed. 182, 187, Judge Putnam said:

"The same principles apply with reference to the exercise of discretionary powers for the appointment of receivers as to the exercise of discretionary powers for preliminary injunctions."

In Briggs v. Neal, 120 Fed. 224, 56 C. C. A. 572, the Circuit Court of Appeals for the Fourth Circuit held that the appointment of a receiver is discretionary, and will not be reviewed, unless a gross abuse of discretion is shown. And all the authorities hold that the appointment of a receiver pendente lite, like the granting of an interlocutory injunction, is a matter resting, with certain limitations, within the discretion of the court to which the application is made, to be governed by a consideration of all the circumstances in the case. The courts have always recognized the propriety of appointing receivers in mining property, where the substance of the property in controversy may be wasted by the extraction of ores. In High on Receivers (3d Ed.) § 615, it is said:

"The aid of a receiver is sometimes granted in cases of mines or collieries pending a litigation which is to determine the title and rights of the parties, when, from the peculiar nature of the property, it is necessary that it should be kept in operation and preserved pendente lite."

In Elk Fork Oil & Gas Co. v. Foster, 99 Fed. 495, 39 C. C. A. 615, where the bill sought only an injunction, the Circuit Court of Appeals

held that the District Court had the discretion on its own motion to appoint a receiver. The court quoted with approval from 15 Am. & Eng. Enc. of Law, 605, the following:

"Working of mines is something more than the common and ordinary use of real estate, and required the use of more than ordinary remedies to protect the rights of a party entitled to the possession. The granting of an injunction, and, if necessary, the appointment of a receiver, are common remedies."

The complaint in each of these cases involves a quarter section of land on which, at the time of the withdrawal, no well had been commenced. The complaint distinctly charged that the location of the association claim, purporting to have been filed in the names of Taylor, Powell, Darling, Pentz, Freeman, Thorne, Harder, and Searles, was in fact posted by and for the sole benefit of McLeod, and that the names of the locators were used to enable McLeod, or some other person than the locators, to acquire more than 20 acres of mineral land, in violation of the laws of the United States; that the said persons whose names were so used in said location notice were not bona fide locators, and each of them was without an interest in said location notice so filed, and their names were not used to enable them to secure said land, but that each was a mere dummy, used for the purposes alleged. The answers denied these allegations. The judge of the court below in his opinion stated that in his judgment the present status of the property in the cases should be maintained, either by enjoining the withdrawal of oil or by the appointment of a receiver, "until the right of defendants to withdraw oil from the land is finally determined, either by the Land Department or by the court. It seems to me that the appointment of a receiver will work less hardship to defendants than the granting of an injunction."

The defendants in their answers pleaded the provisions of the Pickett Act, and alleged that they had acquired the association claim by complying therewith. The burden of proof was upon them to prove that this was true. On the hearing of the application for the receiver, they presented affidavits tending to show that it was true. Was the court below bound to accept those affidavits as final and conclusive, and therefore deny the application for a receiver? I think not. Perhaps the members of this court would not have appointed a receiver upon the showing made, but that is not the question here. The question is whether the court below manifestly abused the discretion which was lodged in it. That court may have entertained the opinion of the meaning of the Pickett Act which I have outlined above. If it did, a clear case was made for the appointment of a receiver to prevent waste. It may have been of the opinion that the showing made by the affidavits, made as they were by interested parties, was not sufficient to prove the diligence which the Pickett Act required. If so, the appointment of a receiver was not an abuse of discretion. Lands which have ceased to be public lands, by reason of the initiation of pre-emption and homestead and other claims, are still so far public lands that the United States may protect them from waste. Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231.

NORTH AMERICAN OIL CONSOLIDATED et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2789.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Maurice T. Dooling, Judge.

Suit in equity by the United States against the North American Oil Consolidated, Walter P. Frick, John F. Carlston, Clarence J. Berry, Dennis Searles, Walter H. Leimert, and Wickham Havens. Decree for complainant, and defendants appeal. Reversed.

See, also, Consolidated Mut. Oil Co. v. United States, 245 Fed. 521, —— C. C. A. ——.

U. T. Clotfelter, of Los Angeles, Cal., and A. L. Weil, Charles S. Wheeler, and John F. Bowie, all of San Francisco, Cal., for appellants.

E. J. Justice, F. P. Hobgood, Jr., Frank Hall, Jas. W. Witten, and A. E. Campbell, Sp. Asst. Attys. Gen., all of San Francisco, Cal., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

PER CURIAM. On the authority of Consolidated Mutual Oil Company, a Corporation, and J. M. McLeod, Appellants, v. United States of America, Appellee, No. 2787, and Consolidated Mutual Oil Company, a Corporation, and J. M. McLeod, Appellants, v. United States of America, Appellee, No. 2788, 245 Fed. 521, —— C. C. A. ——, just decided, the order appealed from is reversed.

GILBERT, Circuit Judge, dissenting.

UNITED STATES STEEL PRODUCTS CO. v. POOLE-DEAN CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2936.

1. CONTRACTS ⊜186(2)—SUBCONTRACTORS—RIGHTS OF.
   Defendant, the principal contractor, who subcontracted with plaintiff to do part of the work, cannot defeat plaintiff's action on the theory that plaintiff was doing the work for defendant's principal; plaintiff having no contractual relations with the principal.
2. CONTRACTS ⊜176(6, 7)—CONSTRUCTION—PROVINCE OF COURT AND JURY.
   Where the entire contract was found in correspondence between the parties, the trial judge should construe the same; but, if the contract was partly written and partly parol, the question of its terms is for the jury.
3. CONTRACTS ⊜176(7)—CONSTRUCTION—QUESTION FOR JURY.
   Where plaintiff entered into a subcontract with defendant, the principal contractor, to erect steel work for buildings and a dry dock composing a terminal of a railway company, and correspondence between the parties recited the price per ton to be paid for the erection, riveting, and painting of the steel work, but defendant's answer alleged that the contract was made on the express understanding that defendant should deliver the steel by water as completely fabricated as was its custom to ship by water transportation similar steel for similar work, and one of defendant's letters relating to the contract recited that a formal contract should be drawn up as soon as conditions would permit, the contract must be

treated as partly written and partly parol, and hence the question of its terms is for the jury.

4. APPEAL AND ERROR ⊂=1001(1)—REVIEW—VERDICT.

Where the evidence presented a question for the jury, and the instructions were correct, the verdict will not be disturbed on appeal.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by the Poole-Dean Company, a corporation, against the United States Steel Products Company, a corporation, to recover damages for breach of contract for the erecting and painting of the steel work for the buildings and dry dock composing the terminal of the Grand Trunk Pacific Railway at Prince Rupert, British Columbia. Judgment for plaintiff. Defendant brings the present writ of error. Affirmed.

In 1912, plaintiff in error, a New Jersey corporation, obtained from the Grand Trunk Pacific Railway Company a contract to furnish and erect steel to be used in the latter's terminal buildings and floating dry dock at Prince Rupert, British Columbia. Not being entitled to operate in Canada, plaintiff in error sublet the erecting of the steel to defendant in error, an Oregon corporation. The latter agreement was never incorporated in a formal contract, but is evidenced by the following letters:

"November 16, 1912.

"U. S. Steel Products Co., Selling Building, Portland, Or.—Gentlemen: We propose to furnish all necessary labor and equipment to erect, rivet, and paint the structural steel to be used in buildings and smokestack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of eighteen ($18.00) dollars per ton of 2,000 lbs. Material to be delivered on docks at building sites.

"Yours very truly, Poole-Dean Company,
"Per Otho Poole."

"United States Steel Products Company, Pacific Coast Department.

"Portland, Oregon, March 24, 1913.

"Messrs. Poole-Dean Co., Portland, Oregon—Gentlemen: Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific Buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection.

"As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert.

"Our formal contract with you for the erection will be drawn up as soon as conditions permit.

"Trusting this letter will give you the necessary authority for making your arrangements for your part of the work, we remain,

"Very truly yours, Bridge and Structural Department,
"C. C. Overmire, Contracting Manager.

"By Frank E. Fey, Contracting Agent."

"November 7, 1913.

"U. S. Steel Products Co., City—Gentlemen: In looking through our files we find that we have misplaced copies of our original proposals on the main buildings and wings of the dry dock at Prince Rupert.

"It is our understanding we are to erect, rivet, and paint two coats on main buildings for $18.00 per ton of 2,000 lbs.; on wings of dry dock we are to

erect, rivet, and caulk for $18.00 per ton of 2,000 lbs.; all material to be delivered to us on dock at building site.

"If the above is in accordance with your understanding, we will ask that you confirm same at your earliest convenience, in order that our records may be complete. Thanking you in advance, we are,

"Yours very truly, Poole-Dean Company,
"Per Otho Poole."

"United States Steel Products Company, Pacific Coast Department.

"Portland, Oregon, November 11, 1913.

"Subject: Prince Rupert Buildings.

"Messrs. Poole-Dean Co., Portland, Oregon—Gentlemen: We have your letter of the 7th instant, which states that you have misplaced copies of your original proposal on the buildings and wings of the dry dock on the above subject.

"Your understanding is, in accordance with ours, that you are to haul, erect, and rivet the steel for the buildings, for eighteen dollars ($18.00) per net ton of 2,000 lbs., which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet, and caulk the steel work for the wings of the dry dock, for eighteen dollars ($18.00) per net ton of 2,000 lbs. All steel work to be delivered to you on dock at Prince Rupert, B. C.

"Very truly yours, Bridge and Structural Department,
"C. C. Overmire, Contracting Manager.

"By Frank E. Fey, Contracting Agent."

There is no dispute as to the accuracy of the above letters, nor as to their contents. On September 19, 1916, defendant in error filed its amended complaint, in the United States District Court for the District of Oregon, against plaintiff in error, alleging substantially as follows: That plaintiff entered into a contract with defendant to furnish the labor and equipment to erect, rivet, and paint the structural steel to be used in the terminal buildings of the Grand Trunk Pacific Railway Company at Prince Rupert, B. C., at an agreed price of $18 per ton, which price was based upon the understanding that the steel would be delivered completely fabricated, and that if extra work was necessary, other than for the erection of said steel, plaintiff would be allowed a reasonable amount for such extra work; that thereafter, when the erecting plans were received, plaintiff discovered that the steel would not be received at Prince Rupert completely fabricated, and thereupon notified defendant that plaintiff would charge defendant for the extra work required in fabricating the steel, and defendant, through its agent, Overmire, promised and agreed that said matter would be satisfactorily adjusted and instructed plaintiff to proceed with the work; that plaintiff fabricated and assembled the steel for the various buildings at an actual and reasonable expense of $3,330.69.

For a second cause of action it is alleged in the complaint that it was understood that the erecting under the above contract should begin when three pontoons had been floated in the dry docks of said terminal, and that defendant would not order plaintiff to begin work until such time as plaintiff could continuously keep at work until the completion of the job, and that defendant would reimburse plaintiff for any delays in the work; that it was further understood and agreed that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Railway Company; that defendant thereafter instructed plaintiff to commence work, and plaintiff did commence work, upon the buildings, and completed the same before three pontoons of the dry docks had been floated; that because of the premature instructions, and the delays in the completing of said pontoons, plaintiff's equipment was compelled to lie idle and remain in disuse from September 1, 1914, to November 5, 1914; and that the reasonable rental of said equipment for said period of time was $2,123.64.

For a third cause of action it is alleged in the complaint that plaintiff was compelled to return the laborers who were employed upon the work at Prince

Rupert, B. C., to Vancouver, B. C., and pay the railroad expenses and wages of the men while in transit, at a cost of $918, on account of the breach of the contract by defendant as set forth in the preceding paragraph.

For a fourth cause of action it is alleged that, notwithstanding it was provided in the contract above mentioned that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Railway Company, defendant disregarded this understanding and agreement, in that it failed to provide adequate space for such purpose, necessitating plaintiff's using extra time and labor in assorting and handling the steel; the reasonable value of said extra time and labor being $2,459.

For a fifth cause of action it is alleged that plaintiff, at the special instance and request of the defendant, performed extra work during the months of April, May, June, and July, 1915, for which it was understood and agreed that defendant should pay, and which amounted in the aggregate to the sum of $400.70.

Wherefore plaintiff prayed judgment in the sum of $9,232.03.

Defendant answered, alleging that it was understood between plaintiff and defendant that the latter should deliver the steel to plaintiff by water transportation, and that said steel should be delivered as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work, and that defendant did in fact deliver the steel as completely fabricated as it was defendant's custom when shipping by water transportation; that plaintiff's construction operations were conducted under the orders and instructions of the Grand Trunk Pacific Railway, and not under the orders and instructions of defendant; that the pontoons and space for storing mentioned in the complaint were to be furnished and provided by the Grand Trunk Pacific Railway and not by defendant, and that plaintiff's loss or damage mentioned in the second, third, and fourth causes of action was not occasioned by defendant; and that plaintiff's claim of $400.70 for extra work was duly allowed by the Grand Trunk Pacific Railway, and the amount thereof deducted from certain indebtedness due from plaintiff to the railway.

The case came on for trial before a jury, who thereafter returned a verdict in favor of the plaintiff for $7,000. Defendant alleges error in the admission of certain testimony over defendant's objection, in the giving of certain instructions, and in the refusal by the court to give certain other instructions requested by defendant.

Teal, Minor & Winfree and Rogers MacVeagh, all of Portland, Or., for plaintiff in error.

McDougal & McDougal, of Portland, Or., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The defense that the work was done for the Grand Trunk Pacific Railway, and not for the defendant, cannot be sustained. The plaintiff had no contractual relations whatever with the Grand Trunk Pacific Railway. It is true the work was done under the terms of a subcontract provided for in an original contract between the defendant and the Grand Trunk Pacific Railway; but the contract in suit was between the plaintiff and defendant. This is expressly admitted in a number of paragraphs in defendant's answer, and particularly in paragraph 4, where it is alleged that:

"Plaintiff submitted to defendant written proposals for the performance of a part of said contract between defendant and Grand Trunk Pacific Railway, which proposals were accepted in writing by defendant, and said proposals and acceptance constituted and do now constitute the contract between plaintiff and defendant mentioned in plaintiff's said amended complaint."

[2] The main question for this court to determine is whether or not the contract between the parties, and under which the work in question was done, was entirely in writing; that is, whether the four letters introduced in evidence and relied upon by the defendant contained the completed contract. If that question can be answered in the affirmative as a matter of law, then it was the duty of the trial judge to construe such contract; but, if it must be answered in the negative, it was within the province of the jury, and its duty, under proper instructions from the court, to determine what the contract was, not only from the writings introduced as setting forth the alleged agreement, but from all the evidence produced in connection with such writings and the subject-matter thereof. Etting v. United States Bank, 11 Wheat. (24 U. S.) 57, 75, 6 L. Ed. 419; Rankin v. Fidelity Ins. Trust & Savings Deposit Co., 189 U. S. 242, 252, 23 Sup. Ct. 553, 47 L. Ed. 792; American Bridge & Contract Co. v. Bullen Bridge Co., 29 Or. 549, 46 Pac. 138.

[3] That the contract was not entirely in writing we think is admitted by the defendant in its answer, wherein it states, in paragraph VII, that:

"It was mutually understood and agreed by and between plaintiff and defendant, at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made upon the express understanding, that defendant should deliver said steel to plaintiff by water transportation, and that said steel should be delivered as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work."

Again, in paragraph IX, allusion is made to the fact that "said contract between plaintiff and defendant was made with the express understanding" that certain conditions existed, while in paragraph X it is positively set forth as a defense that:

"It was mutually understood and agreed by and between plaintiff and defendant, at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant, and said pontoons are the pontoons mentioned in plaintiff's said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant, at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant."

These allegations in themselves disclose the fact that the contract under which the work in question was done was not fully expressed by the writings, and that the court could not as matter of law exclude evidence of the oral agreements and mutual understanding of the parties upon which such writings were based, and in accordance with which said work was done; nor could the court decline to submit to the jury the question of what the real contract was between the parties, and whether the terms of that contract had been properly carried out. That the execution of a more formal instrument by the parties was contemplated is shown in a paragraph of one of the letters of the de-

fendant set forth in the pleadings, where it is said that "our formal contract with you for the erection will be drawn up as soon as conditions permit." The testimony shows that the plaintiff tried repeatedly to have such an instrument prepared and executed, but defendant failed, for some reason not disclosed, to comply. Having had ample opportunity to reduce to writing the full details of their agreement, and failed to do so, the defendant is not now in a position to invoke the rule of law which prohibits the introduction of oral evidence to explain the meaning of a written instrument. That rule does not apply to the facts of this case, from any standpoint.

[4] The first, second, third, and fourth causes of action are based upon the agreement alleged by plaintiff to have been made, and the court having properly instructed the jury in regard thereto, the findings of the jury as to the facts will not be disturbed.

The fifth cause of action relates to the performance of extra work by the plaintiff at the alleged instance and request of the defendant, outside of the alleged contract, for which a charge is made of $400.70. The defendant admits that this work was done at its request, but alleges that the work was ordered at various times by the Grand Trunk Pacific Railway, and such orders merely transmitted by defendant to plaintiff; that after said work was completed plaintiff's claim of $400.70 therefor was presented by plaintiff to the said Grand Trunk Pacific Railway and duly allowed, and the amount thereof deducted from certain indebtedness due from plaintiff to said railway. Evidence was introduced upon this matter, and the question submitted to the jury under proper instructions from the court.

Finding no error in the instructions of the court below, the judgment is affirmed.

JACOBSOHN v. LARKEY. GOLD v. SAME. In re AMERICAN BEAVER CO.

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

Nos. 2271, 2313.

1. BANKRUPTCY ⊂=264—SALE OF PROPERTY—RIGHT TO OPPOSE CONFIRMATION.
The unsuccessful bidder at a sale of a bankrupt's real and personal property had no standing to oppose confirmation of the sale on the ground that he would have bid more than the highest bidders if the property had been sold as a whole, instead of separately, where the sale was made in conformity with the order therefor.

2. BANKRUPTCY ⊂=264—SALE OF PROPERTY—RIGHT TO URGE CONFIRMATION.
The high bidders on a public sale of a bankrupt's property have a standing to appear and urge the acceptance of their bids and the confirmation of the sale, especially as public policy requires stability in judicial sales in order to induce bidding at such sales.

3. BANKRUPTCY ⊂=269—SALE OF PROPERTY—GROUNDS FOR SETTING ASIDE.
A mere offer to pay more than the price bid is not a sufficient ground for setting aside a public sale of a bankrupt's property, especially as it would tend to discourage and prevent bidding to deprive the highest bidder of the advantage of his accepted bid because of a subsequent offer of another person to bid higher on a resale.

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

4. BANKRUPTCY ⊜269—SALE OF PROPERTY—GROUNDS FOR SETTING ASIDE.
Mere inadequacy of price is not a sufficient ground for setting aside a public sale of a bankrupt's property; but when the inadequacy is so great as in itself to raise a presumption of fraud, or to shock the conscience of the court, it becomes gross inadequacy and is a sufficient ground.

5. BANKRUPTCY ⊜264—SALE OF PROPERTY—CONFIRMATION—DISCRETION.
Under Bankruptcy Act July 1, 1898, c. 541, § 70b, 30 Stat. 565 (Comp. St. 1916, § 9654), requiring the real and personal property of bankrupt estates to be appraised, and providing that property shall not be sold, otherwise than subject to the approval of the court, for less than 75 per cent. of its appraised value, whether the price bid on a public sale is grossly inadequate, and whether confirmation should be refused on that ground, are matters within the judgment and discretion of the tribunal ordering the sale.

6. BANKRUPTCY ⊜446—REVIEW OF PROCEEDINGS—DISCRETION OF COURT.
An appellate tribunal will not reverse the discretion of the bankruptcy court in approving or setting aside a public sale of a bankrupt's property, under Bankruptcy Act, § 70b, by substituting its own discretion; nor will it disturb or interfere with the exercise of such discretion, so long as it does not amount to an abuse of discretion.

7. BANKRUPTCY ⊜269—SALE OF PROPERTY—SETTING ASIDE—DISCRETION.
While the bankruptcy court would have exercised a discretion of doubtful validity in setting aside a sale of a bankrupt's real and personal property for $19,900 and $7,600, respectively, because an unsuccessful bidder offered to bid $1,500 more on a resale of the property as a whole, there was no improvident exercise of its discretion in setting aside the sale for gross inadequacy of price, where the personal property was appraised at $31,212.20 and the real property at $34,350, providing the appraisement was evidence upon which the court might properly base its discretion.

8. BANKRUPTCY ⊜269—SALE OF PROPERTY—SETTING ASIDE—DISCRETION.
Under Bankruptcy Act, § 70b, requiring the real and personal property of bankrupt estates to be appraised, and providing that it shall not be sold otherwise than subject to approval of the court for less than 75 per cent. of the appraised value, the appraisement was evidence upon which the court might act in setting aside a sale for gross inadequacy of price.

9. BANKRUPTCY ⊜269—SALE OF PROPERTY—SETTING ASIDE—CONDITIONS ON RESALE.
Where the bankruptcy court set aside a public sale of a bankrupt's property for gross inadequacy of price, and not because an unsuccessful bidder offered to bid more on a resale, there was nothing improper in conditioning its order for a resale on the giving of bonds by the objectors to insure a better bid on the resale.

Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

In the matter of the American Beaver Company, bankrupt; Barney Larkey, trustee. An order of the referee, refusing confirmation of sales of the real and personal property of the bankrupt, was affirmed by the District Court (242 Fed. 599), and Lazar Jacobsohn and Herman Gold separately petition for review of the order so far as it affects the real and personal property, respectively. Affirmed.

Cecil H. MacMahon, of Newark, N. J., for petitioners.
Nathan Bilder, of Newark, N. J., for defendant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The matter here involved was brought before the District Court on petition to review an order of a referee refusing confirmation of a sale in bankruptcy on the ground of gross inadequacy of price. The court affirmed the order. Its decision is now before us for review and revision. Bankruptcy Act, § 24b (Comp. St. 1916, § 9608).

Pursuant to an order of the referee, the trustee offered at public sale, subject to confirmation, the property of the bankrupt, consisting of real estate, machinery, equipment and merchandise theretofore used in the bankrupt's business of hat manufacturer. The real estate was encumbered by a first mortgage for $9,000 and by a second mortgage for $58,000 given to secure an issue of bonds. The latter mortgage purported to be a lien also upon the personal estate. Conceiving that the liens upon the two classes of property required that the property be sold separately in order to avoid confusion in the application of proceeds (the property being offered free of liens) the trustee declined to sell the property in bulk as a going concern, but sold it in separate parcels on different days.

The trustee reported that Lazar Jacobsohn had bid $19,900 for the realty and Herman Gold $7,600 for the personalty; that these were the highest bids; and recommended the confirmation of the sale.

Confirmation was opposed by Louis Kamm, an unsuccessful bidder, and by sundry unsecured creditors. Kamm's complaint was that he was forced to bid low because the property was offered in two parcels, realty and personalty; that he had no use for one without the other; that had the property been offered in bulk as a going concern he would have bid and was still ready to bid a sum larger than the aggregate of the highest bids received. The creditors' objection to confirmation was that the property was sold for a grossly inadequate price.

Upon the question of inadequacy of price no evidence was produced. The creditors cited the appraisement, and the referee, relying upon it as evidence of value, was manifestly influenced in his conclusion by the great disparity between the valuations there made and the prices bid. The personal property was appraised at $31,212.20 and was sold for $7,600; the real property was appraised at $34,350 and was sold for $19,900.

Notwithstanding this disparity, the referee was not inclined to let go the bids at the first sale without first making sure of equally good bids at a second. To meet this situation the objecting bidder proposed giving a bond to insure that at a second sale the property would bring $2,500 more than the amount brought at the first, and the objecting creditors similarly offered a bond that the amount obtained at the second sale would be at least $1,500 more than that obtained at the first, provided that the property, after being offered in parcels, be offered as a whole. These tenders were accepted by the referee, the sale set aside (conditioned upon filing the bonds) and another sale ordered. On review the District Court affirmed the order of the referee. This action of the court is the matter before us for revision.

The principal question, of course, is whether the trial court exer-

cised a proper discretion in affirming the order setting aside the sale. But in this question are involved separate and conflicting rights of perhaps three classes of persons, (1) the low bidder, (2) the high bidders, and (3) creditors.

[1] We may lay aside any claim of right made by the low bidder to have the sale set aside in order to give him another chance to bid. There was no irregularity in the sale. He simply complains that he would have bid higher if the property had been offered in a different way. The trustee offered the property in conformity with the order of sale, and as there is nothing to show either in the order of sale or in the manner in which the trustee executed it that the low bidder was injuriously affected, he is without right to oppose confirmation. In re Burr, 217 Fed. 16, 19, 133 C. C. A. 126.

[2] The high bidders, however, have a standing which permits them to appear and urge the acceptance of their bids and the confirmation of the sale. They were brought to the sale by invitation of the court, and having done what the court asked them to do, they now have a right to ask the court to approve their acts.

Their right to be heard is based upon still another consideration. Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. Public policy requires stability in such sales. The Ruby (D. C.) 38 Fed. 622; In re Burr, 217 Fed. 16, 19, 133 C. C. A. 126. To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final, Tewabic Mining Co. v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. 887, 36 L. Ed. 732; they are not to be disturbed except for substantial reasons.

[3] After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing that nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid higher on resale. Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; In re Metallic Specialty Mfg. Co. (D. C.) 193 Fed. 300; In re Shapiro (D. C.) 154 Fed. 673.

While such are the rights of successful bidders and while the policy of the law favors them as against lower bidders who attempt to overthrow them, their rights, however, are not superior to the right of creditors not to be deprived of their security at prices which are grossly inadequate. Therefore the issue in this case is not between the low and the high bidders but is between the high bidders and creditors—parties with equal standing—and the issue is not whether the court exercised a valid discretion in ordering a second sale on a tender of a higher bid, but is whether it abused its discretion in setting aside the first sale on the ground that the bids were grossly inadequate.

[4] The rule is that mere inadequacy of price is not a sufficient ground for setting aside a judicial sale; but when the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court, it becomes gross inadequacy, and is a sufficient

ground. In re Burr, 217 Fed. 16, 21, 133 C. C. A. 126; Cowen v. Stevens, 3 Har. (Del.) 494; Oldham v. Hossenger, 5 Houst. (Del.) 34; Broomall v. Reybold, 5 Houst. (Del.) 435; Roger v. Ocheltree, 4 Houst. (Del.) 452.

[5-7] When in a given case a price is grossly inadequate and when upon that ground confirmation should be refused, are matters within the judgment and discretion of the tribunal ordering the sale. When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting aside the sale (Bankruptcy Act, § 70b), an appellate tribunal will not reverse its discretion by substituting its own nor will it otherwise disturb or interfere with its exercise so long as it does not amount to an abuse of discretion. In re Shea, 126 Fed. 153, 61 C. C. A. 219. In the exercise of this discretion the trial court in this case found that the prices bid were grossly inadequate. It based its judgment, as we read the record, not on the difference between the bids made at the first sale and the bid offered to be made at a second, but upon the disparity between the prices bid and the property valuations made by the appraisement. Had the court refused confirmation of the sale upon a finding of an inadequate price, based upon the difference between the bids made and the bid proposed, it would have exercised a discretion of doubtful validity. Morrisse v. Inglis, supra; In re Metallic Specialty Mfg. Co., supra; In re Shapiro, supra. But having found gross inadequacy of price in the disparity between the bid and the appraisement, we cannot say that the discretion of the court was improvidently exercised—if based upon evidence. As nothing was before the court showing the value of the property except the appraisement, the remaining question is, whether the appraisement is evidence upon which the court may base a valid discretion.

[8] An appraisal in bankruptcy is an estimate of the value of the bankrupt estate made by three disinterested persons. The appraisers are officers of the court and are selected with an especial regard to their fitness to give an opinion upon the value of the particular property comprising the estate. In the case under consideration the kind of property appraised was a hat manufactory and merchandise. Two of the appraisers were men of long experience and high standing in that business. The appraisal, therefore, is the value data upon which the court subsequently acts in disposing of the bankrupt's property. To obtain such data the statute provides (section 70b) that "all real and personal property belonging to bankrupt estates shall be appraised." Certainly this means that the property shall be appraised before it is sold, and as it is provided in the same section that property "shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value," the statute connects the appraisal with the sale and plainly intends that the value of the property as appraised shall have a bearing upon and a relation to the price at which the court, in the exercise of its discretion, shall confirm or set aside the sale.

The sale in this case was made subject to confirmation, as shown by the terms of the order, and was conducted under authority of the

provision which requires confirmation by the court when the property is sold for less than seventy-five per centum of its appraised value. As the provision conferring upon the court authority to confirm the sale declares that that authority shall be exercised when the price bid has a given relation to the value appraised, it is clear to us that the statute intends that the appraisement shall be employed by the court as a guide in the exercise of its discretion. When the purchase price approaches the appraised value it leads the judgment of the court in one direction; when the disparity between the purchase price and the appraised value is so great as to suggest fraud or to shock the conscience of the court, then it directs the court's judgment in another direction. The appraisal thus becomes evidence of value. It is not conclusive evidence, to be sure, nor does it speak absolute verity, but it is provided for the court's use and the court may rely upon it alone or may rely upon it partially, or may look beyond it to other evidence in ascertaining the real value, as in an exceptional instance where a sale was set aside on a bid equal to the appraisal and a second sale ordered on proof that the property was worth and would bring three times the appraised value. In re Shea, 126 Fed. 153, 61 C. C. A. 219.

We are of opinion that the appraisement is evidence upon which the court may base a valid discretion when called upon to confirm or set aside a trustee's sale.

[9] It is further contended in this case that the care exercised by the court to secure as good a bid at the second sale as was obtained at the first shows that the court's discretion was swayed, if not determined, not by the disparity between the bid obtained and the appraised value, but by the small difference between the bids made at the first sale and the bid offered to be made at a second. We are not of this view. Inadequacy of the price bid at the first sale, and the terms under which the first sale was set aside and a second sale ordered are matters separate and distinct. Having found gross inadequacy of the price bid at the first sale, the court might validly set aside that sale on that ground and at the same time make an order for a second sale conditioned upon terms that would secure to the estate whatever advantage it derived from the bids at the first sale. These terms are considerations which have to do with a new sale ordered and have no relation to the discretion exercised in setting aside the first sale.

The decree below is affirmed.

UNION PAC. R. CO. v. LAUGHLIN (two cases).

(Circuit Court of Appeals, Eighth Circuit. August 20, 1917.)

Nos. 4730, 4731.

APPEAL AND ERROR ⊜1008(2)—REVIEW—ACTION TRIED TO COURT.

A general finding by the court in an action at law, in which a jury was waived by stipulation pursuant to Rev. St. § 649 (Comp. St. 1916, § 1587), is conclusive upon all questions of fact, and the judgment thereon is reviewable only for errors of law committed during the trial and to which exception was duly reserved.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

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

Action at law by one Bisbiroulis against the Union Pacific Railroad Company. From a judgment in favor of L. A. Laughlin, petitioner, defendant brings error. Appeal dismissed.

R. E. Watson, of Kansas City, Mo. (R. W. Blair, of Topeka, Kan., and Watson, Gage & Watson, of Kansas City, Mo., on the brief), for appellant and plaintiff in error.

C. R. Pence, of Kansas City, Mo., for appellee and defendant in error.

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

AMIDON, District Judge. A Greek by the name of Bisbiroulis was employed by an employment agency at Kansas City as one of a gang of laborers to work for the defendant, the Union Pacific Railroad Company. After some months of employment he was set to work upon a new cut-off line from Hastings to Gibbon, Neb. This line was being built by a subordinate company, known as the Hastings & Northwestern Railroad Company. That corporation, however, was simply an agency of the Union Pacific for building the line. Its officers were all officers of the Union Pacific, with the exception of the treasurer. While thus employed, Bisbiroulis met with an accident by a rail falling upon his leg, crushing it so as to require amputation. By a written power of attorney he employed L. A. Laughlin, the defendant in error (petitioner below), to prosecute his claim for damages against the Union Pacific Railroad Company. The present action was brought for that purpose in the state court at Kansas City, Mo., and removed by the defendant into the federal court. Thereafter a settlement was effected with the plaintiff, without the knowledge of his attorney, by claim agents in the employ of the Union Pacific, for the sum of $1,700. This settlement was made in the name of the Hastings & Northwestern Railroad Company, and the draft for $1,700 was on the treasurer of that company, but the voucher accompanying it is approved by the auditor of the Union Pacific Company. The release signed by Bisbiroulis in person contains this language:

"Received of Hastings & Northwestern Railroad Company $1,700 in full settlement and complete satisfaction of all claims and causes of action against it growing out of any matter whatsoever, and particularly in full settlement and complete satisfaction of all claims or causes of action, that exist or may hereafter accrue, against it *or any other company,* * * * for damages for any and all personal injuries, or loss or damage to property sustained in or growing out of a certain accident. * * * Said accident occurred on the 7th day of March, 1913, at or near Gibbon, Nebraska, and consisted in being injured while employed as a laborer in extra gang No. 4."

This release clearly identified the cause of action upon which the suit against the Union Pacific was based. The attorneys for that company presented the release in court and asked for a dismissal of the action.

Going back now for a moment to the power of attorney signed by Bisbiroulis employing Laughlin, it contains the following language:

"As compensation for his services I agree to give said attorney 50 per cent. of whatever he obtained in settlement of my said claim either by suit or compromise. And in case I shall settle or compromise otherwise than through said attorney, he shall be entitled to a fee equal in amount to that received by me."

In response to the motion to dismiss, Laughlin filed a petition in court alleging that the settlement had been made fraudulently in the name of the Hastings & Northwestern Railroad Company for the purpose of defrauding him out of his fees as attorney, and that the Hastings & Northwestern Railroad Company was a subsidiary corporation of the defendant having the same officers, and that that company acted in collusion with the defendant in effecting the settlement on its behalf for the above-mentioned fraudulent purpose. He prayed a judgment against the Union Pacific Railroad Company for $1,700. The defendant filed an answer containing a general denial, and further alleging that Bisbiroulis was at the time of his injuries working for the Hastings & Northwestern Railroad Company, and that that company compromised and settled the claim for $1,700, and alleging that Bisbiroulis' injuries occurred in Nebraska, and that the settlement was made there, and that the law of that state as to the settlement and attorney's fees ought to control, and prayed that Laughlin's complaint be dismissed. The issue thus formed presents the only controversy that was before the trial court.

A stipulation in writing was filed waiving a jury. Evidence was introduced by Laughlin in support of his petition. At its conclusion defendant demurred to the evidence and excepted to the order of the court overruling the demurrer. The defendant then offered evidence on its own behalf, which upon elementary principles amounted to a waiver of the exception just taken. At the conclusion of the entire evidence the demurrer was not renewed, nor was any motion or request for findings of fact or declarations of law made, which would afford a basis for the errors that have been assigned in this court. The cause was submitted. The court made a general finding of the issues in favor of Laughlin, and entered a judgment at law in his behalf for $850. The railroad company has not only sued out a writ of error to review that judgment, but has also taken an appeal for the same purpose. Clearly the appeal should be dismissed. The proceeding was

purely legal, and the judgment was also of that character. Under some circumstances the right and suit would be equitable; but upon the pleadings and evidence shown by this record it was legal, for the enforcement of a purely pecuniary liability.

The general finding by the court is conclusive upon all questions of fact. The bill of exceptions contains no errors of law in the course of the trial to support the errors that have been assigned here. Upon principles that have been asserted so frequently by this court as not to require discussion, the judgment must therefore be affirmed. Mason v. United States, 219 Fed. 547, 135 C. C. A. 315; Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622.

The appeal is dismissed.

MOISE v. SCHEIBEL et al.

In re OMAHA MOTOR CAR CO.

(Circuit Court of Appeals, Eighth Circuit. July 11, 1917.)

No. 4666.

1. BANKRUPTCY ⊜359—PROVABLE CLAIMS—CONDITIONAL ALLOWANCE.
That a stockholder and creditor of a bankrupt had orally promised another creditor of the same class that its claim should be paid does not estop the former from receiving dividends equally with the latter.

2. BANKRUPTCY ⊜341—PROVABLE CLAIMS—CONDITIONAL ALLOWANCE.
A creditor of a bankrupt corporation, who is also the holder of unpaid stock, cannot properly be required, as a condition to the allowance of his claim, to pay the amount due on his stock subscription, where the assessment against unpaid stock necessary to pay the claims of creditors has not been judicially ascertained.

Appeal from the District Court of the United States for the District of Nebraska; Thos. C. Munger, Judge.

In the matter of the Omaha Motor Car Company, bankrupt. From an order allowing the claim of Minnie Moise, as administratrix of Walter Moise, deceased, conditionally, on objection of L. W. Scheibel, trustee, and the Omaha Auto Top Company, another creditor, claimant appeals. Modified and affirmed.

F. S. Howell and J. E. Von Dorn, both of Omaha, Neb. (Isidor Ziegler, of Omaha, Neb., on the brief), for appellant.

Sidney W. Smith, of Omaha, Neb. (McGilton, Gaines & Smith, of Omaha, Neb., on the brief), for appellee.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Walter Moise filed claims aggregating $31,635.76 against the estate of the Omaha Motor Car Company, a bankrupt. Objections were filed to the allowance of the claims by the trustee in bankruptcy, and also by the Omaha Auto Top Company, a creditor of the bankrupt. After a hearing, the referee found a balance due to Moise of $1,615.05, but disallowed the same, for the reason, among others, that Moise was the subscriber and owner of 25

shares of the common and 50 shares of the preferred stock of the bankrupt, of the par value of $7,500, for which he had paid nothing. On petition for review the matter was certified to the District Court. That tribunal restated the account between Moise and the bankrupt, and found a balance due the former of $13,728.58, but disallowed this amount unless Moise should first pay to the estate of the bankrupt $7,500, with interest at 7 per cent. from April 12, 1912, as payment for the stock above mentioned. It was further ordered that, if such payment should be made, then the claim of Moise as found by the court should stand allowed, and that Moise should receive dividends upon his claim equally with all other creditors of the same class, except that the claim of the Omaha Auto Top Company should be preferred to that of Moise, and that any dividends that Moise should be entitled to should be paid to the Auto Top Company until its claim should be paid in full; otherwise, the findings of the referee were affirmed. From this order Moise appealed to this court.

The assignment of errors as printed in the record contains the following:

"9. That the court erred in finding and adjudging that the total net claim that should be allowed this creditor is only $13,728.58 (No. 9 hereof withdrawn from further consideration—See Præcipe filed Jan. 11, 1916.)"

Turning to page 41 of the record, we find that the præcipe for transcript filed by appellant directs assignment of error No. 9 to be omitted. We therefore have no occasion to review the correctness of the balance found due to Moise by the court, except as to the items known as the Colby note, the Burmeister note, the Stangl note, and the automobile item, as the charging of these items to Moise are separately assigned as error.

It is further assigned as error that the court erred in finding that Moise was a subscriber to the stock of the bankrupt in the sum of $7,500, par value. The referee and the District Court both found that Moise was a subscriber to the stock of the bankrupt in the above amount, and that he had not paid for the same. A careful review of the evidence has satisfied us that this finding is correct. We are also satisfied that the court did not err in charging the amount of the notes above mentioned to Moise, or the price of the automobile.

[1] We, however, think the court erred in granting a preference to the claim of the Auto Top Company over that of Moise. They were creditors of the same class, and the evidence does not warrant the establishment of what practically amounts to a lien on the dividends payable to Moise, in favor of the Auto Top Company. The evidence tends to show that Moise promised orally that the indebtedness of the Auto Top Company should be paid; but there is no evidence of facts which would create an estoppel on the part of Moise from receiving his dividends on an equality with the Auto Top Company.

[2] We are also of the opinion that the court erred in deciding that Moise was not entitled to dividends until he had paid the full par value of his stock. It is true that unpaid stock subscriptions pass to the trustee (Loveland, p. 809, § 309), and that the corporate stock of

an insolvent corporation is a trust fund for the benefit of creditors (Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227); but Moise was not obliged to pay to the creditors of the bankrupt the full amount unpaid on his stock unless the full amount was necessary to pay the creditors of the bankrupt in full (Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968). There is no way of determining in this proceeding what assessment shall be levied upon the stock of Moise. The amount of the assessment can only be determined in a proceeding brought by the trustee in bankruptcy against the estate of Moise, in which all the debts and expenses chargeable against the bankrupt estate and all available assets belonging thereto shall be ascertained, and the conclusion reached as to the amount of assessment necessary against the stock of Moise which, together with all available assets, will pay the creditors of the bankrupt estate in full.

It is possible that the assessment may equal the par value of the stock, or it may be much less; but whatever it shall be cannot be determined until some such proceeding as has been suggested is had. Scovill v. Thayer, supra; Rem. Auto & Motor Car Company, 153 Fed. 345, 82 C. C. A. 421. We are also of the opinion that, when the assessment to be paid upon the stock is ascertained, then no dividends should be paid on the claim of Moise until the stock assessment is fully paid, but that, in case the assessment is duly paid, then the claim of Moise shall stand allowed and share equally in the payment of dividends with claims of the same class.

The order appealed from, except as modified by this opinion, is affirmed, and the case remanded to the District Court for further proceedings not inconsistent with the views herein expressed.

DELAWARE, L. & W. R. CO. v. LANTERMAN et ux.

(Circuit Court of Appeals, Third Circuit. October 20, 1917.)

No. 2242.

1. APPEAL AND ERROR ⊜1053(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE.

On the trial of an action by a husband and wife against a railroad company for an assault, the statement of the husband, in answer to a question as to how soon the wife began to vomit after the affray, that she got very much worse "right after they put us in jail," did not require a reversal, where the trial judge immediately told the jury to disregard the remark, and repeated such caution in the charge; it appearing that no other allusion was made to the fact that plaintiffs had been in jail, and there being nothing to show that they were put in jail at the railroad's instance, and the remark apparently not having been made with any malicious intent.

2. APPEAL AND ERROR ⊜1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On the trial of an action for assault, the exclusion of a question asked a witness as to whether she formed any opinion as to whether plaintiff's

shaking spells were real or simulated was harmless, where the witness testified at length concerning what she observed, and her testimony was full of her opinion, expressed or necessarily implied, that plaintiff's sickness was a sham.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, District Judge.

Action by U. S. Grant Lanterman and wife against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Frederic B. Scott, of New York City, for plaintiff in error.

William H. Morrow, of Belvidere, N. J., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The plaintiffs, who are husband and wife, recovered verdicts in the District Court for bodily injuries received at the hands of the railroad's servants about 10 o'clock in the evening of June 19, 1913. The details of the assault need not be given. It is enough to say that from the conflicting testimony the jury must have found that the railroad was on the point of trespassing deliberately on the plaintiffs' land, and that the injuries were inflicted during a physical encounter that was brought about by the railroad's wrongful act; the amount of the verdicts indicating that in the jury's opinion Mrs. Lanterman suffered severely and permanently. The questions before us relate to four rulings made during the trial.

[1] 1. The railroad objects to the court's refusal to declare a mistrial under the following circumstances: During the husband's examination by his counsel concerning the extent of his wife's injuries, the following questions and answers were exchanged:

"Q. How soon after this affray was it that she first began to vomit?
"A. I want to add to that, this shoulder keeps twitching. How soon after?
"Q. Yes.
"A. It was not any more than a week. *She got very much worse right after they put us in jail.*"

Thereupon the defendant's counsel moved for a mistrial because of the words in italics, but the trial judge denied the motion, instructing the jury at the same time to pay no attention to the remark, and afterwards at the beginning of the charge instructing them again that the statement had no relevancy whatever to the issue, and should be wholly disregarded. Nothing else on this subject appears in the record; no other allusion was made to the fact that the plaintiffs had been in jail, and no information was offered about the charge on which they had been confined. It may be that they were put in jail at the railroad's instance; but no such testimony was given, and the whole matter was left in obscurity. Assuming the statement to be incompetent, the general rule is thus stated in Turner v. American Trust Co., 213 U. S. 267, 29 Sup. Ct. 424, 53 L. Ed. 788:

"The general rule is that the admission of incompetent evidence is not reversible error if it subsequently is distinctly withdrawn from the consideration of the jury."

If the rule is to govern, it is clear that the answer—which was not in response to the question of counsel, but was a not unnatural addition made by the witness, and does not seem to have been made with any malicious intent—is not cause for reversal. The court dealt with it immediately by telling the jury to disregard it, and repeated the caution in the first sentences of the charge. The railroad insists, however, that the situation falls within the exception to the rule stated in Waldron v. Waldron, 156 U. S. 383, 15 Sup. Ct. 389, 39 L. Ed. 453:

"The curative effect of the correction, in any particular instance, depends on whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court."

Both the rule and the exception are well established, and need no discussion; but of course a trial judge must be allowed some discretion in such a matter, and we shall only add our approval of the ruling now complained of. We do not think it likely that so brief and so vague a statement, taken with the immediate correction applied by the court, could have persisted in the minds of the jury during a trial that lasted more than four days longer.

[2] 2. The other matter, which can be disposed of in a few words, is the court's refusal to allow the following question to be answered: The witness was a woman detective, who had been sent by the railroad to obtain information concerning Mrs. Lanterman's real condition, and had stayed in the house on numerous occasions for a day or two at a time. She testified at length concerning what she observed, and in the course of her examination she was asked, but was not permitted to answer:

"From your observation of the shaking spells she had while in the vestibule of the church, and while at the railroad station when there were people around, and when there was company in the house, did you form any opinion as to whether they were real or simulated?"

It is not necessary to decide whether the refusal was erroneous, for we are satisfied that no harm could have been done. We have read carefully the testimony of the witness, and find it to be full of her opinion, either expressed or necessarily implied, that the sickness of Mrs. Lanterman was a sham, and the fact that she was not allowed to say so once more seems to us to be of no importance.

We do not think the other two objections call for comment.

Finding no reversible error, the judgments are affirmed.

JACKSON v. PENNSYLVANIA R. CO.

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

No. 2289.

CARRIERS ⊂=286(4)—INJURIES TO PASSENGERS—ENTRANCE TO AND EXIT FROM STATION.

A railroad company, which maintained a ferry house, the entrance to which was through several broad arches abutting the street, with no pathway or flagging leading to any particular entrance, was not liable for an injury to a prospective passenger, caused by a defect in the paving of the street 10 or 12 feet distant from its property line, as it was under no obligation to repair the street, and had no right to do so.

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Action by Fannie M. Jackson against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. C. Gilson, of Jersey City, N. J., for plaintiff in error.

Vredenburgh, Wall & Carey and John A. Hartpence, all of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This action was brought by Fannie M. Jackson against the Pennsylvania Railroad Company in a state court, and thereafter removed to the court below on the ground of diversity of citizenship. On trial in that court, a judgment of nonsuit was entered in favor of the defendant; whereupon the plaintiff sued out this writ of error.

The proofs in the cause tended to show that the railroad operated, as part of its railroad system, a ferry from the foot of Cortlandt street, New York, to Jersey City. The approach to such ferry was across West street, which was paved with Belgian block, and the entrance to the ferry house was through several broad arches abutting the street. As the plaintiff approached one of these openings and was still on the West street pavement, and while still 10 or 12 feet distant from the railroad's property line, she stumbled over some Belgian blocks which protruded above the general level of the pavement, fell, and was injured. These blocks had so protruded for several weeks. The action was to recover for such injuries, and the negligence charged therein was that the railroad, "with full knowledge and notice thereof, negligently permitted the said path or roadway to be and remain in a dangerous condition, and negligently suffered the same to be without proper repair."

It will thus be seen that the question here involved is, not the railroad's duty to provide a safe egress for a departing passenger or a safe ingress on its own property for an incoming one, but whether the railroad was liable to an arriving passenger for an injury happening on an abutting public street, caused by the alleged unsafe condition of

such street. It will also be noted that the railroad provided several other entrances to the ferry from the street, any one of which could have been used; that there was no pathway or flagging on West street leading to any particular entrance; and that the place where the plaintiff stumbled was a course she was not constrained to take. It will also be noted that the alleged negligence of the railroad was not in allowing the entrance opposite these protruding Belgian blocks to remain in use, nor in failing to give warning of the protruding blocks, but was solely, as we have quoted, for permitting the roadway to be out of repair.

Under the circumstances, we fail to see how the faulty condition of the street can be charged to the railroad. It was neither under obligation to repair it, nor, indeed, had it a right to do so. To have done so would have been a wrong on its part. If it was bound to repair the highway 10 feet back, why was it not bound to repair 100 feet further back? The incoming passenger had to pass over the whole width of the street to reach the ferry, and the same principle and reason that would constrain the railroad to compel repairs of a defective place 10 feet out on the street would extend that duty to the whole area of the street. Moreover, to hold the railroad in effect responsible for the condition of the abutting street is to breed confusion and invite carelessness. On the other hand, if the railroad is held rigidly to its duty in regard to territory it controls, and the city likewise to its duty in the territory it controls, the public will be better protected than where we have divided, dual duty. In the present case it would seem the plaintiff could have sued the city for its alleged neglect, and to subject the railroad to an alternative and original liability for such alleged negligence is to encourage carelessness on the part of the municipality.

We have examined the many cases cited, and, while stray phrases may here and there be found countenancing such an extension of responsibility on the part of the carrier as is here suggested, we have found none which either in facts or principles would warrant our holding the plaintiff entitled to recover. And it may be said that through all the cases bearing on this general subject it will be found the decisive factor is whether the defective locus in quo was on the carrier's property, was in its possession, or was under its control.

Restricting our decision to the facts and pleadings here involved, it is clear that no ground was shown to hold the railroad guilty of the negligence charged. The judgment below is therefore affirmed.

CHATHAM & PHŒNIX NAT. BANK v. LOVEGROVE.

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

No. 2264.

FRAUDULENT CONVEYANCES ⊂=57(3)—SOLVENCY OF DEBTOR—CONVEYANCE TO WIFE AND CHILDREN.

Where a solvent man, able to pay his debts and having no hazardous business in contemplation, without intent to defraud subsequent creditors, made a voluntary conveyance of real estate to his wife's brother, for the benefit of his wife and daughter, and the rents thereafter went to the wife and daughter, he did not continue to be the beneficial owner, and the conveyance was not fraudulent as to creditors.

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

Feigned issue between the Chatham & Phœnix National Bank and Maibelle S. Lovegrove. Judgment for defendant, and the bank brings error. Affirmed.

Joseph S. Clark and C. Alison Scully, both of Philadelphia, Pa., for plaintiff in error.

Albert W. Sanson, of Philadelphia, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In the court below this was a feigned issue between the Chatham & Phœnix Bank and Maibelle Lovegrove to determine the right to certain rents, and the writ of error attacks the correctness of binding instructions in favor of the defendant.

The dispute arises upon the following facts: In January, 1915, the bank sued, and in February recovered a judgment against, Thomas Lovegrove for more than $4,600, upon several notes dated between January 15 and April 2, 1914. Upon this judgment numerous attachment executions were issued, and the tenants of three buildings on Third street in the city of Philadelphia were summoned as garnishees. The ownership of the buildings was the point in controversy; the bank asserting that Thomas Lovegrove must be regarded as the true owner, while Maibelle Lovegrove, the daughter of Thomas, asserted her own title. To avoid expense and confusion, the parties agreed to a receivership, and afterwards to an issue for the purpose of determining who was the owner. It appeared without contradiction that on June 28, 1911, the buildings were owned by Thomas Lovegrove, a dealer in machinery, and were conveyed by him on that day to Wm. G. Huey, a brother of his wife. The conveyance was voluntary; its object being to transfer the property for the benefit of Lovegrove's wife and daughter. Huey held the title until October, 1913 (the rents going to the wife and daughter), and then conveyed to Mrs. Lovegrove, who in turn conveyed to Maibelle in October of the following year; these two deeds being also voluntary, but having the same object as the deed of 1911. The bank limits its attack to the deed of October, 1913, in-

sisting that the deed of 1911 should be disregarded, and asserting as the reason that Thomas Lovegrove continued to be the beneficial, and therefore the real, owner thereunder. The deed of 1913 is assailed on the ground that the bank (although a subsequent creditor) was defrauded, because the debt upon which the judgment is based was contracted soon after the deed of 1913 was delivered.

We do not think the evidence sustains this contention, for in our opinion the record contains nothing to defeat the deed of 1911. In June of that year Thomas Lovegrove was solvent, and no legal obstacle prevented him from making a family settlement. He did *not* continue to be the beneficial owner; he had no hazardous business in contemplation; he was able to pay his debts; and there is no evidence that he intended to defraud subsequent creditors. Nothing is shown concerning his notes to the bank, except the mere fact that he is bound by them, and the record discloses no connection between this debt and his financial condition in 1911. In a word, no fact was proved that would justify a suspicion that the deed of that year was made in fraud, either of such debts as perhaps he may then have had, or of other debts to be afterwards contracted. The legal question sought to be raised by the bank—namely, should a jury be allowed to find the fact of fraud merely from the fact that a debt has been contracted within a few months after a voluntary conveyance?—does not arise on this record, and need not be discussed.

As no facts were in dispute, the direction to find for the defendant was correct, and accordingly the judgment is affirmed.

COLLINS v. HUFFMAN et al.

(Circuit Court of Appeals, Third Circuit. October 19, 1917.)

No. 2269.

COURTS ⊂=405(14)—CIRCUIT COURT OF APPEALS—TIME OF TAKING PROCEEDINGS FOR REVIEW.

Under Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (Comp. St. 1916, § 1647), forbidding an appeal or writ of error to the Circuit Court of Appeals, except within six months after the entry of the order, judgment, or decree sought to be reviewed, the court has no jurisdiction, where the writ of error is not actually issued within six months, though allowed within that period.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action by Clara Collins against Harvey Huffman and others. The suit was dismissed, and plaintiff brings error. On motion to dismiss the writ of error. Writ dismissed.

John H. Bonner, of Scranton, Pa., for plaintiff in error.

W. B. Eilenberger, A. M. Palmer, and Harvey Huffman, all of Stroudsburg, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This suit for a conspiracy to defraud was begun on June 20, 1916, by Clara Collins, a married woman, against Harvey Huffman and several other defendants. In the præcipe for the summons and in her statement of claim the plaintiff declared herself to be a citizen of New York, and the defendants to be citizens of Pennsylvania. On the face of the papers, therefore, the court had jurisdiction; but before answering on the merits the defendants raised the preliminary question whether the plaintiff was in fact a citizen of New York, averring that both she and her husband were citizens and residents of Pennsylvania. On that point the District Judge heard testimony, and, being of opinion that "the evidence before the court conclusively shows the plaintiff to be a citizen of Pennsylvania," he entered an order dismissing the suit for lack of jurisdiction. The order was entered on October 31, and on April 30, 1917, he allowed a petition for a writ of error to this court "upon the plaintiff giving bond according to law in the sum of $500, which bond shall be approved by the clerk." No bond was presented for approval until May 11, and not until that day was the writ of error issued and filed in the District Court. U. S. Comp. Stat. § 1663. No assignments of error were filed in that court until September 26, when the District Judge allowed them to be filed "nunc pro tunc." The defendants now move to dismiss the writ of error on three grounds:

(1) The assignments were not filed in accordance with section 6, rule 14, of this court (224 Fed. ix, 137 C. C. A. ix) requiring "the assignments of error [to be] submitted and filed with the petition for appeal or writ of error immediately after the appeal or writ of error is allowed."

(2) The only question raised and decided below was the jurisdiction of the District Court, and therefore the writ should have been taken directly to the Supreme Court. Act March 3, 1891, § 5 (Comp. St. 1916, § 1215).

(3) The writ of error to this court was not taken within the statutory period of six months.

The third reason alone will be considered. Section 11 of the act of 1891 (Comp. St. 1916, § 1647) forbids an appeal or a writ of error to this court "except within six months after the entry of the order, judgment, or decree sought to be reviewed." Under this section we have already decided in Rutan v. Johnson, 130 Fed. 109, 64 C. C. A. 443, that we have no appellate jurisdiction where the writ of error is not actually issued until after six months from the entry of the judgment sought to be reviewed, although (as in that case) the writ may have been allowed within the period limited by the act. See, also, Waxahachie v. Coler (C. C. A. 5) 92 Fed. 284, 34 C. C. A. 349; Kentucky Coal Co. v. Howes (C. C. A. 6) 153 Fed. 163, 82 C. C. A. 337; Williams Co. v. United States, 215 U. S. 541, 30 Sup. Ct. 221, 54 L. Ed. 318.

The writ of error is dismissed, with costs.

BATES COUNTY, MO., v. WILLS et al.

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

No. 4650.

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

On rehearing. Part of original opinion (239 Fed. 785, — C. C. A. —) withdrawn.

Frank Hagerman, of Kansas City, Mo. (Thomas J. Smith, of Butler, Mo., on the briefs), for plaintiff in error.

Frederick N. Judson, of St. Louis, Mo. (William Mumford, of Pittsfield, Ill., Frank M. Lowe, of Kansas City, Mo., and John F. Green, of St. Louis, Mo., on the briefs), for defendants in error.

Before SANBORN, SMITH, and CARLAND, Circuit Judges.

PER CURIAM. The second trial of this case was reviewed in the opinion of this court filed February 1, 1917, published in 239 Fed. 785, — C. C. A. —. Each of the parties to the litigation moved for a rehearing, the motions were granted, and the case has been again heard.

A critical examination of the pleadings has convinced us that the questions discussed and decided in paragraphs numbered 2, 3, 4, and 5 in that opinion were not fairly at issue, and for that reason, and to the end that what was said may not constitute the law of the case, and thus be conclusive upon the trial court at the next trial, and not because the court is convinced that the views expressed were erroneous, those paragraphs of the opinion will be withdrawn, and the questions there considered left open for subsequent determination and the remainder of the opinion and the order for a reversal of the judgment and for a new trial will be affirmed.

MIAMI CYCLE & MFG. CO. v. ROBINSON.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917. On Motion for Rehearing, October 11, 1917.)

No. 3009.

1. PATENTS ⊜212(1)—LICENSES—SUIT FOR ROYALTIES.
The fact that a complainant, who had contracted to grant to defendant an exclusive license under a pending application for a patent, refused to execute a formal license, although without justification, *held* not to bar a suit for royalties under the patent after issuance, where up to the time of such issuance the failure to execute the license was immaterial, and was waived by defendant, and thereafter the parties treated the contract as still in force in other respects, and as in effect a license.

2. CONTRACTS ⊜316(5)—BREACH—WAIVER.
The action of a defendant in demanding further performance of a contract after its breach by complainant *held* to be a waiver of the right to treat such breach as ending the contract.

3. PATENTS ⊜211(1)—EXCLUSIVE LICENSE—REISSUE.
An exclusive licensee is not bound by the narrow construction which the patentee puts upon his claims for the sake of getting a reissue, and when

the original claims are repeated in the reissue, the licensee may have them construed as broadly as they would have been in the original.

4. PATENTS ⊜211(3)—LICENSE—CONSTRUCTION.
When applicant and licensee have dealt upon the theory that pending claims, if allowed, would cover the licensee's product, the licensee may not, after the patent issues with these claims, deny liability thereunder.

5. PATENTS ⊜211(2)—LICENSE—SUIT FOR ROYALTIES—DEFENSES.
Where a license contract required the payment of royalties, such royalties to cease and determine in the event the patent should be adjudged invalid, the licensee cannot set up the invalidity of the patent as a defense to a suit for royalties.

6. PATENTS ⊜211(1)—LICENSE CONTRACT—CONSTRUCTION—ROYALTIES.
At a time when an application for a patent was in interference with others, the applicant made a contract to grant an exclusive license thereunder, which provided that "upon the issue of the final award of priority in favor of" the applicant the licensee should pay a royalty on such of its manufactures "as are covered by said patent." After the patent issued a reissue was applied for and obtained. *Held* that no royalties became due and payable until the date of the reissue, since until that time it could not be determined what was covered by the patent, but that the royalty period dated back to the specified final award.

7. PATENTS ⊜219(4)—LICENSES—SUIT FOR ROYALTIES—CROSS-SUIT.
In a suit brought to recover royalties under a contract for an exclusive license, which provided that the royalty should "cease and determine in the event that a court of competent jurisdiction shall declare said patent * * * null and void," the defendant may properly be permitted by answer, under equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), to raise the issue of validity, not for the purpose of avoiding payment of royalties accrued, but of obtaining a decree terminating the contract.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by William Robinson against the Miami Cycle & Manufacturing Company. Decree for complainant, and defendant appeals. Reversed.

July 6, 1908, Robinson, the appellee, was the owner of three patents, and of the inventions covered by six pending applications for patent, all relating to coaster brakes for bicycles or other more or less analogous features. The appellant, hereinafter called the company, was manufacturing coaster brakes pursuant to the O'Horo patent, No. 860,234, of July 16, 1907 (reissued September 28, 1909, No. 13,023). Robinson's earliest application (hereinafter called the basic one) had been pending since October 8, 1897. The company's attorneys saw, in one of the issued Robinson patents, some reference to this early application, and so were led into communication with him. It was found that this invention was of such character as to make it likely that he would be entitled to claims broad enough to dominate the entire coaster brake art and to reach all the forms then being put on the market by several manufacturers; but that application was tied up in interferences. Negotiations were had, which resulted in the execution of a written contract between the company and Robinson, made July 6, 1908. Certain specially important provisions are copied in the margin;[1] but the substance of the whole contract was that Robinson was to assign to the company all his patents and inven-

[1] 8. Upon the formal transfer by Robinson of the title of all of Robinson's inventions, applications and patents, as recited above (with the exception of application serial No. 654,532, filed October 8, 1897), and the formal transfer of an exclusive license under the application filed October 8, 1897, the Cycle Company will pay to Robinson the following considerations, to wit: (a) Two thousand five hundred dollars ($2,500) cash; (b) a formal order for the

tions, except the basic application, and under that one he was to give the company an exclusive license; that the company, by its attorneys, should take over the prosecution of the pending applications and interference cases, and prosecute them all at its expense; that the company should presently pay Robinson $12,500 in stock and cash; that when Robinson was awarded the broad invention, as was expected, the company should pay him a license fee of 10 cents per brake, with minimum annual payments of $5,000, until he should receive $20,000 in royalties, whereupon the title to the broad patent should be assigned to the company, subject to further royalty payments and certain contingencies. The patent upon the basic application issued on July 8, 1913, No. 1,067,230, and reissued February 17, 1914, No. 13,690. Controversies between the parties finally resulted in the filing of this bill in the court

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transfer to Robinson by the Cycle Company of 100 shares of the stock of the Cycle Company, which stock has a par value of $100 per share.

9. Upon the issue of the final award of priority in favor of Robinson in interference proceedings in the matter of the application of October 8, 1897, serial No. 654,532, in which Robinson is involved with other contestants, the Cycle Company agrees to pay to Robinson under the terms of the exclusive license recited in paragraph 8, a royalty fee of ten (10) cents upon such coaster brakes made by or for the Cycle Company as are covered by said patent, such royalty to cease and determine in the event that a court of competent jurisdiction shall declare said patent to be obtained null and void.

10. From and after the final award recited in paragraph 9, and unless the application and patent is declared invalid as recited in paragraph 9, the Cycle Company covenants and agrees to pay to Robinson, as a minimum yearly royalty, the sum of five thousand dollars ($5,000), payable quarterly.

15. The exclusive license given the Cycle Company by Robinson under the application of October 8, 1897, and patent to be obtained, is to continue so long as the Cycle Company complies faithfully with the terms of this agreement.

16. Upon the payment by the Cycle Company to Robinson of royalty fees under the application of October 8, 1897, and patent to be obtained, amounting to a total sum of twenty thousand dollars ($20,000), then Robinson hereby agrees to assign to the Cycle Company the entire title therein, subject, however, to the continuance of royalties thereunder as recited in paragraph 9.

17. The Cycle Company has the right to license others under any of the Robinson inventions, applications and patents upon the payment by the Cycle Company to Robinson of half the license fee so exacted.

18. Robinson agrees to join the Cycle Company in any action in or out of the Patent Office or in the courts which may be necessary to enforce the payment of royalties by others, or for the accounting for past profits or damages, at the expense of the company.

20. The Cycle Company agrees to use its best endeavors to collect all royalties which are or may be due under the Robinson inventions, applications and patents at the expense of the Cycle Company, and such net sums or their equivalent as may be collected thereunder shall be equally divided by Robinson and the Cycle Company.

21. The Cycle Company agrees to engage counsel at its own expense to conduct all proceedings under the Robinson patents, inventions and applications in the Patent Office and before the courts, and Robinson agrees to the retaining of such counsel in securing and maintaining their validity at the expense of the Cycle Company.

22. If the Cycle Company shall at any time cease to manufacture with due diligence marketable hubs covered by any of the Robinson patents, or shall discontinue, through failure or other cause, to do business, then the Robinson patents shall be reconveyed to Robinson without compensation or prejudice.

23. The Cycle Company shall be empowered to enter into trade relations with other manufacturers looking toward the establishment of satisfactory prices and the control of the coaster brake business of the United States, with a view of securing to both parties to this agreement the maximum amount of royalty fees attainable.

below. It prayed disclosure of the number of brakes manufactured by the company or its licensees and asked a decree for the minimum royalties due, and also certain other relief. The company answered, proofs were taken, and, on final hearing, a decree was made finding minimum royalties and interest thereon due, and directing immediate payment thereof, amounting to about $20,000, and making a reference to a master to ascertain the number of brakes made which were within the contract, and thus to learn whether royalties were due in excess of the minimum. The company brings this appeal.

Walter B. Grant, of Boston, Mass., and Fenelon B. Brock, of Washington, D. C., for appellant.

Leonard Garver, Jr., of Cincinnati, Ohio, and John M. Coit, of Washington, D. C., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). 1. Whether the bill states a case for which there is no adequate remedy at law may be matter of grave doubt. However, it undertakes to rest upon certain established grounds of equitable jurisdiction; and although the defendant challenged that jurisdiction below, it has assigned no error upon the overruling of its objection. Under these circumstances, we find no occasion to look into the question.

[1] 2. The first defense, in order of presentation, is that Robinson cannot enforce the contract, because he has never granted the exclusive license which he agreed to give. Further statement of facts here becomes necessary. Robinson was an inventor and patent solicitor of large experience. He had been conducting his own cases. After his original application had been long tied up in interferences, he devised the plan of filing what he called a divisional application, thinking, apparently, that he could thereby proceed, free in some respects from the complications which the interferences had brought about. Accordingly, in June, 1905, he filed this divisional application. It consisted of a copy of the specification and drawing and some of the claims of the original. In July, 1908, the Patent Office had repeatedly refused to give consideration on the merits, such refusal being for the reason that there was nothing truly divisional about it; and Robinson was insisting, both that it did contain claims not allowable under the basic application, and that the claims common to it and the former might eventually be assigned to one or the other, as the Office might direct. The contract of July 6, 1908, included this divisional application among the list of eight patents and applications which were to be assigned to the company. Immediately upon the signing of the contract, an assignment was prepared covering these eight, and the paper was executed and delivered. The contemplated exclusive license under the basic application not being entirely finished that day, it was arranged that Robinson would go home, and this paper would be sent to him the next day, and he would sign and return it. It was so prepared and sent. He declined to execute it, saying that, the moment the company's attorneys were in charge of the applications, they could transfer the broad claims from the basic to the divisional, to which the complete title had already passed, and so could defeat the purpose of the contract; he therefore asked that the divisional

be reassigned to him, whereupon he would include both the original and divisional in his license. This request was neither granted nor refused, but consideration was postponed. During all the years while the application was pending, and after the patent issued, there were occasional references by both parties to their respective positions on this subject, but there never was a positive demand for the license made as a condition of continuing the contract in force nor was there an absolute refusal to give it; but the company proceeded with the prosecution of the matter in a manner wholly inconsistent with any intention to claim forfeiture for lack of this instrument.

Robinson's original refusal to execute the license was unjustified. It amounted to saying that, although he had executed a contract in which there was neither fraud nor mutual mistake, he would not carry it out because he had later observed that he had left open one possible door by which the other party, if so disposed, might attempt to defraud him. All must agree that to transfer the broad claims to the divisional application, for the purpose and with the effect he feared, would have been to attempt a fraud upon him of which no reputable attorney would have been guilty, which he had no reason to apprehend, and which could not have been successfully carried out. It is true that the attorneys continued Robinson's efforts to get some broad claims allowed in the divisional case, but there is no reason to think that this was with any fraudulent intention; and it is true, also, that after Robinson ousted them from management of the basic case, in June, 1913, they threatened to misuse their power over the divisional; but they never tried to do so, and the threat was measurably, if not quite, justified as a matter of self-defense against Robinson's misconduct. Further, in so far as the divisional application, in July, 1908, supported or could thereafter be made to support details of form rightly separable from the basic claims, it was within the fair intent of the parties that such divisional matter should be included in that which was being absolutely transferred to the company. The substance of the arrangement was that the company presently became absolute owner of all subsidiary inventions [2] and exclusive licensee of the basic one. The company could rightfully have insisted upon the immediate execution of the license as agreed. However, the divisional application then contained nothing which the Patent Office considered properly divisional. Whether it might thereafter be made to do so was wholly contingent and rather improbable, and there is apparently no very substantial reason why the company might not have complied with Robinson's request. Both parties were content to let the matter of reassignment to Robinson drift along. It was not important while the interference made everything contingent; and later, after the patent issued, there was no possibility that the broad claims could be transferred to the divisional, and the latter was either negligible, because there was nothing left in it, or else it belonged to the company, because containing something rightly separable from the basic appli-

[2] Subject to a reverter clause (paragraph 22), which is rather incomprehensible, if it is intended to apply to the inventions assigned and in the use of which by the company Robinson had no apparent interest.

cation. Probably there was nothing left, because it was allowed to die. Certainly since the patent issued, the existence of legal title in the company to the divisional application has not afforded even a plausible pretext for not executing the formal license for the basic invention.

Merely as between the parties, and until the patent issued, there was no particular necessity for the formal license nor any prejudice to the company from its nonexecution. The contract of July 8th fixed the rights of the parties; and not until the patent issued could such a formal instrument have been of any value to the company for the purpose of enabling it to license others. Any such licenses to others could not be effectively granted before the issuing of the patent, and if the company desired to make contracts that it would license others when the patent was obtained, it could make those contracts as well on the basis of the contract of July 8th as upon a more technical basis. It follows that Robinson's conduct, in not giving the formal license up to the time when the patent issued, cannot be considered a substantial or material breach which justifies the company in denying its contract liability. After the patent originally issued, the company never took the position that the failure to give the license had ended its rights and liabilities under the contract. When Robinson, in October, 1913, claimed that the company had broken the contract and forfeited all rights, and so demanded a reassignment of everything, the company responded:

"If you propose to treat the agreement as having been broken, we will be compelled to take proper steps to put us in the position we both were in prior to the date of the agreement. Has the reissue been granted?"

Robinson then dropped the subject until, in December, 1913, he demanded royalty. The attorneys for the company replied that the contract had been broken by Robinson by his personal interference in the issue of the original patent and by his application for reissue, and that, because of this repudiation by Robinson in these two particulars, they had advised the company to turn everything back to him, if certain compensations could be agreed upon; but this termination of contract rights was tentative, and based expressly on grounds other than the failure to execute the license. The company made no demand for this formal license until and unless by its letter of April 1, 1914 (after the reissue), in which it said, in reply to a further demand for royalty payments:

"Dr. Robinson's contract has not yet been executed upon his part. He has failed to execute and forward to us the exclusive license under the 1897 application, including the right to license others. Are you ready to forward that license?"

To this Robinson's attorneys replied that the original contract itself sufficiently gave the license. After further correspondence, and demands to know the number of the coaster brakes manufactured, etc., the company's attorney answered, on April 27, 1914:

"I cannot well answer the questions raised by your letter, until we ascertain from you whether you are ready to turn over to us an exclusive license under the 1897 application and in accordance with the terms of the contract."

To this Robinson's attorney answered:

"If the Robinson-Miami contract is valid and in force, Dr. Robinson has certain rights thereunder, regardless of whether or not he gives the Miami Company an exclusive license under its 1897 application. I now assume that you will stand on your contention that the contract is null and void, and that the Miami Company does not intend to comply with any of the terms thereof."

Thereupon the bill of complaint was filed. It is clear enough that any breach on Robinson's part by his failure to execute the formal license, and in so far as such breach might justify repudiation of the whole contract by the company, had been waived by the company, and that, down to the date of filing the bill, it was bound to accept such license, if tendered.

In this situation, the execution of the license cannot be considered a condition precedent to the accruing of any royalty liability; but we do not think it was an immaterial condition, nor one which Robinson was not bound to perform. An essential part of what the company was buying was the right to control the situation by licensing other manufacturers (paragraph 17). It would be natural to include a provision to that effect in the formal license contemplated by paragraph 8, and this was done in the form of license drafted at the time, and to which form Robinson made no objection. It was also provided (paragraph 18) that, under the terms of this exclusive license, Robinson would join in any infringement suits which it might be necessary to bring to enforce the monopoly. It was plainly contemplated that upon the issue of the patent there should be a formal instrument given to the company, evidencing these rights, which could be placed upon record and upon the basis of which the company could deal with others without the necessity of resorting to all the conditions and complications of the original contract; and when Robinson came into a court of equity, it was his duty (as it had been since the issue) to tender to the company, before filing the bill or in the bill, such a formal exclusive license.

The bill did not allege or make such a tender, nor expressly touch this subject-matter; but the whole theory of its filing and maintenance necessarily implies that the company had received a sufficient license to satisfy the contract. It refers to the original contract as an "agreement and license"; and, taken altogether, it is a clear declaration that the company is vested with all the rights as exclusive licensee to which it was entitled under the contract. The answer, among other defenses, alleges the failure to execute the formal license, but it counts substantially upon Robinson's original refusal to do so in 1908. Although it alleges that the refusal continued down to the filing of the answer, yet it does not allege any willingness to accept, nor present any distinct theory of defense on this ground, excepting the continuing breach of the contract by the continuing effect of Robinson's original refusal; and we have seen that this original refusal was at the time immaterial and was waived by the company. In this situation, Robinson's suit should not fail merely because he had not executed the formal license nor because he did not offer to do so in his bill of complaint; but any decree in his favor based upon the contract, should be conditional upon his performance of his part thereof

in the matter of execution of this license. Such prejudice as there has been to the company for lack of earlier execution can be taken care of as hereafter indicated.

[2] 3. The next defense relates to the issue of the patent. After the delays caused by the interferences had ended in the manner hereafter stated, Robinson asked the attorneys to have the patent issued at once. They replied that they needed some considerable time for complete study of the state of the art, in order to shape the claims broadly enough to give the desired monopoly, but not too broadly to be valid. Losing patience, he went to the Patent Office, canceled all the pending claims which had not been allowed, paid the final fee, and directed immediate issuance. Here, again, Robinson clearly broke his contract. It had been stipulated that the conduct of the application was to be under the control of the company's attorneys. This had been their reasonable demand, agreed to by Robinson. His reasons now given for his conduct do not justify it. During the years the interferences had been pending, amendments and reshaping of the claims could not be allowed. The days of time and study required to secure the most perfect formulation would have been wasted if the interference was lost, and would have become at any time unavailing by the discovery of new references. The attorneys were justified in not having made this preparation while the interferences were on hand, nor could it rightly be made in a few hours, as Robinson seemed to think. On this ground, again, the company could have refused to proceed further with the contract; but it did not take this course. Its attorneys arranged with Robinson to join in trying to recall the case from issue and get further time for amendment, and, although the Patent Office would give only two weeks the attorneys accepted this situation and co-operated with Robinson in formulating and securing four additional claims (6, 7, 8, and 9). The company was represented in the whole matter by these attorneys, and their conduct was a clear election to condone Robinson's default and continue the contract in force notwithstanding.

4. Next is the matter of reissue. After the original had been thus hastily issued through Robinson's personal act, he changed his mind and decided that the invention was not rightly protected and that the claims were quite inadequate. Accordingly, he employed another attorney, offered the original for surrender, and filed the reissue application. Here, again, his action was high-handed and an entire breach of his contract duty; but still, again, it must be held that the breach was waived. On his suggestion to the attorneys that the claims of the original were inadequate, they advised Robinson that there should be an immediate reissue, they consulted together about the best form of claims, and there was co-operation until they learned that he had filed the application by another attorney. Their only objection then was:

"We do not know what effect the prosecution of the reissue pro se by you will have upon the contract."

In December, 1913, they complained of this conduct as a breach; but in April, 1914, they are found claiming the license, and this can

refer only to a license under the reissue. In its answer in this case, the company twice alleged Robinson's continuing fault in not giving a license under the reissue. After the answer was filed, the company again indicated a claim that the reissue constituted a breach of the contract; but this was too late. Robinson had then put the controversy into the hands of the court under a bill which committed him to that license under the reissue which the company had been asking.

[3] We have the less hesitation in holding that the company cannot rely upon the taking of the reissue as a breach of the contract, because there is no reason to think that substantial prejudice to the company has resulted therefrom. It is apparent that the only complaint of the original and the only ground for reissue was the absence from the original of sufficiently broad claims; and, in this situation, it would seem that the eleven claims of the original, repeated verbatim in the reissue, are just as valid as they were in the original. The company, as the holder at the time of substantial interests in the original patent, could not be bound by any narrow construction which Robinson erroneously put upon the original claims to support his theory that a reissue was necessary; and if the broader claims of the reissue shall not be sustained, the company will be entitled to have the same construction put upon the original claims as if the reissue had not been made. It is true that such damages as might have accrued against others from infringement of the original patent before its surrender have been forever lost (Reedy v. Scott, 90 U. S. [23 Wall.] 352, 364, 23 L. Ed. 109); but the existence of such damages, in material amount, is problematical, and their possible existence is a thing which the company must have taken into account while it was treating the reissue as the rightful substitute for the original.

5. Next comes the denial that the company's product is covered by the claims of the patent, leading to a denial of any liability to pay the contract royalties.

We must first observe that the question is not whether the company's device is covered by any valid claim. The subject of the validity of the patent which was to be obtained, the contract takes care of in another way, when it provides that royalties must continue to be paid until the patent is judicially declared invalid. Therefore, when the contract refers to paying royalty upon the company's product which is "covered by the patent to be obtained," it must refer to a situation where, when the claims are assumed to be valid and construed as the circumstances require them to be, they will cover the company's device.

No one questions that some of the added claims of the reissue reach and cover the devices in question; but we prefer to dispose of this matter as if affected only by the claims of the original patent. Upon a review of these claims, we entertain no doubt that the court below was right in thinking that royalties accrued, for, regardless of any expert testimony or of what occurred between the parties, an inspection of the company's device shows that at least claim 9 reads thereon so clearly that the device must be considered to be "covered" by the patent. When we take into account the differences between claim 9 and other claims, there is no room to give it any narrower construction

than its language seems to imply. Both the face of the patent and the contemporaneous conduct of the parties make it clear that this claim (if not also others) cannot be restricted by interpretation. It is either valid as broadly as it reads or invalid because too broad.

[4] Further, it appears without dispute that the original purpose of the company was to get a patent which would cover the product which it was making, then and continuously thereafter, as well as the product of all other manufacturers then operating; that unless the claims did cover its product and at least a part of the others, it had no object in continuing for years its effort to get this patent; that the four claims added after Robinson's order for immediate issue were formulated by him and by the attorneys with this broad purpose, which was then regarded by both of them as sufficiently accomplished. Claim 9 is one of those so added. To permit the company now to say that this patent does not cover its product would be to allow it to repudiate the whole theory upon which it dealt with Robinson for years and which it allowed him, if it did not lead him, to accept as the basis of their continuing relations.

[5] 6. In its answer and in amendments thereto, the company set up a large number of earlier patents and inventions, and sought to take testimony concerning them. The court declined to allow such testimony, and struck out these paragraphs from the answer. In this action, there was no error, so far as concerns the rights of the parties before decree. This was not, in any sense or degree, an infringement suit. If the contract of license counted upon was valid and in force, the licensee could not question the validity of the patent; if the license contract could not be enforced, that was the end of the suit. It is true that a licensee may show the state of the art, as an aid to determining the construction of the patent; that was not the company's effort here. Not only was each stricken paragraph of the answer introduced by the statement that the Robinson patent was anticipated or was made invalid by the older patents and the uses recited; but, as we have already held, there was no room for any construction permitting the conclusion that the patent did not cover the company's product. The company's right to show the patent's invalidity as affecting future royalties will be considered hereafter.

7. Paragraph 23 is said to show that the contract was in violation of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209), and, therefore, void. This conclusion cannot be supported. The paragraph is ambiguous. It is obvious that a patent, giving such a broad monopoly as was here expected, might rightfully be used as the basis of "trade relations" with other manufacturers, looking toward a complete control of the coaster brake business. Doubtless it could be used unlawfully to the same end; and it appears that the company did proceed to enter into a combination which the government caused to be dissolved because it was in violation of the Anti-Trust Act. There is nothing to show, however either that this unlawful combination was essentially dependent upon the Robinson contract with the company, or that Robinson knew that the company intended to abuse the advantages it derived from the contract rather than to use them lawfully—much less that Robinson participated in any such intent.

Under these circumstances, the company cannot be heard to make this defense.

[6] 8. It results from the views so far expressed that the company must pay royalties to Robinson; but when these payments should begin and how long they should continue must be determined. The language of the contract is very peculiar (see paragraphs 8, 9, 10, quoted above). Robinson was experienced in the soliciting of patents, as were the attorneys representing the company, and they both knew that the shape which the claims of a patent would take could never be determined till the patent issued, since rejections and amendments might come even after the final fee was paid and the printing in progress. It is, therefore, not easy to understand how they could contemplate the accruing of royalties contingent upon the terms of a patent to be obtained, and which royalties should, nevertheless, accrue before the patent issued; yet they make very express provision for commencing the royalty period at the time when there was a final award in the interferences. We see no way to construe all these provisions and to make them intelligent and mutually reconcilable and applicable to the complications caused by the reissue, except to say that nothing was payable or due until the patent reissued, but that, when it did so reissue, so that the terms of its claims were finally known, the royalty period, upon whatever the claims turned out to cover, should date back to the specified final award. This construction will directly modify the decree below only as to the matter of interest.

The date of this final award is in controversy. When the contract was made, Robinson was in interference with Townsend and Copeland. These interferences were decided and priority upon the broader issues awarded to Robinson by the order of the Court of Appeals of the District of Columbia, on May 29, 1911. Immediately, another interference was declared between Robinson's same basic application and another application of Copeland. This interference was not finally settled until January 6, 1913, when the Court of Appeals of the District of Columbia decided that this second controversy was within the issues of the former one and was res judicata. Robinson now claims that the royalty should begin at the date of the final determination of the first interference; the company contends that any liability which may exist cannot reach back of the final decision in the second interference. The company is right in its contention. When we undertake to apply to the situation, as it actually developed, the language of paragraph 9 of the contract, we see there is ambiguity. The reference is to the final award of priority in interference proceedings "in which Robinson is involved with other contestants." This, standing alone, would normally refer to the interference proceedings in which he was involved on July 6, 1908, the day of the contract; and yet, when we observe that it could hardly have been intended that royalties should accrue upon an invention while there was pending an interference which might result in a patent upon the same thing to some one else, it may be that "is involved" should be read as meaning "is involved from time to time as the application progresses."

It is also urged with much force that under the special circumstances here existing, the first interference and the second should be

considered as one. Indeed, the decision of the Court of Appeals leads almost to this conclusion. However these things may be, there is clearer ground for the conclusion we have stated. One of the claims, No. 11, of the Robinson patent, as first issued, and a claim which it must be presumed was an essential part of the monopoly which the parties were contracting about, was first made by Copeland in his application that went into the second interference and never was present in Robinson's application until he annexed it by right of conquest after the second interference was finished. In addition to this, claim 9, which is, from most points of view if not from all, the broadest claim of the patent and which forms Robinson's chief reliance in the present suit as a basis of his claim for royalty, never was present in his application until after this second interference was finished. This claim was one of the four inserted by the attorneys during the two weeks' delay allowed after Robinson's personal orders that the patent issue at once. Certainly only the clearest and most unambiguous language could justify the accruing of royalty before the second or rehearing interference was finished and the patent for the first time took substantially its final shape; and, instead of this being clear and unambiguous, the natural inferences are all the other way. If there were doubt about this, it would be solved by Robinson's letter of May 14, 1913, in which he says:

"Now it is pointed out that the 'final award of priority in favor of Robinson in interference proceedings in the matter of the application of October 8, 1897,' was the issue of the decision of the Court of Appeals in Interference No. 33,840, dated and decided January 6, 1913, awarding priority to Robinson. That finished the interference, and any delay since that time has been in the hands of counsel. It seems clear, therefore, that the accumulation of royalty must be computed from that date."

9. We have found that Robinson was in fault for not executing or tendering the formal exclusive license. He should have done so, when the original patent issued, and when his only claimed reason to the contrary disappeared. If it be thought that the almost immediate application for reissue postponed this duty, then he should have done so upon the reissue. At the latest, he should have distinctly made such tender upon filing this bill, instead of relying on the mistaken theory that the formal license was unnecessary. At the same time, we have found action by the company, continuing up until after the filing of the bill, such that it cannot be permitted to rely upon the lack of this formal license to destroy its contract obligations to Robinson. The question is whether, by permitting the exclusive license to be given now, we can restore substantially the situation which would have existed if it had been given when the patent issued or tendered when the bill was filed, and can put the company in substantially the same shape as if it had then, as was its duty to do, accepted the license and proceeded with the contract. It may be that changes in the manufacturing or trade conditions during the interval, impair such restoration, but the burden was upon the company to make proof to this effect, and it has not done so.

The record indicates only one difficulty. Paragraph 9 of the contract provides for the company the only escape from the continued payment of royalties (unless by paragraph 22). If the formal license had been

delivered when the patent issued, and the company had proceeded under the contract, and if it had been of the opinion, as it now is, that the patent was invalid, it would at once have begun or caused to be begun some suit which would lead to a judicial determination and so either establish the patent or end the royalties. We make allowance for the reissue delay and give the company the benefit of whatever doubts there ought to be, if we assume that, acting with diligence, it could have secured such judicial determination within two years from the original issue, or by July 8, 1915. It is somewhat arbitrary, but essentially fair to assume that if the royalties ought to terminate under paragraph 9, the necessary judgment would have been pronounced as early as that date, that it would not have occurred earlier, that, until that time, the liability of the company for the contract royalty was inevitable, but that the delay from that time to this in instituting proceedings which may lead to that result has been so far the result of Robinson's default and of the confusion and uncertainty thereby created that he must allow further reasonable opportunity for that test, before exacting a further performance of the contract.

After the suit was commenced, the company seems to have executed a transfer to Robinson of everything that had been assigned to it. This was never completed by delivery and acceptance, but the record indicates that it may have been recorded in the Patent Office; if so, Robinson should at once execute and record a sufficient release and quitclaim back to the company of everything so apparently transferred. At the same time and within 30 days after the mandate goes down, he should execute and deliver to the company, or deposit with the clerk of the court below for delivery to the company, an exclusive license, under the reissue patent, but otherwise in the form prepared and tendered to him on July 8, 1908. Thereupon, the company must pay to him the prescribed minimum royalties for ten quarters commencing with the quarterly payment due April 6, 1913, and ending with that due July 6, 1915, and with interest at 6 per cent. from the date of the reissue, on payments due theretofore, and with interest at the same rate from the date of each maturity on payments due thereafter. There should also be an accounting, if desired, to ascertain whether more than the minimum accrued during these ten quarters, and, if so, the excess amount should be paid as soon as it is fixed. If Robinson should fail to execute and record the reassignment (if by record of assignment to him this has become necessary) or to execute and deliver the license, his bill will be dismissed. If the company should fail for 30 days after the delivery of the license to pay the minimum royalty for the ten quarters and interest, it will lose its right to any further consideration, and it must pay at once, also, the remainder of the $20,000 agreed minimum, with interest, and be subject to the general accounting as provided in the decree appealed from. If the company does make this payment for the ten quarters, thereupon all further proceedings (except the accounting as to the excess in these ten quarters) should be stayed for 60 days. Within this period, the company may institute such proceedings as it may be advised, for the purpose of obtaining the judicial decision contemplated by paragraph 9. If it elects to bring an infringement suit against another manufacturer, Robinson must join therein as

provided by paragraph 18. So long as the selected proceeding is prosecuted with the utmost diligence, the stay may continue. If, upon the final determination of such proceeding the patent is found invalid within the meaning of paragraph 9, the company will be excused from all payments, except the royalty (both minimum and excess) for the first ten quarters. Lacking such result, the stay will expire and the accounting will proceed in the court below for all the intervening period. All time limits herein mentioned are subject to modification, in the discretion of the court below.

[7] We see no reason why the company, if it so elects, may not proceed in this cause to obtain the decree which shall establish the validity of the patent or the contrary. The general rule that a licensee may not dispute the validity of the patent must yield, as far as necessary, to an express provision providing for a decree of invalidity as the means of ending the contract. Probably the rendering of such a judgment in a suit prosecuted by Robinson and the company against a third party infringing was the thing specifically in the mind of both parties; but if the licensee, under a contract like this, is later convinced that the patent is invalid, suit in a proper court brought by the licensee against the licensor is the most direct and sure way to get the question decided, without the suspicions of collusion sure to arise if the licensee were prosecuting a suit which it brought against a stranger and in which it wished to fail. If this may be done by direct suit, it surely may be done by answer, under the provisions of general equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), in a suit in the United States District Court.

The company, in its answer and amendments thereto in this case, laid all foundation for obtaining such a judgment, except that it did not pray therefor. It set up the invalidity of the patent, not as a basis for obtaining a decree terminating the contract, which it might have done, but as a basis for defending against current liability under the contract, which it could not do. The election which we now permit to institute proceedings looking to such a judgment may be exercised (if defendant desires) by reforming its answer in this cause.

The proper interpretation of "null and void" in paragraph 8, we cannot now consider. Whether this phrase means utterly void as to all claims, or whether it means void as to those claims which might purport to secure the monopoly contemplated by the parties, is a question to be later decided by the tribunal to which it is presented.

The decree below must be reversed, and the case remanded for proceedings in accordance with this opinion. The appellant will recover costs in this court. Costs in the court below will be in the discretion of that court.

On Motion for Rehearing.

PER CURIAM. On application for rehearing, the Miami Company, for the first time, brings to our attention the claim that Robinson accepted the retransfer to him of everything which the company had received from him, and to which attempted retransfer the opinion refers. This suit was commenced on July 13, 1914. On November 2, 1914, by an amendment to the answer, the defendant alleged that it had renounced the contract by notification to Robinson in a letter dated

and mailed on September 29, 1914, and that the defendant had retransferred to Robinson all the patents and applications which were the subject-matter of the contract. To this Robinson replied denying that the defendant had any right to renounce the contract as claimed in the amendment. We think we rightly interpreted this record as failing to show that any retransfer to Robinson had been effectively made. We are now told that, in the court below, it was agreed between counsel that the retransfer had been completed on September 29, 1914, that Robinson's brief in the court below was upon that theory, and that the decree framed by Robinson's counsel in the court below is upon the same theory, and, for that reason, awarded only that royalty which had accrued up to September 29.

Counsel for Robinson, responding to the application for rehearing, do not concede that the transfer was made and accepted; yet we are not sure that they deny it. It may be that when the reply denied the right of the company to "renounce" the contract it contemplated only the liability already accrued. If in fact the retransfer was accepted by Robinson, either expressly or as a necessary effect of what was said and done in the court below, and if the intent and effect of the retransfer were to deprive the company of its status as licensee under the main patent, it is obvious that there could be no recovery in this suit, except for the royalties which had then accrued; but the existence and all the effect of such retransfer and acceptance cannot be decided by us upon this record. These questions must be remitted to the court below for its decision, except as hereafter stated.

It is not now apparent to us how this retransfer can affect the right to recover the royalties then already accrued; but if there are reasons which lead to such a result, the court below will be at liberty to consider them and give them due effect. We have held that the company has the right to initiate proceedings looking toward a judicial determination that the patent was invalid; but for the reasons stated in the opinion it must be assumed that its obligation to pay royalties and be considered a licensee continued at least till September 29, 1914; and it cannot be heard to question the validity of the patent as against royalties arising before that date. If, therefore, it shall be found that the company then ceased to have the rights and carry the burdens of a licensee, there will be no occasion to litigate the validity of the patent. In the event that it is so found, the decree below will require no modifications, except those resulting from the conclusion that the accruing of royalty will begin January 6, 1913, and the recovery thereof will be upon condition that Robinson execute and deliver (instead of the exclusive license specified by the opinion) an assignment of the legal title to and the right to recover all profits and damages that accrued from any infringement of the reissued patent by others prior to September 29, 1914, and which assignment shall provide that one-half of the net sums collected thereunder shall be paid by the company to Robinson. The other conditions specified in the opinion to attach to the execution of the decree will be inappropriate.

The application for rehearing is denied; and, except as herein provided, the conclusions of the opinion remain unmodified.

AMERICAN STEEL FOUNDRIES et al. v. BETTENDORF AXLE CO.

(District Court, S. D. Iowa, Davenport Division. February 17, 1917.)

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—CAR TRUCK.
The Bettendorf patent, No. 740,617, for a car truck, claim 5, if construed not to include as a part thereof the journal boxes, is void for prior publication in the specification and claims of prior patents. If construed to include the journal boxes, *held* not infringed.

2. PATENTS ⊂=65—PATENTABILITY—DESCRIPTION IN "PRINTED PUBLICATION."
A patent and the drawings therein, although the patent may be void, are "printed publications," within the meaning of the patent statute; and if they sufficiently describe the invention to enable a skilled mechanic to produce the structure, with its functions, without the exercise of the inventive faculty, such structure is not thereafter patentable.

[Ed. Note.—For other definitions, see Words and Phrases, Printed Publication.]

In Equity. Suit by the American Steel Foundries and the J. S. Andrews Company against the Bettendorf Axle Company. Heard on cross-bill. Decree for cross-defendant.

C. C. Linthicum and Geo. L. Wilkinson, both of Chicago, Ill., and Wm. M. Chamberlin, of Davenport, Iowa, for complainant.

C. C. Bulkley, of Chicago, Ill., and Lane & Waterman, of Davenport, Iowa, for respondents.

WADE, District Judge. On January 25, 1896, James Seymour Hardie filed application for patent upon "a new and improved metallic car truck," upon which, with subsequent amendments, a patent issued October 6, 1896. On June 1, 1903, William Bettendorf made application for patent for "certain new and useful improvements in car trucks," upon which letters patent were issued October 6, 1903.

In Wolff Truck Frame Co. v. American Steel Foundries et al., 195 Fed. 940, 115 C. C. A. 628, the Circuit Court of Appeals (Seventh Circuit) held (January 2, 1912) the Hardie patent to be void for insufficiency of claim or specification covering the only patentable element in his construction, to wit, a bolster opening in the truck frame larger at the bottom than at the top, so as to admit the end of a bolster constructed with column guides, illustrated in the Schaffer bolster. On May 15, 1912, the Circuit Court of Appeals of the Eighth Circuit, in American Steel Foundries et al. v. Scullin Gallagher Iron & Steel Co., 197 Fed. 49, 116 C. C. A. 576, followed the aforesaid decision of the Circuit Court of Appeals of the Seventh Circuit and held the patent void.

It will be observed that the Hardie patent was issued October 6, 1896, and the Bettendorf patent October 6, 1903, seven years later. This action, charging infringement, was commenced by the American Steel Foundries and J. S. Andrews Company, assignees of the Hardie patent against the Bettendorf Axle Company, assignee of the Bettendorf patent, on April 6, 1909, some three years prior to the adjudications holding the Hardie patent void. The case was continued from time to time, evidently awaiting the adjudication of the Hardie patent.

On April 22, 1913, about a year after the Hardie patent was held void, the defendant filed its cross-bill, charging the plaintiff with infringement of the Bettendorf patent. A reply was filed, alleging that the Bettendorf patent was void because of prior art patents and prior knowledge and use; also charging laches and denying infringement.

The case came to trial upon the issues presented by the defendant's cross-bill and replication. Complainants (in view of the fact that the Hardie patent had been held invalid) offered no evidence, and upon the trial asked leave to dismiss their bill, ruling upon which was reserved. Inasmuch as this case proceeds upon the cross-bill and replication, it will aid in clearness of expression to designate the Bettendorf Company as "plaintiff" and the American Steel Foundries and J. S. Andrews Company as "defendants."

[1] The plaintiff (Bettendorf Company) charges defendants with infringement of claim 5 of the Bettendorf patent, which is as follows:

"5. An integral metal side frame for car trucks, the lower portion having a bolster opening therein, which is wider than the upper portion thereof."

Defendants contend that this claim must be construed as limiting construction to an integral truck frame, which must include the journal boxes as part thereof, and, as so construed, it is admitted that the patent is valid, and it does not appear that the same, so construed, has been infringed. The plaintiff contends that claim 5 excludes the journal boxes, and if so (and if valid) there is no question but that it has been infringed.

Construing claim 5 of the Bettendorf patent as excluding the journal boxes, we are confronted with the contention of the defendant that more than two years before Bettendorf invented his side frame for car trucks, or applied for a patent therefor, the same was described in a printed publication in this country; reliance for this defense resting largely upon the patent to Hardie and a subsequent patent to Woods. That Hardie invented the identical thing afterwards patented by Bettendorf (construing claim 5 as excluding the journal boxes) cannot be questioned. In fact, it is admitted by counsel that, if Hardie had procured a valid patent upon his invention, it would have been an anticipation of Bettendorf.

It will be observed that what Hardie invented was a one-piece metal side frame for car trucks; but a one-piece metal side frame was not new in the art, and the patentable novelty devised by Hardie was an opening enlarged in the lower portion for insertion of the end of the bolster, having column guides, or lips, and contracted in the upper portion, so that after insertion the bolster could be lifted up, held in place by springs underneath, and permitted to operate in the contracted portion of the opening. As described in the opinion of the Court of Appeals of this Circuit in American Steel Foundries et al. v. Scullin Gallagher Iron & Steel Co., supra:

"The invention here involved consists in a combination truck having as an essential element a transverse opening in each truck arch or side frame in such a form as enables its use with all kinds of bolsters. This is the only structural novelty relied on. The new feature of this opening is found in the contracted upper portion, whereby a bolster constructed with column guides, integral or otherwise, upon its opposite sides, may be passed through

the enlarged portion of the opening in the side frame of the one-piece side frame, and then be raised into and maintained in contact with the sides of the contracted upper portion of the opening of the arch or side frame, so as to resist any substantial backward or forward movement of the bolster, and make a comparatively rigid connection between the two side frames."

That Hardie actually made this invention is clearly established by the photograph (Plaintiff's Exhibit R) of a wooden model made about 1896, and the printed description thereof upon the back of the photograph, which accurately describes the invention, its uses and functions, as follows:

"Car Truck—Patent Applied for.

"Truck to be made of steel, cast or pressed, and consists of the following members: Truck arch, oil box lock, spring seat, and spring seat block. The transverse openings in truck arches being so designed as to permit the free passage of truck bolster through opening, when it can be raised to position, the guide lips on bolster engaging flange on truck arch at front, and web of truck arch at back.

"Spring seat block is designed to take up play allowed for the free insertion of bolster spring, also to slightly compress spring. The oil box lock having one end reduced and rounded hooks in suitable opening in truck arch flange, being raised and bolted, firmly engages oil box.

"Only (12) bolts in entire truck, no vital part of truck dependent on a nut or bolt.

"Any or all parts of truck can be replaced by use of hammer, wrench and jacks, requires no special dies, presses, forms, forge, or boiler maker to rivet in case of distortion account of wreck.

"Patent for sale. Correspondence solicited.

"Respectfully, J. S. Hardie, El Dorado, Kansas."

Hardie testified that he had sent copies of the photographs bearing this printed description to "various steel casting companies throughout the United States," about or prior to the time the patent was issued; and this is corroborated by the original letter written by Hardie to William G. Kelley, Simplex Railway Appliance Company, Chicago, dated December 1, 1896.

It is also contended that Hardie made a contract for manufacture upon royalty with the American Steel Foundries Company in 1897, and that small models were made as samples, and that two side frames, full size, were completed. The execution of the contract, the making of the models, or the two side frames, is not material to the question at present under consideration, which relates to the prior publication of a description of the invention.

The failure of Hardie to secure a valid patent was apparently through "his solicitor's failure to comprehend" the functional use of the "two-sized" opening as an element of his invention. The court, in Wolff Truck Frame Co. v. American Steel Foundries et al., supra, says:

"Moreover, his story is most persuasive, almost pathetic. His car truck has been highly successful in the hands of his assignee, as evidenced by its enormous sales. The picture of the poor, but brilliant, inventor being cheated out of his valuable discovery by the misapprehension of his solicitors, is an appealing one, well calculated to influence any court."

The great importance of the "two-sized" opening for insertion of the bolster end is understood from an inspection of the illustration of

the Schaffer bolster in the above case. 195 Fed., shown at page 942, 115 C. C. A. 628. It will be observed that near the ends are rigidly fastened substantial metal guides or lips, which form a space in which the column guides of the side frame fit when in place and in operation. It is apparent that, if the opening in the frame were the same width throughout, the end of the bolster could not be inserted without removing the guides or lips. To enable the bolster to be inserted without removing the guides or lips, Hardie conceived the simple device of making the opening wide enough at the bottom to receive the bolster with the guides or lips attached, which could then be lifted up into the contracted space, where it is held by springs while in use.

The drawings filed with application for Hardie patent clearly presented this element. In claim 2, he describes:

"Truck arches rigidly connected with each other, each truck arch having a transverse opening, the upper portion of which is contracted; a truck bolster fitted in the upper portion of said openings, and springs seated in the openings, and below the truck bolster."

In claim 3 he describes:

"A truck having two truck arches, each formed with an opening, the upper portion of which is contracted, and the truck bolster having its ends respectively fitted within the upper portions of said openings, and means within the openings and below the truck bolster by which the truck bolster is held in place, substantially as described."

In drawings, Figure 1 clearly presents the "two-sized" opening with bolster in place, and springs beneath. His failure was to state, in claims or specifications, the function of this two-sized opening, and therefore the court held that, "within the loosest construction of the statute requiring full, clear, concise description," the patent was void.

The Bettendorf patent, in its claims and drawings, presents exactly the same construction shown in Hardie drawings, and in addition properly describes the use or function of the two-sized opening. The Hardie patent, even though void, was a publication, within the meaning of the statute. The drawings of the Hardie patent, aside from the claims or specifications, were a publication.

"Apart from the undisputed testimony of the defendant's expert, the drawings alone must here be relied on; it hardly can be doubted, however, that they show the arched axle to be pivotally connected with and supported by the depending arms of the fifth wheel. Further, the bolt mentioned would seem to afford withdrawable means equally with that feature of Keene's patent; and we think it is clear that through these drawings the device mentioned was 'described' in a 'printed publication' within the meaning of the Patent Act. Section 4886, as amended by Act March 3, 1897, c. 391, 29 Stat. 692; Loom Co. v. Higgins, 105 U. S. 580, 594, 26 L. Ed. 1177; Saunders v. Allen, 60 Fed. 610, 613, 9 C. C. A. 157 (C. C. A. 2d Cir.)." Keene v. New Idea Spreader Co., 231 Fed. 708, 145 C. C. A. 594.

The question here is not whether the Hardie patent presented that "full, clear, concise description" which the statute requires, in order to make a valid patent, but it is a question as to whether or not the patent did in fact disclose the invention in such manner as to enable a person skilled in the art of truck making to fully understand just what Hardie invented.

It is my judgment that any person having knowledge of the art, with the Hardie patent (as a publication) before him, could have made the Bettendorf truck. The functional use of the two-sized opening may not have been described in words, but its use and purpose was obvious. Given a Schaffer or smiliar bolster and a Hardie side frame, it would not even require skill in the art to observe the function or make the adjustment.

"A patent cannot be invalidated by a structure which can only be altered into an anticipation by the use of inventive skill." Waterbury Buckle Co. v. Aston, 183 Fed. 120, 105 C. C. A. 410.

I cannot conceive that the discovery of the function of the two-sized opening (the structure being fully described) involved "the use of inventive skill."

But the art was not limited to the Hardie patent when Bettendorf made his invention. On August 7, 1900, nearly three years previous, patent No. 655,386 had been issued to Woods for "certain new and useful improvements in car truck frame." It cannot be disputed that in its claims and specifications this patent disclosed the functional purpose of a two-sized opening—not in the same form, it is true, but the principle and utility were there disclosed, and this patent was a publication.

When Bettendorf invented his side frame, he is supposed to have had the Hardie publication and the Woods publication before him.

"While he may not have had any knowledge of them whatsoever, he is deemed, in a legal point of view, to have had this [these] and all other prior patents before him." Duer v. Corbin Cabinet Lock Co., 149 U. S. 223, 13 Sup. Ct. 853, 37 L. Ed. 707.

"But it is said that defendant has failed to show any single patent or prior publication which contains all the elements of any of the contested claims, and that 'the question of anticipation' cannot be determined upon a showing from the history of the art that one of the elements may be found here, and another there and so on throughout the entire number. Clearly the facts of the present case do not admit of, much less require resort to, such a course here; too many parts of the present structure are found, as we have seen, in a single prior patent, not to speak of their repetition in each of several earlier patents. It is true, however, that the method suggested by counsel might not of itself justify condemning a patent. It is equally plain that the suggestion is not an answer to the question that must be met here; it overlooks the evidential tendency of the prior art in a given case either to establish or to negative the presence of invention. It scarcely need to be said that courts may and do look into the prior art, for the purpose of ascertaining whether the elements of a claim are new or old, and, if old, whether through the means of comparison so afforded the skill of the mechanic, or indeed the faculty of the inventor, was required to organize the elements of the claim and to adapt them so as to accomplish the result attained. It is not perceived, nor do counsel suggest, what better source of information, what means more calculated to lead the mind to a right conclusion, can be found than in the prior art. True, prior art becomes at times a source of confusion, and even abuse. Still, to insist that claims disclose invention or discovery, where their substantial equivalency in elements, in mode of operation and results, plainly appear in two or more earlier patents or publications, though not all in one patent or publication, is to ignore the very terms of the patent act. Above all, counsel's theory is opposed to the settled course of judicial decision. As was said, in holding a claim to be void for want of invention, in Dilg v. George Borgfeldt & Co., 189 Fed. 588, 590, 110 C. C. A. 568, 570 (C. C. A. 2d. Cir.): '* * * Although all the elements of the claim may not be found in any one patent, it is clear that

they are all to be found in different patents. No single patent may anticipate, but they all have a bearing upon the question whether invention or mechanical skill was involved or required.' Again, in Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, at 222, 13 Sup. Ct. 850, at 853 (37 L. Ed. 707), when affirming a decree dismissing the bill in a patent suit, Mr. Justice Brown said: 'In view of the advance that had been made by prior inventors, it is difficult to see wherein Orum displayed anything more than the usual skill of a mechanic in the execution of his device. All that he claims as invention is found in one or more of the prior patents.'" Keene v. New Idea Spreader Co., supra.

[2] A patent being a publication, the drawings of a patent being a publication, it must follow that, where the invention is sufficiently described in one or more patents (even though they be held void for some statutory reason), so that a skilled mechanic can take the publications and from them, without the exercise of the inventive faculty, produce the structure, with its functions, that such structure is not patentable because it has already been disclosed to the public. The whole matter comes down to a question of contract rights. Assuming that Bettendorf created his invention without any actual knowledge of the Hardie or Woods patents, yet the law fixes certain specific conditions which must exist to entitle him to the monopoly provided by a patent. The law seeks to confer the benefits and privileges of a patent upon the person who is "first to confer on the public the benefit of the invention." Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504.

In contemplation of law, the Hardie publication and the Woods publication gave to the public a description of the very car truck described in the Bettendorf patent. There was nothing subtle or deeply scientific in the constructions described. The patentable novelty was one of those things so simple that one is astonished that it was not thought of by some one long prior to Hardie. Having the Schaffer or a similar bolster in mind, it needed little more than a suggestion to enable even an unskilled person to see that the lower portion of the opening should be enlarged, so as to permit the bolster to be entered without removing guides, lips, or lugs, which might be necessary to hold it in place in operation.

For these reasons, I am convinced that the Bettendorf patent, limited to construction without journal boxes, is void by reason of prior publication, and this conclusion renders it unnecessary to consider the other defenses. As heretofore stated, there is no question made that the Bettendorf patent, construed as integral with journal boxes, is valid; but, so construed, infringement is not shown.

The application for dismissal of the complainant's bill will be granted, and there will be a decree for the defendants upon the cross-bill in accordance with the foregoing, and a judgment against Bettendorf Company for all costs, excepting these made prior to the filing of cross-bill. Counsel will prepare such decree, and submit it to counsel for the plaintiff in the cross-bill, who may file objections and submit for determination.

I do not find it necessary to review the question as to the title of the Bettendorf Company, in view of this determination.

MINERALS SEPARATION, LIMITED, et al., v. BUTTE & SUPERIOR MINING CO.

(District Court, D. Montana. August 25, 1917.)

No. 8.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PROCESS OF ORE CONCENTRATION.

The Sulman, Picard & Ballot patent, No. 835,120, for a process of ore concentration by air bubble flotation, is valid, and while, as construed by the Supreme Court, and since the disclaimer of claims 9, 10, and 11, it is limited to a process the results of which are obtained by the use of oil "amounting to a fraction of 1 per cent. on the ore," infringement is not avoided by the use of a larger percentage of oil, where the process is the same, and the excess of oil is either without effect or renders the process less efficient.

2. PATENTS ⊂=154—DISCLAIMERS—TIME AND REQUISITES.

A disclaimer of claims of a patent, filed 107 days after a decision of the Supreme Court adjudging them invalid, and which conforms to the language of the decision, is timely and sufficient.

In Equity. Suit by the Minerals Separation, Limited, and others against the Butte & Superior Mining Company. On final hearing. Decree for complainants.

Henry D. Williams, William H. Kenyon, and Lindley M. Garrison, all of New York City, and Odell W. McConnell, of Helena, Mont., for plaintiffs.

W. A. Scott and Thomas F. Sheridan, both of Chicago, Ill., and J. Bruce Kremer, of Butte, Mont., for defendant.

BOURQUIN, District Judge. This is trial on the merits of the suit reported in 237 Fed. 401. It involves the patent and claims of the Hyde suit, wherein the Supreme Court (242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286) held the patent valid, but some claims invalid. The issues are as in the Hyde suit, viz. novelty, invention, infringement, and in addition defenses of unreasonable delay and defects in disclaimer of the invalid claims, and estoppel by reason of statements by plaintiffs' counsel to the Supreme Court in arguing the Hyde suit. The evidence herein is that submitted during 25 days and also the record in the Hyde suit. So far as heretofore known, the nature and history of the discovery and invention (a process of ore concentration by air flotation) are fairly set out in reports of the Hyde suit (242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286; 214 Fed. 100, — C. C. A. —; [D. C.] 207 Fed. 956), of the Miami suit (244 Fed. 752, — C. C. A. —; [D. C.] 237 Fed. 609), and of foreign suits cited in footnote on page 754 of 244 Fed., page — of — C. C. A. This suit is an important contribution, and yet it discloses that, though the use of the process is very wide, extensive and growing, its simplicity, economy, and success still surprise and gratify the metallurgical world, and its laws or principles of operation still interest and puzzle the scientists. "In the beginning it was very little knowledge and mostly guesswork, and since then there has been every year a little

more knowledge and still a great deal of guesswork," testifies one of defendant's experts, Prof. Bancroft, of Cornell, a physical chemist of note, acquainted with the process since 1906, and lecturer upon it since 1912. Though speaking for himself alone, the learned doctor's estimate might well be applied to all, practical layman and expert scientist alike.

At the same time, though heretofore somewhat ambiguous and obscure, present knowledge warrants the conclusion that the gist of this remarkable and valuable process and the actual discovery and invention are that, whereas, theretofore in ore concentration air had been used in desultory and fugitive bubbles as a makeshift incident of and supplement to oil and skin flotation, air can be made to do all the work by creating in water ore pulp modified by a suitable oily contaminant an infinitude of bubbles. It is the first of its kind, and the patent sufficiently discloses it and methods to those skilled in the art.

Ambiguity and obscurity were as much due to the extreme mechanical simplicity of the process as to the inability then and now to know and explain all its laws or principles. The tendency was to attach prime importance to reduction in amount of oil used, when in fact this is but a necessary incident (for which there are substitutes if not equivalents) to the creation of the infinitude of bubbles that do the work. Despite this tendency, and to overlook the simple and obvious, the patent fairly clearly sets out the various ways and means to create this infinitude of bubbles and that they do the work. The tests to determine which kind and amount of "oily substance yields the proportion of froth or scum desired," that flotation is "mainly from the inclusion of air bubbles," the froth, the agitation, all are so many guides in the patent, pointing the skilled operator to and including the infinitude of bubbles and the degree of agitation and amount of soap or oil to produce such bubbles, as surely as the word "crystallization" points to appropriate temperature in Commercial Co. v. Canning Co., 135 U. S. 189, 10 Sup. Ct. 718, 34 L. Ed. 88, and the words "uttered sound" by the "human voice" to articulate speech in the Telephone Cases, 126 U. S. 531, 8 Sup. Ct. 778, 31 L. Ed. 863.

Of the new evidence herein are learned dissertations upon the philosophy of the process, upon the philosophy of bubbles, the heart of it, by Profs. Bancroft, of Cornell, and Taggart and Beach, of Yale, and Drs. Sadtler, of Philadelphia, and Grosvenor, of New York. From these it is gathered that the mere introduction of particles of air into a liquid does not create bubbles, but that they are created by subsequent agitation, either applied, or self-agitation. Air particles, introduced into pure water, are incapable of creating bubbles. The reasons are the surface tension of the water, and the lack of viscosity to create a sufficient film about the air particles, compel the escape of the air particles into the atmosphere, and no bubble is formed. Some soaps and oils possess the quality to lessen this surface tension of water and to give or increase this necessary viscosity. Their addition in appropriate quantity to water enables air particles introduced

therein to create bubbles. Rather, the meeting and coaction of water, oil, and air create a film composed of all three, and which surrounds the air particles. This film is more viscous than the mass of the water, and, rising to the surface, the tension of which (and of the film) has been reduced by the oil, maintains itself as an air bubble. This quality of oil is of first importance in the process. Another of lesser importance, and which all oils possess, is the "preferential affinity for metalliferous matter over gangue." Of lesser importance because it is now known (and patented) that, given another contaminant than oil, but which possesses the like bubble-making quality, though not the said "preferential affinity," the process is equally successfully worked. Air also possesses this "preferential affinity," and in view of the foregoing it well may be that the capture as well as the flotation of the metallic particles is more due to the great volume of air than to the infinitesimal oil. That in this process air without oil cannot capture and retain the metallic particles seems due to its inability to create bubbles without oil. And why this capture in any case is still of the unsolved phenomena of the process. On the other hand, water has a preferential affinity for gangue over metalliferous matter; that is, it wets the former more readily than it does the latter. And this contributes to the process, in that oil and air displace water from the surface of metalliferous matter more easily and quickly than from gangue, and so more readily capture and float the former than the latter. At the same time, despite these preferential affinities, in successful operation of the process the bubbles generally float more gangue than metal, more in quantity, but not in proportion, and why is also unsolved.

There are "critical proportions" of any oil used in this process; perhaps not a sharp divide, but rather a broad one. For the amount of oil to produce sufficient and efficient bubbles must depend on many other factors, viz. the working cell space, amount of water, degree of agitation, kind and amount of ore, and perhaps on occasion amount of metallic content, kind of oil, etc. For example, if a ton of ore be agitated in a lake of water, doubtless a lake of oil will be necessary to create sufficient bubbles to capture the metal in the ore. But with bona fide operations in a good, workmanlike manner, with the proportion of space, water, agitation, etc., such operations and manner dictate, the range in amount of oil will be narrow and well within 1 per cent. on the ore. These "critical proportions" are like those known to and solved by every child with its pipe and bowl of suds. Too little soap, the bubbles are few, small, fragile, and break quickly. Too much soap, they flow from the pipe in a torrent, are heavy, and refuse to float. The right amount of soap, the "critical proportions," his bubbles are large, detach readily, and float high, far, and for long. So is it with the bubbles in this process. With excess oil, but not enough to defeat bubbles altogether, though of fair aspect to the eye, the bubbles will not do the work. In the excess oil in the films the metallic particles do not cling, but swim or slide to the bubble's lower surface, "neck off," detach, and sink. The untechnical workman recognizes there are "critical proportions"

of oil, and small deviation from the predetermined amount in the feed, whether more or less, manifests itself to him in the appearance of the froth and poorer results; and he knows and remedies the error in oil.

Metallic content of ore seems of little importance—sometimes seems to require oil inversely. For example, a local operator with the process upon ore from the same vein as defendant's, uses seven tenths of a pound of oil per ton of ore of 11.23 per cent. zinc content, making 50.59 per cent. concentrates with 94 per cent. recoveries, and in the same plant uses 2.83 pounds of the like oil per ton of tails of .97 per cent. copper content, making 9.085 per cent. concentrates and .266 per cent. tails. It is apparent it is the air, and not at all the oil, that floats the mineral, noting that in the first of this example 211 pounds of zinc are floated by air bubbles in the creation of which only seven tenths of a pound of oil is used. How the air particles are introduced into the pulp is immaterial. For, introduced, they are still particles, and not bubbles. Agitation subsequent to introduction is vital, and alone can convert air particles into water-oil-air bubbles. It is this subsequent agitation that within the claims of the patent agitates "the mixture until the oil-coated mineral matter forms into a froth," or "to form a froth." And it is all one, whether this be applied agitation or self-agitation—the agitation set up by the air particles themselves in merely rising through the mass and thereby coming in contact with both water and oil, all coacting to form bubbles which capture the metal. The mineral particles, either oiled before or by contact with bubbles, attach to and enter the viscous film of the bubbles. The particles also increase the viscosity of the bubble films, armor them, and increase their stability, perhaps as stays that, decreasing the area of unsupported surfaces, increase the latters' ability to resist rupture.

The great mass of new evidence herein is but cumulative of the Hyde suit. The only new publication is the California Journal of Technology, detailing a suggestive, but rather misleading and abandoned, experiment, sufficiently referred to and disposed of in the Miami suit. There is much evidence that progress in the process and methods of operating it now discloses that, with some ores and some oils or mixtures of oils, the process can be fairly successfully operated with 1 per cent. and more of oil. This is really admitted by plaintiff, and is taken as proven. But it is also proven, practically without conflict, that in all the operations with this process not to exceed .2 per cent. of oil is used, save by defendant and others in like situation, and only since the decision in the Hyde suit, and solely to avoid infringement; that some oils are effective, and more are ineffective, to operate the process; and that the excess oil used is useless, wasted, and harmful.

[1] But the defendant contends that this evidence demonstrates the process lacks novelty and invention, and that because of it the record is substantially different from the Hyde suit, the decision there should not control here, and the patent is and ought to be held invalid. This is without support in the patent and Hyde decision. In describing the invention the patent refers to Cattermole and says that the patentees "have found that, if the proportion of oily substance be considerably

reduced, say to a fraction of 1 per cent. on the ore," after vigorous agitation the metallic particles rise to the surface in a froth; that the proportion thereof varies considerably with different ores and different oils, and so it is necessary to test "to determine which oily substance yields the proportion of froth or scum desired." An example of a particular ore and oil is of oil "say from .02 per cent. to .5 per cent. on the weight of ore," wherein on cessation of agitation "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 the oil, which has "a preferential affinity for metalliferous matter over gangue." It adds that the minimum of that oil "may be under .1 per cent. of the ore, but this proportion has been found suitable and economical."

The claims are (1) for "oily liquid * * * to a fraction of 1 per cent. on the ore"; (2) for oleic acid "to 0.02–0.5 per cent. on the ore," and (3) for "a small quantity of oil." These last were held invalid. In upholding the patent the Supreme Court says:

That, "as described and practiced," the process 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 1 per cent. on the ore,' and in so impregnating with air the mass * * * by agitation * * * as to cause to rise to the surface * * * a froth, * * * 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." That "it differs so essentially from all prior processes in its character, in its simplicity of operation, and in the resulting concentrate, that we are persuaded that it constitutes a new and patentable discovery." That the facts are not overstated by Liebman that: "'The present invention differs essentially from all previous results. It is true that oil is one of the substances used, but it is used in quantities much smaller than was ever heard of, and it produces a result never obtained, before. The minerals are obtained in a froth of a peculiar character, consisting of air bubbles which in their covering film have the minerals imbedded in such manner that they form a complete surface all over the bubbles. A remarkable fact with regard to this froth is that, although the very light and easily destructible air bubbles are covered with a heavy mineral, yet the froth is stable and utterly different from any froth known before, being so permanent in character that I have personally seen it stand for 24 hours without any change having taken place. The simplicity of the operation, as compared with the prior attempts, is startling. All that has to be done is to add a minute quantity of oil to the pulp to which acid may or may not be added, agitate for from 2½ to 10 minutes and then after a few seconds collect from the surface the froth which will contain a large percentage of the minerals present in the ore.'" That the court is convinced "that 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 on prior processes, but that this force 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 on the prior art and the resulting froth concentrate 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." That the court agrees with the House of Lords' decision that the process is not one before described but a new method in which flotation is by the "buoyancy of air bubbles." That tests to determine the necessary "amount of oil and the extent of agitation," and "the range of treatment

within the terms of the claims," satisfy the law; but that, while the patentee "discovered the final step, precedent investigations 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,' and therefore * * * the patent is valid as to claims Nos. 1, 2, 3, 5, 6, 7, and 12, * * * but * * * invalid as to claims 9, 10, and 11."

Those held invalid are those heretofore referred to as (3). It seems clear neither patent nor decision undertakes to say the process depends upon less than 1 per cent. of oil or is inoperative with 1 per cent. or more of oil.

It is true that in the beginning and during the Hyde suit the patentees inclined to so believe, or at least believed better results would be obtained with a fraction of 1 per cent. of oil. Perhaps limited investigation and experience with few ores and oils justified the belief. Indeed, all experience to date, plaintiffs', defendant's, strangers', demonstrates that with any ore and any efficient oil, less than 1 per cent. of oil gives better results, all circumstances considered. The "critical proportions" referred to seems absent, in terms, from the patent, and ought not to be adversely inferred, in disregard of construction in favor of the patentee where the patent is ambiguous. The patent describes oil "considerably reduced," and refers to a "fraction of 1 per cent." by way of example. And though some claims limit oil to such fraction, and a limited range within it, others are for "a small quantity," and for that reason held invalid by the Supreme Court. With the later knowledge of this suit, it is doubted that such would be the decision now. It is to be observed that this limitation of the patent indicates the Supreme Court believed the process might be operative with 1 per cent. and more of oil, and contemplated that this would not defeat the patent, but might affect infringement. If the patent is limited to the use of a fraction of 1 per cent. of oil, that the process can be operated with 1 per cent. and more is not material to validity, though it may be to infringement. For if a patentee limits his claim voluntarily, or because he does not know the extent of his invention, he abandons the excess, and the patent is valid to the extent of the claim. If it be conceded that new evidence might warrant and demand that a trial court hold invalid a patent by the Supreme Court held valid, such evidence must be unequivocal, clear, and convincing, in quality and quantity that inspires confidence and produces conviction that the patent is invalid, and that the Supreme Court would so determine, beyond a reasonable doubt. Not only does it fail here, but it strengthens the conviction that the patent is valid.

[2] The disclaimer, to conform to the Supreme Court's decision that claims 9, 10, and 11 are invalid, was filed 107 days after said decision, and after mandate, but before expiration of the time for rehearing. It was timely filed. In substance it fairly conforms to the language of the decision, disclaiming "from claims 9, 10, and 11 * * * any process of concentrating powdered ores excepting where the results obtained are the results obtained by the use of oil in a quantity amounting to a fraction of 1 per cent. on the ore." The parties differ in its

interpretation, even as they do in respect to the decision. Written words, not oral claims, control. The patent claims included what the patentees were entitled to, and more. The decision pointed out the excess. The patentees disclaim the excess. They can safely rely upon the decision, and a disclaimer conforming to the language of the decision is sufficient. The patent valid, defendant admits infringement from before suit commenced to January 7, 1917, and denies infringement thereafter. During the period of admitted infringement it applied the process to some 1,598,000 dry tons of crushed ore, the tailings from water concentration, of mineral zinc content by yearly averages as follows: 1913, 15.14 per cent.; 1914, 14.14 per cent.; 1915, 13.66 per cent; 1916, 12.89 per cent. Oil used by yearly averages is as follows: 1913, 5.58 pounds; 1914, 2.22 pounds; 1915, 1.49 pounds; 1916, 1.43 pounds. The concentrate grade by yearly averages is as follows: 1913, 47.60 per cent.; 1914, 53.03 per cent.; 1915, 54.62 per cent.; 1916, 53.83 per cent.; and recoveries (apparent) likewise are for 1913, 80.03 per cent.; 1914, 86.08 per cent.; 1915, 90.18 per cent.; 1916, 92.63 per cent. Progress is indicated by leaner ores, less oil, higher grade concentrates, greater recoveries, all coincident with advancing time.

It is noted that the process is responsible for advance in methods, devices, and machines for its operation. To briefly describe defendant's during infringement admitted, the water concentrate tailings, oil added, flowed to the head of a pyramid machine of seven cells in series; each cell containing a revolving perpendicular spindle and horizontal blades, and having two opposed spitzkasten. The agitation was very violent. The tails from each cell flowed by gravity to the cell immediately below, those from the last cell flowing to Callow air cells, which produced froth middlings, returning to the head of the pyramid, and tails to waste. The first three cells of the pyramid produced froth rougher concentrates, which flowed to cleaners, and the other cells produced froth middlings, which returned to the head of the pyramid. The rougher concentrates passed through five cleaner cells for washing. This produced concentrates which flowed to and through five recleaner cells, and tails which returned to the head of the pyramid. The recleaners produced final concentrates, and tails which returned to the head of the cleaner. Commencing January 7, 1917, the defendant's methods are as before, save pneumatic, as well as mechanical, agitation is employed in the lower four cells of the pyramid, some spitzkasten are blocked, an additional cleaner operation is used, and from which for some unexplained reason 8.65 per cent. zinc tails go to waste, and oil in amount 1 per cent. and more on the ore is used. Defendant not very insistently claims results for this latter period are more profitable than for the former; but plaintiffs' analysis (neither denied nor criticized, and beyond both) of defendant's reports and tabulations makes manifest the fact is otherwise to the extent of about $1.75 per ton of ore—an enormous loss on 45,000 tons monthly. There is considerable like testimony in reference to operations by other infringers. However, coming as it does after very large operations, investigations, and experiments of several years, after the Supreme

Court's decision in the Hyde suit, it is incredible that use of 20 pounds of oil per ton results in more profit than 1½ to 4 pounds per ton. If it does, these great concerns would not have waited to discover the fact, and employ it, until after the said decision. Defendant practically admits that it now uses the present amount of oil merely to avoid the patent. It is done, says its counsel in argument, "because the Supreme Court has said it is not at liberty to use less than one-half per cent.," and "out of abundance of caution" it uses "more than 1 per cent." The evidence likewise persuades. If the excess oil were effective and useful, and not inert and useless or harmful, it would be without the claims of the patent, would be of that the patentees abandoned to the public, and would involve no infringement.

Plaintiffs somewhat laboriously argue that though the Supreme Court held that the claim for use of "a small quantity of oil" to produce froth is too broad and so invalid, yet since the court identifies the invention by the "results obtained," though confining it to the "results obtained" by the use of oil "amounting to a fraction of 1 per cent. on the ore," the import of the decision is that, if the results obtained by operation of the process with oil in amount of 1 per cent. and more on the ore are like and the same results obtained with a fraction of 1 per cent. of oil, it is within the patent and is infringement. This is more ingenious than sound, and would deprive the decision of effect. The court does not confine the patent to the *like* or *same* results obtained, but to *the* results obtained, by the use of a fraction of 1 per cent. of oil on the ore. It is believed, however, that the court employs the word "use" in its or the ordinary sense of beneficial service. Patent law is not concerned with the useless, and a valuable result sought is not "obtained" *by,* but *despite,* the use of an excess of an essential ingredient, which excess renders no or ill service. From the evidence it appears the larger part of the oil used by defendant, and all in excess of a fraction of 1 per cent. on the ore, if not inert, is ineffective, wasted, and injurious to the process and results. Before January 7, 1917, defendant used only pine oil, and about 1.43 pounds per ton of ore, with excellent results. Since said date it uses a mixture of 20 to 24 pounds of oil per ton of ore, made up of 18 per cent. of pine oil, 12 per cent. of kerosene oil, and 70 per cent. of fuel oil, with poorer results. The kerosene and fuel oil are petroleums. As before stated, many oils are ineffective to operate the process, and that is because they have not the quality that contributes to bubble making. What this quality consists of, wherein it lies, does not appear. With these ineffective oils, agitation will not produce froth, and so there is no flotation of the metallic particles. One of defendant's witnesses testifies that in the laboratory and plant of the Utah Copper 1,000 oils have been tried, of which but two mixtures give satisfaction. Petroleums seem generally ineffective, by the evidence of both parties, though some of defendant's witnesses testify to sometime successful experiments with them. Incidentally, there is suspicion that with experiments, as with figures, can be done anything for or against, without impropriety in the operator. Some petroleums are used in limited quantities, but

always in combination with a recognized bubble-making oil, and only, it is said, for a somewhat bubble-stabilizing effect. Defendant's present mixture of oil contains more pine oil on the ore than it used alone before January 7, 1917. The other factors the same, it is obvious the excess petroleums in the mixture are responsible for the poorer results.

Defendant uses the patent process, uses plaintiffs' invention of ore concentration by air bubble flotation, uses the same elements in the same combination, in the same way, with the same function, to the same, but poorer, results; and exceeding the patent claims in reference to one ingredient (oil) uselessly, wastefully, and injuriously, and merely with intent to avoid the letter of the patent, does not avoid infringement. The addition of the excess oil no more adds to or changes the process, no more avoids infringement, than would the addition of milk or other useless substance, not a part of the process. The excess oil either exercises no function, or less efficiently exercises the same function in the same way, as the limited oil, and to the same, but poorer, results. To secure to patentees their invention, the law looks quite through mere devices and forms to the substance of things. And if in substance the invention is taken, if the thing that does the work is taken, all devices to evade the letter of the patent avail nothing to escape the consequences of infringement. Neither principle nor authority to the contrary is cited or known to the court.

In the matter of estoppel affecting infringement, it suffices to say neither in pleading nor proof do the elements of estoppel appear. Although the evidence is of great volume and the arguments of relative length, all have been carefully considered, but require no additional reference herein.

The patent is valid in respect to all claims involved. Defendant throughout has infringed, and now infringes, all said claims, save 5, 6, and 7, and decree accordingly.

JEFFERSONIAN PUB. CO. v. WEST, Postmaster.

(District Court, S. D. Georgia. August 29, 1917.)

POST OFFICE ⊂=14—NONMAILABLE NEWSPAPERS—VIOLATION OF ESPIONAGE ACT.

In a suit to enjoin a postmaster from withdrawing mailing privileges, articles in a newspaper *held* to violate Espionage Act June 15, 1917, tit. 1, § 3, making it an offense for one, when the United States is at war, to willfully make false statements with intent to interfere with the operation or success of its military or naval forces, or to willfully attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in its military or naval forces, or to willfully obstruct its recruiting or enlistment service, and so, under title 12, § 1, to render the paper unmailable.

In Equity. Bill by the Jeffersonian Publishing Company against J. Q. West, Postmaster. Preliminary injunction denied.

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

S. G. McClendon, of Atlanta, Ga., J. Gordon Jones, of Cordele, Ga., Samuel L. Olive, of Augusta, Ga., and B. J. Stevens, of Thomson, Ga., for plaintiff.

W. H. Lamar, Sol. for Post Office Department, and Earl B. Barnes, Sp. Asst. Atty. Gen., for defendant.

SPEER, District Judge. The bill before the court was brought originally to enjoin the postmaster at Thomson, Ga., from withdrawing the second-class mailing privileges of the Jeffersonian. The action complained of had been taken by the postmaster in obedience to an order of Hon. A. S. Burleson, as Postmaster General.

Appreciating the weighty effect of determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, a preliminary injunction was withheld. A rule was, however, granted, calling upon the respondent to show cause why the injunction sought should not be granted. At the hearing, it became apparent that the Postmaster General had forbidden the Jeffersonian of the 16th inst. all admittance to the mails; this, upon the ground that it was distinctly unmailable. By suitable amendment, the legality of this conclusion was challenged. The court, being of opinion that the plaintiff was entitled to specific information, not only of those features of the Jeffersonian issued on the 16th inst. held unmailable, but also those in past issues deemed so unmailable as to induce the conclusion by the Attorney General that the publication was not a newspaper, in the meaning of the law conferring the second-class privilege, directed that the respondent should file specifications of all such matter. This has been accordingly done, and thus the question is presented: Do the facts and the determination of the Postmaster General demand or justify a court of the United States in the interference here sought with an administrative branch of government?

In the affidavit of the Postmaster General, after the specification required by the court of the passages in the Jeffersonian held by him to be unmailable, there appears the following statement:

"Deponent further says that in his judgment, in their entirety, the issues (of the Jeffersonian) evince a purpose and intent on the part of the publisher to willfully make or convey false reports or false statements, with intent to interfere with the operation and success of the military or naval forces of the United States, to willfully obstruct the recruiting or enlistment service of the United States to the injury of the service, * * * and that the circulation of such matter is causing antagonism and resistance among the people to the conduct of the war with respect to enlistments, execution of the draft, and the sale of bonds to raise revenue to carry on the war."

The Postmaster General further states under the sanction of his oath that he is advised and believes that there is an organized propaganda which has inflamed a large body of people to such an extent that it constitutes in effect the advocacy of treason, insurrection, and forcible resistance to the laws of the United States. Upon such information, he states that this has been actually threatened, and that prominent among the publications thus engaged is the Jeffersonian; that the matter it produces to this end, in contemplation of the Espionage Act, is

nonmailable. After due and thorough consideration, deponent so decided, but prior to his ruling that the issue of June 28, 1917, was nonmailable, the paper was submitted to the Attorney General of the United States, and deponent was advised by the Attorney General that the paper was in violation of section 3 of title 1 of the Espionage Act. For the same reason, and because it contained matter of the same nonmailable description, the Postmaster General, after examination, caused the postmaster at Thomson to be advised that the issue of August 16th was also unmailable. Thus it will be seen that the court is advised of the concurrent opinion of two members of the cabinet, the chief of the Post Office Department, and the chief of the law department of the government, in justification of the action of which plaintiff complains.

A supreme measure of legislation, enacted by Congress for the successful prosecution of the great war in which the country is engaged, termed the Espionage Act, in title 1, section 3, declares that:

"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 * * * of the United States, shall be punished by a fine," etc.

In connection with this, section 1 of title 12 of the same act must be considered. This declares that:

"Every letter, * * * newspaper, etc., in violation of any of the provisions of this act is hereby declared to be nonmailable, * * * and shall not be conveyed in the mails or delivered from any post office or by any * * * carrier."

The light afforded by these sections of a valid and vital law shone upon the pages of the Jeffersonian when they were under the scrutiny of the members of the President's cabinet. Congress had declared war. Thousands of the élite of the American army were on the soil of France. At any moment the crash of their rifle fire and the thunders of their artillery in the vindication and defense of human liberty might be heard. American men of war, manned by Americans, were swiftly cleaving the waters forbidden by the enemy to our commerce, questing every billow for his lurking and deadly craft. By the thousands, the gallant youth of every American state were rallying to the flag. By the vast oversubscription of the Liberty bonds our people had proven that in the common cause they will be as lavish of their treasure as of their blood. With the utmost nobility of soul, with the self-sacrificial spirit of woman, in the humane Red Cross and similar organizations, our country's daughters were no whit behind her sons.

At this juncture of the nation's life, the Postmaster General and the Attorney General have discovered in the plaintiff's publication, which the government through its mail was distributing to its people, such passages as this, taken from the issue of June 28th:

"Men conscripted to go to Europe are virtually condemned to death and everybody knows it.

"President Wilson admitted as much in his Flag Day address. * * * Why is your boy condemned to die in Europe?"

Again in the issue of July 19th is a statement aimed at the Chief Magistrate of the United States. That it is false, that it was intended to interfere with the operation or success of our forces, that it was an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty by them, the Postmaster General might well conclude.

"Does he, the President, not know that the Conscription Act, forcing citizens out of the Union to die in Belgium and France, is every bit as lawless as the action of the Phelps Dodge Copper Company in forcing these one thousand one hundred (1,100) miners out of Arizona? What are 1,100 miners to six hundred and eighty-five thousand (685,000) conscripts whom our Cæsar has condemned to death in 'foreign fields of blood'?"

Nor is such reference as the following, to the Commander in Chief of the Army and Navy of the United States, made in time of war, deterrent to insubordination, disloyalty, mutiny, or refusal of duty:

"Are we—like the sow returning to her wallow, and the dog to his vomit—to go back to the medievalism of personal rule—a Pope's word ruling the church, and a king's word ruling the state?

"Why not call Woodrow Wilson by the name of King, or Kaiser, or Czar, if the Constitution is to be treated as the Kaiser treated the Belgium treaty?

"The Kaiser did not swear to support the Belgium treaty. Woodrow Wilson did swear to support the Constitution.

"And now, within six months after taking that solemn and public oath, the Congressmen and President, who did so, are treating the Constitution exactly as the Kaiser treated the Belgium treaty."

Nor does Congress escape. On page 4 of the issue of July 19th is printed the vote of the House on the question to create a national army; this under the title:

"These are the Representatives in Congress, Lower House, Who Confiscated the Liberty and the Lives of Your Sons."

A more direct, but not more effective, effort to obstruct the recruiting or enlistment service of the United States, appears on page 7 of the issue of July 26, 1917:

"I advise [prints the editor of the Jeffersonian] *the conscripts* to await the decision of the United States Supreme Court, *and not to be clubbed* by the fact of conscription *into enlistment*. Once you volunteer, and sign up, you can be sent anywhere, and the law can't help you."

Equally, but not more, unmailable in contemplation of the act of Congress above quoted is the issue of August 16th. In the affidavit before the court the Postmaster General, as we have seen, after charging the existence of an organized propaganda to discredit and handicap the government in the prosecution of the war, declared that such matter is in violation of section 3 of title 1, and sections 1 and 2 of title 12, of the Espionage Act, and is nonmailable; that for these reasons the publication is not a newspaper or other periodical publication, within the meaning of the laws of the United States governing mailable matter of the second class; and the deponent so decided after

due and thorough consideration of the matters and things stated herein. In this conclusion I find that he was fully justified.

In such crises in Lacedæmon, the Spartan mother, when her son went forth to battle, was accustomed to exclaim, "Return on your shield or with it!" How dissimilar, how sordid, is the cowardice the Jeffersonian would encourage:

"What about a carload of German soap made out of our boys?

"What about manuring German fields with our bravest youth, and fattening German hogs on the choicest selection from American manhood?

"'I raised my boy to be a soldier,' says the song, but did mother raise him to be pig feed?"

Had the Postmaster General longer permitted the use of the great postal system which he controls for the dissemination of such poison, it would have been to forego the opportunity to serve his country afforded by his lofty station.

This is, moreover, an additional consideration of the weightiest character, which obliges the denial of such an injunction as is here sought. An appeal is made to an American court of equity to oblige the postal authorities of our country to contribute its mailing facilities for the furtherance and success of a propaganda against the nation as distinct as it is truculent and dangerous. Under the familiar rule in equity, such an appeal is addressed largely to the discretion of the court. It is to be determined by the conscience of the chancellor, and always with proper regard to the public welfare. This imports the country's welfare. And a party seeking this extraordinary remedy, under a rule equally familiar, must come into court with clean hands. Can one be said to come with clean hands when the policy, methods, and efforts he would maintain may cause his hands to be imbrued in the blood of the demoralized and defeated armies of his countrymen? If by such propaganda American soldiers may be convinced that they are the victims of lawless and unconstitutional oppression, vain indeed will be the efforts to make their deeds rival the glowing traditions of their hero strain. On the contrary, the world will behold America's degradation and shame, the disintegration under fire of our line of battle, the inglorious flight of our defenders, like the recent debacle of the Russian army, brought about by methods much the same, the ultimate conquest of our country, the destruction of its institutions, and the perishing of popular government on earth.

The preliminary injunction is denied.

SHERA et al. v. CARBON STEEL CO.

(District Court, S. D. West Virginia, at Charleston. February 24, 1917.)

1. CORPORATIONS ⇐552—APPOINTMENT OF RECEIVER—WHEN AUTHORIZED.
   A receiver should not be appointed for a corporation, thereby impairing its credit, interfering with its management, and imposing upon the court the onerous duty of corporate management, except in extreme cases.
2. INJUNCTION ⇐11—GROUNDS—ABANDONMENT OF THREATENED ACTION.
   An injunction in a suit by a stockholder to restrain the corporation from turning over its assets to another corporation will be denied, where the

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

plan of turning over the assets to such other corporation has been abandoned, and no action to that end can be taken without due notice to all the stockholders.

3. CORPORATIONS ⊂=189(12)—MISAPPROPRIATION OF FUNDS—PRIMA FACIE EVIDENCE.

Where a corporation with a capital of $5,000,000, and which was enjoying unusual prosperity, was paying only moderate dividends to its stockholders, the payment of large bonuses to its officers was prima facie evidence of a misappropriation of its funds, and prima facie illegal corporate action, though in strict conformity with the formalities required by law.

4. INJUNCTION ⊂=11—GROUNDS—ABANDONMENT OF THREATENED ACTION.

An injunction against the payment of such bonuses would not be denied merely because the president, on behalf of himself and other officers, filed a disclaimer, stating that such payments had not been made, and that they would not hold the company to the obligation to make them, unless acted upon at the end of the fiscal year by those authorized; this not being signed by any officer except the president, and being without consideration, and possibly nothing more than an expression of intention upon the part of the president, not legally binding as a waiver.

In Equity. Suit by George W. Shera and another against the Carbon Steel Company. Decree granting part of the relief sought.

Henry W. Runyon, of Jersey City, N. J., and Arthur S. Dayton, of Philippi, W. Va., for complainants.

Royal T. Riggs, of New York City, and H. V. Blaxter, of Pittsburg, Pa., for defendant.

WOODS, Circuit Judge. In a case of so much importance and interest, it is usually the duty of the court to take the papers and consider them carefully, in the light of the argument before coming to a conclusion. In this case, however, after the lucid arguments of counsel, I have no doubt as to what the decision ought to be. The motion to dismiss the bill and the motion to strike out the answer are denied.

[1] The application for the appointment of a receiver is denied for these reasons: The appointment of a receiver of any kind is a very severe blow to any corporation. It impairs its credit, interferes with its management, and it imposes upon the court the onerous duty of corporate management, which it is not qualified to perform, and which it should not undertake except in extreme cases.

Another reason for refusing the receivership is that all the relief which could be obtained by the appointment of a receiver may be obtained by amendment of the bill, making it a bill on behalf of the complainants and any other creditors who may desire to come in and contribute to the expense of the suit. That relief, however, will not be adequate, unless the complainants have access to the list of the stockholders of the corporation, so that they may have an opportunity to notify other creditors to come in. The denial of the motion is with this qualification: That the complainants may renew their motion for the appointment of a receiver upon due notice, unless (1) the defendant shall furnish the complainants or their counsel a list of the stockholders of the corporation and the number of shares held by each, within 15 days from the filing of the decree entered in accordance with this opinion; and (2) shall allow the complainants or their counsel upon

written request to examine the minutes of the corporation, in so far as they show the resolution of the board of directors voting the bonuses attacked in this proceeding, and that of the stockholders affirming the resolution.

[2] The injunction against turning over the assets of the corporation to another corporation will be denied, because the plan of turning over the assets to another corporation, which is set out with particularity in the bill, has been abandoned and made of no effect, and no action could be taken looking to that end without due notice to the complainants, and all other stockholders. If any action of that kind should be undertaken in the future, there will be abundant time and opportunity for the complainants to apply again for injunction to prevent it.

[3] The application for injunction against paying out the funds voted as a bonus to the officers for the year 1917 stands upon a different foundation. We have here a corporation of $5,000,000 capital, which from its earnings paid nothing more than a moderate dividend to its stockholders. It was such a dividend as the stockholders might reasonably expect in ordinary times from a prosperous corporation. By reason of fortunate circumstances the corporation had wonderful prosperity, and it appears from the bill that approximately $500,000 of the earnings of the corporation prior to January 1, 1917, profits of a contract with the English government for war munitions, was paid out to the officers and other employés of the corporation according to the discretion of the president, by virtue of the resolution of the directors and stockholders above referred to. It appears, further, that prior to September 30, 1916, the salary of the president was $6,000, the secretary $2,400, the treasurer $3,600, and the general sales agent $4,800. These salaries were increased at that date, so as to give the president $18,000, and large increases to the other officers.

The very large bonuses paid in lieu of salaries are complained of as a misappropriation of the funds of the corporation. The court does not hold, at this time, that this payment was a misappropriation; that will be a matter to be determined upon the final hearing of the case. It does hold, however, that payment of such large bonuses to the officers of a corporation paying only moderate dividends to its stockholders is prima facie evidence of a misappropriation of the funds, either from a misapprehension of what the rights of the corporation and its stockholders as against its officers were, or from a disregard of those rights. The whole transaction may be satisfactorily explained, and the corporation and its officers entirely exonerated at the final hearing. Prima facie, it was illegal corporate action. The fact that this action may have been taken in strict conformity with the formalities required by law does not overcome the inference of inequity against the minority stockholders.

[4] It is urged that the injunction should not be granted, because the president, on behalf of himself and the other officers of the company, by a disclaimer dated February 7th, stated:

"That no payments have been made to the officers under the resolution of October 27, 1916, which relates to profits made by the company after the termination of the contract with the English government for munitions, and during the year to come, 1917, will not hold the company to the obligation enter-

ed into by it, unless it is acted upon at the end of the fiscal year by those properly authorized."

I do not think this paper affords complete protection to the complainant stockholders for these reasons: First, it is not signed by any officer, except the president himself; second, it is without consideration; third, it is doubtful whether it can be regarded as anything more than an expression of intention upon the part of the president, not legally binding as a waiver of the stipulations of the contract upon his part.

To sum up: This order of injunction is based upon serious issues made by the pleadings as to the alleged misappropriation of the funds of the corporation, requiring investigation at the hands of a court of equity. But in making it the court expressly disclaims any intention to hold that there has been any fraudulent appropriation or intentional wrong committed by the officers of the corporation, or by the corporation in its corporate capacity. Those inquiries are to be determined upon the final hearing.

A decree will be entered in accordance with this opinion.

CHICAGO GREAT WESTERN R. CO. v. POSTAL TELEGRAPH-CABLE CO.

(District Court, N. D. Illinois, E. D. August 14, 1917.)

No. 735.

1. CARRIERS ⟸32(2)—TELEGRAPHS AND TELEPHONES ⟸34—CHARGES—DISCRIMINATION.

Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (Comp. St. 1916, § 8569), provides that no carrier, unless otherwise provided, shall engage in the transportation of passengers or property unless its charges have been filed and published, nor shall any carrier charge, demand, collect, or receive a greater, less, or different compensation than the charges specified in the tariff filed. Act June 18, 1910, c. 309, 36 Stat. 539, amending the Commerce Act, provides that its provisions shall apply to telegraph and telephone companies, that all charges for the transmission of messages by telegraph or telephone shall be just and reasonable, and that every unjust and unreasonable charge is thereby prohibited, provided that nothing therein shall prevent telegraph and telephone companies from contracting with common carriers for the exchange of services. *Held*, that the act of 1910 does not authorize a railway company and a telegraph company, contracting for an exchange of services to render "off-line" service, such as the transportation of material or supplies destined for points beyond the railway company's lines, or the transmission of messages to points beyond the carrier's lines, at a rate other than that published in the regular schedules, and different from the rate charged the general public.

2. CARRIERS ⟸23—TELEGRAPHS AND TELEPHONES ⟸34—DISCRIMINATION—STATUTORY PROVISIONS.

A contract between a telegraph company and a railway company for the rendition of "off-line" services for less than the rates published and charged the general public, though valid when made prior to the amendment of Commerce Act by Act June 29, 1906, c. 3591, is prohibited thereby.

3. STATUTES ⟸219—EXECUTIVE CONSTRUCTION—WEIGHT.

The conference rulings of the Interstate Commerce Commission respecting the construction of statutes regulating commerce, though not conclusive, are entitled to great weight, and should not be lightly overruled.

In Equity. Suit by the Chicago Great Western Railroad Company against the Postal Telegraph-Cable Company. Bill dismissed.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., for plaintiff.
Jacob E. Dittus, of Chicago, Ill., for defendant.

EVANS, Acting District Judge. Plaintiff in this suit seeks to compel defendant to comply with the terms of a certain contract made December 26, 1888, between the defendant and plaintiff's predecessor, and to restrain the prosecution of certain actions instituted by defendant to collect moneys alleged to be due for services rendered plaintiff by defendant. Sufficient allegations appear in the bill and are admitted in the answer and were conceded upon the trial to give a court of equity jurisdiction of the cause. In other words, it is conceded that, if the contract be upheld, the decree must be for the plaintiff.

The contract under consideration provided generally for the rendition of service by the parties to this action to each other and was to continue for 99 years from its date. The substance of a very similar contract is set forth at some length in the opinion of the court in deciding the case of Baltimore & Ohio Railroad Co. v. Western Union Telegraph Co. (D. C.) 241 Fed. 162. Only a few of the more important paragraphs will be quoted. Paragraphs 2, 3, 7, and 8 read as follows:

"2. The railway company agrees to furnish all labor necessary for the maintenance, repairs, and renewals of said telegraph lines, and for any extensions thereto that may hereafter be made upon property that is now or may hereafter be owned or controlled by the railway company, and to furnish office room in its railway stations, and that its railway telegraph operators shall handle the business of the telegraph company at all stations along the line of said railway, except at such places as the telegraph company may establish a separate office for the better accommodation of the telegraph business of such places. It is understood and agreed, however, that, whenever the commercial or public business at any office maintained by the railway company shall become greater than can be properly carried on by the operator or operators employed by the railway company, then the telegraph company shall furnish and pay for its own operating service at such office. And it is agreed that the employés of the railway company, in the performance of their duties in connection with the maintenance and operation of said telegraph lines, shall observe the rules and regulations of the telegraph company applicable thereto, and shall exercise the same care and diligence in the maintenance and repair of the wire or wires that the telegraph company has or may have along said railway for its business, and in the transaction of the commercial telegraph business, as in the maintenance and repair of the wire or wires of the railway company, and in the transaction of the telegraph business of the railway company.

"3. The railway company agrees to transport free of charge over its railway, upon application of the superintendent or other officer of the telegraph company, employés of the telegraph company, when traveling upon the business of said company, and also to transport and distribute free of charge along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair, and operation of the lines and wires covered by this agreement, and of such additional lines of poles and wires as may be erected under the provisions of this agreement, and also of material and supplies for the establishment, maintenance, and operation of the offices of both parties hereto at places along and adjacent to said railway."

"7. The telegraph company agrees to transmit free, over its lines beyond

said railway telegraph lines, business of the railway company to the extent of $10 per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the telegraph company, and for this purpose the telegraph company will issue to said officers of the railway company as may be designated by the president, vice president, or general manager thereof, annual franks of the telegraph company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the railway company, originating at or destined to points on the telegraph company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the railway company beyond its lines shall amount to more than $10 per mile of railway per annum, the excess shall be paid for at one-half the regular rates of the telegraph company. It is understood and agreed, however, that the telegraph service herein provided for applies only to the transmission of messages concerning business of the railway company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the railway company, the tolls upon which should properly be chargeable to such customers.

"8. It is mutually understood and agreed that the business of the railway company shall have precedence over all other business upon the wires set apart for the use of the railway company, and that the railway company shall have the full use of all the wires now in operation, and of two wires upon any extensions of said railway that may hereafter be made in case the railway company require the same, free of charge, but that until the railway company shall find it necessary to have the sole use of said wires the commercial business of the telegraph company shall also be done over the said wires. In case the railway company shall require the use of an additional wire or wires for railway business over and above the two wires hereinbefore mentioned, the same shall be paid for by the railway company, and in case an additional wire or wires shall be required for commercial business, the same shall be paid for by the telegraph company, and in either case such additional wire or wires shall come in under the terms of this contract as to maintenance, repairs, and renewals. In case the two wires, or either of them, set apart for the use of the railway company, shall be at any time unfit for use, the railway company shall have the free use of such of the wires set apart for commercial business as shall be necessary to transact its business until the wires set apart to it shall be put in fit condition for use."

[1] Defendant's counsel attempts to make a distinction between what is termed "on-line" service and "off-line" service. When the railroad transports material or supplies for use on its own right of way, the service is described as "on-line" service. When the carrier transports material or supplies over its road to be used in constructing or repairing the telegraph company's lines beyond the carrier's lines, it is "off-line" service. Likewise the telegraph company conveys messages for the railroad company along the common line of the two companies, and in doing so renders what it calls "on-line" service. When the same company conveys messages to points beyond the lines of the carrier, the service is said to be "off-line" service. Defendant assails the present validity of that portion of the contract that calls for the rendition of "off-line" service at other than regular rates.

The precise question is this: Under the laws as they exist to-day, can a carrier or telegraph company render "off-line" service to the other at a rate other than that published in the regular schedules and different from the rate charged the general public?

Plaintiff answers this question in the affirmative, and for its authority relies upon an act of Congress enacted June 18, 1910, generally

referred to as an amendment to the Interstate Commerce Act. The material portion of the act relied upon reads as follows:

"Section 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or District of the United States, to any other state, territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: and *provided further, that nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.*" Comp. St. 1913, § 8563.

In support of its contention that the "exchange of service" referred to in this amendment supports the contract in question, reference is made to the court's opinion in the case of Baltimore & Ohio Railroad Company v. Western Union Telegraph Company, 241 Fed. 162, which decision has since been affirmed by the United States Circuit Court of Appeals for the Second Circuit. In view of this authority, I announce my conclusions, which differ from those of the learned courts whose opinions have been referred to, with some hesitancy.

The history of the times, so far as it pertains to the regulation of commerce, is out of harmony with plaintiff's contention. From 1887, when the Interstate Commerce Act was passed, down to the present time, it has been the evident intent and purpose of Congress to require the railroads to render service at reasonable *and uniform* rates. While less appreciated generally, the value of uniformity in the rates charged by a common carrier is as great as the advantage that comes from reasonable rates.

Not only was it the purpose of Congress to secure uniformity of rates in the act to regulate commerce enacted in 1887, but that intent and purpose has been since frequently re-expressed in the various amendments to that act that have been passed by this same body. The Hepburn amendment, enacted in 1906, not only expressed such an intent, but endeavored to avoid evasions of the law. After this amendment became effective, section 6 of the act to regulate commerce, generally known as the Interstate Commerce Act, read as follows:

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers

or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * *" Comp. St. 1916, § 8569.

Two decisions by the United States Supreme Court followed shortly thereafter and are particularly enlightening. In the case of Chicago, I. & L. Ry. Co. v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. 305, the court said:

"The decisive question in this case is whether the contract between the railway company and the Munsey Company is repugnant to the acts of Congress regulating commerce. In other words, could the company, in return for the transportation which it agreed to furnish and did furnish to the Munsey publisher over its interstate lines, and to his employés and to the immediate members of his and their families, accept as compensation for such service anything else than money, the amount to be determined by its published schedule of rates and charges? Upon the authority of Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467 [31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671], just decided, and according to the principles announced in the opinion in that case, the answer to the above question must be in the negative. The acceptance by the railway company of advertising, not of money in the payment of the interstate transportation furnished to the publisher of the Munsey Magazine, his employés and the immediate members of his and their families, was for the reasons given in the Mottley Case, in violation of the Commerce Act. The facts in the present case show how easily, under any other rule, the act can be evaded, and the object of Congress entirely defeated. The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money."

In the case of Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, the court said:

"In our opinion, after the passage of the Commerce Act, the railroad company could not lawfully accept from Mottley and wife any compensation 'different' *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were as well as to have the equal benefit of them. To that end the carrier was required to print, post, and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules, except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail, and would not ordinarily be of any practical value, if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier. * * * The passenger has no right to buy tickets with services, advertising, releases, or property, nor can the railroad company buy services, advertising, releases, or property with transportation. The statute manifestly means that the purchase

of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs. In the first of the cases last above cited [the Goodridge Case, 149 U. S. 690, 691, 13 Sup. Ct. 970, 37 L. Ed. 986] the court, referring to the practice of allowing rebates, said: 'So opposed is the policy of the act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices he may know precisely with what he has to compete.' * * *"

The foregoing is but a brief account of the history of railroad rate regulation pertinent to the question under consideration, and a brief statement of the law as it stood in 1910, when the amendment to the act to regulate commerce, relied on by the plaintiff, was enacted. The railroads were then without authority to make a contract with a telegraph company, or any one else, whereby as carriers they rendered services at rates different from those charged the general public. This state of the law was the result of successive acts of Congress, each succeeding one going further than its predecessor in eliminating discriminating and preferential rates.

It is claimed by the plaintiff, however, that this act of June 18, 1910, amending the act of February 4, 1887 (Comp. St. 1916, § 8563, subd. 3), gave to the carrier the authority which was denied it by the previous acts of Congress as interpreted by the Interstate Commerce Commission and the Supreme Court of the United States.

Examining the history of this amendment, we find that the purpose and object of the legislation was to include telegraph, telephone, and cable companies, etc., within the provisions of the act to regulate commerce. The amendment of 1910 was not intended to in any way affect the regulation of railroads. It neither added to nor detracted from the power of carriers in respect to rates. The amendment had for its object the bringing within government regulation of quasi public corporations, somewhat similar in their nature and business to common carriers, and was in harmony with public sentiment throughout the nation, voiced by legislation, both state and national. If the carrier did not have the authority to make the contract prior to 1910, it is difficult to see how an act bringing telegraph and telephone companies within the provisions of the law furnished the authority.

But the learned counsel for the plaintiff contends that the amendment was passed by Congress with a full appreciation on its part of the close relation and interdependence of telegraph companies and carriers, and with a full appreciation of the difficulty encountered in charging regular rates for the varied services rendered. Appreciating this situation, it is claimed that the amendment of 1910 expressly ratified the form of contract in existence between most of the telegraph companies and the carriers of the country, which contracts were in all material respects similar to the one here under consideration.

Defendant does not seriously dispute that the effect of this amendment was to ratify the contract so far as "on-line" service was con-

cerned, but denies that it gave validity to these contracts so far as "off-line" service was concerned.

In view of the defendant's contention, it is interesting to examine the reports of the Commission and the decisions of the courts to determine whether there was in fact a distinction between "on-line" service and "off-line" service of a carrier.

This court's attention is called to the Twenty-First Annual Report of the Interstate Commerce Commission, page 25, where the Commission, speaking of the telegraph railroad contracts, said:

"So far as the Commission could see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely. Nevertheless the Commission knows of no provisions of law now in force that vests it with authority, or any clause in the law that affords it a reasonable ground, to differentiate "off-line" service of carriers by telegraph companies by transportation of merchandise or any other form of private property for shippers."

In the case of Santa Fé, Prescott & Phœnix Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177, 33 Sup. Ct. 474, 57 L. E. 787, the following language, used by Mr. Justice Hughes, speaking for the entire court, is instructive:

"It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See Matter of Railroad-Telegraph Contracts, 12 Interst. Com. Com'n R. 10, 11."

Still another decision by the Supreme Court, supporting the Interstate Commerce Commission ruling and reversing a decision of the Commerce Court, is that of Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 225 U. S. 326, 32 Sup. Ct. 742, 56 L. Ed. 1107, Ann. Cas. 1914A, 504. The question in that case was whether the railroad company could charge a different rate for transportation of coal to a given point to a railroad than to other shippers; the coal being intended for use by the railroad as fuel. The court held that the rate charged must be the same as the rate charged other persons for the same service. In that case the court said:

"The circumstances and conditions which may so far be considered as distinguishing traffic so as to take from different transportation charges the vice of preference, have been described by this court. In Wight v. United States, 167 U. S. 512, 518 [17 Sup. Ct. 822, 42 L. Ed. 258], it is said: 'It was the purpose of the section (2) to enforce equality between shippers, and it prohibits any rebate or any device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.'"

Again the court said:

"It is admitted that the fact that the railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put, and it would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only,

and we may let in considerations which may become a cover for preferences. * * * It must be kept in mind that it is not the relation of one railroad to another with which we may have any concern, but the relation of the railroad to its patrons, who are entitled to equality of charges."

The amendment of 1910 made the telegraph and telephone companies common carriers within the meaning and purpose of the act to regulate commerce. The amendment did not in any way modify section 6 of the act to regulate commerce, as amended by the act of June 29, 1906, which expressly provided:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

The difficulty experienced in determining the value of its service, and the inability of the carrier to classify such service as it renders the telegraph company, referred to by the plaintiff's attorney, applies to "on-line" service only. No difficulty should be experienced by the carrier in charging the telegraph company its regular rates for transporting material over its line to be delivered to a connecting carrier for further conveyance. In this respect it acts as a common carrier, and in reason and justice should comply with that cardinal rule of railroad rate regulation, namely, that all rates shall be uniform and the same to all patrons.

The plaintiff's counsel, with much zeal and commendable industry, has collected a large number of definitions of the word "exchange"; while defendant's counsel has also furnished the court with a number of definitions of that word. While not unmindful of the value of lexicons in a case like the present, the court is satisfied that the correct construction to be placed upon the term "exchange of service" cannot be gathered from dictionaries alone.

If this court were to adopt the construction given by the plaintiff's attorney, it would impute to Congress a reversal of its settled policy, and give validity to a contract which at common law was contrary to public policy. Congress, in passing this amendment, acted in the light of judicial construction of similar legislation, and was aided by the conference rulings of the body delegated by it to enforce the law it was about to enact. In the face of the history of railroad legislation, this court is not justified in construing a phrase so as to permit a common carrier, acting as such to render service to one patron at rates different from those charged other patrons, when a different construction is reasonably open.

Under all the circumstances, the court concludes that the "exchange of service" referred to in the amendment of 1910 validated the contract so far as it pertained to "on-line" service, but such act did not validate the contract so far as it provided for compensation other than regular rates when either company rendered the other "off-line" service.

[2] The fact that the contract may have been valid when executed will not overcome the effect of the amendment of 1906, which clearly prohibited such contracts as are here sought to be enforced. New

York Central & Hudson River Railroad Co. v. Gray, 239 U. S. 583, 36 Sup. Ct. 176, 60 L. Ed. 451; C., I. & L. Railway Co. v. United States, supra.

[3] In reaching this conclusion, no consideration has been given the conference rulings of the Interstate Commerce Commission made since the enactment of the amendment of 1910. These rulings, while not conclusive (Atchison, Topeka & Santa Fé Ry. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175, decided June 4, 1917), are entitled to great weight, and should not be lightly overruled.

On June 8, 1912, the Commission approved its conference ruling No. 364, which is as follows:

"*Exchange of Services by Telegraph and Railroad Companies.*—Under the amendatory act of June 18, 1910, it is provided 'that nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.' Upon inquiry, held, that a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement."

On July 15, 1914, the Commission approved the following conference ruling:

"Upon inquiry as to whether or not, under the provision of section 1 'that nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph, and cable companies') to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under section 6 of the act, held, that while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of section 6 of the act, and of the reasonable charges of said telegraph company regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad—that is to say, when such transportation is not conducted by said railroad as a common carrier."

This ruling was reaffirmed on March 26, 1916.

Surely the conclusions of the body delegated by Congress to enforce the statute are entitled to great weight in a case like the present. The rulings of administrative bodies charged with the enforcement of certain statutes have very generally been given careful consideration and credit by the courts. Pennell v. Philadelphia & Reading Ry. Co., 231 U. S. 675, 34 Sup. Ct. 220, 58 L. Ed. 430; United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

The contract in the present case was modified some years after it was made; but the rights of the parties, so far as this case is concerned, were not changed in any respect by the modification. The contract, so far as it provides for compensation for "off-line" service at rates other than those charged the general public, is invalid.

Plaintiff's bill must be dismissed. Let a decree be so entered.

UNITED STATES v. MITCHELL.

(District Court, S. D. West Virginia. September 25, 1917.)

COMMERCE ⟸33—OFFENSES—INTERSTATE "TRANSPORTATION"—"COMMERCE."

The West Virginia intoxicating liquor law (Acts W. Va. 1917, c. 58) declares in section 31 that it shall be unlawful for any person to bring or carry into the state during any period of 30 consecutive days, or to carry from one place to another within the state, more than one quart of intoxicating liquors for personal use, and that it shall be unlawful for any carrier to knowingly carry for a passenger, or knowingly permit a passenger to carry, into the state, more than one quart of intoxicating liquor as personal baggage. Act Cong. March 3, 1917, c. 162, 39 Stat. 1058, 1069, making appropriations for the service of the Post Office Department, declares in section 5, after providing penalties for use of mails in advertising or soliciting orders for liquor in territory where by the local laws it is unlawful to so advertise or solicit liquor orders, that whosoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors, shall be punished, provided that nothing herein shall authorize a shipment of liquor into any state contrary to the laws of such state. Accused carried as personal baggage one quart of intoxicating liquor from Kentucky into the state of West Virginia, which liquor was intended for his own use. *Held* that, as "commerce" is defined as the exchange of merchandise on a large scale between different places or communities, or, as extended trade or traffic, accused was not guilty of a violation of Act March 3, 1917; his transportation of liquors into the state of West Virginia not amounting to interstate commerce, and the word "commerce" not being synonymous with "transportation," even though a transaction of magnitude would be unnecessary to violate the statute.

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

Walter Mitchell was indicted for violating Act Cong. March 3, 1917. Defendant discharged.

F. W. McCullough, Dist. Atty., of Huntington, W. Va., for the United States.

H. C. Warth, of Huntington, W. Va., for defendant.

KELLER, District Judge. This indictment, under what is known as the Reed Amendment, contained in the Act of March 3, 1917, the title of said act being, "An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," is submitted to me upon an agreed statement of facts.

The act consists of five sections, the last of which, after providing penalties for the use of the mails in advertising or soliciting orders for liquors in territory where, by the local laws, it is unlawful to so advertise or solicit orders for liquors, contains the following clause:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, that nothing

herein shall authorize the shipment of liquor into any state contrary to the laws of such state: Provided further, that the Postmaster General is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of states in which it is unlawful to advertise or solicit orders for such liquors."

The agreed statement of facts is as follows:

"In the District Court thereof, September term, 1917. This day the defendant came and entered his plea of not guilty to the indictment in the above case. And now, after an examination of the evidence in the above case, F. W. McCullough, United States district attorney for West Virginia, in the Southern district thereof, and H. C. Warth, attorney for the defendant, Walter Mitchell, have agreed that the following statement of facts is correct, and hereby agree and do now submit this case to the court on the said statement of facts hereinafter set out, as being a question of law as to whether or not the said Walter Mitchell is guilty as charged in the indictment. It is hereby agreed between the attorneys in the above case that the following facts are true and correct:

"That the defendant's name is Walter Mitchell, that his place of residence is Republic, Kanawha county, West Virginia, and that he is 35 years of age; that on the 18th day of September, 1917, the said Walter Mitchell went to the town of Catlettsburg, in the state of Kentucky, that he there purchased one quart of intoxicating liquor, contained in two one pint bottles, from the Virginia Wine & Liquor Company, at Catlettsburg, in the state of Kentucky, that he paid the sum of $1 for the said intoxicating liquor, that the said intoxicating liquor was purchased by the said Walter Mitchell for his own personal use and consumption, and without any intention on his part of making a sale of said intoxicating liquor, and that the said liquor was never offered by said Walter Mitchell for sale at any time while the same was in his possession; that after purchasing said intoxicating liquor the said Walter Mitchell boarded a trolley car, commonly known as a street car, on the electric line of the Ohio Valley Electric Railway Company; that said railway company was then and there engaged in the transportation of passengers and baggage between the said state of Kentucky and the state of West Virginia; that the said Walter Mitchell paid the fare required to transport him from the town of Catlettsburg and state of Kentucky to the town of Kenova, and state of West Virginia, in the Southern district thereof; that said Walter Mitchell had in his possession as baggage at the time of boarding said trolley car, in the said town of Catlettsburg and state of Kentucky, the said quart of intoxicating liquor, and that he transported the same as personal baggage, on said trolley car, from the said state of Kentucky to the town of Kenova and state of West Virginia, in the Southern district thereof; that it was the purpose of said Walter Mitchell to make connection with No. 4, on the Chesapeake & Ohio Railroad, and, on leaving the said trolley car, to board said No. 4 on said Chesapeake & Ohio Railroad, and to go to his home at Republic, West Virginia, where he intended to store said intoxicating liquor for his own personal use and consumption; that said Walter Mitchell was not permitted to go to his home at Republic, West Virginia, but as soon as said trolley car arrived at Kenova, in the state of West Virginia, in the Southern district thereof, that the said Walter Mitchell was then and there arrested by Arthur J. Devlin, special agent of the Department of Justice of the United States; that, when arrested, said Walter Mitchell had the said intoxicating liquor in his possession as personal baggage, and that he was committed to jail to await the action of the grand jury; that the said Walter Mitchell had not brought into the state of West Virginia, in interstate transportation, any intoxicating liquor within 60 days, and that the said Walter Mitchell had never before been arrested and indicted for the transportation of intoxicating liquor in violation of the laws of West Virginia; that the said Walter Mitchell bought the said intoxicating liquor in the state of Kentucky with the assurance and understanding that he was entitled to do so under the statute of West Virginia permitting persons to transport into the state of West Virginia one quart of intoxicating liquor per month for personal use, and that said Walter Mitchell thought he was complying with the law in every respect when he purchased said intoxicating liquor in the state of Kentucky and

transported it into the state of West Virginia as personal baggage, and was informed and verily believed that he had a perfect right under the law to do so; and as evidence that the said Walter Mitchell was complying with the statute of West Virginia, and was not violating the prohibitory laws of West Virginia in any way, that section of the statute of the state of West Virginia, allowing persons the right to bring into said state of West Virginia, for their own personal use and consumption, one quart of intoxicating liquor per month, is herein set out as follows:

"'Sec. 31. It shall be unlawful for any person to bring or carry into the state, during any period of thirty consecutive days, or carry from one place to another within the state, in any manner, whether in his personal baggage, or otherwise, more than one quart of intoxicating liquors for personal use. If any person shall bring, or carry into the state, during any period of thirty consecutive days, or from one place to another within the state, in any manner, whether in his personal baggage, or otherwise, more than one quart of intoxicating liquors for personal use, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months. And upon conviction of the same person for the second offense under this act, he shall be guilty of a felony, and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or introducing evidence and proving the same on the trial. It shall be unlawful for any carrier operating in this state to knowingly carry for a passenger, or knowingly permit a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage. But nothing contained in this section shall be construed as requiring a carrier to carry, or permit a passenger to carry into the state, or from one place to another in the state, any intoxicating liquors as personal baggage. If any carrier shall knowingly carry for a passenger, or knowingly permit a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, the carrier shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than two hundred nor more than one thousand dollars. And a court of equity upon showing that a carrier has knowingly carried for a passenger, or knowingly permitted a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, or through the want of due caution and care, has carried for a passenger, or permitted a passenger to carry into the state, or from one place to another within the state, more than one quart of intoxicating liquors as personal baggage, shall have jurisdiction to entertain such suit and to enter such decree and take such proceedings as are provided for in section seventeen.'"

It is to be noted that the sanctions of this act are directed against the ordering, purchasing, or causing intoxicating liquors to be transported in interstate commerce, and this brings us to inquire what is meant by interstate commerce. Webster defines commerce as:

"The exchange of merchandise on a large scale between different places or communities; extended trade or traffic."

And he gives as synonyms the following words:

"Trade; traffic; dealing; intercourse; interchange; communion; communication."

Of course, the question of the magnitude of the commercial transaction is unimportant, considered from a legal standpoint where the

commerce is prohibited; but that the phrase "interstate commerce" necessarily connotes interstate commercial dealings originating in one state and extending to another I am fully persuaded. I am quite as fully persuaded that, in the case at bar, no transportation of liquor in interstate commerce has been shown, but that, on the contrary, a mere interstate transportation of goods no longer in commercial existence, so to speak, has taken place in strict accord with the laws of the state to which such goods were transported.

"Commerce" is not a term synonymous with "transportation," and where an owner transports his goods personally from one state to another, not for purposes of trade, he is not engaging in commerce, and the statute does not apply. The indictment is doubtless good, and it is only the agreed facts that show that no conviction can be had upon it.

It is not necessary in deciding this case to consider the question whether Congress has power to regulate interstate transportation, where such transportation is not in commerce, because I do not find in the act any declared intention so to attempt to regulate or control such transportation; and it will be time enough to pass upon that question when, if ever, it arises.

It follows that the proofs do not support the charge in the indictment, and the defendant is discharged.

UNITED STATES v. SUGARMAN.

(District Court, D. Minnesota, Second Division. October 25, 1917.)

1. ARMY AND NAVY ⟸40—OFFENSES—ATTEMPT TO CAUSE INSUBORDINATION—INDICTMENT.

Under Act June 15, 1917, § 3, providing that 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, shall be punished, an indictment alleging that defendant, in a county specified, willfully attempted to cause insubordination, etc., in the military forces, by urging, counseling, and advising certain men named not to report when ordered to do so by the military authorities for military service, such named persons being persons who had registered for service in the military forces under Selective Draft Act May 18, 1917, and the rules and regulations promulgated by the President, sufficiently alleged the facts of defendant's offense, though it did not set forth what defendant said in the way of urging, counseling, and advising such refusal of duty, as an indictment is not required to set out the evidence, but only the ultimate facts.

2. ARMY AND NAVY ⟸40—OFFENSES—"ATTEMPT" TO CAUSE INSUBORDINATION—INDICTMENT.

The indictment was sufficient, though it did not allege defendant's intent, as the offense charged was not that of causing insubordination, etc., but that of attempting to cause insubordination, and an attempt includes and involves intent.

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

3. CRIMINAL LAW ⟸304(2)—JUDICIAL NOTICE—HISTORICAL FACTS.

The date of the drawing under the Selective Draft Act is a historical fact, of which the court takes judicial notice without proof.

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4. ARMY AND NAVY ⊂=40—OFFENSES—ATTEMPTING TO CAUSE INSUBORDINATION—"MILITARY FORCES OF THE UNITED STATES."

Under Const. art. 1, § 8, authorizing Congress to make rules for the governing and regulation of the land and naval forces, Act April 22, 1898, c. 187, § 1, 30 Stat. 361 (Comp. St. 1916, § 1714), providing that the national forces consist of all able-bodied male citizens and persons of foreign birth who have declared their intention to become citizens between the ages of 18 and 45, and Act May 18, 1917, designating a class of persons between the ages of 21 and 31 from whom an army should be drawn for active military service, persons who had registered thereunder and had received their serial numbers were a part of the "military forces of the United States," within Act June 15, 1917, § 3, making it an offense to attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States.

Criminal prosecution by the United States against Abraham L. Sugarman. On motion by defendant for a directed verdict. Motion denied.

Alfred Jaques, U. S. Atty., of Duluth, Minn., and William Anderson, Asst. U. S. Atty., of Minneapolis, Minn.

Louis L. Schwartz and T. E. Latimer, both of Minneapolis, Minn., and Seymour Stedman, of Chicago, Ill., for defendant.

BOOTH, District Judge. The motion is a rather broad one, and the argument has naturally taken a somewhat broad scope. The motion, I take it, in its present form, practically covers the same ground as the demurrer that was interposed to the indictment, and the motion to quash the indictment, and also the more limited motion to direct a verdict for lack of evidence to go to the jury.

It is insisted by counsel for the defendant, not only that the indictment does not state facts sufficient in law to constitute an offense, but also that under the evidence as disclosed on the part of the government a good indictment cannot be drawn under section 3 of the Espionage Law to cover the facts disclosed. These questions as to whether the indictment states facts in sufficient form, and whether the facts stated are sufficient in law, are somewhat intimately connected, and have been argued more or less together, so that they may be properly treated more or less together.

[1] The indictment is drawn under section 3 of the so-called Espionage Law (Act June 15, 1917), and, so far as this case is concerned, that section reads as follows:

"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, * * * shall be punished."

Now, the indictment drawn under that section is substantially as follows: That on the 24th of July, 1917, the United States being then and there at war, Abraham L. Sugarman, in the county of Sibley, state and district of Minnesota, and within the jurisdiction of this court, did willfully attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States, by then and there urging, counseling, and advising a number of young men (named) not to report when ordered so to do by the military authorities of the United States for military service; they, the said young men, being the persons who had theretofore registered for service in the military

forces of the United States in accordance with the act of Congress of May 18, 1917, and the rules and regulations promulgated by the President. Now, the ordinary tests for sufficiency of an indictment as to form are that it shall be sufficiently definite to acquaint the defendant with what charge he has to meet upon the trial; and also sufficiently definite and certain so that, if he either is convicted or acquitted, he may thereafter plead the judgment in any other prosecution that may be brought against him for the same offense; and, third, that the court may be acquainted with what is charged, so that it may determine whether or not the facts, if they are proven, constitute an offense in law within the statute under which the indictment is drawn.

Now, it seems to me, applying those tests to this indictment, that as to the formal requisites it is sufficient. It acquaints the defendant with the time and place of the offense; it acquaints him with the fact that it is claimed that then and there he attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States; and it acquaints him with how it is claimed that was done, by urging certain young men there not to report for military duty, and that these young men were men who had been registered under the act of Congress. It is true the indictment does not set forth what was said by the defendant in the way of urging, counseling, and advising this disloyalty and refusal of duty; but it seems to me that, in the present instance, that would be requiring the indictment to set out evidence, and the indictment, as I understand it, is not required to set out evidence. It is required to set out ultimate facts, and it seems to me that within the tests this indictment does set out ultimate facts. Now, whether the indictment sets out facts which, if true, are sufficient in law to constitute an offense, and whether the evidence that has been introduced here is sufficient to be submitted to a jury to determine whether the offense has been committed, are further questions that are raised by this motion.

[2] It is claimed that there is no allegation in the indictment of any intent on the part of the defendant, and it is true that there is no specific allegation of intent on the part of the defendant. It is alleged that he did "feloniously and willfully attempt to cause insubordination, disloyalty," etc. Now, if the indictment had been for causing, and had alleged that he did certain acts, and then had alleged that he did those acts with intent to produce a certain effect, and that the effect was produced, that would have constituted one offense under this act. But this is the offense of attempting, which in its very nature assumes that the attempt was not consummated into the completion of the full crime. Now, an attempt, in its very nature, includes and involves intent. So that it seems to me that, when the indictment alleged that there was an attempt to do a certain thing, it also, though not in so many words, stated that he intended to do that certain thing. So that it seems to me it was not necessary, in addition to the words used, that there should have been any allegation that in attempting to do a certain thing he was intending to do that certain thing, because the two, under the circumstances, are practically synonymous. Now, it is alleged in the indictment that he attempted to cause insubordination, disloyalty, and refusal of duty. That is in the words of the statute. The indictment goes further, and sets up specifically how that was

attempted to be done, "by counseling and advising" certain young men not to report when ordered to do so by the military authorities—in effect that they were to pay no attention to this duty under the law. Now, the allegations of the indictment, it seems to me, are sufficient in that respect, and the evidence that has been introduced here certainly tends to support the allegations of the indictment, and would, on the face of the record as it now stands, make a case for the jury.

[3] There is a further question raised by this motion, and that is as to the status of these men in whom it is claimed this attempt was made to produce disloyalty and refusal of duty. The indictment alleges that these men had registered. It also alleges that an attempt was made to cause disloyalty and refusal of duty in the military forces of the United States. The evidence shows that the young men in question, named in the indictment, had registered. It also shows that they had received their serial numbers under the Draft Act. The indictment does not allege that to be the case; but the proof shows it, and no point is made that the indictment does not state that particular fact. And, of course, the date of making the drawing is an historical fact, of which the court would take judicial notice without proof.

[4] Now, the defendant claims that these men were not in actual military service, but the government contends that the men were in the military forces of the United States, and that is the most important question that is raised by this motion. I am sorry that I have not had an opportunity myself to investigate more thoroughly this question. It is, I think, a very important question, and, so far as I know, has not yet been passed upon under the present law. The section itself reads:

"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, * * * shall be punished."

It does not use the language "in persons in the military service of the United States." And the question arises whether those two expressions are synonymous—whether the "military forces of the United States" may not be broader in scope than "persons in the actual military service of the United States." This word "forces" is used in a number of places in the statutes of the United States. It is also found in the Constitution of the United States. In section 8 of article 1 of the Constitution of the United States, enumerating the powers of Congress, amongst others, are these:

"To raise and support armies; * * * to provide * * * a navy; to make rules for the government and regulation of the land and naval forces."

Now, whether the words "land and naval forces" there are exactly synonymous with the words "army and navy," is a question that might well bear close investigation. In chapter 187, § 1, 30 Statutes at Large, p. 361 (Comp. St. 1916, § 1714), which was the act providing for the raising of the amy for the Spanish-American War, we find this language:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years,

are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

So far as I am advised, this section has not been repealed. Now, it seems to me there is a clear distinction between the expression "national forces," as used there, and persons in the actual military service of the United States. In the National Defense Act, which was passed in June, 1916, we find this language, in section 111 (Comp. St. 1916, § 3045):

"When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the regular army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war, unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve."

There, again, a distinction is made between the forces of the United States and persons in the actual military service of the United States. Now, as I say, I have not had an opportunity to investigate this question carefully; but I have concluded, from reading these laws, and from considering the purpose of the laws, that the military forces of the United States are, at any particular time, what Congress declares them to be. By the act of April 22, 1898 (30 Stat. p. 361), the national forces were declared to be male persons, citizens and certain others, between the ages of 18 and 45. By the act of May 18, 1917, the Selective Draft Act, Congress designated a class of persons between the ages of 21 and 31 from whom should be drawn an army for active military service. Now, registration was the first step in the organizing of the army, the first step in bringing this class of men, or certain members of it, into active military service, and the drawing of the numbers at Washington, on July 20th, was a second step, and other steps, of course, would be those taken by the local boards and the district boards, until finally a man would either be excused or rejected, or become a member of the army in active military service.

Considering, therefore, the broad purposes of this act of May 18, 1917, considering the evils that were intended to be met by section 3 thereof, considering the language of the section, I am of opinion that the words "military forces" therein should be given a broad, rather than a narrow, meaning, and should be held to mean, not merely the men that are in active military service, but also men who had registered and had received their serial numbers from Washington, and that is as far as is necessary to hold in this particular case. Now, if that construction is the proper one, then the indictment in that respect is sufficient, inasmuch as these men named in the indictment were within the class of persons constituting "the military forces of the United States" at the time and place in question. And the evidence supports the allegation of the indictment that these men named had in fact registered, and also shows that they had in fact received their serial numbers.

It seems to me, therefore, under the circumstances, that the indictment is sufficient, and that the evidence is of such character and amount as requires the submission of the case to the jury. Therefore the motion for a directed verdict will be denied.

O. & W. THUM CO. v. DICKINSON.

SAME v. A. K. ACKERMAN CO.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917. Petition for Rehearing Denied November 6, 1917.)

Nos. 2906, 2907.

1. TRADE-MARKS AND TRADE-NAMES ⊂=58—INFRINGEMENT.
Complainant's trade-mark for sticky fly paper, consisting of printed matter and arbitrary designs printed in black ink on the sheets, *held* infringed by defendant.

2. TRADE-MARKS AND TRADE-NAMES ⊂=58—INFRINGEMENT—IMITATION.
In testing the charge of infringement of trade-mark or of unfair competition, consideration must be given to the question whether the resemblances so far dominate the differences as to be likely to deceive ordinary purchasers; and the purchasers most to be considered are the ultimate users rather than jobbers and retailers; also the larger features of resemblances, instead of the subordinate points of differences, must control.

3. TRADE-MARKS AND TRADE-NAMES ⊂=55—INFRINGEMENT—INTENT.
It is not necessary to the maintenance of a charge of infringement of trade-mark to prove a distinct intent on the part of the infringer; but it is the fact of infringement, and the consequent invasion of the good will and business of the owner of the mark, that is controlling, and the intent will be presumed.

4. TRADE-MARKS AND TRADE-NAMES ⊂=60—UNFAIR COMPETITION—IMITATION OF DRESS.
When a manufacturer has, through a particular trade dress, as by the size of the article, and of the cartons and cases in which it is marketed, so identified his product as to indicate that it is his, every principle of fair dealing and fair trade forbids the adoption by a subsequent competitor of the same dress, without otherwise effectively distinguishing it from that of the first user.

5. TRADE-MARKS AND TRADE-NAMES ⊂=70(4)—UNFAIR COMPETITION—IMITATION OF DRESS.
Defendant *held* chargeable with unfair competition in imitating in size and marking the sheets of fly paper made by complainant, an older manufacturer, with an established business and reputation, and also of the cartons and cases in which the same was marketed, to such extent as to justify the inference that the similarity was intentional, and for the purpose of deceiving purchasers.

6. TRADE-MARKS AND TRADE-NAMES ⊂=93(3)—SUIT FOR UNFAIR COMPETITION—PROOF OF INTENT.
To establish unfair competition, it is not necessary to prove intent by direct evidence, where it is clearly to be inferred from circumstances.

7. MONOPOLIES ⊂=21—VIOLATION—DEFENSE TO SUIT FOR INFRINGEMENT.
A suit for infringement of trade-mark and unfair competition cannot be defended on the ground that complainant has violated the anti-trust laws.

8. TRADE-MARKS AND TRADE-NAMES ⊂=86—SUIT FOR INFRINGEMENT—LACHES.
Where the action of a defendant in imitating the trade-marks and trade dress of complainant was progressive, new features of similarity being added from time to time, complainant is not chargeable with laches in delaying to bring suit, which deprives it of the right to an injunction, although the delay may affect its right to an accounting for the full period.

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9. TRADE-MARKS AND TRADE-NAMES ⟸70(2)—UNFAIR COMPETITION—USE OF MISLEADING NAME.

Complainant and its predecessors had been for many years engaged in the manufacture of sticky fly paper in Grand Rapids, Mich., and had extended its business until its product was known throughout the country, when defendant went into the business in Grand Rapids under the trade-name of "Grand Rapids Sticky Fly Paper Company." He marked such name, and also the word "Sticky," on the sheets of his product, and later marked the cases in which it was shipped "Grand Rapids Sticky Fly Paper." *Held* that, while complainant had never used the name "Grand Rapids" in connection with its product, except to designate its place of business, both such name and the word "sticky" had come to be identified by consumers with its product, and that the use made of them by defendant tended to deceive purchasers, and should be enjoined.

10. TRADE-MARKS AND TRADE-NAMES ⟸68—"UNFAIR COMPETITION."

The essence of "unfair competition" consists in palming off, either directly or indirectly, one person's goods as the goods of another.

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

Appeals from the District Court of the United States for the Southern Division of the Western District of Michigan, and from the District Court of the United States for the Eastern Division of the Northern District of Ohio; Clarence W. Sessions, Judge.

Suits in equity by the O. & W. Thum Company against Albert G. Dickinson and against the A. K. Ackerman Company. From the decrees, complainant appeals. Reversed.

Chappell & Earl, of Kalamazoo, Mich., and Kleinhans, Knappen & Uhl, of Grand Rapids, Mich., for appellant.

Willard F. Keeney and Roger C. Butterfield, both of Grand Rapids, Mich., for appellees.

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

WARRINGTON, Circuit Judge. June 11, 1914, the O. & W. Thum Company, a Michigan corporation, brought suit in the United States District Court for the Western District of Michigan, Southern Division, against Albert G. Dickinson, a citizen and resident of Grand Rapids, Mich., to enjoin his alleged infringement of a registered trade-mark; and on July 14th following the same company commenced suit in the United States District Court for the Northern District of Ohio, Eastern Division, against the A. K. Ackerman Company, an Ohio corporation, to enjoin its alleged infringement of the same trade-mark and also for unfair competition.[1] The defendants answered and the two cases were heard together and decided upon the evidence so presented; and a decree was entered in each case dismissing the bill, with costs. The Thum Company appeals from each decree.

[1] September 4, 1914, District Judge Sessions, of the Western District of Michigan, was designated in aid of the judges of the district to hold the District Court of the United States for the Northern District of Ohio, and to hear and determine all matters arising in the suit there brought against the Ackerman Company as stated.

The two bills of complaint are in the main similar in averment and in relief sought as to alleged infringement of trade-mark; the chief differences in averment relate, in the Dickinson suit, to certain alleged conduct of defendant Dickinson, and, in the Ackerman suit, to acts alleged in respect of that company as a broker engaged in the sale of Dickinson's products, while injunctive relief additional to that sought to restrain infringement is prayed in the Ackerman suit respecting certain acts charged in the bill as constituting unfair competition.[2] The plaintiff and defendant in the first case are rivals in the manufacture and sale of sticky fly paper; and the plaintiff and defendant in the second case are rivals in the sale of such paper. The defendant in the second case handles and sells only such paper as the defendant Dickinson produces, though by no means all; and this includes sheets of fly paper, cartons, and cases, such as Dickinson causes to be placed upon the market. If we ascertain, then, what the two main rivals, plaintiff and defendant in the first suit, have done and are doing in this line of business, we shall at the same time learn substantially all that is done by the Ackerman Company.

The plaintiff's predecessors began the manufacture of sticky fly paper about 1883 at Grand Rapids, Mich., and the business has ever since been continued in that city by such predecessors and the plaintiff. The defendant Dickinson, through a corporation, began the same business in Grand Rapids in 1902, and (through that corporation and another and later individually) he has been engaged in this business since that time. The business of the Thum Company and that of defendant have been developed into large proportions, extending throughout this country and into foreign countries. The evidence has taken a wide range, and has brought out a number of controversies, which so far as necessary will be noticed as we progress.

[1] I. *Infringement of Trade-Mark.* The Thum Company has several registered trade-marks. The particular mark which is claimed to be infringed is No. 57,567, entitled "Trade-Mark for Sticky Fly Paper," and was registered November 13, 1906. The following appears in the statement found in the certificate of registration:

"The trade-mark has been continuously used in the business of said corporation by it and its predecessors, from whom it derived title, since January, 1888, * * * and the particular description of goods * * * upon which the said trade-mark is used is sticky fly paper."

And in the verified declaration it is stated that the trade-mark had been in actual use as a trade-mark of applicant or its predecessors

[2] Presumably the two suits were brought against the respective defendants and in separate jurisdictions, and the bills differentiated as stated, for the purpose of testing both the question of infringement of the registered trade-mark and that of the claimed unfair competition; and this course was probably adopted because of the lack of diversity of citizenship in the first suit. Burt v. Smith, 71 Fed. 161, 163, 17 C. C. A. 573 (C. C. A. 2); Air-Brush Mfg. Co. v. Thayer, 84 Fed. 640, 641 (C. C.). Whether, in view of the fact that the validity of the trade-mark here involved is not questioned, it was necessary to resort to the second suit, need not be considered; but we remark that it is difficult to determine in some instances, as respects each of the bills, whether the effect of particular allegations is to charge infringement or unfair competition, and this difficulty extends to some of the evidence.

"for ten years next preceding the passage of the act of February, 1905 [Act Feb. 20, 1905, c. 592, 33 Stat. 724], and that to the best of his (affiant's) knowledge and belief such use has been exclusive." Neither of these statements nor the validity of the trade-mark is questioned.

The trade-mark so registered consists of an assemblage of figures shown in black ink and arranged as follows: (a) One full ellipse, centrally located, and near each end of its major axis a fractional ellipse, all arranged in succession, with their major axes extending lengthwise of the sheet on which the figures are displayed; (b) four circles disposed thus, one above and one below the adjacent parts, respectively, of the complete ellipse and each fractional ellipse; (c) the borders of the ellipses and circles may be said to be in the form of a scroll, the several borders having four figures, each resembling a bowknot, one at each end of the major and minor axes of the complete ellipse, and, so far as shown, of each fractional ellipse, and also at points equidistant upon the periphery of each circle.

According to one of defendant Dickinson's exhibits he made application to register a trade-mark in 1914, consisting of one full and two fractional elliptical figures, which so far as shown are so nearly true ellipses that they may fairly be called one full ellipse and two fractional ellipses, with their major axes disposed lengthwise of the sheet. Their borders are in single lines and terminate at each end of the major axes in what seems to be a Maltese Cross. A panel bordered in single line is disposed centrally within each main and fractional ellipse. Four sketches of flies in enlarged scale are disposed similarly to the four circles of plaintiff's trade-mark. The defendant's entire mark, as it was used throughout 1914 and as it has been since, is shown in black ink.

The statement accompanying defendant's application contains the following:

"The trade-mark has been continuously used in my business and in the business of my predecessor, the Grand Rapids Sticky Fly Paper Company, of Grand Rapids Michigan, * * * since 1904."

Defendant offered testimony to show that this application was practically allowed August 31, 1914, which as we have seen was after the instant suits were begun. Attention, however, has been called to a decision of the Court of Appeals of the District of Columbia rendered April 2, 1917, in a case between the parties to the first of the present suits, in which the decision of the Commissioner of Patents allowing the defendant Dickinson's application, was reversed. Judge Robb, in announcing the opinion, said of the two marks here in question:

"Comparing the two marks, we cannot escape the conviction that there has been a studied attempt on the part of the applicant to put on the market a fly paper closely resembling that of opposer."

In the practical use that has been made of these two marks certain matter has been displayed upon them to which attention should be called. Within the full ellipse and fractional ellipses of plaintiff's mark the word "Tanglefoot" has been carried, which in itself is a trade-mark and was registered by plaintiff, in connection with other matter, December 11, 1894, No. 25,660, and was registered separately, in spe-

cial style of type, November 13, 1906, No. 57,566. The validity of this mark is not in dispute. Within the four circles of plaintiff's mark the following appears:

(a) "In cool weather warm slightly before opening;" (b) "Catches the germ as well as the fly; (c) "Pat. in the United States and Canada, trade-mark registered;" (d) "Ask for Tanglefoot, it is the best fly destroyer."

Beneath the complete ellipse it is stated:

"Made by the O. & W. Thum Co., Grand Rapids, Mich., U. S. A., and Walkerville, Ont., Canada."

The word "Sticky" is displayed within the complete and fractional ellipses of defendant, though only the ends of the four interior letters appear above and below the panels before mentioned, and upon each panel it is stated:

"The best fly paper, kills fly and germ, not poisonous."

The letters of "Sticky," so far as shown, are in form similar to those of "Tanglefoot." The following appears immediately above the main ellipse:

"Open slowly; if paper tears, warm slightly."

And immediately below:

"Grand Rapids Sticky Fly Paper Co., Grand Rapids, Mich., U. S. A."

[2] Now, whether we consider these two marks according to their respective forms alone, or in connection with the accompanying matter of each, we fail to discover any reason for the resemblances brought about, unless the purpose was to imitate. The main figures of each are elliptical in form and disposed alike upon the sheets bearing the marks. The four circles of plaintiff's mark and the four flies of defendant's mark are positioned alike with reference to the complete and fractional ellipses. The test is to be found in the ensemble. If, for instance, an ordinary view is taken of all the parts together of each mark, so that each part is considered in relation to the whole, a substantial resemblance is apparent. It is in this way, since it is the natural way, that effective impressions of users are acquired; and the tendency to confuse one mark with the other, when either is seen separately, must be evident as respects the average purchasing user. The tendency here to confuse ultimate users—indeed, to enable the palming off of defendant's goods as those of plaintiff—is made more certain and continuous by the fact that the marks of plaintiff and defendant, respectively, are exposed on both sides of every sheet of sticky fly paper put out by either; and thus in dealings between retailers and ultimate users these marks necessarily come to the view of such users both before their purchases and afterwards. It is to be observed, moreover, that in testing the charge of infringement, as well as that of unfair competition, consideration must be given to the question whether the resemblances so far dominate the differences as to be likely to deceive ordinary purchasers; and the purchasers most to be considered are the ultimate users, rather than jobbers and retailers, since they, like all middlemen, are interested in and have the means of identifying the manufacturers of the goods they pur-

chase. W. A. Gaines & Co. v. Turner-Looker Co., 204 Fed. 553, 556, 123 C. C. A. 79 (C. C. A. 6); Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 723, 119 C. C. A. 164 (C. C. A. 6); Royal Baking Powder Co. v. Royal, 122 Fed. 337, 345, 58 C. C. A. 499 (C. C. A. 6); Singer Manufacturing Co. v. Wilson, 2 Ch. D. 434, 442; Singer Manufacturing Co. v. Loog, 18 Ch. D. 395, 412; Celluloid Manuf. Co. v. Cellonite Manuf. Co. (C. C.) 32 Fed. 94, 97, per Mr. Justice Bradley on the circuit; G. Heileman Brewing Co. v. Independent Brewing Co., 191 Fed. 489, 497, 112 C. C. A. 133 (C. C. A. 9); Improved Fig Syrup Co. v. California Fig Syrup Co., 54 Fed. 175, 178, 4 C. C. A. 264 (C. C. A. 9); Liggett & Myer Tobacco Co. v. Hynes, 20 Fed. 883, 885 (D. C.); Lawrence Manuf. Co. v. Lowell Hosiery Mills, 129 Mass. 325, 328, 37 Am. Rep. 362; L. E. Waterman Co. v. Standard Drug Co., 202 Fed. 167, 171, 120 C. C. A. 455 (C. C. A. 6), and citations; Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 610, 128 C. C. A. 203, L. R. A. 1915F, 1107 (C. C. A. 6); L. E. Waterman Co. v. Modern Pen Co. (D. C.) 193 Fed. 242, 247, per Judge Learned Hand, modified 197 Fed. 534, 536, 117 C. C. A. 30 (C. C. A. 2), affirmed as modified, 235 U. S. 88, 35 Sup. Ct. 91, 59 L. Ed. 142.

Why, out of the exhaustless variety of geometric figures and of methods of grouping should the defendant Dickinson have adopted figures and grouping substantially like those of plaintiff's mark? A purpose to appropriate a trade-mark in substantial part could scarcely be more manifest. A feature kindred to this appears in a matter of color and to which we have not thus far alluded. Until the manufacturing season of 1912–1913 defendant Dickinson displayed his main ellipse and fractional ellipses, together with the panel and printed matter thereon, in red ink. He then began to change the color to black, and in 1914, and since, has continuously printed his mark in black ink. The excuse given for this change is one of expense though it is not shown that some color, other than black, might not have been adopted with reasonable economy; and, apart from the bearing this change has in the other case upon the question of unfair competition, it also tends to support the charge of infringement, since it extends and emphasizes the resemblances between the two marks. True, the ellipses differ in dimensions and in borders, the ellipses of the plaintiff being greater in minor axes, though less in major axes, than those of the defendant; and, of course, the four circles of the former are not the four flies of the latter; yet the similarity of the main figures, and especially in the entire arrangement, rather than the differences mentioned is likely to be kept in mind by the average user. The larger features of resemblance, instead of the subordinate points of difference, must control. As this court said in De Voe Snuff Co. v. Wolff, 206 Fed. 420, 423, 124 C. C. A. 302, 305, speaking by Judge Knappen:

"* * * It is not necessary, to constitute infringement, that every element of a trade-mark be appropriated, nor that the trade-mark be completely copied. A proper test is whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby."

In Singer Manufacturing Co. v. Wilson, supra, Sir George Jessel said (at page 442):

"A trade-mark, to be taken, need not be exactly copied; it need not be copied even with slight variations; but it must be a substantial portion of the trade-mark."

See W. A. Gaines & Co. v. Turner-Looker Co., supra, 204 Fed. at page 556, 123 C. C. A. at page 79; Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116, 120, 62 C. C. A. 116 (C. C. A. 6); Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24, 35, 104 C. C. A. 464 (C. C. A. 8); Kostering v. Seattle Brewing & Malting Co., 116 Fed. 620, 621, 54 C. C. A. 76 (C. C. A. 9); "Singer" Machine Manufacturers v. Wilson, 3 App. Cas. 376, 394, bottom; The Upper Assam Tea Co. v. Herbert & Co., 7 Eng. Patent, Design and Trade-Mark Cases, 183, 186; Edelsten v. Edelsten, 7 L. T. Rep. (N. S.) 768, 769; McLean v. Fleming, 96 U. S. 245, 251, 253, 255, at page 256, 24 L. Ed. 828, Mr. Justice Clifford saying:

"Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other."

[3] It is not necessary to the maintenance of a charge of infringement of a trade-mark to prove a distinct intent on the part of the infringer; it is the fact of infringement and the consequent invasion of the good will and business of the owner of the mark that is controlling; the intent will be presumed. De Voe Snuff Co. v. Wolff, supra, 206 Fed. at page 424, 124 C. C. A. 302; McLean v. Fleming, supra, 96 U. S. at pages 253, 254, 24 L. Ed. 828; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 525, 549, 11 Sup. Ct. 396, 34 L. Ed. 997; Samson Cordage Works v. Puritan Cordage Mills, supra, 211 Fed. at page 608, 128 C. C. A. 203, L. R. A. 1915F, 1107; W. A. Gaines & Co. v. Turner-Looker Co., supra, 204 Fed. at page 556, 123 C. C. A. 79; Hygeia Distilled Water Co. v. Consolidated Ice Co., 144 Fed. 139, 141, 142 (C. C., opinion by present Circuit Judge Buffington); Hutchinson, Pierce & Co. v. Loewy, 163 Fed. 42, 90 C. C. A. 1 (C. C. A. 2); Layton Pure Food Co. v. Church & Dwight Co., supra, 182 Fed. at page 33, 104 C. C. A. 464; "Singer" Machine Manufrs. v. Wilson, 3 App. Cas. 376, 391.

As regards the words and names carried on the fly sheets of the respective parties, we do not understand it to be claimed that they alone are of controlling importance upon the question of infringement; they, of course, are pertinent to the question of unfair competition. There is here a degree of similarity, however, which contributes to the resemblances found in the two marks. This will be seen by comparison of some of the words already pointed out. For example, it is stated on one of the circles of plaintiff's mark, "In cool weather, warm slightly before opening;" while it is stated immediately above the main ellipse of defendant's mark, "Open slowly; if paper tears, warm slightly." Again, on plaintiff's "Catches the germ as well as the fly;" and upon the panels of defendant's ellipses, "The best fly paper, kills fly and germ, not poisonous." Nor would the

ordinary purchasing user, when desiring to purchase an article as well known as sticky fly paper, discriminate between the prominent words carried within the ellipses of the respective marks, the plaintiff using "Tanglefoot," and the defendant Dickinson "Sticky"; and the same thing is true, we think, as to the names shown on the marks. The plaintiff's name there appears as the maker of the article, while the defendant Dickinson's name is not shown at all on his mark, but only the name under which he conducts his business—"Grand Rapids Sticky Fly Paper Co."; and it is plain that, if the defendant's mark is not calculated to distinguish his sticky fly paper from that of plaintiff, the name under which he conducts his business would afford but slight, if any, aid in this respect.

Upon the whole, we conclude that defendant's mark infringes the trade-mark of plaintiff.

[4, 5] II. *The Ackerman Company Case—Infringement and Unfair Competition.* The registered trade-mark involved here is the same as that passed on in the first suit; and the holding of infringement there must result in a like ruling here. We have seen that diversity of citizenship exists in this case; and although the bill alleges and seeks relief from both infringement and unfair competition, there is no reason why such causes of action may not be joined (Samson Cordage Works v. Puritan Cordage Mills, supra, 211 Fed. at 608, 609, 128 C. C. A. 203, L. R. A. 1915F, 1107, and citations [C. C. A. 6]); indeed, this is in effect admitted. The issue of unfair competition embraces a variety of subjects. These subjects may be conveniently grouped under the complaint that the Ackerman Company receives and disposes of the Dickinson fly paper in cases, cartons, and sheets substantially like those of plaintiff. As we understand the testimony of Morris Ackerman, vice president of the Ackerman Company, that company had been selling the product of Dickinson and his predecessor for some 10 years prior to 1914. True, Ackerman states that his company had been representing the Grand Rapids Sticky Fly Paper Company for that time; but, while a corporation by that name was formed by Dickinson in 1904, and the business was conducted by it for a time, yet the corporation was suffered to "lapse" (as Dickinson states) shortly thereafter, and the business was taken over by Dickinson, and has ever since been conducted by him under the name of that company. We may therefore look into the evidence concerning the Dickinson packages and their contents during the period that the Ackerman Company has been handling them.

The evidence, as a whole, clearly shows that at the time the Ackerman suit was commenced the cases, cartons, and sheets of fly paper put out by Dickinson and handled by the Ackerman Company were in many respects identical with those of the plaintiff. Comparing these articles of plaintiff with those of defendants: (a) The cases (wooden boxes) are of the same dimensions, seemingly of the same kind of wood, and made and inclosed in the same way; and some of them bear close resemblance, also, in their external dress. For the purpose of showing distinct resemblances, we may refer to two of the cases in evidence, one of plaintiff and the other of defendant.

First as to the top of each: The words "This side up" are shown in black letters within a parallelogram defined by black lines; at the left of the figure are the words, in red, "Keep Dry," displayed on plaintiff's within a half circle in black outlines, and on defendant's within a rectangle in black outlines, and at the right the words, in red, "Never store in basement" shown on both within a rectangle defined by black outlines; and beneath these devices similar space is preserved for the consignee's address. Second, as to the sides of each: Within corresponding parallelograms defined by double black lines certain words and names appear, which, though differing in themselves, are so arranged and colored as to present remarkable similarity; thus "Tanglefoot" on the one and "Grand Rapids" on the other are shown in red letters along the length and upper portion of the respective parallelograms, but with the first and last letters of "Tanglefoot" and of the name "Grand Rapids" enlarged, so as to extend across nearly the entire width of the parallelogram; underneath the short letters of "Tanglefoot" and within the main parallelogram is another similar, though much smaller, figure in black outlines, with a scroll bracket at each end, and within this figure is carried in black letters the name of plaintiff and in red letters its place of business; while immediately under the short letters of "Grand Rapids" (on defendant's case) appears in red letters " 'Sticky' Fly Paper," and underneath, within a parallelogram much smaller than and contained in the main one, appears in black letters "G. R. Sticky Fly Paper Co.," and in red letters Dickinson's place of business. Third, as to the ends of each: Quite similar border scroll work is imprinted in black on one end of each of these cases; within the scroll work is carried in black letters, on plaintiff's, "Tanglefoot," and, on Dickinson's, "Grand Rapids"; there appears on both in red "10 Boxes 250 Double Sheets"; likewise in red, "Keep Dry"; also in red, on plaintiff's, "Fly Paper," and on Dickinson's, "Sticky Fly Paper." It is to be noticed that included within the language so displayed on defendant's case, another and different name for defendant's product is shown on both sides and one end of the case, to wit, "Grand Rapids Sticky Fly Paper." The significance of this will be appreciated when it is recalled that defendant Dickinson does business under the name Grand Rapids Sticky Fly Paper *Co.*, and that both plaintiff and Dickinson manufacture sticky fly paper at Grand Rapids; in other words, "Grand Rapids Sticky Fly Paper" is quite as descriptive of plaintiff's fly paper as of defendant's. This case was put on the market in 1914. Other cases of the respective parties are in evidence; but the objections made to defendant's other cases are not so much in matters of resemblance in colors and arrangement as in the use of certain words and pictures, as, for example, "Sticky" and pictures in greatly enlarged scale of flies, concerning which something will be said later.

Turning, now to a comparison of the cartons used by the plaintiff and the defendants: (b) They are of the same size, and, seemingly, of the same material; they are adjusted in length and width so as to admit of convenient packing in the cases, and each contains 25 double sheets of fly paper. Other features of resemblance are found on the

face and edges of each carton lid. On the face these words appear in black, "25 double sheets," "Fly Paper," "Keep Dry"; on both side edges of plaintiff's, "Do not stand on edge"; on one side edge and on one end edge of defendant's, "Do not stand on edge"; on one end edge of plaintiff's "Keep very dry"; on one end edge of defendant's, "Keep very dry"; and on one side edge of defendant's, "Do not place in basement." The differences on the tops of the lids are as follows: On plaintiff's, additional to what has already been pointed out, the word "Tanglefoot" is shown in prominent black letters across a circle containing a cut designed to represent the rising sun, and upon a peripheral border of the circle the name of plaintiff and its places of business at Grand Rapids, Mich., and Walkerville, Canada, all centrally located; while on the defendant's appear the name under which Dickinson conducts his business—"Grand Rapids Sticky Fly Paper Co."—and his place of business, "Grand Rapids, Mich.," with the word "Sticky" prominently displayed in red and a panel thereon bearing the words, "The best fly paper, catches fly and germ, is not poisonous," and also sketches of two flies in greatly enlarged scale imprinted on the carton with eyes in red, with bodies shading from black into red and wings from red into white, and all centrally located. The bottom of plaintiff's carton is blank, while that of defendant carries a number of pictures and words.

Coming to a comparison of the fly sheets put out by the plaintiff and the defendants: (c) They are of the same size[3] and of the color of manilla paper, though there is a controversy as to their relative qualities; they are double sheets and held together until used (1) by the sticky matter spread over their interior faces, so as to leave a border of more or less depth from their edges, and (2) by adhesive matter placed upon such border for the purpose of preventing escape of the sticky matter; and, as pointed out in the infringement case, the plaintiff imprints its registered trade-mark and the defendant Dickinson his mark, on both the outside and inside faces of their respective double sheets. What was said of these marks in the infringement case should be remembered here.

Now, it is to be observed of the resemblances above pointed out that they did not all occur at one time. The evidence is convincing that the defendant Dickinson adopted a progressive course. There is, however, an exception to this. It is the identity in sizes. It is shown that the fly sheet of plaintiff is the same in size as that of other and older manufacturers of fly paper. From this it is contended that defendant had the right to use the same sized sheet; and that this right operated to fix the size alike of the cartons and the cases; in other words, that the sizes arose from the necessities of this situation. Plaintiff's type of fly sheet (so far as used in this country) is 9 by 15⅝ inches. It is shown that fly sheets differing materially in dimensions from plaintiff's have been used in this country. The fault, then, in defendant's contention as to necessity for like sizes, is to be found in his voluntary selection of a fly sheet exactly the size of plain-

[3] There is an exception to this which should be noticed. Plaintiff seems to use a smaller sheet than this, though only in its export traffic.

tiff's. We do not mean by this to intimate that plaintiff has an exclusive right to the sizes of its fly sheet and packages; on the contrary, we think it has not. Granting the right, however, in defendant Dickinson to select the same sizes as those of plaintiff, it is perfectly clear that he must exercise the privilege so as not wrongfully to interfere with plaintiff's continued exercise of the same right. Wotherspoon v. Currie—Glenfield Starch Case, 5 Eng. & Irish App. 508, 514. What must challenge attention here is that the sizes of plaintiff's case, carton, and fly sheet constitute part of the details which go to make up its trade packages and the dress in which it had been accustomed to place them on the market. It will not do for a subsequent maker of a product like that of the first user to segregate the details of the earlier trade packages and dress, and then, on the theory that the first user does not possess an exclusive right to them separately, appropriate them in whole or in substantial part by piecemeal; and yet this is the theory on which the defendant Dickinson's claims are for the most part bottomed. This ignores the first user's grouping of parts, of details, for the very purpose of denoting the origin of his product; it is through such distinctive characteristics, considered in a unitary way, that the first user and the public can be protected against confusion and deception as to his product. Wherever, then, the first user has through a particular trade dress, as here, so identified his product as to indicate that it is his, every principle of fair dealing, fair competition, forbids any subsequent user of the same product to adopt any part of the first user's dress without otherwise effectively distinguishing his dress from that of the first user. We may observe, in this connection, that the facts of the instant case plainly distinguish it from the decision of this court in Globe-Wernicke Co. v. Fred Macey Co., 119 Fed. 696, 703, 56 C. C. A. 304, and relied on here. The Globe-Wernicke Company had depended on a patent, which proved to be void, to safeguard its claimed exclusive right to manufacture its product, instead of relying on a particular trade dress or trade-mark to denote the origin of its product; and this distinction is recognized in the opinion itself. It results that, by adopting and persisting in the use of plaintiff's sizes of packages and fly sheet, defendant Dickinson incurred and still rests under an obligation at least to avoid still further and material similarity through the dress applied to his packages. It is hard to see that defendants have observed any such rule.

Turning attention again to the progressive course pursued by the defendant Dickinson, but few illustrations are necessary to make this clear. One is found in the external dress of his cases of 1914. Prior to that year the dress of defendant's cases, although changed from time to time, was not in either color or arrangement, as already pointed out, particularly objectionable; but a distinct change was made in the dress for that year. We have just described this dress by comparison with that of one of the cases of plaintiff; and we need only to refer to what was there said in order to show the resemblances introduced through the advance then made in defendant's dress. The particular case of plaintiff with which such comparison was made

had been used by it before and during the year 1913. The plaintiff, it is true, made some changes in the dress of its case for 1914; but they are of minor character and do not operate to alter the striking resemblances of the dress whether the comparison be made with respect to plaintiff's dress of 1913 or 1914.

As to the cartons, apt illustration of defendant's encroachment by degrees upon plaintiff's carton is found in the identity of the language in terms already shown to be displayed on the edges of the carton lids. This identity could not have been the result of either accident or necessity; it must have come about through design. It was shown that before 1909 there was some difference between the words employed by the respective parties, as, for instance, plaintiff's directions were, "Do not stand on edge;" "Keep very dry;" but in the year named defendant changed his directions and made them exactly like plaintiff's. Defendant even changed his method of securing the corners of the carton lid from metal clasps to "paper corners," the same as plaintiff had used for years, and also changed to that of plaintiff the method of holding the carton lid in place.[4]

An illuminating example of defendant's progression appears on both the outside and inside faces of the fly sheets. It will be borne in mind that in the infringement suit we described the figures and matter imprinted on these sheets. It appears that the defendant's first design for his fly sheet consisted of two full ellipses defined in red lines, with a red Maltese cross shown at the extremities of the major axes, but with the four flies disposed, two above and two below the ellipses, at points opposite their respective minor axes; this design also bore the words, in red letters within and without the ellipses, which are set out in the infringement suit. An important change, however, was made in this design. The two full ellipses were replaced by a single ellipse centrally located, with fractional ellipses at the ends of its major axis. This change brought the four flies into the same relation with the full ellipse and the fractional ellipses that the four circles bear to the complete and fractional ellipse of plaintiff's registered trade-mark. Defendant's final change came when he converted his red ellipse and fractional ellipses, with the matter displayed within them, into black. We have already in substance stated that the testimony to the effect that this change was necessary as a matter of expense is not convincing. It seems to us that the reason for the change is to be found in the purpose obviously to be inferred from

[4] It is worthy of notice that the sketches in enlarged scale of flies, shown on defendant's carton, seem to have originated with plaintiff. Plaintiff shows, without contradiction, that, before defendant engaged in the fly paper business, plaintiff purchased from a lithographing company, for use, 250,000 show cards on which was displayed "a large fly with shadings of red on the head and back," and a sketch of a fly in enlarged scale, with eyes in red, is shown in one of plaintiff's exhibits upon the face of a fly sheet bearing an imprint of plaintiff's registered trade-mark. There is enough similarity between the two sets of sketches to give rise to a fair inference, despite denial, that the sketches appearing on defendant's cartons had their origin in the sketches of plaintiff.

the gradual encroachments made upon the plaintiff's mark rather than in the slightly increased cost shown.

What, then, is to be deduced from the resemblances described and the method of gradual change in bringing them about? This method cannot be misunderstood. The effect of every step in the process was more or less to imitate something theretofore existing in plaintiff's trade-mark or trade dress. This course consumed time and evidently involved deliberation; and in view of the sequel every step was toward a definite end. The course thus pursued appears to have avoided present opposition and contest and so to have secured the advantage of the use of the parts so taken; but it did not conceal the intent with which the encroachments were evidently made. In view of the culmination reached in 1914, it is vain to assert that the resemblances so brought about are not material. This ignores the most obvious purpose that can be predicated of the course pursued, and ascribes to the originator of the scheme a lack of resource that is not deserved; above all, it fails to observe the accomplishment of the purpose in the resemblances ultimately achieved. These resemblances would be more fully appreciated, if it were feasible to reproduce their effect here in color and form. It is not necessary again to endeavor to point out the resemblances and confusing features of defendant's mark and trade dress. Repetition of an example or two of their effect, however, may not be amiss. The effect of the change in color of defendant's mark necessarily comes to the notice of every purchasing consumer. It is printed, as we have seen, on both the outside and inside surfaces of every double fly sheet; and, notwithstanding the interior coating of the sticky matter, the mark is visible on the inside as well as the outside, so that the sheet cannot even be used without displaying defendant's mark fully in the same color, black, as that of plaintiff's. One of the confusing features, also, of defendant's trade dress, is shown, as already stated, on its cases of 1914. Defendant Dickinson, not satisfied with the name under which his business is conducted, "The Grand Rapids Sticky Fly Paper Co.," prominently places on both sides and one end of his cases these words, "Grand Rapids Sticky Fly Paper." No explanation that explains has been given for this; and, since both plaintiff and defendant Dickinson are producing and shipping sticky fly paper at Grand Rapids, it would be difficult to select words more calculated to confuse than these. There are other illustrations quite as convincing, but further repetition is not required.

[6] The essence of unfair competition consists in palming off, either directly or indirectly, one person's goods as the goods of another, and this, of course, involves an intent to deceive. Testimony was offered tending to show that defendant's goods had been mistaken for and confused with the goods of plaintiff. This is disputed in several ways; but we do not find it necessary to try to reconcile or to determine the weight of this testimony. It is not necessary to prove intent by direct evidence, where it is clearly to be inferred from circumstances. Scarcely anything of an evidential nature, for example, could more certainly characterize intent than repeated imitation of

material parts of another person's trade tokens; the imitations themselves reveal the object. Further, in our judgment, the resemblances and confusing features shown in respect of defendant's output are themselves calculated to lead users to believe that it is the plaintiff's output, and so to deceive them, and such consequences, inevitable in their nature, justify an inference of wrongful intent to secure "some part of the benefit of the good will and reputation of the plaintiff's trade." Johnson v. Orr Ewing, 7 App. Cas. 219, 226; Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; Samson Cordage Works v. Puritan Cordage Mills, supra, 211 Fed. at 608, 128 C. C. A. 203, L. R. A. 1915F, 1107 (C. C. A. 6); Fuller v. Huff, 104 Fed. 141, 145, 43 C. C. A. 453, 51 L. R. A. 332 (C. C. A. 2); Helmet Co. v. Wm. Wrigley, Jr., Co., 245 Fed. 824, — C. C. A. —, decided August 1st (C. C. A. 6); Braham v. Beachim, 7 Ch. D. 848, 856; Collinsplatt v. Finlayson, 88 Fed. 693 (C. C.); Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. 357, 372 (C. C.); Meccano v. Wagner, 234 Fed. 912, 918 (D. C.); Wm. Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., 195 Fed. 568, 570 (C. C.); Von Mumm v. Frash, 56 Fed. 830, 837 (C. C.); Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, 168, 24 Atl. 658; Northwestern Knitting Co. v. Garon, 112 Minn. 321, 326, 128 N. W. 288.

It must therefore be concluded that placing these goods on the market, whether by the producer or his selling agent, the Ackerman Company, imports an intent to have them mistaken for and confused with plaintiff's product; and in determining the effect of this, it is not enough to consider simply the jobber or the retailer, though of course their interests are entitled to protection. As we in effect said when passing on the question of infringement of plaintiff's trade-mark, jobbers and retailers are cautious buyers and have the means of identifying manufacturers when negotiating their purchases; but it is well known that all jobbers and retailers are not so considerate of either the interests or the choice of unsuspecting users. The subject, then, cannot be fully considered unless the interests of purchasing users are taken into account.[5] It results that plaintiff is entitled to relief.

[7] III. *Nature and Extent of Relief.* Under averments of the answer in each of the suits, and also evidence offered at the trial, it is urged that plaintiff has in various ways sought to monopolize the sticky fly paper business, and so is not here with clean hands or entitled to any relief. It may be assumed that in these matters the plaintiff is amenable to actions in appropriate proceedings; certainly some

[5] Upon this point we may add to the citations above given in the trade-mark infringement suit the following: N. K. Fairbank Co. v. R. W. Bell Manuf'g Co., 77 Fed. 869, 875, 23 C. C. A. 554 (C. C. A. 2), followed in Hansen v. Siegel-Cooper Co., 106 Fed. 690, 691 (C. C.); Helmet Co. v. Wm. Wrigley, Jr., Co., supra; Wotherspoon v. Currie, supra, 5 Eng. & Irish App. at 517; Lever v. Goodwin, 36 Ch. D. 1, 3, 7; Bissell Chilled Plow Works v. T. M. Bissell Plow Co., supra, 121 Fed. at 366 (C. C.); National Biscuit Co. v. Baker, 95 Fed. 135, 136 (C. C.); R. Heinisch's Sons Co. v. Boker, 86 Fed. 765, 768 (C. C.); Cauffman v. Schuler, 123 Fed. 205, 206 (C. C.); Shredded Wheat Co. v. Humphrey Cornell Co. (D. C.) 244 Fed. 508, 518, 522.

of the acts charged, if true, could not be sanctioned; but plainly such wrongs as are set out cannot be redressed in actions like these. Upon this feature of the cases we agree with the learned trial judge, who, in speaking of these complaints, said:

"And it is the settled law that tort actions like these cannot be successfully defended upon the ground that plaintiff has violated the laws prohibiting monopolies and unlawful attempts to monopolize." [6]

[8] It is urged further that through its laches and acquiescence plaintiff is estopped to claim any relief. It is true that it was not until 1914 that plaintiff took active measures to interfere with the course pursued by either of the defendants. This presents another effect of the progressive course of encroachment, already considered; such a course does not tend to arouse hostile action until it is fully developed; indeed, this happened; plaintiff does not appear to have regarded the situation as requiring active interference until near the opening of the fly paper season of 1914, when, as we have seen, radical and apparently permanent changes in the Dickinson trade-mark and trade dress were introduced. Plaintiff then took definite action, both through written notices and the institution of suits. In these circumstances we cannot think the defendants can shield themselves behind the charge of laches; this would be to ignore the fact that the true design of the partial encroachments, of the continuing trespass, did not develop until the culmination in 1914; permanent benefits in the good will and trade reputation of another cannot be acquired in this way. Still this is not to say that the full measure of relief sought should be granted. Even if laches and acquiescence could rightfully be imputed to plaintiff, it might well be denied an accounting of profits for a substantial portion of the encroachment period, and yet be granted relief by injunction as to the future. Hanover Milling Co. v. Metcalf, 240 U. S. 403, 418, 419, 36 Sup. Ct. 357, 60 L. Ed. 713. Further, it is not necessary to the due protection of plaintiff's trade tokens that an injunction should go to all their minutiæ; relief that will operate to prevent confusion and deceit as to the origin of the products of the respective parties, with a limited accounting, is all that should be granted; as nearly as may be, the decrees should be formulated so as to fix conditions that will admit of full and fair competition but destroy unfair competition.

[9] Provision will be made in the decrees as to infringement to enjoin the respective defendants permanently from using the Dickinson elliptical device or mark in issue, as it is imprinted and shown on the fly sheets, in any manner or for any purpose whatever connected with the fly paper business. The decree as to unfair competition will permanently enjoin the A. K. Ackerman Company, defendant: (a) From selling or in any wise disposing of any sticky fly sheets bearing

[6] In support of this the following cases were cited: Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 726, 119 C. C. A. 164 (C. C. A. 6); Prest-O-Lite Co. v. Davis, 209 Fed. 917, 919 (D. C.), affirmed 215 Fed. 349, 357, 131 C. C. A. 491 (C. C. A. 6); Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 697, 131 C. C. A. 626 (C. C. A. 7); Shaver v. Heller & Merz Co., 108 Fed. 821, 834, 48 C. C. A. 48, 65 L. R. A. 878 (C. C. A. 8).

an impression of such infringing mark, or any of the cases produced or used by defendant Dickinson in 1914, or since then, and bearing on their sides and one end the words "Grand Rapids Sticky Fly Paper," together with the external dress which is particularly described in this opinion; and, subject to the conditions hereinafter provided for, (b) from selling or in any wise disposing of any of the Dickinson products which bear the words "The Grand Rapids Sticky Fly Paper Co." [7] and the word "Sticky."

This requires separate consideration. We cannot repress a conviction that the tendency of these words when so used is necessarily to confuse and mislead in respect of the origin of the product; and this accords, too, with some of the testimony. The words describe with equal accuracy the place of manufacture, Grand Rapids, and the products alike of the plaintiff and the defendant Dickinson; the Ackerman Company handles the Dickinson product without change of these words; and all this is done without trying to avoid the misleading effect of the words. It is practically conceded that plaintiff's predecessors began the manufacture and sale of sticky fly paper at Grand Rapids some 19 years in advance of Dickinson, and that plaintiff has continued the business there ever since.[8] It is true that plaintiff's predecessors were not the original manufacturers of sticky fly paper at Grand Rapids, yet they were the first to enter upon the business there in a large way and to develop it into a general commercial success. Their development of trade in sticky fly paper at Grand Rapids tended naturally to create a belief in many persons that sticky fly paper produced at Grand Rapids—in other words, "Grand Rapids Sticky Fly Paper"—meant their product; this association of Grand Rapids with sticky fly paper has been preserved by plaintiff, and necessarily as well as according to some of the testimony, a like belief still prevails that sticky fly paper there produced is that of the plaintiff. True, neither plaintiff nor its predecessors ever collocated the name of the place of manufacture and that of the product into a single phrase; but no amount of phrasing could accentuate the fact that through its predecessors and itself plaintiff has during all these years produced and sold sticky fly paper at Grand Rapids. It is therefore impossible to dissociate plaintiff's product from the name "Grand Rapids," or the words "sticky fly paper," or even the word "Sticky"; the name no more certainly describes plaintiff's place of manufacture than the word "sticky," when used in connection with fly paper, characterizes its product; indeed, its registered trade-mark, "Tanglefoot," has for all the years mentioned been known to denote sticky fly paper.

[7] Controversy has arisen between counsel as to the rights of the respective parties to use this name, each claiming an exclusive right in the name. This grows out of the decision in People v. Sticky Fly Paper Co., 144 Mich. 221, 231, 107 N. W. 1119; but that decision is not helpful to either side.

[8] We have in mind that plaintiff in a less conspicuous way shows upon its packages that it has another place of business at Walkerville, Canada; but this does not alter the fact that its only place of business in this country is at Grand Rapids, nor does it diminish the liability to confusion of the products turned out at Grand Rapids.

What limitation, then, should be placed upon the adoption and use by another of these words as a trade-name under which to carry on the same business at the same place? We recognize the fact that granting relief against a long-standing appropriation like this is attended with difficulty; but, in view of what we have already said concerning the claim of laches, we are not disposed to believe that the present situation is remediless, since its duration without explanation has amounted to a continuing trespass. The appropriation was made in the very beginning of defendant Dickinson's connection with the fly paper business and by a corporation with which he was officially and financially connected. It is manifest that the object was at once to identify the new enterprise with the old one then in operation at Grand Rapids, and so to gain substantial benefits from this established business; and we are satisfied that this object still prevails in material degree. It is vain to suppose that the name, "The Grand Rapids Sticky Fly Paper Co.," would have been adopted, or that its use would be so strenuously persisted in, if the object stated was not and is not the true one; it is simply a contradiction for the appropriator of the name to question its beneficial effect. Indeed, it is now in effect insisted that these words must be treated as signifying the product of defendant Dickinson; but, in the sense that Dickinson is generally known in the enterprise, this cannot be correct. Mr. Dickinson has never associated his individual name with his business name. His own name nowhere appears on his fly sheet, carton, or case; nothing has been done to indicate the manufacturer of the product or the proprietorship, except only through display of the business name in dispute.

A different question would have arisen, if his own name had been associated prominently with the business name he assumed. The case in that event would have been more like Kellogg Toasted Corn Flake Co. v. Quaker Oats Co., 235 Fed. 657, 668, 669, 149 C. C. A. 77 (C. C. A. 6), since the parties there distinguished their respective products, "toasted corn flakes," by associating names with these purely descriptive words, which prevented confusion of their products. However, many persons may, and no doubt do, associate sticky fly paper with the *company* indicated by the business name under consideration, and also with the term "Sticky," when found in connection with that name. But this states the difficulty; it does not solve it. The rights of the first user, plaintiff, with its predecessors, and the liability to confuse the Dickinson goods with the plaintiff's clearly remain, and must be reckoned with. It must be conceded that we have found no decision, and none has been cited, which deals with a situation just like this. It is not, for instance, precisely like the class of decisions typified by the Glenfield Starch Case. The town of Glenfield had been associated with the starch of a particular manufacturer (plaintiff) as a name, "Glenfield starch," by which the article was known; and the respondent, although subsequently producing and selling starch at Glenfield, was restrained from using the name "Glenfield" in connection with his starch in such a way as to deceive.

[10] Such cases are bottomed on the principle that any later and unqualified use of the name by another in producing and selling a similar

article at the same place is to misrepresent, is to commit a fraud, since the necessary effect is to palm off his article as that of the earlier user. It is a long-settled doctrine of equity, however, that courts are not concerned with the particular method or form through which the goods of one person are disposed of as the goods of another. It cannot be, for instance, that this end is prohibited only when it is effected through simulation of a technical trade-mark. Wherever the use of a name or of words or designs involves duplicity, in the sense that they can be employed to make the forbidden misrepresentation, such use must be open to relief that is calculated to prevent the mischief, or else it must be confessed that equity in dealing with fraud has at last found its limitation. The Lord Chancellor said in the Camel Hair Case—Reddaway v. Banham, A. C. (1896) 199, 207:

"What in each case or in each trade will produce the effect intended to be prohibited is a matter which must depend upon the circumstances of each trade, and the peculiarities of each trade."

See, also, Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co., 166 Fed. 26, 29, 92 C. C. A. 60 (C. C. A. 3), per Circuit Judge Gray.

The present assumed trade-name reveals the fact that the so-called company produces and sells sticky fly paper at Grand Rapids; but it does not even in a remote way intimate, much less reveal, the further fact that there is another and older producer and seller of sticky fly paper at Grand Rapids. Thus the assumed name has a double meaning; and its greatest value, at least to the person using it, lies in its duplicity. Reddaway v. Banham, supra, A. C. (1896) at 218, 219. This is intensified by the proved if not conceded fact that Grand Rapids is known as the "home of sticky fly paper"; and the inevitable effect is to misrepresent the facts concerning Grand Rapids sticky fly paper, and to enable unscrupulous dealers to put out the Dickinson product as the plaintiff's product. The commonest principles of unfair competition forbid this, and it would seem to follow that all further use of the assumed name should be enjoined; still, in view of the geographic and otherwise descriptive character of the words in issue, we do not think the use of the name ought to be prohibited absolutely. The relief granted against the use of such words has developed from apparent absolute prohibition into conditional prohibition. In the Glenfield Starch Case, for instance, the injunction granted would seem on its face to have been intended as an unconditional restraint. Wotherspoon v. Currie, supra, at page 523. Yet the decree has since been construed to mean that the respondent should not use Glenfield "in such a way as to deceive" (Camel Hair Case, supra, [1896] A. C. 212); in the Stone Ale Case the injunction was made absolute in terms, and although for reasons stated by the Lord Justices they affirmed the decree entered below, yet they expressed the belief that it would have been better, had defendant been restrained from using the word "Stone" in connection with his product, "without clearly distinguishing" it from that of the plaintiff (Montgomery v. Thompson, [1891] A. C. 217, 221). In the Camel Hair Case the defendants were enjoined from "using the words 'Camel Hair' as descriptive of or in connection with belting manufactured by them * * * without clearly distinguishing such

belting from the belting of the plaintiffs." Camel Hair Case, supra, at 222.

The theory is that it is sufficient so to qualify the use as to prevent the mischief; and this in substance is the familiar and settled rule in the courts of this country. Herring, etc., Co. v. Hall, etc., Co., 208 U. S. 554, 559, 28 Sup. Ct. 350, 52 L. Ed. 616; French Republic v. Saratoga Vichy Co., 191 U. S. 427, 435, 24 Sup. Ct. 145, 48 L. Ed. 247; G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 373, 117 C. C. A. 245 (C. C. A. 6); Knabe Bros. Co. v. American Piano Co., 229 Fed. 23, 30, 31, 143 C. C. A. 325 (C. C. A. 6); Kellogg Toasted Corn Flake Co. v. Quaker Oats Co., supra, 235 Fed. at pages 667, 668, 149 C. C. A. 77. The names in issue in the English cases, as well as in most of those of our own courts, just mentioned, had acquired in each instance a secondary meaning, and if we are right in the belief that the words in issue in the instant case have acquired the secondary meaning already pointed out the case is ruled by these decisions. Upon this hypothesis it is impossible to escape application of the principle declared by this court, when speaking through Judge Denison, in the Dictionary Case, supra (G. & C. Merriam Co. v. Saalfield, 198 Fed. at 373, 117 C. C. A. 245):

"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."

However, we do not rest our decision on the rule of secondary meaning alone. There is analogy both in fact and principle between the appropriation of a trade-name having a secondary meaning and the appropriation of words which as here pertinently describe the location and product of, and injuriously affect, a previously established business. The only perceivable difference between two such appropriations is in matter of form rather than in substance; each amounts to a misrepresentation; it is true as to the former a priority in right of use is treated by the decisions as residing in the primary user, yet as to the latter (apart from any existing secondary meaning) there is manifestly a continuing trespass upon a previously established good will and trade. This cannot in reality amount to a distinction so far as wrongful injury is concerned; and we therefore see no reason why the rule of relief that is employed in cases of secondary meaning may not be applied here, nor why the particular wrong here committed, though novel, should not be redressed.

It must follow that, unless and until effective qualification and explanation are made of the use of the name under which defendant Dickinson conducts his business, and also of the term "Sticky" as it is applied to his product, which will unmistakably differentiate his product from plaintiff's the Ackerman Company (since Dickinson is not a party to the unfair competition suit) will be enjoined from selling or in any wise disposing of such product in any form or manner what-

ever which bears either such business name or term. Just what qualification should be made as to the use of this business name and term cannot now be justly determined. Counsel for plaintiff in their brief have suggested explanatory words that cannot be accepted. Counsel for defendants have made no suggestion in this behalf presumably because of their belief that no qualification can rightfully be imposed. In these circumstances we have concluded that proper restriction can better be determined by the trial judge upon hearing from the parties. It will be provided, however, in each decree, that the respective defendants shall be permitted to sell, as now marked and dressed, such finished stock, including fly sheets, as either may have on hand at the date of the filing of this opinion, on giving satisfactory bond to account for such profits and damages resulting from the sale of the stock as the plaintiff may ultimately be found entitled to.

An accounting in the usual form will be allowed against each defendant for such profits and damages as may have accrued since the dates in 1914 of the written notices given by plaintiff to the defendants, respectively, and in effect requesting them to discontinue the acts complained of later in the respective bills; this is for the reason that despite the evidential significance of the encroachments made before these dates, as already pointed out, plaintiff made no objection or claim in respect of them and must be concluded to have condoned them so far as remuneration is concerned.

The orders of injunction herein provided for will, in addition to what has already been specified, restrain the defendants in the respective cases from doing any acts that will in the one instance infringe the registered trade-mark of plaintiff, or that will tend in the other instance to imitate or to create confusion respecting the mark or dressing employed by plaintiff upon its fly sheet, carton, or case, or that will tend in either instance to accomplish the same ends through advertisement.

The decree in each case will be reversed, and the case remanded for further proceedings in accordance with this opinion.

On denial of petition for rehearing the following court order was entered:

"Ordered that the petition for rehearing be denied. However, the inference stated in the fourth footnote to the opinion was inadvertently drawn from resemblance between Dickinson's sketch and both of plaintiff's sketches therein mentioned, instead of the resemblance alone between Dickinson's sketch and plaintiff's first sketch; so considered, we think the inference should be withdrawn. This withdrawal, however, affects the evidence only in a cumulative sense, and hence is not material."

UNITED STATES v. WHITTED et al.

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

No. 4792.

1. PUBLIC LANDS ⟸106(1)—FOREST RESERVE LIEU LAND SELECTIONS—CONCLUSIVENESS OF ACTION OF LAND DEPARTMENT.
A finding by the Commissioner of the General Land Office, affirming that of the district officers, made after a contested hearing, and not appealed from, that land selected in lieu of land within a forest reserve was not coal land, but was properly subject to the selection made, is conclusive of such fact, and cannot be relitigated by the government after the issuance of patent, even though the technical issue, as made by the Land Department in the notice which was the basis of the hearing, was erroneously limited to the question of the known character of the land at the time the selection was made.

2. EQUITY ⟸273—AMENDMENT OF BILL—STATING NEW CASE.
A complainant cannot be permitted, under the guise of amendment, to make a new bill.

Stone, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Colorado; Jacob Trieber, Judge.

Suit in equity by the United States against Genevieve G. Whitted and others. Decree for defendants, and the United States appeals. Affirmed.

Eugene B. Lacy, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

E. E. Whitted, of Denver, Colo. (Frederic Burnham, of Chicago, Ill., on the brief), for appellees.

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

RINER, District Judge. In 1901 Allen M. Ghost held the legal title to 1,640 acres of land in Jefferson county, Colo., located in what was then, and is now, known as the "South Platte Forest Reservation." Pursuant to the provisions of an act of Congress approved June 4, 1897 (30 Stat. 36, c. 2), as amended March 3, 1901 (31 Stat. 1037, c. 831), which authorized the owner of land included within the limits of a public forest reservation to relinquish the tract to the government and to select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent, Ghost, in May and June, 1901, conveyed this land by deed to the government, receiving as consideration therefor two forest lieu selection applications. The amendment to the act approved March 3, 1901, limited the lieu selection to vacant, surveyed, and nonmineral public lands subject to homestead entry. May 27 and June 17, 1901, Ghost filed said forest lieu selection applications upon the lands in controversy, located in Las Animas county, Colo., in the United States land office at Pueblo, Colo., together with the nonmineral affidavit and proofs required by

the acts of Congress above referred to and the rules and regulations of the Land Department. No further action was taken in regard to these selections until the 26th of July, 1906. On that date the General Land Office, through the register and receiver of the local land office at Pueblo, notified Ghost by letter that a special agent of the General Land office had made a report to that office to the effect:

"That upon numerous subdivisions embraced in said lieu selections coal crops and coal measures of varying thicknesses were found of merchantable quality and workable quantity; that such coal croppings were well and plainly to be seen at the date of the selection."

The notice further required Ghost to advise the local land office within 30 days whether he denied the truth of the charges and desired a hearing to defend his entry, stating that his failure to apply for the hearing within the time specified would be taken as an admission of the truth of the charges against his entry, and that the entry would be rejected. In response to this notice, and within the time specified, Ghost filed with the register and receiver of the local land office at Pueblo a denial of the truth of the charges contained in the special agent's report and demanded a hearing in defense of his lieu selections. Pursuant to this demand a hearing was had in December, 1906. Six witnesses testified for the government and seven witnesses testified for the applicant for the land. The testimony, which was reduced to writing, was filed in the local land office, and in March, 1907, the register and receiver, after setting out their findings of fact at length, recommended that the lieu selections be relieved from suspension and approved for patent. Thereafter the entire record, including the findings and recommendations of the register and receiver, all of the testimony, documents, proofs, and briefs submitted at the hearing, were forwarded to the Commissioner of the General Land Office at Washington. On the 27th of June, 1908, the Commissioner affirmed the findings and conclusions of the register and receiver, and, no appeal having been taken to the Secretary of the Interior, directed that patents be issued for the lands, which was done, the patents being delivered on the 10th of August, 1908.

August 8, 1914, the government filed its bill to set aside these patents, on the ground that the affidavits and proofs offered in support of the forest lieu selection applications, to the effect that the lands were nonmineral, agricultural lands, and contained no deposit of coal, were false, and known to be false by the applicant and those making the affidavits at the time the application was made; that these affidavits and proofs were made for the purpose of suppressing and concealing from the land officers the mineral character of the lands and thus fraudulently procuring title thereto; that the officers of the local and general land offices believed and relied upon these false and fraudulent representations, and were misled and deceived thereby; and that the said officers were, at all times prior to the issuance of the patents, ignorant of the mineral character of the lands, and believed that the lands were lawfully selected by the applicant, and on account of such belief, reliance, deception, ignorance, falsity and fraud, and not otherwise, issued the patents.

Allen M. Ghost having died, Genevieve G. Whitted, Catherine Hoover, Charles W. Tunnell, Ada M. Burnham, who claimed some interest in the lands, and the City Bank & Trust Company of Denver, as executor of the last will and testament of Allen M. Ghost, were made parties defendant to the bill. October 31, 1914, the defendants filed a joint and several answer, denying specifically every allegation of fraud contained in the bill, and, in paragraphs 12 to 16, inclusive, of the answer, set forth in detail all of the facts concerning the acquisition of the patents by Ghost, the contest proceedings had in the land office in 1906, including the findings and decisions of the register and receiver of the local land office and of the Commissioner of the General Land Office, and then alleged that the questions of fact involved in the hearing before the Land Office in 1906 were the same sought to be raised in this case, and, as such questions of fact were determined adversely to the government, that therefore the question before the court was res adjudicata in favor of the defendants, and pleaded such former adjudication as a defense to the bill.

After the answer was filed, the government moved to strike out paragraphs 13 to 16, inclusive (the plea of res adjudicata), on the ground that the matters therein set forth did not constitute an adjudication by the Land Department that the lands involved were at the time of the approval of the lieu land selection applications properly subject to acquirement from the government under its public land laws under which title to said lands was acquired. This motion was denied. The government then filed a motion for leave to amend its original bill of complaint. This motion was also denied.

August 28, 1916, the cause came on for a final hearing, which resulted in a decree dismissing the bill, and the government brought this appeal. At the final hearing the defendants, in support of their plea of former adjudication of the matters in controversy in this suit by the officers of the Land Department, offered in evidence the notice to Ghost of the contest filed against these selections, his denial of the truth of the charges therein, and his demand for a hearing; also a stipulation of counsel to the effect that, pursuant to the notice and demand for a hearing, a hearing was had; that at the hearing both parties were represented by counsel; that the testimony of six witnesses was taken on behalf of the government and the testimony of seven witnesses taken on behalf of Ghost. The defendants also offered in evidence the findings and conclusions of the register and receiver of the local land office, and the decision of the Commissioner of the General Land Office affirming the findings and conclusions of those officers. It was admitted by counsel for the government in open court that there was no appeal in this contest before the Land Office from the decision of the Commissioner to the Secretary of the Interior. It was further admitted that the patents were issued and delivered.

To meet the evidence offered by the defendants in support of their plea of former adjudication, the goverment offered in evidence two option agreements for the sale of the land in controversy between Allen M. Ghost and one E. B. Sopris. These offers were objected to, and the objection sustained. The government then offered the original transcript of the testimony and proceedings had before the Land

Office in December, 1906, to which an objection was sustained. It then made fourteen offers of proof, the first seven going to the character of the land, as to whether or not it was valuable for coal. The eighth was an offer to show that at the time of filing thereon, and at the date of the hearing, Ghost knew the lands were chiefly valuable for coal. The ninth was an offer to show that the option agreements between Ghost and Sopris were entered into in furtherance of the unlawful purpose of securing the lands. The tenth was an offer to show that the patentee procured false affidavits as to the nonmineral character of the lands at the time, knowing these affidavits were false. The eleventh, twelfth, thirteenth, and fourteenth were offers to show that the patentee procured false witnesses to testify at the hearing before the Land Office as to the nonmineral character of the land. The trial court excluded all of these offers and dismissed the bill.

[1] The real question sought to be reviewed, as suggested by counsel for the government in their brief, is the holding by the court below that the decision of the register and receiver, based upon the hearing before the local land office in December, 1906, and the approval thereof by the Commissioner of the General Land Office, was in fact such an adjudication of the nonmineral character of the lands involved as to be conclusive of the issues in the present case. No formal pleadings were filed in the proceeding before the Land Office, but it is insisted by the government that the notice to Ghost of the contest and his denial and demand for a hearing narrowed the issues to the known character of the lands at the dates of the selection, and that the decision of the Land Department based thereon did not and could not determine whether or not the lands in question were, at the date of the hearing, properly subject to entry under the lieu land selection applications as noncoal, agricultural lands. That the officers of the Land Department did not consider the issues thus narrowed, and confine their investigations to the dates of selection, but, on the contrary, covered the entire time from the dates of selection down to the date of hearing, is shown by the record of the proceedings before them. The register and receiver made the following finding:

"While the testimony fails to show that there was any coal or any indications of coal on or adjoining said tracts at or before the dates of selections, it also fails to show that any discoveries on the lands or adjacent thereto have been made since such dates that would classify the lands involved herein as being chiefly valuable for the mineral (coal) contained therein, even at the date of this hearing."

And the Commissioner of the General Land Office, reviewing the action of the register and receiver upon the entire record, in his opinion said:

"The testimony has been carefully examined and no error found in your conclusions. It has not been shown that any of the 40-acre legal subdivisions embraced in the selections are chiefly valuable for coal or that they contain any workable deposits of coal. The testimony covered the time within the knowledge of the witnesses up to date of the hearing."

So that, regardless of the language used in the notice, it is perfectly clear that the investigation was not confined to the date of the selection, but included the entire time down to the date of the hearing.

That being true, and the question whether the land in controversy was or was not coal land being a question of fact, the determination of the question by the Land Department, in the absence of fraud, is final and conclusive on the courts. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; United States v. Primrose Coal Co. (D. C.) 216 Fed. 553. It has often been decided that the sufficiency of the proof and the weight of the evidence in a contested hearing on the proposition as to whether the lands involved are or are not coal lands are matters within the jurisdiction of the Land Department, and its judgment thereon is final. It would, indeed, be a dangerous doctrine, creating great insecurity in titles, if the correctness of the action of the Land Department upon a matter decided by it, and over which it had jurisdiction, could, years afterwards, be assailed because of supposed errors of judgment upon the sufficiency of the evidence presented to that department in a contested hearing. Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929. In the case just cited the rule is stated thus:

"The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are."

In the same case the court further said:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said that there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. * * * The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute."

See United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Steel v. Smelting Co., 106 U. S. 450, 1 Sup. Ct. 389, 27 L. Ed. 226; United States v. Primrose Coal Co. (D. C.) 216 Fed. 553.

In reply to the suggestion made at the argument that the Department of the Interior raised a false issue through a mistaken interpretation of the law which invalidates the plea of res adjudicata, it may be said: (1) The issue at all times before the Land Office was as to whether the lands entered were coal lands, and even if we assume that the department did limit the scope of the evidence upon this issue to the appearance of the lands sought to be entered and that the department erred in thus limiting the scope of the evidence upon the issue as to whether the lands were coal lands or not, this fact would not render the judgment of the Land Office any the less res adjudicata. To hold that a judgment pleaded as res adjudicata could be destroyed by showing that the court which rendered it erred in the exclusion or admission of evidence would be not only to create a court of appeals out of every court where a judgment was offered, but destroy the whole principle upon which the doctrine of res adjudicata is founded. (2) The evidence which the department directed to be taken was in strict accordance with its rule as to the determination of whether the lands in controversy were coal lands or not, and this rule was in force when

the lands in question were entered and the patents therefor issued. The persons entering these lands had a right to rely upon this rule, and if it can be said that the decision in Diamond Coal Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936, enlarged the scope of the evidence admissible for determining whether land is coal land or not, that fact could not invalidate the judgment of the Land Office rendered prior to the decision in that case or permit a court of equity to charge the entrymen of the lands in question with the duty of knowing more than the Department of the Interior itself.

The government having had a full hearing as to the character of the lands in controversy in the contest proceeding before the Land Office, with opportunity to show, if it could, that the lands were coal lands, not subject to entry under the lieu selections, either at the date of selection or at the date of the hearing, we think the trial court rightly held that that question was not open to relitigation in the courts. Neither do we think that the trial court committed error in denying the motion of the government to amend its bill. The proposed amendment is set out in the record, and an examination of it discloses that it bases the right to recovery upon grounds entirely different from those stated in the original bill. The theory of the original bill was that the officers of the government had been deceived and had been induced to issue the patents by false affidavits filed in support of the lieu selections, while in the proposed amendment the right to relief is based upon the allegations that the officers of the Land Department were induced to issue the patents by (1) false testimony procured by the patentee and offered at the hearing before the local land officers; (2) because of the misunderstanding by the land officers of the effect and purport of the evidence given at the hearing; and (3) that these officers acted under a misapprehension of the land law, especially as to what was and what was not evidence that the lands contained coal in merchantable quantities.

[2] The rule is too well settled to require the citation of authority that under the privilege of amending a party is not permitted to make a new bill. While much liberality of amendment should be shown where the bill is found defective in proper parties, it its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, yet to insert a wholly different case. as is attempted by this proposed amendment, is not properly an amendment, and should not be considered within the rules on that subject.

The testimony offered by the government at the final hearing all related to matters which were or might have been presented to the Land Department in the contest proceeding and was properly excluded.

Finding no error in the record, the decree dismissing the bill is affirmed.

STONE, Circuit Judge (dissenting). After the selection of the lands here involved there was a hearing before the proper department officials. This hearing was based upon a letter from the department to the selector. The only objection raised therein to the selection was:

"That upon numerous subdivisions embraced in the above selections coal crops and coal measures of varying thicknesses were found of merchantable quality and workable quantity; that such coal croppings were well and plainly to be seen at date of selection."

This was the only charge the selector was called upon to meet, and his denial thereof made it the sole issue which could properly be considered at the hearing. The findings of facts and decision of the register and receiver of the local land office clearly stated the scope of the issue involved as:

"July 13, 1906, the Commissioner of the General Land Office directed that a hearing be had on the charge of the Special Agent, that, 'upon numerous subdivisions embraced in the above selections coal crops and coal measures of varying thicknesses were found of merchantable quality and workable quantity; that such coal croppings were well and plainly to be seen at date of selection.' * * * It is charged in the order of hearing that coal measures of varying thicknesses and of merchantable quality and workable quantity were found upon said lands and that said croppings were well known and plainly to be seen at the date of selection."

The affirmation by the Commissioner of the above findings of facts and decision also defined the basis of the hearing to be:

"That upon numerous subdivisions embraced in the above selections coal crops and coal measures of varying thicknesses were found of merchantable quality and workable quantity; that such coal croppings were well and plainly to be seen at date of selection."

Thus the issue in the department inquiry was simply and solely whether at the time of the selections there were evidences of the coal bearing quality of the lands to be seen upon the lands themselves. This was a false issue raised by the department through a mistaken interpretation of the law. The only objection of this character which the department could properly raise against the selections was that they were coal lands; and undoubtedly that was the issue it attempted to make. But its definition of what it took to constitute coal lands within the statute was too narrow. As said by Justice Van Devanter in a notable opinion in Diamond Coal Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936:

"An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining."

And again:

"There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate."

A decision of the department upon a matter of law is always reviewable, in the sense of not being binding upon the courts as res adjudicata. Diamond Coal Co. v. U. S., supra; Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064. It is true that a portion of the testimony and some of the findings before the department took a wider scope than the presented issue warranted; but it is the issue, and not the testimony nor the findings, which de-

fine the outside limits of the controversy. Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570.

In my opinion, this objection is not met by saying that to permit a judgment of the department to be overturned for any error of the department in limiting the scope of the evidence would be to destroy the principle upon which the doctrine of res adjudicata is founded and turn the courts into tribunals of appeal from the department. Errors of admission or exclusion of evidence usually deal with the materiality or pertinency of the testimony to the issues as made by the pleadings. If that were the case here, so that the only question would be one of adjective law, then the statement would be patently true. This, however, is not an instance of rulings on or scope of evidence in any such sense, but of the scope of the issue to be covered by the evidence and to be ultimately decided.

Nor can it be said, because the department acted in strict accordance with its rule in force at the time of the hearings, that the entryman is protected. These departmental rules are entitled to much consideration, because worked out by men who are experts by learning and experience in dealing with such matters (Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063); but departmental rules cannot supersede congressional enactments. Nor are such rules controlling in the particular cases in which they are challenged in the courts. A decision nullifying such a rule is not alone the law governing future departmental action, but it is equally effective in the controversy which gives rise to it.

For this error of law by the department, the court should have denied the plea of res adjudicata, and heard the case below upon the other issues presented by the pleadings.

STALLO v. WAGNER.

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

No. 195.

1. APPEAL AND ERROR ⟸119—REVIEW—ALLOWANCE OF COSTS IN EQUITY CASES.

   In equity the matter of imposition of costs is so far within the discretion of the court of first instance that a decree relating to costs alone will not ordinarily be reviewed in an appellate court, but an appeal lies when the decree involves the construction of a positive statute or where the question presented arises upon the taxation of costs by the lower court in carrying out the decree and mandate of the appellate court in a former appeal.

2. COSTS ⟸189—TAXABLE COSTS—COPY OF STENOGRAPHER'S MINUTES FOR USE OF PARTY.

   A copy of the stenographer's minutes of a trial furnished to one of the parties is not a copy of a paper necessarily obtained for use on the trial within the meaning of Rev. St. § 983 (Comp. St. 1916, § 1624), and a party who obtains such copy for his own convenience and use on the trial of a suit in equity is not entitled to have the amount paid the stenographer

therefor taxed under equity rule 50 (198 Fed. xxxii, 115 C. C. A. xxxii), which provides for the taxation only of the fee fixed by the court for the copy used by the court.

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

Suit in equity by Edmund K. Stallo against Petro E. Wagner, as receiver of the Mt. Vernon National Bank. On appeal by complainant from orders taxing costs. Reversed.

See, also, 233 Fed. 379, 147 C. C. A. 315.

This cause comes here on appeal from certain orders of the United States District Court for the Southern District of New York, which orders were dated respectively August 30, 1916, and October 10, 1916.

The complainant brought an action in the District Court for an accounting of certain transactions alleged to have been had between complainant and the Mt. Vernon National Bank. The trial lasted a week, and 550 pages of testimony were taken. The transactions involved were somewhat complicated, the claims aggregating in excess of $74,000. A transcript of the daily proceedings of the trial made each night by the stenographer was furnished the judge, who had requested that a copy of the evidence be submitted to him from day to day. Two other copies were furnished, one each to the complainant and defendant. At the conclusion of the trial a decree was entered, from which both parties appealed. When the case reached this court we held that the bill was without merit, and remanded the cause, with directions to dismiss the bill with costs in both courts. Thereupon in due course the defendant served a bill of costs with notice of taxation of the same. The plaintiff objected to an item for $432.90, which was for the stenographer's fees for the minutes of the trial, the item being apparently for the copy of the minutes obtained for the use of the defendant in the conduct of the trial, the plaintiff having paid for the copies which had been furnished to himself and to the judge. The clerk on May 18, 1916, allowed the item to be included in the costs taxed. The complainant then moved the court for an order retaxing the costs of the defendant, and an opinion was rendered on August 30, 1916, reaffirming a previous ruling allowing the stenographer's fees to be taxed. Thereafter a motion was made for a retaxation, and on October 10, 1916, an order was entered nunc pro tunc as of June 16, 1916, and the taxation of the item was affirmed. Thereupon this appeal was taken from the orders.

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

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, 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 question which counsel ask the court to determine in this case is whether in an equity suit the amount paid by defendant for a copy of the stenographer's minutes furnished him for use on the trial can be taxed as a part of the costs. The amount involved, $432.90, is not large, but the principle is important.

Costs were not recoverable eo nomine at common law. It is said, therefore, that costs can be imposed at least in law cases, only where there is statutory authority therefor. Stevens v. Boston Central National Bank, 168 N. Y. 560, 61 N. E. 904; Alger v. Boston, 168 Mass. 516, 47 N. E. 194; Studwell v. Cooke, 38 Conn. 549; Smith v. Boynton, 44 N. H. 529. The Legislature may grant the power in general

terms to the courts, and these tribunals may make rules or orders under which costs may be taxed. It has been held that the power to do this has been granted by Congress. See Tesla Electric Co. v. Scott (C. C.) 101 Fed. 524, and cases there cited. We are not, however, concerned now to inquire as to the power of the federal courts to tax costs in law cases. For the question here comes up in an equity case. Nevertheless we observe that in cases at law where the right to tax costs is given, the courts have held that the stenographer's fees are not taxable as "costs" except where the statutes so provide. Kelly v. Springfield R. Co. (C. C.) 83 Fed. 183, and cases there cited; Hughes v. Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2; Bringgold v. City of Spokane, 19 Wash. 333, 53 Pac. 368; Down v. McGourkey, 15 Hun (N. Y.) 444.

It was enacted by 17 Rich. II, c. 6, that the chancellor should award damages according to his discretion against persons bringing vexatious and unfounded suits in chancery. And "damages," as used in this statute, has been understood as including costs. Since the enactment of the statute the power of adjudging costs has become apparently so far inherent in the equity court as to be inseparable from the exercise of its judicial authority. It has frequently been said that the power of a court of equity to give costs is wholly inherent in the court independent of any statutory authority, and solely according to the conscience of the court.

"This view," it is said in Street's Federal Equity Practice, vol. 2, § 983, "is too radical to be considered orthodox, but it seems correct to say that the power of the equity court to allow costs, though originating in statute, has become a common principle and incident of its judicial action, so that the mere establishment of a court of equity and the endowment of it with judicial authority necessarily imports a power in such court to adjudge costs. This idea is fully exemplified in the history of the subject of costs as dealt with in the federal courts."

And in section 1994 the same writer says that:

"No general proposition relating to costs is more thoroughly well settled than that in the court of equity costs are entirely within the discretion of the court. Costs in equity depend, so it is said, upon conscience, and upon a full and satisfactory view and determination of the whole merits of the case. This rule is applied in equity causes in the Circuit Courts of Appeals as well as in courts of first instance. The imposition of costs in equity is never determined by unbending rules of general application; and it has been observed that any attempt to prepare and enforce ironclad rules as to costs would more often than otherwise lead to injustice."

Congress has enacted as follows:

"The bill of fees of the clerk, marshal and attorney, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases, whereby law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." U. S. Comp. Stat. 1916, Ann., vol. 3, p. 3223, § 1624; section 983 of the Revised Statutes, p. 184.

And rule 50 of the existing equity rules (198 Fed. xxxii, 115 C. C. A. xxxii) is as follows:

"When deemed necessary by the court or officer taking testimony a stenographer may be appointed who shall take down testimony in shorthand and if

required transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs."

Are the copies of the stenographer's minutes to be regarded as included in the clause "copies of papers necessarily obtained for use on trial"? And does equity rule 50 mean anything more than that the fees paid for the copy of the minutes of the stenographer furnished to the court shall be taxed, and not the fees paid for the copy furnished to either of the parties?

[1] In equity the matter of the imposition of costs is so far a matter within the discretion of the court of first instance that a decree relating to costs alone will not ordinarily be reviewed in an appellate court. Canter v. Insurance Co. (1830) 3 Pet. 307, 317, 7 L. Ed. 688; Elastic Fabric Co. v. Smith, 100 U. S. 110, 25 L. Ed. 547 (1879); Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895 (1895). But it has been held that an appeal lies when a decree complained of involves the construction and application of a positive statute involving the allowance of costs. This was decided by the Circuit Court of Appeals in the Sixth Circuit. In re Michigan Central R. Co., 124 Fed. 727, 733, 59 C. C. A. 643 (1903). This decision was followed by the same court in Scatcherd v. Love, 166 Fed. 53, 91 C. C. A. 639 (1908). So in Blanks v. Klein, 78 Fed. 395, 24 C. C. A. 144 (1896), the Circuit Court of Appeals in the Fifth Circuit, while recognizing the general rule that an appeal from a mere decree for costs should be dismissed, held that, as one item taxed was incurred in the appellate court, it would consider the matter. And in Kell v. Trenchard, 146 Fed. 245, 76 C. C. A. 611 (1906), the Circuit Court of Appeals for the Fourth Circuit entertained an appeal where the sole question presented arose upon the taxation of costs by the lower court in carrying out the decree and mandate of the Court of Appeals in the former appeal, and which prescribed that the costs in both courts should be borne equally between the appellant and the appellees. It was held that the action of the lower court in carrying into effect the decree of the Court of Appeals was subject to the review of the latter court.

In the instant case the disputed item is claimed under a statute, and also under equity rule 50 which has the force of a statute. The questions presented also arise upon the taxation of costs by the lower court in carrying out the decree and mandate of this court in the former appeal.

In Prescott & Arizona Central Railway Co. v. Atchison, Topeka & Santa Fé R. Co., 84 Fed. 213, 28 C. C. A. 481 (1897), this court through Judges Wallace and Shipman held that, where a judgment dismissing the complaint "with costs to be taxed" was signed by the judge and entered by the clerk, it was a final judgment. "Nothing further was necessary," it was stated in the opinion, "to a final and complete disposition of the action. The circumstance that the costs were not taxed and the amount inserted in the judgment is not material. It was essentially a final judgment." In that case subsequently a more formal judgment was entered after the amount of costs had been taxed, and the amount of costs as taxed was entered in the judgment, and it was expressly provided in the judgment that plaintiffs should have execu-

tion therefor. The practice seems not uncommon where a bill is dismissed with costs to be taxed, to enter the judgment "dismissing the bill with costs ———," leaving a blank space which is filled later by the clerk who inserts the amount after he has taxed the costs. In so doing reliance seems to be placed on section 983 of the Revised Statutes, p. 184, which has been already set forth in this opinion.

This practice accords with that in the state courts which hold that a judgment for a specified amount and costs is not void as to the costs because the amount thereof is left blank, since it may be afterwards inserted by the clerk. Calhoun v. Parter, 21 Conn. 526; Linton v. Housh, 4 Kan. 535; Schroeder v. Boyce, 127 Mich. 33, 86 N. W. 387; Young v. Connelly, 112 N. C. 646, 17 S. E. 424; Smith v. Nelson, 23 Utah, 512, 65 Pac. 485.

This brings us directly to the question of the right to include in the costs the stenographer's fees for copies of the minutes of the testimony furnished on the trial.

In Gunther v. Liverpool, London & Globe Ins. Co. (C. C.) 10 Fed. 830 (1882) District Judge Benedict disallowed an item for stenographer's charges, saying:

"The sum paid the stenographer by the plaintiff to obtain a copy of his minutes of the testimony given on the trial cannot be taxed, because the employment of a stenographer was not directed by the court, and there was no consent to the insertion of any part of the stenographer's charges in the bill of costs."

The question arose under the provision of the statute allowing clerks to include in the judgment fees for exemplifications and copies of papers necessarily obtained for use on the trial. In Wooster v. Handy (C. C.) 23 Fed. 49, 59, 60 (1885), the expense of a copy of stenographer's minutes was disallowed by Justice Blatchford, sitting in the Circuit Court for the Southern District of New York. The question arose under the statutory provision and the suit was in equity.

In The William Branfoot, 52 Fed. 390, 395, 3 C. C. A. 155 (1892), the Circuit Court of Appeals, Chief Justice Fuller writing the opinion, held that the amount paid for a copy of the stenographer's minutes was properly disallowed by the District Judge. He said:

"Another item was for money paid for a copy of the official stenographer's notes, obtained for libelant by his counsel. This was simply for convenience, and not a copy necessarily obtained for use on the trial. The item was properly rejected."

In Atwood v. Jaques (C. C.) 63 Fed. 561 (1894), District Judge Philips held that the sum paid by the respondent for copies of the stenographer's minutes was not taxable, saying:

"As these copies were evidently for the use of the respondent or his counsel, they are not chargeable as costs in the case."

In Roundtree v. Rembert, 71 Fed. 255 (1896) in the Circuit Court for the District of South Carolina, Circuit Judge Simonton said:

"Another exception is the disallowance of the fee paid for a copy of the testimony taken de bene esse. By consent counsel on both sides were allowed to obtain a copy of the testimony taken in New York. Properly this is no part of the costs of the case. The copies were solely for the convenience of counsel. In the absence of any agreement that it should be included in the costs, that

cannot be done. Counsel for the plaintiffs deny that there was any such agreement, and no stipulation in writing to that effect is in the record. The exception is overruled."

In Kelly v. Springfield Ry. Co. (C. C.) 83 Fed. 183 (1897), District Judge Sage declared that:

"The expense of copies of testimony is not taxable as part of the costs in this district."

The suit was in equity.

In Monahan v. Godkin (C. C.) 100 Fed. 196 (1900), District Judge Seaman affirmed the action of the clerk who had refused to tax for a copy of the testimony taken on the trial of an action at law under a stipulation obtained by a party for the purpose of preparing a bill of exceptions. After citing the statutory provision, heretofore referred to, Judge Seaman said:

"Requirement of a copy of the testimony for the purpose of preparing a bill of exceptions is not a requirement for use on the trial as thus defined. The mere fact of a stipulation by the parties to have the testimony on the trial taken by a stenographer cannot operate to make the expense of a transcript of the notes taxable as costs, without express stipulation to that effect. The item was properly rejected."

In Sedlacek v. Bryan (C. C.) 192 Fed. 361 (1911) District Judge Chatfield upheld the action of the clerk in refusing to tax an item paid for the taking of testimony upon a jury trial. In the course of his opinion he said:

"There being no official stenographer, one-half of the charges for taking the testimony is usually borne by each party, if an exact record is wished. In case the minutes are written out, the party securing these minutes pays the additional charge for transcribing. Where this has been done by agreement, the successful party taxes his share for taking the testimony against the unsuccessful party, and if the unsuccessful party wishes a record for appeal he is bound to secure that for himself."

In not one of the cases cited has the court construed rule 50 of the equity rules. In only one of the cases was the question before a Circuit Court of Appeals, and in that case the action of the District Judge was affirmed, disallowing the stenographer's fee.

A close scrutiny of the language of the statute, and a careful examination of the decisions, leaves us in no doubt as to how we ought to decide the questions involved. This court adjudges:

[2] 1. That a copy of the stenographer's minutes of a trial furnished to one of the parties is not a copy of a paper necessarily obtained for use on the trial within the meaning of section 983 of the Revised Statutes. In reaching this conclusion we adhere to what was said by Chief Justice Fuller in The William Branfoot, supra.

2. That a party who obtains for his own convenience and use on the trial a copy of the stenographer's minutes is not entitled to have the amount paid the stenographer therefor taxed under equity rule 50. Under that rule the amount paid to the stenographer which can be taxed is the fee fixed by the court for the copy used by the court. It does not include the amount expended by one of the parties for a copy obtained simply for his convenience at the trial. Whether it would include the cost of a copy obtained after trial and for the pur-

pose of preparing the case for argument in this court upon an appeal is not before us and is not decided. If the purpose of that rule was to change the existing law so as to confer upon a party to the action a right to tax for a copy of the minutes furnished him for use at the trial, the intention would have been clearly expressed, and would not have been left to be inferred from doubtful language.

No doubt the transcript of the testimony obtained by the defendant was convenient for him to have. Whether it was necessary for him to have it is quite another matter. It does not follow that it was "necessary" and taxable because it was convenient. See Hoyt v. Jones, 31 Wis. 389; Mark v. City of Buffalo, 87 N. Y. 184; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158.

The District Court erred in refusing to strike from the bill of costs the item of $432.90 alleged to have been paid by the defendant for a copy of the stenographer's minutes. The orders appealed from are reversed, with the costs of this appeal, and the District Court is directed that the said costs should be allowed in reduction of the judgment docketed.

THOMAS v. ANDERSON et al.

(Circuit Court of Appeals, Eighth Circuit. August 20, 1917. Rehearing Denied December 3, 1917.)

No. 4729.

1. WILLS ⊜513—CONSTRUCTION—DESIGNATION OF DEVISEE.
A devise and bequest of the residuary property of a testatrix "to my executor, William E. Thomas, to convey, bargain, sell, distribute or dispose of as he may choose or see fit to do with, following as nearly as may be possible for him to do, any instructions, directions or requests that I may hereafter * * * make or request," construed in connection with another clause making a separate devise to "my nephew, William E. Thomas," without restrictions, *held* not a gift to the devisee in his private capacity, but as executor in trust for such purposes as the testatrix might thereafter designate.

2. WILLS ⊜513—CONSTRUCTION—DEVISE TO EXECUTOR—PRESUMPTION.
It is a cardinal rule that a devise of property to an executor is presumed to be given to him in trust, and not privately, and, in order to justify a court in reaching a contrary conclusion, there must be language in the will which clearly expresses such an intent.

3. WILLS ⊜862—ESTATES IN TRUST—EFFECT OF FAILURE OF TRUST.
Where a residuary estate is devised to the executor in trust, but the testator fails to designate the beneficiaries of the trust, it will be treated as intestate property, and disposed of as if no such will had been made.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by Harry Anderson, William C. Michaels, as administrator of John Anderson, deceased, and William C. Michaels, as administrator of Mary Anderson, deceased, against William E. Thomas, as executor of the will of Mary Thomas Piper, deceased, and William E. Thomas individually. Decree for complainants, and defendants appeal. Affirmed.

A. N. Gossett, of Kansas City, Mo., for appellant.

William C. Michaels, of Kansas City, Mo. (Delbert J. Haff, Edwin C. Meservey, and Charles W. German, all of Kansas City, Mo., on the brief), for appellees.

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

AMIDON, District Judge. This suit is brought by plaintiffs to compel defendant as executor to account to them for their share of the residuary estate of Mary Thomas Piper, deceased. The defendant in his answer claims that the residuary estate by the will of the testatrix is left to him personally, and not as executor. The suit has been in this court before. 223 Fed. 41, 138 C. C. A. 405. The defendant whose presence defeated jurisdiction then was dismissed when the case was returned to the lower court. Upon the second trial a decree was entered in favor of plaintiffs, and defendant appeals.

The defendant offered parol evidence which he thought tended to support his side of the controversy. The trial court at first received it, but later struck it out, and that ruling is one of the matters complained of. We think the ruling was right, but do not consider the question important. We have examined the evidence and agree with the trial court that it does not furnish substantial aid in the decision of the matters that are controlling.

[1] The controversy turns upon the twenty-ninth article of the will which reads as follows:

"Twenty-Ninth. All the rest, residue and remainder of my property both real and personal that I may own or possess at the time of my death, I give, devise and bequeath to my executor, William E. Thomas, to convey, bargain, sell, distribute or dispose of as he may choose or see fit to do with, following as nearly as may be possible for him to do, any instructions, directions or requests that I may hereafter give, make or request."

The question to be decided is whether under this paragraph William E. Thomas takes the residuary estate personally for himself, or in trust as executor.

It would not be true to say that the question could be answered clearly, either from reading the will or reading the will in connection with the oral evidence. The real intent of the testatrix is still dark and obscure.

What are the factors from which the inference one way or the other must be drawn? The principal ones are few. Those in favor of the plaintiffs, and which the trial court thought preponderant are these:

1. The testatrix in the seventh paragraph of her will had already given a separate bequest to William E. Thomas of one-tenth of her real property, valued at $100,000. If she meant him to have everything except what she specifically devised to others, why did she not leave this specific bequest to be embraced as a part of the residuary estate? It will be noted that the twenty-ninth paragraph by its language embraces both real and personal property.

2. In making the bequest in the seventh paragraph the author of the will spoke in unmistakable terms. There is no doubt that she in-

tended the one-tenth there referred to to belong to defendant personally. She makes no reference that clouds this meaning. She speaks of him there, not as her executor, but as her nephew. She adds no words in which she attempts to tell what powers William E. Thomas may exercise over that property. She evidently recognized clearly that, if it was to be his private property, he could exercise all the powers with respect to it possessed by any owner.

3. But in the twenty-ninth paragraph she does not speak of William E. Thomas as her nephew. She speaks of him as her executor, and the plaintiffs urge that when she uses that term she uses it not simply to identify William E. Thomas, but uses it to indicate the capacity in which he is to take the residuary estate. It is certainly impressive that when she intends him to take privately, as she clearly does in the seventh paragraph, she refers to him as "my nephew, William E. Thomas." If it is her purpose that he shall take privately as to the residuary estate devised in the twenty-ninth paragraph, why does she use the words "my executor," which on their face are words of trust? To be sure, it is possible to say that she used them simply as terms to identify the William E. Thomas to whom she was referring. But the fact that she uses a term, when she is giving to him in his private capacity, which implies no trust, and uses the term "executor," which does imply a trust, when she is disposing of the residuary estate, is one of the factors which tend to show her purpose that he should take the residuary estate as executor, and not privately.

4. Every word that follows the name William E. Thomas in the twenty-ninth paragraph militates against the inference that the testatrix was giving the residuary estate to Mr. Thomas in his private capacity. If we select the terms "convey" "bargain," "sell," "dispose of as he may choose or see fit," all of that language becomes mere surplusage, if the residuary estate was given to him as his private property. Every owner of private property has the right to exercise all those powers with respect to it. It is only those who are acting in a trust relationship who need to have such powers specifically granted to them. If we take the other term, "distribute," that is clearly a word of trust, indicative of an act to be performed by William E. Thomas as executor, and not as a private individual.

5. If we take the concluding words of the paragraph, "following as nearly as may be possible for him to do any instructions, directions or requests that I may hereafter give, make or request," these are unmistakably words of trust inconsistent with a purpose to confer upon William E. Thomas an absolute private ownership of the residuary estate.

[2] 6. Finally, it is a cardinal rule, well established by authority, that a devise of property to an executor is presumed to be given to him in trust, and not privately, and in order to justify a court in reaching a contrary conclusion there must be language in the will which clearly expresses such an intent. The best that can be said of this will is that there is some language in it supporting such an inference. It cannot truthfully be said that that inference is made clear and plain.

Let us now turn to the factors which it is claimed point to the con-

clusion that the residuary estate is given to William E. Thomas in his private capacity.

1. Chief of these is that the twenty-ninth article fails to specify the beneficiaries of the trust, or the terms upon which the trust is to be performed. In other words, the trust, if the property was in fact given in trust, is not expressed in the will, but is left to directions thereafter to be given by the testator, and which she failed to give, and for that reason the trust must fail. The defendant therefore invokes the rule that the will must be construed so as to dispose of the entire estate. He properly urges that when a person makes a will the mere execution of the instrument necessarily imports a purpose to dispose of the entire estate by means of the instrument. McMahan v. Hubbard, 217 Mo. 264, 118 S. W. 481. If it be ruled, as the trial court decided, that William E. Thomas took the residuary estate in trust, still the court is compelled to adopt the conclusion that the author of the will did not in fact make a valid disposition of the residuary estate because the trust is so indefinite that the court cannot perform it without writing into the will language which shall define both the beneficiaries and the shares which they shall have.

2. Defendant urges that the words which immediately follow his name are used for emphasis to express the intent that William E. Thomas is to have the property absolutely, and exercise with respect to it the powers of an absolute owner.

3. The last clause, according to defendant's view, simply expresses a pious confidence of the testatrix in the relative of whom she was most fond. It was not intended to qualify the absoluteness of the devise of the residuary estate, but is a specific expression of a contrary purpose. At the time of signing her will the testatrix knew of no desired benefaction which she had not made. If anything of that nature should occur to her, she would tell her trusted kinsman to whom she had left the residuary estate, and, instead of adding a codicil to her will, would leave it to him to carry out her wish. She wrote this expression of her confidence in immediate relationship to her most generous gift to William E. Thomas, not only as an expression of that confidence, but that it might have an association which would be most impressive upon his memory after she was gone. Viewed in that light, instead of expressing a purpose that the residuary estate should be held upon an indefinite trust, the last clause indicates the clear purpose of the testatrix that the residuary estate was left absolutely to William E. Thomas, with a purpose to trust to him personally to carry out any new wish that should occur to the testatrix after the signing of her will.

There are several minor considerations upon both sides which are referred to in the briefs, but which are not of sufficient importance to require separate discussion. We think we have presented the real controlling elements.

[3] After the most careful consideration and weighing of these elements in the light of the entire will, and also examining the oral evidence which the trial court struck out, we have reached the conclusion that the trial court correctly ruled that defendant took the residuary

estate in his trust as executor, and not beneficially. The trust itself fails because it is too indefinite for enforcement. That leaves the residuary estate to be disposed of as if no will had in fact been made. The decedent having failed to dispose of it by her will, the law takes hold of it, and disposes of it as if no will had been executed. That course is adopted, not as a matter of choice, but as a matter of necessity.

There have been too many instances in which such trusts have failed, and the courts have been compelled to dispose of the residuary estate as if no will had been made, to justify us in reaching the conclusion which the defendant urges, and upon which his case largely rests. It would serve no good purpose for us to do again what has been so often done by courts, review the authorities and restate the particular features that have led judges, in interpreting wills similar to the one here involved, to adopt one conclusion or the other. Every will presents its own problems. The question to be decided is not a question of law, but a mixed inference of law and fact. It is akin to the question that is ever recurring in patent cases as to whether a patent discloses inventive genius or is only the result of mechanical skill, or the question in negligence cases whether a party exercised or failed to exercise reasonable care. Each case rests upon its own facts, and the court best performs its duty when it sets forth, as we have tried to do, the considerations which impel it to the decision reached. The cases which present the closest analogies to the present one are the following: Christman v. Roesch, 132 App. Div. 22, 116 N. Y. Supp. 348; Ingram v. Fraley, 29 Ga. 553; McCurdy's Appeal, 124 Pa. St. 99, 16 Atl. 626, 10 Am. St. Rep. 575; Briggs v. Penny, 3 De Gex & Sm. 525; Schmucker's Estate v. Reel, 61 Mo. 592; Condit v. Reynolds, 66 N. J. Law, 242, 49 Atl. 540; Davison v. Wyman, 214 Mass. 192, 100 N. E. 1105; Gross v. Moore, 68 Hun, 412, 22 N. Y. Supp. 1019; Hughes v. Fitzgerald, 78 Conn. 4, 60 Atl. 694.

The decree is affirmed.

ROSENFELD v. SCOTT, Collector of Internal Revenue.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2846.

INTERNAL REVENUE ⊂=8—WAR REVENUE TAX—VESTED INTERESTS—"CONTINGENT BENEFICIAL INTEREST."

Under the will of a testator, who died in May, 1902, leaving a fund in the hands of trustees, the income of which was to be paid for 11 years to beneficiaries named, who were then to receive the principal, if living, the interest of such beneficiaries in the fund, beyond that in the income for the trust period of 11 years, was a contingent beneficial interest, which did not become vested prior to July 1, 1902, within the meaning of Act June 27, 1902, c. 1160, § 3, 32 Stat. 406, and under such act any tax paid thereon under War Revenue Act June 13, 1898, c. 448, 30 Stat. 448, § 29, is recoverable.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by Henry Rosenfeld, as sole surviving trustee of the trust created by the will of John Rosenfeld, deceased, against Joseph J. Scott, Collector of Internal Revenue, to recover taxes paid under Act June 13, 1898. Judgment for plaintiff, who brings error. Reversed.

For opinion below, see 232 Fed. 509.

Marshall B. Woodworth, of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. John Rosenfeld died on May 28, 1902. He left personal property in the state of California. His will provided for the creation of a trust fund out of this property for the benefit of his six children, and appointed trustees to administer the trust, the income of which was to be paid by the trustees to the beneficiaries for a period of 11 years. The will further provided:

"At the end of the said period of eleven years, or upon the death of the last surviving of my said children, whichever shall first occur, then the whole of the trust property remaining on hand shall be distributed in equal shares among my six children."

The six legacies mentioned in the will were assessed by the then collector of internal revenue upon the theory that under the provisions of the War Revenue Act of June 13, 1898 (30 Stat. 448), as amended by the act of March 2, 1901 (31 Stat. 946, c. 806), as amended by the act of April 12, 1902 (32 Stat. 96, c. 500), these legacies had become vested in gross in possession and enjoyment prior to July 1, 1902, and the taxes thereon were not refundable under the provisions of section 3 of the act of June 27, 1902 (32 Stat. 406). Each legacy was assessed at the clear value of $57,965.55, and the tax assessed on each legacy was $652.15. The taxes were paid by the trustees under protest, and a suit brought to recover the amount so paid. The court below held that the legacies were contingent beneficiary interests, and not vested, and rendered judgment for the plaintiffs, on the authority of Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, and the decision of this court in Lynch v. Union Trust Co., 164 Fed. 161, 90 C. C. A. 147, and other cases. The defendant brought the case here on a writ of error.

In the later case of United States v. Fidelity Trust Co., 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137, it was held by the Supreme Court that a legacy of property in trust to a trustee, who was to pay the net income to the legatee in periodical payments during the latter's life, was not a contingent interest, but a vested estate for life, and was assessable, under the War Revenue Act of June 13, 1898, upon its value ascertained by the aid of mortuary tables. This court, following the decision of the Supreme Court in United States v. Fidelity Trust Co., supra, held that:

"The rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon, and were subject to the war revenue tax, and assessable, not upon

the gross amount of the legacies, but upon the value of the rights to receive the annual income."

The judgment was accordingly reversed, and, as the pleadings in the case did not present the precise issue as it had been developed, leave was given to the parties to amend the pleadings, and for further proceedings. Muenter, Collector, etc., v. Union Trust Co., 195 Fed. 480, 115 C. C. A. 390. The case going down for such further proceedings, the pleadings were amended, and the case again heard. Upon the second trial the court held that the vested right of each legatee was the income for life, for the reason that under the terms of the will the beneficiaries would have and enjoy the income, not only during the trust period of 11 years, but thereafter during their lives by the vesting in them of the corpus of the legacy at that time.

A clear understanding of the law upon which this controversy turns will aid very materially in its solution. Section 29 of the War Revenue Act of June 13, 1898 (30 Stat. 448) required:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, * * * passing after the passage of this act, * * * shall be, and hereby are, made subject to a duty or tax to be paid to the United States as follows."

Section 30 of the act provided that:

"Every executor, administrator, or trustee" having in charge or trust any legacy or distributive share as aforesaid shall notify the collector or deputy collector of the district where the decedent last resided of such legacy or distributive share, the names of the persons entitled to any beneficial interest therein, shall make and render to the collector a schedule, list, or statement of the amount of such legacy or distributive share, giving the clear value of such interest, and shall pay the tax assessed thereon to the collector, whose receipt therefor "shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by any court empowered to decide upon and settle all accounts of executors and administrators."

Section 3 of the act of June 27, 1902 (32 Stat. 406), provided for the refunding to executors, administrators, or trustees who had paid this tax "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902." It was further provided:

"And no tax shall hereafter be assessed or imposed under said act approved June 13, 1898, upon or in respect to any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

Section 29 of the act of June 13, 1898, with all of its amendments, had already been repealed by the act of April 12, 1902 (32 Stat. 96), to take effect July 1, 1902. Section 3 of the Refunding Act (Act June 27, 1902) was added to the bill in the Senate on June 17, 1902 (Cong. Record, vol. 35, p. 6935). Upon the return of the bill to the House for concurrence, Mr. Payne, chairman of the committee on ways and means, said:

"The third section, which is the second amendment of the Senate, as numbered, provides for a refund of the tax collected on contingent beneficiary interest in legacies taxed by the law, and also repeals it upon any future contingent beneficiary interest after the 1st of July. The Internal Revenue Com-

missioner has lately decided that the tax under the law must be exacted on contingent beneficiary interests although they take effect on the 1st of July and become vested after that date. As we have repealed all these legacy taxes, the committee thought it fair and just to repeal this part of it, and not to require those who receive legacies which are to be paid after the 1st of July—some of them 20 and 30 years from now—to be taxed on those legacies, and not to require trustees and executors to pay such tax." Cong. Record, vol. 35, p. 7087.

The words "which shall not have become vested," in the first paragraph above quoted from the act of June 27, 1902, have been declared by the Supreme Court to have the same meaning as "absolutely vested in possession or enjoyment" in the last paragraph above quoted. United States v. Fidelity Trust Co., 222 U. S. 158, 159, 32 Sup. Ct. 59, 56 L. Ed. 137.

When John Rosenfeld died on May 28, 1902, his executors became charged with the trust of administering the legacies provided in his will for the term of 11 years, provided some one of his children therein named should so long survive; otherwise, the trust was to terminate upon the death of the last surviving of his said children. The trust might continue, under this provision, for the period of 11 years. It might be less, but it could not continue for any longer term.

The statute required the executors to pay the tax on the legacies placed in their hands as trustees by the will; that is to say, a trust to continue for a period of 11 years. This was the legal unit of their right and duty. They were not required to pay a tax for any longer or different period, or for any other or different unit of right and duty. but, aside from this limitation contained in the act of June 13, 1898, the Refunding Act expressly provides for the repayment to the executors of "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902"; that is to say, absolutely vested in possession or enjoyment.

The tax not authorized to be refunded by the act of June 27, 1902, was the tax paid by the executors, administrators, or trustees, which had become absolutely vested in possession or enjoyment prior to July 1, 1902. It is conceded by the plaintiffs in error that upon the death of John Rosenfeld on May 28, 1902, a trust became vested in the trustees for his six children, the income of which was to be paid by the trustees to the beneficiaries for the period of 11 years. The clear value of said interest has been ascertained by the aid of mortuary tables, and found to be the aggregate sum of $20,313.62, and the amount of the tax on each legacy to be $152.35, or $914.10 for the six legacies. The tax actually paid by the trustees under protest upon the gross amount of the legacies was $4,062.90. Deducting from this gross amount the sum of $914.10, conceded by the plaintiff in error to be due, and a tax of $150, not here in controversy, leaves the sum of $2,998.80 as the amount of the refund claimed by the plaintiffs in error in this action, together with interest and costs.

The defendant in error contends, on the other hand, that the vested right of each legatee was an income for life, for the reason that when the period of 11 years shall have passed the legatees will become vested with the corpus of the estate, the equivalent of an income for life;

that the value of such an estate for life has been ascertained by mortuary tables, and has been found to be $2,480.71, which he claims he is entitled to retain, and that the judgment in favor of the plaintiff in error should be the difference between that sum and $4,062.90, or the sum of $1,432.19, with interest and costs, instead of $2,998.80, with interest and costs, as claimed by the plaintiff in error.

This question we think was determined by the Supreme Court in Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563. In that case the Circuit Court of Appeals for the Second Circuit certified certain questions to the Supreme Court concerning the taxation of certain interests provided for in the will of Cornelius Vanderbilt in favor of his son Alfred G. Vanderbilt. The will gave the residue of his estate to his executors, to be held in trust for the support, maintenance, and education of his son, and to accumulate any surplus income, and pay the accumulation to his son when he should arrive at the age of 21 years, and thereafter to pay him the net income of the estate until he should arrive at the age of 30 years, when he was to be put in full possession of one-half of the estate. The net income from the remainder was to be paid to him thereafter until he should arrive at the age of 35, when he was to receive the rest of the estate. At the time of the death of Cornelius Vanderbilt his son, Alfred G. Vanderbilt, was between 22 and 23 years of age. The period of the trust prior to the son Alfred arriving at the age of 21 years had passed, but there remained four separate and distinct units of trust in the residuary estate: (1) His right to receive the income from the entire residue until he became 30 years of age; (2) his right to receive one half of the principal of the residue upon becoming 30 years of age; (3) his right to receive the income from the other half of the residue until he became 35 years of age; and (4) his right to receive the principal of the other half of the residue upon reaching the age of 35 years. Were all these beneficial interests absolutely vested in possession or enjoyment prior to July 1, 1902? The Supreme Court stated the fundamental question as follows:

"Whilst the questions, apparently, present distinct matters, yet underlying and involved in them all is the fundamental consideration whether the burden imposed by the War Revenue Act was confined to the interest of which Alfred G. Vanderbilt had the beneficial right of immediate enjoyment, or whether that burden also bore upon the right to the residue which Alfred G. Vanderbilt might possess or enjoy in the future, if he lived to the ages specified in the will, upon the theory that the right so to possess or enjoy in the future was technically vested."

And answering this fundamental question, as well as the questions propounded, the court said:

"That there was no authority under the act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned on his attaining the ages of 30 and 35 years, respectively."

In United States v. Fidelity Trust Co., 222 U. S. 158, 160, 32 Sup. Ct. 59, 60 (56 L. Ed. 137) the Supreme Court referred to this case of Vanderbilt v. Eidman with this observation:

It "concerned a life estate in remainder, which, whether the remainder was technically vested or contingent, * * * was not in * * * possession or enjoyment."

Applying that construction of the statute to the present case, we must hold that the life estates were contingent beneficial interests, and were not vested in possession or enjoyment prior to July 1, 1902, and that there was no authority to assess and collect a tax from the trustees of the estate of John Rosenfeld with respect to any right or interest of the legatees in that estate, except the present right to receive the income from the estate for the period of 11 years.

The judgment is reversed, with directions to the court below to enter a judgment in favor of plaintiffs for $2,998.80, with interest and costs.

PRODUCERS' OIL CO. v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. June 6, 1917.)

No. 4603.

RECEIVERS ⊂⊃16—CONFLICTING OIL LEASES—RIGHT TO RELIEF.

In a suit by the United States, on behalf of the Creek Nation, for the cancellation of oil and gas leases authorized by the state of Oklahoma and involving ownership of the bed of the Cimarron river, by stipulation of parties the lessees were permitted to continue operations, and a receiver was appointed to collect and hold the royalties for the benefit of the prevailing party. Intervener, as lessee of land of an Indian allottee on the river, claimed ownership of a portion of the bed in his lessor adversely to both parties. *Held*, that the receivership between the original parties was not adequate to protect intervener's rights pending the litigation, and that, while not entitled to an injunction to restrain operation by the state's lessees because of other facts, it was entitled to protection by bond, or by the impounding of the net proceeds of such operations on that portion of the river bed claimed by it.

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 lessees of the State of Oklahoma. The Producers' Oil Company, intervener, appeals from an order denying a preliminary injunction. Reversed.

F. B. Dillard, of Tulsa, Okl., and Burdette Blue, of Bartlesville, Okl. (F. W. Dillard, of Tulsa, Okl., and A. L. Beaty, of New York City, on the brief), for appellant.

W. P. McGinnis, Sp. Asst. U. S. Atty., and R. C. Allen, both of Muskogee, Okl., and W. A. Ledbetter, of Oklahoma City, Okl. (D. H. Linebaugh, U. S. Atty., and James C. Davis, Assistant to Creek National Attorney, both of Muskogee, Okl., on the brief), for appellees.

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

HOOK, Circuit Judge. This is an appeal by the Producers' Oil Company from an order denying it a preliminary injunction. The branch of the case in which it was taken involves the title to the bed of the Cimarron river, in Creek county, Okl., adjacent to a tract of upland allotted to Mabel Dale, a member of the Creek Tribe of Indians, and the right to extract oil and gas therefrom. There are three sets of

claimants: (1) The United States, on behalf of the Creek Nation; (2) the state of Oklahoma and Frank Brown, its lessee; and (3) the appellant, as lessee of Mabel Dale. The land in question is within the limits of the grant of August 11, 1852, by the United States to the Creek Nation of Indians in fulfillment of the treaty of February 14, 1833 (7 Stat. 417).

The United States asserts that the Cimarron river is nonnavigable, that the land surveyed and allotted to Mabel Dale stopped at highwater mark, and that the adjacent river bed, not having been surveyed or embraced in the allotment, remained the property of the Creek Nation. It also claims that, even if the river were a navigable stream, still the bed thereof would have passed to the Creek Nation by the grant of 1852, and that it was not held in trust for the future state of Oklahoma. The state of Oklahoma and its lessee, Frank Brown, claim the river is navigable, and that upon the admission of the state into the Union it succeeded to the legal title to the bed, according to the familiar rule, and was exclusively authorized to lease it for the extraction of oil and gas. The appellant, the Producers' Oil Company, claims the river is nonnavigable, and that, though the survey lines of the Mabel Dale allotment meander the bank, her title, including that of appellant, her lessee, extends to the thread of the stream, and embraces the part of the bed in which Frank Brown is operating.

The main suit was brought by the United States December 27, 1913, on behalf of the Creek Nation, to cancel various oil and gas leases of the river bed, executed under the authority of the state of Oklahoma, and to enjoin the lessees from operating under them. On the same day the state and its commissioners of the land office intervened in the suit and asserted title in the state and the validity of the leases. Three days later, pursuant to a stipulation between counsel for the United States and for the commissioners of the land office of the state, an order was entered appointing a committee of two persons representing the parties to the stipulation to superintend the operations under the state's leases, and also appointing a receiver to collect the royalties and to disburse them under the orders of the court to the party adjudged owner of the river bed. The leases provided for royalties of 29 per cent. of the production. The excess production over the royalties was to be retained by the state's lessees as their own property. About a year later, January 16, 1915, the appellant intervened for the protection of its rights under the lease from Mabel Dale. That lease provided for a royalty to her of one-eighth of the production. The appellant applied for a preliminary injunction restraining the state's lessees from operating in the river bed adjacent to her allotment. The application was denied, and this appeal followed.

The briefs and arguments have taken a wide range, but we think that at the present stage of the litigation our consideration should be more limited. Aside from the contention of the United States that it should prevail in either case, the rights of the parties depend upon whether the Cimarron river is navigable or not. There is a common knowledge that some of our rivers are navigable, and courts may take judicial notice thereof; but the navigability of many others, being less certain,

is a question of fact requiring proof. Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447. The Cimarron river is of the latter class, and we should not determine its character as to navigability upon the showing now in the record. We think, however, that the appellant should be protected while the case is pending below. There is some doubt that the existing receivership is available to it. The order appointing a committee to superintend the operations of the state's lessees and appointing the receiver was at the instance of appellant's adversaries, and the terms were those of a stipulation to which it was not a party. Part of the language of the order is broad enough to embrace any claimant, though not then a party to the suit; but still there would be some reason for claiming that the general terms should be restrained to the particular intent, which was for the benefit of those who stipulated. But, if the receivership is available to appellant, the terms and conditions of it are insufficient for its protection.

The attitude of the United States and the state is that of proprietors of land, whose interest in underlying oil and gas is generally expressed in terms of rentals or royalties. They were not, like the appellant, engaged in the business of drilling wells and extracting oil and gas; and the mere impounding of the royalties during the pendency of the suit, which they stipulated for themselves, would not be equitable for the latter. If appellant is right as to its title, and much at least may be said in its favor, it is entitled to all the oil and gas that can be drawn from the river bed and to such adequate protection during the litigation as may be practicable. If the parties now operating there are unable or unwilling to give a bond for such purpose, a receiver should be appointed, with authority and direction to offset the wells on the shore and to pay all proceeds of the product into court, less the reasonable allowed costs and expenses of conducting the work. Strictly speaking, the trial court was right in denying appellant's application for a temporary injunction. Appellant had wells on the upland near the line, and the injunction asked would have given it the fruits of title, regardless of the result of the suit. The oil and gas under the river bed would have been drained through the upland wells, without a definite way of determining appellant's liability, if it failed at final hearing. But in a case so exceptionally circumstanced as this we think the court should have imposed conditions upon the denial of a temporary injunction, or given the other temporary protection above mentioned.

To clear the situation for a renewed consideration of this matter, the order denying a temporary injunction will be reversed.

STETSON HOSPITAL OF PHILADELPHIA v. SNOOK-ROENTGEN MFG. CO.

(Circuit Court of Appeals, Third Circuit. April 26, 1917. Rehearing Denied September 1, 1917.)

No. 2198.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—X-RAY MACHINE.
The Snook patent, No. 954,056, for an X-Ray machine, covers an invention of a novel character and a high order of merit, in which, by discarding the use of induction coils and utilizing an alternating current, the inventor greatly increased the intensity of the rays and prevented inverse discharge through the tube, adding largely to the utility of the machine; also *held* infringed.

2. PATENTS ⇐312(3)—CONSTRUCTION—PROCEEDINGS IN PATENT OFFICE.
A discussion of questions in the Patent Office in relation to a pending application, as bearing on the construction of the patent later issued therein, must be read in the light of the grounds of the discussion. To detach isolated statements from their setting, and ignore the occasion and question that caused their use, generally leads to a mistake.

3. PATENTS ⇐155—SUIT FOR INFRINGEMENT—COSTS—EFFECT OF DISCLAIMER.
A disclaimer by a patentee, filed after commencement of a suit for infringement, of a statement in the specification which has no bearing on the issues litigated, will not prevent the recovery of customary costs by complainant, if successful.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by the Snook-Roentgen Manufacturing Company against the Stetson Hospital of Philadelphia. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 237 Fed. 204.

O. Ellery Edwards, Jr., of New York City, for appellant.

Cornelius D. Ehret, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the Snook-Roentgen Manufacturing Company, assignees of patent No. 954,056, granted April 5, 1910, to Homer Clyde Snook, for an X-ray system, filed a bill against the Stetson Hospital of Philadelphia, charging infringement of claims 1, 2, 3, 5, 9, 14, 19, 23, 24, 25, 26, 27, and 33 of said patent. On final hearing the court below in an opinion reported at 237 Fed. 204, held the patent valid and said claims infringed. From the decree so holding, defendant appealed to this court.

The real defendant in the case is the manufacturer of defendant's machine. This patent concerns X-ray machines, and as the opinion referred to describes such machines and the general nature of the controversy here involved, we avoid needless repetition by reference thereto. Confining ourselves solely to the questions involved in this controversy, we may say that two of the most important factors in X-ray machines are here involved, viz.: First, an increase in the intensity and penetrating powers of the X-ray produced by the machine; and, second, the decreasing or eliminating of what are called inverse currents in such machines.

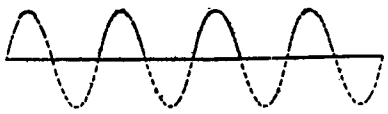
[1] Prior to the patent in suit, the X-ray machine in common use was called an induction machine, and its capacity, as measured by milli-

amperes, was about 8. Snook, who was a trained electrical engineer and a manufacturer of such machines, experimented with that type of machine for a considerable time in a fruitless effort to increase current intensity and eliminate inverse current tendency. The use of induction coils had characterized practically all machines up to that time, and the whole teaching of the art was in that direction. In addition to this accepted use of induction coils, the practice of the art was to use what is called peaked wave contact; that is, to so form the electric wave that it evidenced itself in sharp points or peaks, and in so constructing its mechanism that electrical contacts were confined to these sharp peaks, where the contact was brief in time and space, and was followed by no electrical drag. Taking, for example, the United States patent to Lemp, No. 774,090, applied for December 1, 1897, and granted November 1, 1904, and which may therefore be taken as a fair example of the trend of electrical thought at that time, we find in Fig. 2 an example of the then use of sinusoidal waves, namely, the extreme upper portion of the wave.

Thus Lemp says:

"I propose to utilize *only fractions of the waves, preferably the wave crests* when the potential is at a maximum. By selecting the wave fractions so utilized from points of like sign in the electromotive force waves, unidirectional discharges through the tube or other apparatus are secured."

FIG. 2.



Even where Lemp does not use the extreme peak crest of the wave itself, he still confines himself to limited points of contact. Thus he says:

"I have described my invention as utilizing only the crests of the positive waves; but the same effect is obtained if the crests of the negative waves are utilized. Certain features of novelty in my invention, however, are not limited to sifting out and utilizing the crests of the waves, for by a proper arrangement of the selector I may derive a current or currents corresponding to any desired point or points in the electromotive force waves, while preventing the flow of current at other points in the wave."

Turning from this state of the art, shown by domestic patents, to the situation abroad, we may refer to Koch's article, published at Hamburg in 1904 and 1905, which was addressed to the problem of inverse discharge, there referred to as Roentgen tubes "free of a closing light," and wherein was described a new bi-cathode tube, which tube, and not any mechanism outside of it, was intended to prevent inverse discharge. In discussing his apparatus, Koch says:

"Through proper influence the otherwise more sinusoidal form of separate current impulses is crowded together near the apex, so that commutation, even in abbreviated segments, results without the production of sparks."

By reference to a former article of Koch, to which he therein refers, viz. "Annallen der Physic," he says:

"For producing high peak values a choke coil with relatively small iron cross-section serves best, so that the iron of the choke coil will be magnetized at that part of the curve which approaches the horizontal."

After repeated trials in this field of induction coils and high peak contacts, Snook abandoned it and turned to two other factors, to wit, first, the use of substantially the whole of the sinusoidal curve as a contact element; and, second, the employment of an alternating current. By a suitable switch or rectifier connection, Snook utilized an alternating current in such a way as to secure unidirectional flow, and also used substantially the whole of the broad sinusoidal curve as a sphere of contact.

A study of this art has satisfied us that Snook was a newcomer in this field of X-ray practice. By his discard of the induction coils, and his utilization of an alternating current and the substantial breadth of the whole sinusoidal wave, he has been able to prevent inverse discharge in the tube of an X-ray machine, and at the same time increase tube excitation to 120 milliamperes, as compared with the former practice of 8 milliamperes. The factors which enable him to do this are: First, his high tension switch or rectifier, which passes all the waves, both positive and negative, of an alternating current cycle through the tube always in the same direction. This is done by the use of cross-connectors and parts or segments, which latter are made of such length as to cause the high tension energy delivered by the transformer to persist for a longer time, and for a greater proportion of the entire wave, than had been the practice in the prior art. And, secondly, by availing himself of the low magnetic leakage of a transformer, which by virtue of having such low magnetic leakage contributes with the shortening of the arcs to any suitable point less than correspondence with the full length of the alternating current wave, to prevent inverse discharge. As he states it in his patent:

"These features of very small, if any, phase displacement between current and electromotive force in the secondary *S* and the conducting arcs of angular length slightly less than a half wave of current guarantee that there will be no inverse discharge in the tube *X*; each of these features contributing to that end."

The transformer of low magnetic leakage was old; but Snook appears to have here taken advantage of such low leaking in combination with other elements to secure for the first time prevention of inverse discharge through the tube. We are satisfied from the proofs that Snook's invention was of a high order of merit, but was so novel in its departure from accepted methods that it had to make a place for itself in the art over the opposition it met as a radical departure from prior practices, and that it secured ultimate recognition only by demonstration of its intrinsic merit. In time, large numbers of these machines have come in use, both in this country and abroad. The testimony as to its novel and really remarkable capacity is without contradiction. The testimony of physicians satisfies us that the best results in former machines, expressed in milliamperes, was about 8 while with the Snook apparatus they were able to obtain 120; in other words, virtually 15 times as great light-exciting power. This ray intensity brought about higher penetrating power, and therefore sharper and more definite photographic reproduction. One physician, when asked to give an example of the work that could be done with

the Snook apparatus, which they could not do with the induction coils, said:

"I should say the most noticeable improvement was in connection with chest work, chest examinations, where we were able to make exposures, in a second or less, and to catch that part of the body at rest, and also to get the heart practically at rest. In the abdomen it is necessary to obtain your average exposures in a second or less, or, at the greatest, about a second and a half, in order to avoid movements of the stomach and also through the small intestines. The stomach and intestines are constantly moving, and, if you want to get a radiograph which will show them stationary, you must use the short exposure, and it was not until the Snook apparatus came in that that was practically available. It greatly increased our field for diagnosis. The chest, especially in connection with pulmonary tuberculosis, although we were able to diagnose advanced lesions with the coil, we could not diagnose early lesions."

Another physician says:

"I could handle children without an anesthetic with this machine; whereas, to do the same work with the coil, you would have to anesthetize them."

He continues:

"Any part in which there is motion requires an exceedingly short exposure in order to get a result that is distinct. For instance, I speak mostly of children, because that seems to me to be the easiest thing to understand. If you want to get a picture of a child's chest, which is an important thing, you cannot tell the child to hold its breath, because it is too young to understand you, and is too frightened to obey you if it does understand. So with the transformer [that is, Snook's machine] it is merely a matter of watching the child, and when it is momentarily still, and between the slight pause between inspiration and expiration, you close the switch, and you have the result. That would be impossible with any induction coil I have ever seen."

He was asked:

"Q. In an adult, are there any moving organs; that is, organs which by involuntary action are always in motion? A. Yes, sir. Q. Can you give an example of that case? A. The gastro-intestinal tract; that is, the stomach and intestines. The stomach is usually in constant motion. The intestines are almost always in motion, and in order to get radiographs or roentgenograms of those organs it is necessary to have exceedingly short exposures. Q. Has this increase in intensity of the X-rays due to the Snook apparatus over the induction coil practice, and resultant shorter exposures, been of any benefit to human kind? A. Oh, the utmost. We can take care of ever so many more patients, and the field of diagnosis has been vastly widened. Q. Because of what? A. Because we are able to make quick exposures and get uniform results. Q. Do you mean to say that you can diagnose with greater certainty certain diseases with the present-day practice than with the coil practice? A. Yes, sir."

We are therefore clear that no error was involved in the court's decree when finding this patent valid.

Turning, now, to the question of infringement, it is clear that the defendant's machine, which substantially reproduces the plaintiff's, infringes the claims here in controversy, unless the proceedings in the Patent Office necessitate a narrow construction thereof. Such contention for a narrow construction is based on the fact that in defendant's machine the actual physical length of the arc of the high tension rectifier switch is 52 mechanical degrees, and it is contended that such length falls short of that contemplated by the patent. The plaintiff's commercial machine has an arc of 67°, the length shown by Figure 3

of the patent drawing, and both it and the defendant's 52° machine operate in precisely the same way to produce identical results. Indeed, the machine used by the plaintiff for illustrative purposes in court, has a 52° arc, and so operated constitutes defendant's machine. When movable extension clips are attached, which lengthen the 52° arc to a 67° one, the machine is then used to illustrate the plaintiff's machine. The two effect the same electrical results, viz. increased excitation and elimination of inverse currents, which, as we have seen, are the objects the patentee had in view.

[2] From the nature of electricity, and its capacity to leap an arc or contact beyond the limits of a physical path of travel, it is clear that a contact cannot be described by the expression in degrees of a mere physical length of arc, but that the real or functional—and function, not form, is the real thing—length of an arc is the physical length of the arc plus the leading and the trailing incident to the contact. Without entering into a detail statement of the discussions in the Patent Office, we think two things are apparent: First, the discussion must be read in the light of the ground which caused the discussion, namely, that the contacts in Lemp's patent, which the Office cited, were contacts with peaked waves, and the issue was not as to the measure of the extent of the plaintiff's contact, but to the fact that it was not the peaked contact of Lemp. Any substantial extent of contact differentiated Snook's application from Lemp, and what was said in discussion should be read in the light of what was in issue and under discussion. To detach isolated statements from their setting, and ignore the occasion and question that caused their use, generally leads to a mistake. In these particular proceedings, however, no room for speculation is left, for it is perfectly clear that the applicant, far from limiting himself to an arc of expressed degrees, expressly gave notice to the Patent Office that he did not. And when he said:

"It is submitted that applicant cannot limit his claim to a certain number of electrical and mechanical degrees, for a variation from any definite number of degrees would still embody applicant's invention"

—and when the Office thereafter granted claims embodying such elements as "the angular extent of an arc corresponding with a length slightly less than a current wave," and "conducting arc of angular extent corresponding substantially with an entire current wave," that what the Office and the applicant both had in view was the broad wave contact of Snook, as contrasted with the peaked crest contact of Lemp.

This field of broad wave contact, in connection with the other elements involved, was Snook's disclosure in an undisclosed field, and we protect Snook's share of that field by affirming the decree entered by the court below.

On Petition for Rehearing.

PER CURIAM. After due consideration, we are of opinion this petition for a rehearing should be discharged. The patent involved was for a complicated X-ray apparatus, and the different features thereof were covered by 40 claims. In the opinion, which fully outlined its views of the features here involved, this court held that certain of those

claims were valid and infringed. After the suit was begun, but before trial, the patentee saw fit to enter a disclaimer of a statement in the patent specification as follows:

"It was obvious, also, that a source of direct current may be employed in connection with the transformer primary, a pole-changing switch and interrupter being included in the circuit, and driven or operated at desired speed, with a high-tension pole-changing switch or rectifier in the secondary circuit synchronous with the switch and interrupter in the primary circuit."

[3] We are not satisfied that this disclaimer had, or could have had, any effect on the questions we decided. Whether the statement, thus eliminated, remained in or was stricken out of the specification, its presence or absence would not have led to a different conclusion than the one reached. So far as our general views of the case, as well as our general conclusions, are concerned, we have seen no reason to change such views or conclusions; nor are any suggestions now made which make us feel any such doubt as to what has been already decided as to make us feel a second argument is desirable. No question was raised in the court below as to the effect of this disclaimer on the costs. Assuming, for present purposes, it can be initially raised in an appellate court, we see no basis for contending that the elimination from the specification of this—so far as the litigated issue was involved—irrelevant and inconsequential sentence should now prevent the prevailing litigant in that issue from recovering customary costs.

Accordingly the petition for a rehearing is denied.

BROADWAY TOWEL SUPPLY CO. et al. v. BROWN-MEYER CO.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917. Rehearing Denied October 8, 1917.)

No. 2971.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TOWEL HOLDER.
The Brown patent, No. 1,115,895, for a towel holder, has but a single feature which distinguishes the device covered thereby from the prior art, which feature was made an element of every claim allowed by the Patent Office, and it is not infringed by a device which does not contain such feature.

2. PATENTS ⟸178—INFRINGEMENT—"MECHANICAL EQUIVALENT."
The term "mechanical equivalent," when applied to a patent for a slight improvement in the progress of an art, has a very narrow and limited meaning, and the inventor is ordinarily confined to his specific device.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mechanical Equivalent.]

3. PATENTS ⟸168(2)—CONSTRUCTION—EFFECT OF REJECTION OF CLAIMS.
A claim cannot be so construed as to cover what was rejected by the Patent Office in the application for the patent.

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in equity by the Brown-Meyer Company against the Broadway Towel Supply Company and Amos Burg. Decree for complainant, and defendants appeal. Reversed.

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

T. J. Geisler, of Portland, Or., for appellants.

Joseph L. Atkins, of Portland, Or., for appellee.

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

GILBERT, Circuit Judge. In a suit to enjoin the infringement of letters patent No. 1,115,895, issued November 3, 1914, to C. F. Brown, assignor of the appellee, the court below found that the appellant had infringed claim 2, which reads as follows:

"In a towel holder or the like, the combination with a supporting member of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member, co-operative therewith, for the purpose specified, and means for detachably securing both ends of said retaining member together."

In the appellee's device the "supporting member" is a shelf; the "assembling member" is a standard, curved at the upper end, passing in its lower end through the shelf. The "flexible retaining member" is a chain, one end of which is attached to the curved end of the assembling member; the other end being detachably secured to the lower end of the assembling member beneath the shelf by the use of a padlock. The towels are fitted with eyelets through which, when they are piled upon the shelf, the standard or assembling member is passed. In practice a towel is taken from the shelf, slipped over the curve of the standard, and after being used is dropped; but it is retained by the sag of the chain, which, according to the drawings, extends into a basket on the floor, which serves as a depository for soiled towels.

The court below was of the opinion that the appellant's device, wherein the chain is attached to the bottom of the basket on the inside, instead of to the foot of the assembling member, did not vary the appellee's device to such an extent as to add a new discovery, or even an old element to the combination, and propounded the question whether, if the appellant had used the Reid patent, and had simply detached the chain from the wall and attached it to the bottom of the basket, it could be said that such change constituted an added discovery or new element to the Reid patent. But we think the test question here is not whether the defendant has added a new element to the Reid or the Brown patent, but it is purely a question whether he has infringed the patent in suit, and that is to be determined from the nature and scope of the appellee's combination as measured by the prior art, and the inquiry whether the appellant has used the combination of elements described therein.

[1] Brown's application for patent contained 11 claims. All but 3 of the claims were rejected by reference to several prior patents, and particularly the patent to Reid, issued July 15, 1913, letters patent No. 1,067,622 entitled "Combined Towel Holder and Rack." Reid's combination contains all the elements of the appellee's combination, with the single exception that in the Reid device the lower end of the chain is brought back and fastened by a staple to the wall beneath the standard; the loop of the chain serving to hold and retain the soiled towels. All that Brown added to Reid's device was to

detach from the wall the lower end of the chain, and bring it higher, and attach it to the lower end of the standard by means of a padlock. That is the essential and distinguishing feature of his improvement, and each claim of the patent that was allowed specifies that feature as an element. The device used by the appellant is not patented. It differs from the Brown patent, in that the chain, instead of being locked to the lower end of the standard, is fastened to the inside of the bottom of a basket, which stands on the floor beneath the towel holder, while the lower end of the standard is locked to the shelf. It will be seen that the appellee's invention is an extremely narrow one, limited as it is by the prior art. If there is any invention in the Brown patent, it consists in the precise combination therein described, and each element specifically pointed out is an essential part thereof.

[2] The appellee cannot avail itself of the doctrine of equivalents, where one element of its combination is so far departed from as it is in the appellant's device. The term "mechanical equivalent," when applied to a slight improvement in the progress of an art, has a very narrow and limited meaning. In Liberman's Ex'rs v. Ruwell (C. C.) 165 Fed. 208, Judge McPherson said:

"Where an improvement is narrow in its character, the inventor is ordinarily confined to his specific device, and receives little aid from the doctrine of equivalents. If he depends on a single limited feature (as is the case here), the doctrine will not ordinarily be applied, so as to cover a device in which that feature does not appear."

Cases of similar import are Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 C. C. A. 426; Wright & Colton Wire-Cloth Co. v. Clinton Wire-Cloth Co., 67 Fed. 790, 14 C. C. A. 646; Hill v. Sawyer (C. C.) 31 Fed. 282; Dey Time Register Co. v. Syracuse Time Recorder Co., 161 Fed. 111, 88 C. C. A. 275. If it were held that attaching the lower end of the chain to a basket is the equivalent of the specific means pointed out in the appellee's combination, it would follow that attaching it to any article of furniture, or to the wall, as in the Reid patent, would also be a mechanical equivalent. Brown made claims broad enough to include such methods of attaching the lower end of the chain, but in view of the prior art they were rejected by the Patent Office.

[3] A claim cannot be so construed as to cover what was rejected by the Patent Office in the application for the patent. Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059. In Cleveland Pneumatic Tool Co. v. Chicago Pneumatic Tool Co., 135 Fed. 783, 68 C. C. A. 485, it was said:

"A device which, if existent before the making of a patented invention, would not anticipate it, cannot, if made after the issue of the patent, be said to infringe it."

See, also, Riverside Heights Orange Growers' Ass'n v. Stebler, 240 Fed. 703, 709, — C. C. A. —, and cases there cited.

We think it clear that the appellee's claims should be so interpreted as to cover only details of construction, and that the appellant's device does not infringe, since it lacks the element which is the distinguishing feature of Brown's invention.

It appears from the pleadings and the evidence that before the appellee's patent issued the appellant had been using a device identical with that of the appellee, and that it continued so to do from the date of the patent, November 3, 1914, to December 1st following. For that infringement the appellant is answerable to the appellee in damages, on the principles announced in Dowagiac Mfg. Co. v. Minnesota Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398.

The decree of the court below is reversed, and the cause is remanded for further proceedings.

CRYSTAL LAUNDRY CO. et al. v. BROWN-MEYER CO.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917. Rehearing Denied October 8, 1917.)

No. 2972.

PATENTS ⊂=328—INFRINGEMENT—TOWEL HOLDER.

The Brown patent, No. 1,115,895, for a towel holder, *held* not infringed.

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in equity by the Brown-Meyer Company against the Crystal Laundry Company and Percy G. Allen. Decree for complainant, and defendants appeal. Reversed.

T. J. Geisler, of Portland, Or., for appellants.

Joseph L. Atkins, of Portland, Or., for appellee.

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

GILBERT, Circuit Judge. This is a companion case with Broadway Towel Supply Co. v. Brown-Meyer Co., 245 Fed. 659, —— C. C. A. ——, just decided. It involves the same questions, was tried upon the same record, and the facts are practically identical, except that in the present case the appellant, on proceedings for contempt subsequent to the interlocutory decree, was enjoined from using a new device, which the court held also infringed the appellee's patent. That device, it appears, was subsequently patented on May 9, 1916, to Henry A. Ammann, by letters patent No. 1,181,983. It is clear that if the device used by the appellant, to enjoin which the suit was brought, which device was identical with that used by the appellant in Broadway Towel Supply Co. v. Brown-Meyer Co., did not infringe the appellee's patent, the combination described in the Ammann patent did not infringe it. In the Ammann patent the towels are strung upon a flexible wire, the upper end of which is attached to a shelf, and the lower end to the floor or to the bottom of a receptacle below the shelf; the upper end of the wire being sharpened to a point, so as to pass through the towels, thus dispensing with the use of eyelets.

The decrees are reversed, and the cause is remanded for further proceedings, as in the case of Broadway Towel Supply Co. v. Brown-Meyer Co.

In re SUTHERLAND CO., Inc.

(District Court, D. Massachusetts. October 30, 1917.)

No. 22192.

1. BANKRUPTCY ⟸165(3)—PREFERENCES—NATURE OF TRANSACTION.
Where claimant agreed to advance $1,000 to the bankrupt, if the bankrupt would execute a mortgage securing such advance, and also securing loans previously made by the claimant's wife, aggregating $3,000, but the transaction was carried out by the claimant's brother advancing $1,000 on the claimant's behalf, and claimant, when the mortgage was executed, advancing $4,000, which was then paid to the wife and the brother, nothing was gained by this indirection, and the transaction as respected the question of preference was in legal effect the same as if the mortgages had been made directly to the wife and claimant.

2. BANKRUPTCY ⟸166(4)—PREFERENCES—NOTICE OF INSOLVENCY—DUTY OF INQUIRY.
A person taking a mortgage from one subsequently becoming a bankrupt to secure loans previously made was bound to draw such inferences as would naturally follow from the facts coming to his attention; and where those facts would ordinarily excite suspicion as to insolvency and cause inquiry, he was bound by such knowledge as a reasonable inquiry would have furnished.

3. BANKRUPTCY ⟸166(4)—PREFERENCES—CAUSE TO BELIEVE INSOLVENCY.
Claimant, who advanced $1,000 to the bankrupt, taking a mortgage on the bankrupt's fixtures and stock in trade of its retail business, securing such loan and loans of $3,000 previously made by his wife, knew that the debtor's business had been bad, that it owed a bank substantial sums and had been in pressing need of ready money and had repeatedly borrowed, sometimes in such small amounts as to indicate that it had little or no cash on hand. He was apparently suspicious as to the validity of the transaction, as evidenced by his inquiry of the attorney drawing the mortgage whether a mortgage for cash was good, and the transaction was carried out by having his brother advance $1,000 on his behalf, and by then advancing $4,000 when the mortgage was executed which was then paid to the wife and the brother. *Held*, that he had reasonable cause to believe the bankrupt was insolvent, especially as it is common knowledge that a retail dealer only mortgages his stock in trade and fixtures as a last resort, and that the immediate effect of doing so is to destroy all further credit.

4. BANKRUPTCY ⟸165(3)—PREFERENCES—PAYMENT OF CONSIDERATION FOR TRANSFER.
Where a loan to a bankrupt was expressly conditioned upon the giving of a mortgage to secure it and prior loans, and would not have been made without such agreement, and, though five or six days elapsed between the delivery of a check for the amount of the loan and the execution of the mortgage, the check was held during part of this time awaiting the approval of the bankrupt's directors of the agreement to give the mortgage, and the parties were not in the same city or state, the giving of the mortgage was substantially contemporaneous with the making of the loan and a part of the same transaction, so as to prevent it constituting a preference so far as such loan was concerned, and it was immaterial that the amount of the loan was first advanced by the mortgagee's brother on the mortgagee's behalf, and that when the loan was executed the mortgagee made a further advance, which was then paid to the brother.

5. BANKRUPTCY ⟸165(3)—PREFERENCES—PAYMENT OF CONSIDERATION FOR TRANSFER.
Where a mortgage was given by one subsequently becoming bankrupt to secure a loan then made and prior loans, the security for the new loan was

not invalid by being consolidated with the preferential security for the prior loans.

In Bankruptcy. In the matter of the Sutherland Company, Incorporated, bankrupt. On review of an order of the referee. Order vacated.

Clinton Gowdy, of Springfield, Mass., for mortgagee.
Scott Adams, of Springfield, Mass., for trustees.

MORTON, District Judge. The Sutherland Company, which carried on a retail dry goods shop in Holyoke, was adjudicated bankrupt. Charles J. Holcomb filed with the referee a petition alleging that he held a mortgage for $4,000 on its stock in trade and fixtures, and praying that this mortgage might be declared a valid lien on the proceeds of said property, which had been sold by the trustees. The learned referee made an order granting the prayer of the petition, and the present review proceedings were taken by the trustees and certain creditors. The evidence is fully reported.

[1] It is clear that the mortgage was arranged for the purpose of paying or securing Mrs. Holcomb's previous loans to the bankrupt, and that Holcomb so understood it. He testifies:

"Q. That is, if the Sutherland Company would give a mortgage for $4,000, which would secure your wife for the $3,000, then you would see that they had the extra $1,000? A. That was it."

And again:

"The reason I got that $1,000 was to secure my wife for the $3,000."

The transaction was not on its face carried out in exactly the way stated. Holcomb actually advanced $4,000, and, in accordance with the agreement between him and the mortgagor the latter immediately applied the loan to the payment of Holcomb's wife and brother. The mortgagee gains nothing by this indirection (Roberts v. Johnson, 151 Fed. 567, 81 C. C. A. 47, 18 Am. Bankr. R. 132; Bank of Wayne v. Gold, 146 App. Div. 296, 130 N. Y. Supp. 942, 26 Am. Bankr. R. 722); and the legal effect of what was done is, in my opinion, the same as if mortgages had been made directly to wife and to C. J. Holcomb. The brother, A. R. Holcomb, was not at any time a creditor of the company; and the payment to him was made on C. J. Holcomb's account. The latter acted in his wife's interest and his own in taking the mortgage.

[2] As to the $3,000 paid to Mrs. Holcomb: The effect of the transactions was to give her a preference; and the decisive question is whether Mr. Holcomb, at the time when he took the mortgage, had reasonable cause to believe that the Sutherland Company was then insolvent. He was bound to draw such inferences as would naturally follow from the facts coming to his attention; and, where those facts would ordinarily excite suspicion as to solvency and cause inquiry, he is to be held to such knowledge as a reasonable inquiry would have furnished. Anything "sufficient to excite attention and put a party on inquiry is notice of everything to which such inquiry would have led." In re Knopf (D. C.) 144 Fed. 245, 16 Am. Bankr. R. 433. See, too, In re Eggert, 102 Fed. 735, 43 C. C. A. 1 (C. C. A. 7th Cir.); Remington on Bkcy. (2d Ed.) § 1409, collecting cases.

[3] Holcomb knew that the debtor's business had been bad, that it owed the bank substantial sums, that it had been in pressing need of ready money for several months, and that it had repeatedly borrowed from his wife, sometimes in such small amounts as to indicate that it had little or no cash on hand. He evidently supposed that it had no property except the stock and fixtures in its store, which was the fact. He had been in the store before he took the mortgage, and was able to see, although he might not be able to value correctly, what that property was. The notice afforded by the transaction itself is not to be overlooked. It is common knowledge that a retail shopkeeper only mortgages his stock in trade and fixtures as a last resort, and that the immediate effect of doing so is to destroy all further credit. If the mortgagor has other substantial debts and no other property, and these facts are known to the mortgagee, as they were in this instance, there is ample cause to excite his suspicion and to put him on his inquiry. Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; Remington on Bkcy. (2d Ed.) § 1496. The question how the mortgagor expects to pay his other creditors after having mortgaged all his property to one, can hardly fail to suggest itself. Holcomb made no inquiry whatever, and did not even ask the mortgagor for a statement of financial condition. Reasonable investigation on his part would have disclosed that the Sutherland Company was insolvent, that the mortgage would work a preference, and would probably cause bankruptcy.

It is clear that Mr. Holcomb himself was not free from suspicion as to the validity of the transaction. He states his position as follows:

"I knew he (Sutherland) was pressed for money to meet his obligations; when I took that mortgage and raised that $1,000 I understood the bank was willing to carry this other money, and that if I could help them (the Sutherland Company) raise money enough to float along until they could (do) better, that they would be able to pull through and everything would be all right. I never thought there would be any trouble. If I had, I should not have raised the $1,000 for them. From what I heard up to the bank they was willing to let what they had lay." (Transcript, page 92.)

His inquiry of his attorney, Mr. Snow, who drew the mortgage, whether a mortgage for cash was good is significant. The doubt which led to it obviously was whether such a mortgage would be good in the event of bankruptcy. The carefully prepared and indirect way in which the matter was gone at is, to my mind, strongly indicative of a belief on Holcomb's part that, if done in the usual, straightforward manner, the transaction would not stand.

It is true that Mr. Holcomb does not appear to have had any information as to the total indebtedness of the Sutherland Company, nor as to the value of its assets. Knowledge on those points can but seldom be brought home to persons accepting preferential payments; nor is it necessary. "Reasonable cause to believe" in such cases is usually inferred from circumstances very similar to those which exist here; i. e., from inability to pay bills in the usual course of business as they mature, from poor business, and from transactions of a character not ordinarily resorted to by solvent traders. Thomas v. Adelman (D. C. N. Y.) 136 Fed. 973. Holcomb and Sutherland testify that they expected the company to pull out and continue; but the fact remains

that it was deeply insolvent. Sutherland knew that it was so. Holcomb did not know it; but upon the facts which are clearly established he had, as it seems to me, reasonable cause to believe so; and it is therefore unnecessary to decide whether the learned referee erred in not finding certain further facts contended for by the trustees.

The mortgage, so far as it secures the $3,000 loaned by Mrs. Holcomb, is invalid under section 60 of the Bankruptcy Act.

[4] There remains the further question whether the mortgage is also invalid for the $1,000. There can, I think, be no doubt that the loan of this sum of C. J. Holcomb to the bankrupt was expressly conditioned upon the giving of a mortgage to secure both it and the $3,000, and that without such agreement the $1,000 would not have been advanced. Both parties understood that the mortgage when made should cover the stock in trade and fixtures of the company. Five or six days elapsed between the delivery of the check for $1,000 to Mr. Sutherland and the execution of the mortgage. During part of that time he was holding the check awaiting the approval of his codirectors of the agreement to give a mortgage which he had made. It was not until after they had assented that the check was negotiated; and within three or four days after that the mortgage was given. The parties were not in the same city, nor even in the same state, and under all the circumstances it seems to me that the giving of the mortgage is to be regarded as substantially contemporaneous with the making of the loan, and as a part of that same transaction. In Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, seven days elapsed between the loan and the mortgage given to secure it, but it was held that "the mortgage was given to secure Dean for a substantially contemporary advance."

The facts that the $1,000 was in the first instance advanced by A. R. Holcomb to the bankrupt on his brother's account, and that, at the time when the mortgage was made, C. J. Holcomb advanced another $1,000, which was paid by the bankrupt to A. R. Holcomb in settlement of the former advance, seem to me not to affect the result. As before stated, A. R. Holcomb was never a creditor of the bankrupt. What was done carried out the understanding between Sutherland and C. J. Holcomb, viz. that, if the latter would loan $1,000 more, a mortgage would be given to secure both it and the prior loans from Mrs. Holcomb. As has been said with reference to the $3,000, it is the substance of the transaction, not its form, which is to be regarded in determining questions of this character.

[5] The mortgage was in effect given to secure two sums, viz. the $1,000 presently advanced, and the $3,000 previously loaned. It was invalid as to the latter sum, because it effected a preference, contrary to the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544); but no moral turpitude was involved. In Seligman v. Gray, Trustee, 227 Fed. 417, 142 C. C. A. 113 (C. C. A. 1st Cir.), it was held that one who advanced money on a mortgage, knowing that the proceeds were to be used by the mortgagor to make preferential payments in contemplation of bankruptcy, lost his security, but might prove as an unsecured creditor for the sum so loaned. In the present case, if, instead of a single mortgage, two had been given, one for each sum,

that for the $1,000 would clearly be good. The security for the new loan, which, so far as appears, was for proper purposes and presumably increased the debtor's estate, was not invalidated by being consolidated with the security given for past advances. City National Bank v. Bruce, 109 Fed. 69, 71, 48 C. C. A. 236 (C. C. A. 4th Cir.); Stedman v. Bank of Monroe, 117 Fed. 237, 54 C. C. A. 269 (C. C. A. 7th Cir.)

There is another possible view of the transaction, viz. that the mortgage was given for an entirely independent loan of $4,000, made with the understanding that the proceeds of it should be used to pay Mrs. Holcomb's claim for $3,000 and Mr. Holcomb's claim for $1,000, loaned a few days previous. So considered, the mortgage would be invalid as a fraudulent conveyance under section 67e (Comp. St. 1916, § 9651) as to both sums, because each would be regarded as an unconditional loan made and completed before the mortgage and at the time of the mortgage, an outstanding debt on the same footing as all other indebtedness of the bankrupt. The established facts do not, as it seems to me, support this view.

The order of the referee is vacated, and an order may be entered in accordance with the foregoing opinion.

Ex parte COHEN.

(District Court, D. Massachusetts. October 17, 1917.)

No. 1582.

ARMY AND NAVY ⊂⊃20—SELECTIVE DRAFT ACT—PERSONS EXEMPT—HABEAS CORPUS.

A person who enlisted in the United States army for a term of seven years in 1914, and subsequently purchased his release, and was honorably discharged, was not exempt from draft under Act May 18, 1917, either under section 4, exempting persons in the military service of the United States, or on the theory that his voluntary discharge within the period for which he enlisted created an implied agreement that he should not be called for military service during the remainder of the term of his enlistment, as it was for Congress to determine whether such persons should be exempted.

Petition by Jack Cohen for habeas corpus. Petition dismissed.

Harvey H. Pratt, of Boston, Mass., for petitioner.

The United States Attorney, opposed.

MORTON, District Judge. This is a petition for habeas corpus to secure the petitioner's discharge from the military service of the United States into which he was drafted under Act of May 18, 1917. Upon the filing of the petition an order of notice issued, in response to which the respondent appeared and suggested orally that on the face of the petition no case was stated for the issue of the writ; and the parties were fully heard on that question.

The facts stated in the petition are, of course, assumed to be true. I do not understand that there is any real dispute between the parties

concerning them. It is agreed that Cohen has been duly drafted with all requisite formalities under the act referred to, and is now in the training camp at Ayer, in this district. The only ground on which his discharge is claimed is that in 1914 (as stated in the petition) he voluntarily enlisted as a private in the United States army for a term of seven years, and that April, 1916, he purchased his release and was honorably discharged from said service. He contends that by reason of these facts he was exempt from draft under the present act.

Section 4 of said act specifies with considerable detail those classes which are absolutely exempt from the draft and those which may be exempted by the President. The petitioner does not contend that he comes within the latter group. His first contention is that he was, when drafted, a "person in the military * * * service of the United States," within section 4, and therefore entitled to absolute exemption. No authority is cited in support of this contention, and it does not seem to me well founded. His discharge was not a transfer to a reserve force, where he might be subject to call and would be to some extent under military control. The effect of it was to terminate completely his connection with the military establishment of the United States, as to which he stood thereafter like any other citizen of this country.

The petitioner also claims that the government's action in accepting his enlistment for seven years and voluntarily discharging him within that period created an implied agreement that he should not be called for military service during the remainder of the term covered by his enlistment. No such ground of exemption is given in the act. Its specific and definite provisions in this important particular are unambiguous, and ought not to be enlarged by judicial construction, so as to include classes not therein named. It was for Congress to decide whether persons who had enlisted in the army and purchased their discharge should, during the period of their enlistment, be relieved from draft; and it did not see fit to relieve them.

On the face of the petition it states no case for the issue of the writ; and it is unnecessary that the respondent should answer, or that there should be any further hearing on the matter.

The matter of bail pending an appeal, which was somewhat discussed at the hearing on this petition, should be made the subject of a separate application.

Petition dismissed.

NORTHERN PAC. RY. CO. v. CROWELL et al.

(District Court, D. New Jersey. October 17, 1917.)

1. CORPORATIONS ⊜326—DIRECTORS—LIABILITY—STATUTES.

Laws Mont. 1909, c. 140, requiring every stock corporation, except banks, trust companies, and building and loan associations, to file annual reports, and declaring that, if any corporation shall fail to file such report, the directors shall be jointly and severally liable for all debts or

judgments of the corporation then existing or which may thereafter be incurred, is valid, and renders directors of a corporation liable for debts where the required report is not filed.

2. LIMITATION OF ACTIONS ⟸2(2)—STATUTE—WHAT LAW GOVERNS.

Laws Mont. 1909, c. 140, requiring stock corporations to file reports, declares that directors, in event of failure to file such reports, shall be liable for debts or judgments of the corporation. Rev. Codes Mont. §§ 6443, 6448, declare that the statutory period for actions on penalties shall be two years; but section 6471 declares that the periods of limitation prescribed shall not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, but that such action shall be brought within three years after discovery by the aggrieved party of the facts upon which the penalty or forfeiture or the liability arose. *Held* that, while ordinarily the law of the forum as to limitation of actions governs, yet where by statute a right of action is given which did not exist at common law, and the statute giving the right fixes the time within which it may be enforced, the time so fixed becomes a limitation on such right and will control, no matter in what forum the action is brought, and such limitation, though not contained in the statute giving the right of action, controls, provided it is directed to the newly created liability; and hence, in an action brought in the federal District Court for New Jersey to enforce directors' liability for failure of a corporation to file the required report, the three-year limitation prescribed by section 6471 governs, it being obvious that the limitation of three years was intended to apply to such action.

3. CORPORATIONS ⟸326—DIRECTORS—LIABILITY—STATUTE—"PENAL."

Laws Mont. 1909, c. 140, requiring stock corporations to file annual reports, and declaring that directors shall be liable for corporate debts in event of failure, is not a penal statute in the international sense, or in the sense in which the word "penal" is used in criminal law, but can be construed as penal only in changing the common-law liability of directors, and hence should not receive the same strict construction as a criminal statute.

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

4. JUDGMENT ⟸828(1)—CONCLUSIVENESS—COLLATERAL ATTACK.

Under Const. U. S. art. 4, § 1, declaring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, a judgment rendered in Montana against corporation cannot, in an action brought in the federal District Court for New Jersey on such judgment against the corporate directors, be attacked on the theory that it was erroneous, because sounding in tort, when plaintiff had already elected to sue on contract, for that question should have been raised in the Montana courts, and the judgment cannot thereafter be collaterally attacked.

5. CORPORATIONS ⟸348—DIRECTORS' LIABILITY—CONCLUSIVENESS OF JUDGMENT AGAINST CORPORATION.

Under Laws Mont. 1909, c. 140, declaring that corporate directors shall be liable for debts and judgments of the corporation, where the required annual report is not filed, directors, in an action to enforce their liability on a judgment against the corporation, cannot question it, on the ground that they did not have their day in court and were not served in the action in which judgment was rendered, for such judgment is binding on them where the court which rendered the same had jurisdiction of the corporation and the subject-matter; the only defenses available being that the persons sued as directors were in fact not directors, that the claim had been discharged, that the defendants had a set-off, or that the judgment was procured by fraud, etc.

6. CORPORATIONS ⟸340(3)—DIRECTORS' LIABILITY—STATUTE.
Under Laws Mont. 1909, c. 140, requiring stock corporations to file annual reports, and declaring that in event of failure directors shall be jointly and severally liable for all debts or judgments of the corporation then existing or that may thereafter be in any wise incurred until report shall be made and filed, directors of a corporation are, where the required report was not filed, liable for judgment in tort rendered against the corporation; the statute not being restricted merely to debts, but specifically including judgments.

7. CORPORATIONS ⟸340(3)—DIRECTORS' LIABILITY—STATUTE.
The directors having 10 days between January 20th and 30th, inclusive, to file "exculpating affidavits," a judgment entered on January 29th makes them liable under such section, whether the default be regarded as complete on January 20th, in which case the judgment would be "thereafter incurred," or not complete until January 30th, in which case the judgment would be "then existing."

At Law. Action by the Northern Pacific Railway Company against R. Herbert Crowell and another. On motion to strike defendants' answer. Defenses stricken.

Pitney, Hardin & Skinner, of Newark, N. J., for plaintiff.
Lewis Starr, of Camden, N. J., for defendants.

DAVIS, District Judge. This is a suit to recover from the defendants, directors of the Chico Mining Company, a corporation organized under the laws of Montana, May 11, 1912, the amount of the judgment recovered against the said company in the district court of the Sixth judicial district of Montana. The defendants are residents of the state of New Jersey, and have been directors of the mining company from the date of its incorporation. Shortly after the incorporation of the company, it made a contract with the plaintiff to rent a steam shovel from it, with an option to purchase said shovel. The mining company did not exercise its option to purchase the shovel. Disputes arose between the railway company and the mining company, and in April, 1913, the railway company instituted proceedings against the mining company, apparently joining in the same complaint an action on contract and an action in tort. The mining company entered a demurrer to the complaint, whereupon it was amended, the plaintiff proceeding upon the tort. To this amended complaint an answer was filed March 28, 1914, and on April 21, 1914, the railway company filed its reply. Before the trial, but at just what time is not apparent, the attorneys of the mining company, with permission of the court, withdrew their appearance, and counsel for the defendants in the suit at bar in his brief states that:

"On January 29, 1915, the case in Montana, between the railway company and the mining company, came on regularly for hearing. The mining company was neither present nor represented by counsel. Thereupon a jury was waived, and the case tried by the court, which found the issues in favor of the plaintiff, and assessed damages at the sum of $4,000, for which amount judgment was entered, together with costs, $180.50."

The purpose of the present suit, as above stated, is to recover the amount of said judgment from the defendants, directors of the mining company. The cause is before the court at this time on plaintiff's

motion to strike out defendants' answer. The determination of the motion involves two questions: (1) Does the statute upon which plaintiff's action is based impose liability upon the defendants? (2) If it does, have they pleaded a defense which shields them from liability?

[1] It is agreed by stipulation between counsel that the Montana statute (Laws Mont. 1909, page 217) provides as follows:

"Every corporation, having a capital stock, except banks, trust companies and building and loan associations, shall annually, within twenty days from and after the thirty-first day of December, file, in the office of the clerk of the county in which the principal place of business of such corporation is situated, a report which shall state the amount of the capital stock, the proportion thereof actually paid in and the amount thereof actually paid in cash and the amount issued, if any, in payment of property purchased and the amount of existing debts and also the names and addresses of the directors or trustees and of the president, vice president, general manager and secretary of the corporation. Such report shall be signed by the president and a majority of the directors, inclusive of the president, secretary or treasurer of such corporation. In the absence, or inability to act, of the president, the vice president may sign and verify such report. If any such corporation shall fail to file such report, directors of the corporation shall be, jointly and severally, liable for all debts or judgments of the corporation then existing, or which may thereafter be in anywise incurred until such report shall be made and filed: Provided, however, that if within ten days after such failure a director, or directors, shall make and file, as aforesaid, an affidavit or affidavits, stating that the failure was due to no fault or neglect of his or theirs, and stating, also, that, within the said twenty days, he or they requested the president or sufficient number of the other directors, whose residence was known to the affiants, to join them in making report, such director, or directors, shall not be liable under this section. If the required report be made and filed after the time herein specified, the directors shall not, on account of the prior failure to make report, be liable for the debts thereafter contracted. Where such corporation, on account of insolvency or for any other reason, has ceased to be a going concern and has ceased to voluntarily incur financial obligations, the directors may include a statement to that effect in their report, giving the reasons for the cessation of the corporate activities of such corporation, and, after two annual reports have been filed, the directors shall not be liable for a failure to file annual reports during such time as the disability of such corporation shall continue."

This statute in its original or amended form has been passed upon by the Supreme Court, the court of last resort, in Montana, and the directors have been held liable when their corporation has failed to file the required report. Gans v. Switzer, 9 Mont. 408, 24 Pac. 18; Daily v. Marshall, 47 Mont. 377, 133 Pac. 681; First National Bank of Missoula v. Cottonwood Land Co. et al., 51 Mont. 544, 154 Pac. 582.

Many states have passed statutes making directors of corporations liable for the debts thereof upon their failure to file annual reports setting forth their debts, etc. The acts, so far as I am aware, have all been held constitutional, wherever construed, and directors held liable, when they have failed to file exculpating affidavits, etc., to relieve from liability. The Montana statute is the only one brought to my attention making directors liable for "judgments" as well as for "debts." The plaintiff contends that "judgments" include tort actions when reduced to judgments. This is denied by defendants. This point will be discussed later. It seems to be perfectly clear, and to require no discus-

sion to establish, that the statute does impose liability upon the defendants.

[2] Has a defense sufficient to shield the defendants from liability been pleaded? The answer is based upon the following legal propositions variously stated in the "defenses" by the pleader:

1. The statute of limitations of New Jersey, and not that of Montana, is applicable to the case at bar.

The New Jersey statute provides that:

"All actions or informations which shall be brought or exhibited for any forfeiture, or cause upon any statute, made or to be made, the benefit and suit whereof is or shall be limited or given to the party aggrieved, shall be brought or exhibited within the space of two years, next after the offense committed or to be committed, or cause of action accrued, and not after." Comp. Stat. 3171, § 21.

A report was filed by the directors of the defendant company in January, 1913, for the year 1912, but that report did not include the indebtedness of the defendant company to the plaintiff, and was not a compliance with the requirement that the report should set forth "the amount of the existing debts," and therefore the statute began to run at that time, January 20, 1913, and this suit, which was instituted January 5, 1916, was not within two years after the cause of action accrued, and is therefore barred by the statute of limitations of New Jersey.

The plaintiff's reply is twofold. It contends that the statute of Montana controls as to limitation of actions, and that the failure to include a small item of indebtedness in the report, filed in good faith and in time, is not the equivalent in law of failure to file any report whatever and does not start the statute to running. Accordingly it asks that the answer in so far as it is based upon this ground be stricken out.

The Montana Code of 1907 (sections 6443 and 6448) provides, under the title of "Time of Commencing Actions," that the statutory period for actions on penalties shall be two years; but section 6471 of the Code (old section 554) provides that:

"This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability created."

The law of the forum as to the statute of limitations generally prevails, but—

"where by statute a right of action is given which did not exist by common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right, and will control, no matter in what forum the action is brought." The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; Finnell v. Southern Kansas Railway Co. (C. C.) 33 Fed. 427; Theroux v. Northern Pacific Railway Co., 64 Fed. 84, 12 C. C. A. 52; Brunswick Terminal Co. v. National Bank, 99 Fed. 635, 40 C. C. A. 22; Whitman v. Citizens' Bank, 110 Fed. 504, 49 C. C. A. 122; 25 Cyc. 21.

But if the limitation is not contained in the statute giving the right of action, provided it is directed to the newly created liability "so specifically as to warrant saying that it qualified the right," it controls

just as though it were contained in the statute creating the right. In the case of Davis v. Mills, 194 U. S. 451, at page 454, 24 Sup. Ct. 692, at page 694, 48 L. Ed. 1067, the court said:

"But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right. If, then, the only question were one of construction and as to liabilities subsequently incurred, it would be a comparatively easy matter to say that section 554 of the Montana Code of Civil Procedure qualifies the liability imposed upon directors by section 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought."

Section 6471 of the Code, above referred to, is so specifically directed to the newly created liability, it seems to me, as to go everywhere with the right created just as though it were a part of the act creating the liability. The Montana statute, therefore, is controlling in this matter. Brunswick Terminal Co. v. National Bank, 99 Fed. 635, 40 C. C. A. 22. The case just cited is practically on all fours with the case at bar. The Supreme Court (178 U. S. 611, 20 Sup. Ct. 1029, 44 L. Ed. 1215) refused a writ of certiorari therein. The only question at issue was the question of which law as to limitations, lex fori or lex loci, controlled.

[3] Much is made in the brief for the defendants that this is a penal statute and should be strictly construed, and therefore it should be held that the statute began to run January 20, 1913, because the report filed for the year 1912 was defective. This is not a penal statute in the international sense, or in the sense in which the word "penal" is used in criminal law, and it is doubtful whether or not the New Jersey statute quoted is applicable at all to this class of cases. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976; Howell v. Roberts, 29 Neb. 483, 45 N. W. 923; Coy v. Jones, 30 Neb. 798, 47 N. W. 208, 10 L. R. A. 658; Fitzgerald v. Weidenbeck et al. (C. C.) 78 Fed. 695. There is no penalty in this case in the strict and proper sense. It is a withdrawal from the directors of the exemption from personal liability, which the statute under which the company was incorporated afforded them, because of the failure to file the report, or to take the other steps for their personal exemption required by the statute. As Judge Lochren, in the last-cited case, said:

"It is rather a case or condition where the corporate franchise by its own terms and limitations, and for a plain reason, ceases to afford to officers of the corporation, who disregard an enjoined duty, the exemption from personal liability which the franchise alone would otherwise afford in respect to specified debts contracted in an enterprise in which they were engaged, with others, for profit."

The character of this liability, or so-called penalty, has been passed upon by the Montana Supreme Court in the cases of Gans v. Switzer, 9 Mont. 402, 24 Pac. 18, Daily v. Marshall, 47 Mont. 377, 133 Pac. 681, and First National Bank of Missoula v. Cottonwood Land Co., 51

Mont. 544, 154 Pac. 582. In Gans v. Switzer, 9 Mont. at page 413, 24 Pac. at page 20, the court quoted with approval from Morawetz on Private Corporations, vol. 2 (2d Ed.) § 908, as follows:

"It is the general rule that this law is penal, and must be construed strictly. Providence Steam Engine Co. v. Hubbard, 101 U. S. 191 [25 L. Ed. 786]; Chase v. Curtis, 113 U. S. 457 [5 Sup. Ct. 554, 28 L. Ed. 1038]. Mr. Morawetz, in his valuable treatise on Private Corporations, considers the subject, and makes the following appropriate comments: 'It is not always quite clear what the courts mean to express by saying that statutes of this character are "penal"; and that they impose upon the directors a "penal liability." * * * Nor is the liability of the directors under these statutes penal in the sense in which the word "penal" is used in criminal law; it is not a penalty or fine imposed by the state for the infraction of a public law. * * * The statutes imposing this liability establish a new rule of private right, a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called "penal" appears to be that it does not exist at common law, and is neither created by contract, nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company.' * * * Even with this understanding, 'in construing penal statutes, we must not, by refining, defeat the obvious intent of the Legislature.' Potter's Dwarris on Statutes, 247. The law before us is clothed in clear and concise terms, and we think that the same end will be attained by the application of any canon of interpretation. There should be no difficulty in carrying out 'the true intent and meaning of the legislative assembly.' Under certain conditions the statute, in effect, declares that the trustees of the Helena Pressed Brick Company 'shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made.' There are no exceptions in this clause, and there does not appear to be any obscurity in the scope of the liability of the trustees, if the words 'shall be understood and construed according to the approved and common usage of the language.'"

In 47 Mont., at page 398, 133 Pac., at page 687, in the case of Daily v. Marshall, the court, speaking through Chief Justice Brantly, said:

"As already pointed out, the statute is not penal in the sense in which that term is generally used. It is so only in the sense that it creates a liability which was not known at the common law and therefore must be construed strictly. The very purpose of the legal device known as a corporation is to enable natural persons to engage in business enterprises through the agency of others without incurring personal liability. The extent of immunity is fixed by the law providing for the creation of the artificial body or person, and such a provision as the one in question, being a part of the law of creation, declares the immunity of those who manage the business, viz. the officers and directors, dependent upon their observance of the conditions imposed by it. They may render their immunity effective by doing this; otherwise, they are conclusively presumed to have assented to stand good as sureties for all the liabilities which they have permitted the corporation to assume. In considering the statute in force in 1894 (Comp. Stats. 1887, Fifth Div. § 460), the court in Fitzgerald v. Weidenbeck (C. C.) 76 Fed. 695, said: 'But, while the statutory liability of trustees has some of the characteristics of a penalty, and attaches upon such kind of default or omission of duty on the part of the trustees as is frequently in like statutes punished by the infliction of a penalty, yet, under this statute, such liability of the trustees is not a penalty, but the withdrawal, as to them, as a consequence of their failure to perform certain duties, of the exemption from personal liability which the statute allowing the incorporation of the company would otherwise afford them, and an allowance to the creditors of the corporation at the time of such default or during such omission of duty, of the further remedy of having the right to proceed in the collection of their debts, directly against the trustees from whom such exemption is withdrawn.'"

In the case of First National Bank of Missoula v. Cottonwood Land Co., supra, the court said:

"The words 'as sureties' (in the opinion of Daily v. Marshall, supra) might have been omitted, as they add nothing to the argument. The expression as it appears is an unfortunate one. * * * The purpose of requiring such a report is to furnish information to those who conduct business with the corporation. * * * If for any reason the directors fail or refuse to furnish such information in the manner required by law, any one becoming a creditor of the concern may rightly do so upon the faith of the individual responsibility of the directors. The liability thus imposed is joint and several, direct and primary. The creditor's right of action is not dependent upon the insolvency of the corporation, * * * and neither the corporation nor other directors need be joined in the action."

If the Montana statute of three years controls in this case, as it seems to me must be held, the suit was instituted within time, and it is unnecessary to decide whether or not the statute began to run January 20, 1913, or January 20, 1915. It, however, is doubtful that the failure to include in the report for the year 1912, filed in time in January, 1913, the alleged indebtedness of the company to the plaintiff, which at that time was unliquidated and the exact amount thereof not determined, would start the statute to running. Giddings v. Holter, 19 Mont. 263, 48 Pac. 8; Bonnell v. Griswold, 80 N. Y. 128; Whitaker v. Masterton, 106 N. Y. 277, 12 N. E. 604; Walton v. Godwin, 58 Hun, 87, 11 N. Y. Supp. 391; Ford River & Lumber Co. v. Perron, 148 Mich. 399, 111 N. W. 1074; 10 Cyc. 875. The mining company in good faith filed its report in time, and the most that can be said is that it was defective, and that some amount, not liquidated, was due the plaintiff by the mining company. The mining company, however, contended that nothing was due the plaintiff at that time. Whether or not an indebtedness as a fact did exist could not be definitely known until the case was adjudicated and judgment entered.

[4] 2. The plaintiff elected to sue in contract in April, 1913, and that election was binding upon it, and the defendants are not bound by the judgment record, based upon tort against the company in Montana, but may defend upon the merits, as though the case were being tried de novo.

The original complaint apparently contained elements of an action based upon both contract and tort. The mining company, therefore, demurred, and the complaint was amended, and judgment was thereafter rendered against said company, based upon the tort. It is not clear, as counsel for defendants contend, that the plaintiff waived the tort and based its original action on contract, and, even if it did, that point should have been raised in the Montana court, and not here. The statute makes the directors liable for "judgments," as well as for "debts," and the judgment stands in the Montana court unappealed from. Counsel cites as the leading authority for his contention the case of Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. Two questions arise here: First, whether or not full faith and credit must be given in New Jersey to the judgment secured in Montana, the same faith and credit that the judgment receives in that state; second, if the first question is answered in the affirmative, are the defendants, directors of the Chico Mining Company, bound by the judgment against that

company, so that they may not attack the judgment collaterally and plead the merits of the case, disregarding the judgment?

The Constitution of the United States (article 4, § 1) provides that:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

This provision applies to judgments—"judicial proceedings." Under the authority of the above provision the same faith and credit should be given to a judgment in another state as in the state in which it was rendered, and the only grounds for impeachment of a judgment of another state are that the court was without jurisdiction of the subject-matter or of the person, or that the judgment was procured by fraud, perjury or collusion. Irregularities which do not show want of jurisdiction, or fraud, or collusion are not ground for collateral attack. 23 Cyc. pp. 1561, 1576, 1588; Jardine v. Reichert, 39 N. J. Law, 165; Anthony v. Wilson, 74 N. J. Law, 630, 65 Atl. 988; Elliott v. Peirsol, 1 Pet. (26 U. S.) 328, 7 L. Ed. 164; Christmas v. Russell, 5 Wall. (72 U. S.) 290, 18 L. Ed. 475; Maxwell v. Stewart, 21 Wall. (82 U. S.) 71, 22 Wall. 77, 22 L. Ed. 564; Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; Conway v. Ellison, 14 Ark. 360; Nunn v. Sturges, 22 Ark. 389; Davidson v. Sharpe, 28 N. C. 14; Anderson v. Fry, 6 Ind. 76; Norwood v. Cobb, 20 Tex. 588; McFarland v. White, 13 La. Ann. 394; Gulick v. Loder, 13 N. J. Law, 68, 23 Am. Dec. 711; Royal Arcanum v. Carley, 52 N. J. Eq. 642, 29 Atl. 813; Wood v. Mobile, 107 Fed. 846, 47 C. C. A. 9; United States v. Eisenbeis, 112 Fed. 190, 50 C. C. A. 179. The pleadings contain nothing showing want of jurisdiction of the subject-matter, or of the mining company, the defendant, or showing fraud, perjury, or collusion. The judgment, therefore, may not be attacked collaterally, and the defendant may not go back of the judgment and defend on the merits. That might have been done in Montana, but may not here. The judgment under the pleadings is conclusive as far as it goes. When it became final in Montana, the mining company became bound by it in this court. It is res judicata here as to the company.

[5, 6] Are the directors bound by the judgment against their corporation? Is there a distinction in this respect between the corporation and the directors? The defendants became directors with the knowledge that, if the corporation failed to file the annual report required by law, they were liable directly and primarily, and in becoming directors they consented to become responsible, and assumed this liability, and a judgment against the company is binding upon them. They may, of course, show in defense that the court in which the judgment was recovered was without jurisdiction of the person or subject-matter; that they are not directors; that the claim has been discharged by them, or other directors; that they have a set-off; that the judgment was procured by fraud, perjury, or collusion, etc. In absence of such defense, they are bound by the judgment. Stevens v. Hein, 37 App. Div. 542, 55 N. Y. Supp. 491; Converse v. Ætna National Bank, 79 Conn. 163, 64 Atl. 341, 7 Ann. Cas. 75; Swing v. Consolidated Fruit Jar Co., 74 N. J. Law, 145, 63 Atl. 899; Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Hancock National Bank v. Far-

num, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; Old Colony Boot & Shoe Co. v. Adams Co., 183 Mass. 557, 67 N. E. 870.

Counsel for defendants contends that a cause of action based upon the judgment cannot be sustained against either the corporation or defendants, because the judgment is based upon a tortious action, and that the statute simply meant to confer upon a creditor the right to alternative action, either upon the debt or judgment rendered thereon, and cites Chase v. Curtis, supra, as sustaining his views. The court in that case was construing a New York statute, and followed the construction put upon it by the Court of Appeals of that state. That statute made trustees liable for all debts existing and thereafter contracted before the filing of the report, upon the failure of the corporation to file said report. A judgment was secured against the corporation for a tort, and suit was brought thereon against the trustees, on the theory that after the tortious act became a judgment it was a debt within the meaning of the statute. What the court held was:

"That no right of action could arise upon the judgment itself, but upon the debt alone, on which the judgment was founded; * * * that the judgment was, as against the trustee, evidence, neither conclusive nor prima facie, of the existence of a debt due from the corporation, for the payment of which they could be charged." "The creditors to be protected [by requiring the report to be filed] are those only who become such by voluntary transactions, in reference to which, for their benefit, the information becomes important as to the debts of the company."

In other words, a judgment does not change the character of the obligation, which is simply merged in the judgment. A tort, when merged into a judgment, does not become a debt ex contractu, based upon a "voluntary transaction." Consequently, in an action based upon a judgment against trustees or directors—who are liable for the debts ex contractu only of a corporation—they should be allowed to go behind the judgment and show that it is for a tort and they are not liable. A judgment under such an act is not evidence, conclusive or prima facie, of an obligation of directors. Under that act, in the state of New York the trustees could go behind the judgment, which was for a tort, and show that they were not bound by the judgment.

This does not meet the situation in the present case. The statute makes the directors responsible for judgments thereafter incurred, as well as for debts. A great many states have statutes making directors liable for debts; but the Montana statute is sui generis, in that it alone makes directors liable for judgments, as well as for debts. Counsel for defendants argues that, when the Legislature of Montana amended the act in 1907, and for the first time made directors liable for "judgments," it simply meant to say that a director was liable for the debts of the corporation after they had been reduced to judgment. A suit would then be based upon a judgment, whereas before it would be based upon a debt. Litigants could and did do that before the amendment. "Judgments" would in that case be without meaning in the statute, and the amendment added nothing. Either that view must be taken, or the Legislature meant to make directors liable for the torts of the corporation, which had been reduced to judgment. The plain interpretation

of the language would indicate that such was its intention. It was perfectly clear, before the addition of the word "Judgments" to the statute, that directors were liable for the debts of the corporation, upon its failure to file said report, and for judgments based upon its debts. It must have been intended to increase the liability of directors by adding judgments, including torts, to the liability already existing at the time of the amendment. The plain interpretation of the language forces this conclusion. The provision in the statute requiring such reports to be filed annually is intended for the protection of creditors, and the added liability, making directors liable for judgments based upon torts, is another inducement or pressure to force directors to see that the report is filed in order that creditors or prospective creditors may ascertain the financial responsibility of the corporation. Inherently there is no more reason why directors, charged with the management of the corporation, should be liable for the debts of the corporation arising from the use of a shovel than for the torts of the corporation arising from an injury to that shovel by the negligence of its servants, acting within the scope of their authority and in the exercise of corporate powers.

The directors, who presumably knew the law making them liable for debts and judgments of the corporation thereafter incurred upon failure of the corporation to file the report required by the statute, in legal effect consented to the same, and cannot now complain. This was one of the conditions imposed by the statute upon which the corporation was permitted to come into existence. The defendants, with others, associated themselves together in a corporation for profit, because they believed it would be mutually advantageous for them to do so. They may not be permitted to reap the advantages given by the statute, and escape the disadvantages imposed by the statute upon their failure to perform duties prescribed by the statute for the benefit of creditors, whose confidence in the integrity of the corporation may be based upon their belief in the faithful performance of those duties and the responsibility of its directors. The argument that the defendants were not residents of Montana, were not in the state during the trial, were not served in the original action, and so did not have their day in court, is without merit. To this they agreed in becoming directors. Hawkins v. Glenn, supra; Hancock National Bank v. Farnum, supra; Bernheimer v. Converse, supra; Gilson v. Appleby, 79 N. J. Eq. 590, 81 Atl. 925; Converse v. Hamill, supra.

[7] 3. The judgment against the company was not in existence at the time default was made in filing the report. The report should have been filed on or before January 20, 1915, and the judgment was not entered until January 29, 1915. The plaintiff replies that the default was not complete until ten days after January 20, 1915, the time within which the directors might file affidavits relieving them from liability, and therefore the judgment was in existence before default was complete. I am not impressed with the soundness of the plaintiff's argument. The statute provides that, upon failure to file said report, the "directors shall be jointly and severally liable for all debts or judgments of the corporation then existing, or which may thereafter be in any wise incurred until such report shall be made and filed." The word

"incurred," it is argued, is not applicable to judgments, but applies more particularly to debts or other pecuniary obligations, either liquidated or otherwise, and not to the entry of a judgment based thereon. Assuming that the word "judgments" refers to or includes tort liabilities which have been reduced to judgments, then the statute covers this case, as being a judgment "thereafter incurred," in accordance with the contention of defendants, or "then existing," according to plaintiff's view, the failure not being complete until the time had expired for the directors to file "exculpatory affidavits," on January 30, 1915. If the word does not include liabilities for torts which have been reduced to judgments, the plaintiff cannot sustain its action. In my opinion, "judgments," as used in the statute, includes those rendered in tort actions.

It follows that the "defenses" pleaded in the amended answer, from the "first defense" to the "tenth defense," inclusive, must be stricken out, for they are all based upon the above principles pleaded by defendants as a defense to shield them from liability.

THE ANN C. STUART.

(District Court, D. Maine. September 15, 1917.)

No. 362.

1. SALVAGE ⊂=34—RIGHT TO COMPENSATION—AWARD.
   Libelant, who, at the request of the master of a salt-laden schooner of 50 tons valued at $1,000, sent a steamer of 44 tons, an experienced pilot, and 10 other men on a dark night to a dangerous point on the coast, where the schooner was ashore in an exposed place, without other help, and towed her into deep water and to a harbor, performed a salvage service entitling him to an award of $200, apportioned $80 to the owner of the steamer, $20 each to libelant and to the pilot, and $8 to each of the men.
2. SALVAGE ⊂=34—COMPENSATION—TUGS.
   The increased use of tugs does not tend to reduce the value of salvage services, or change the intent of the courts to give to tugs a substantial gratuity, to induce their prompt assistance, when required, in case of actual or reasonably apprehended danger.

In Admiralty. Suit by James E. Brennan against the schooner Ann C. Stuart, to recover for salvage services rendered to the schooner and to her cargo. Decree for libelant.

Benjamin Thompson, of Portland, Me., for libelant.

G. B. Stuart, of Ellsworth, Me., and Verrill, Hale, Booth & Ives, of Portland, Me., for claimant Mary C. Stuart.

HALE, District Judge. The libelant, in his own behalf and as agent for the Port Clyde Cold Storage & Fisheries Company, owner of the steamer Princess, and in behalf of the officers and members of the crew of the steamer, brings this suit to recover for salvage services rendered to the schooner and to her cargo. Salvage for the cargo has already been settled. The salvage claim here considered is only for the schooner and freight.

The Ann C. Stuart is of the burden of about 50 gross tons, and at the time in question was under the command of Capt. John F. Sprague, on a voyage from Gloucester, Mass., to Manset, Me., with a cargo of about 200 hogsheads of salt. The Princess, the steamer rendering the service, is of the burden of 44 tons, about 76 4/10 feet long, 15 7/10 feet beam, and about 6 4/10 feet depth of hold. She is employed by her owner in freighting fish.

[1, 2] On October 12, 1915, in the early evening, the schooner struck on a part of Hart's Island Bar called "the bight," an exposed point near the entrance to Port Clyde harbor. At that time it was low water; a moderate sea was running; a light breeze was blowing from the southwest; the night was dark and threatening. After the schooner struck, her master let her sails run down, dropped her kedge anchor, and started, with one of the crew, in a small boat, for Port Clyde for help. After making an application to the master of a motor boat, who could give him no help because his boat was loaded with coal, Capt. Sprague applied to Capt. Brennan. Capt. Brennan sent for Capt. Chadwick, an experienced pilot, to take charge of a towing vessel; he got 10 other men to go with Capt. Chadwick, to assist in the work. Four men were sent in a dory to locate the position of the schooner and to be ready to run a line to her when the towing vessel reached her. An effort was made to get the Pathfinder, a motor vessel, to render the service, and in doing so she took fire. The fire was put out, but it was not deemed advisable to start her again. The libelant then gave orders to take a larger steamer, the Princess, then lying at her wharf with banked fires. Capt. Chadwick took charge of the Princess, and proceeded to Hart's Island Bar, where the schooner was found in the "bight" on a dangerous part of the bar. She was broadside to the shore, having her small kedge anchor down, with 15 to 30 fathoms of line. It was a dark night; the schooner had gone ashore in an exposed place, in such a way that, when the tide flowed, the wind and sea tended to work her up higher on the bar. There is some testimony tending to show that the schooner had floated on the rising tide before the salvors arrived. A hawser was taken off to the schooner, and she was towed out of her exposed position, into deep water, and back to Port Clyde.

In The Lyman M. Law, 122 Fed. 816, this court has considered the leading elements in determining the amount of a salvage award. In The Rebecca Shepherd, 148 Fed. 727, 731, this court has occasion to comment on the fact that the same service may sometimes be called either salvage or towage, and that it is often immaterial by which name it is called. The material thing is that the court should give a proper amount of compensation, and should, where the circumstances require, give such award as will encourage similar services. In Baker v. Hemenway, 2 Low. 510, Fed. Cas. No. 770, Judge John Lowell referred to the increased use of tugs, as tending to reduce the value of salvage services. It clearly does not, however, change the intent of courts to give to tugs a substantial gratuity, in order to induce prompt assistance, when such assistance is required in case of danger, either actual or to be reasonably apprehended.

In the case before me it is not necessary to consider how many of the elements mentioned in The Lyman M. Law are present. It is evident that the case presents a salvage claim of some merit. Salvage assistance was sought by the master of a vessel in distress. In his protest, Capt. Sprague says he "deemed it advisable to procure assistance as soon as possible for the preservation of the vessel and cargo." Great danger was reasonably apprehended. No other help was at hand. The service was rendered on a dark night, at a dangerous point on the coast. On account of not being able to procure a small vessel, it was found necessary to employ a large steamer. Twelve men in good faith went out in the nighttime, at the call for service, although the event proved that the labor of all was not required. A short time was consumed in the actual salvage service; but this does not tend to reduce its value.

The schooner receiving assistance was, from the whole testimony, I think, of the value of at least $1,000. While the amount of property saved and the value of the vessel rendering the services are not always decisive considerations, as Judge Lowell has observed, they bear somewhat upon the vital question of compensation; and we must always bear in mind that "the compensation should be enough to induce prompt assistance."

After a careful examination of the testimony, I award the following sums:

To the Port Clyde Cold Storage & Fisheries Company, the owners of the steamer Princess	$ 80.00
To James E. Brennan, the sum of	20.00
To Capt. Alvah Chadwick, the sum of	20.00
To Clarence Thompson, the sum of	8.00
To Louis Hart, the sum of	8.00
To Ernest N. Wilson, the sum of	8.00
To Charles Jones, the sum of	8.00
To Orrin Brown, the sum of	8.00
To Russell Brown, the sum of	8.00
To Capt. Winfred W. Flinton, the sum of	8.00
To Capt. Henry Davis, the sum of	8.00
To William Aylward, the sum of	8.00
To Walter D. Hall, the sum of	8.00
	$200.00

A decree may be drawn, consistent with this opinion. The libelant recovers costs.

UNITED STATES v. BRYANT et al.

(District Court, N. D. Texas, at Abilene. September 13, 1917. On Motion to Instruct Jury, September 27, 1917.)

1. CRIMINAL LAW ⟸42—IMMUNITY FROM PROSECUTION—TESTIFYING BEFORE GRAND JURY.
   The constitutional provision that no man shall be forced to give evidence against himself in a criminal proceeding does not extend immunity from prosecution to persons testifying before the grand jury concerning a matter for which they are subsequently indicted, but merely authorizes them to refuse to answer any question tending to incriminate them, and their ignorance of this right does not entitle them to claim immunity from prosecution.
2. CONSPIRACY ⟸28—CONSPIRACY TO COMMIT CRIME—ACTS CONSTITUTING.
   A conspiracy to offer forcible resistance to the United States authorities in raising an army by conscription was a conspiracy to resist the existing authority of the United States, though the Selective Draft Act was not passed until after the termination of the conspiracy by the indictment and arrest of defendants, as such authority existed, whether or not it was ever exercised.
3. CONSPIRACY ⟸28—CONSPIRACY TO COMMIT CRIME—ACTS CONSTITUTING.
   That the whole scheme was chimerical and utterly impossible of success did not make it any less a conspiracy denounced by statute.

Criminal prosecution by the United States against G. T. Bryant and others. On plea of immunity by W. B. Glass and others. Plea overruled.

W. M. Odell, U. S. Atty., of Ft. Worth, Tex., and W. E. Allen, Asst. U. S. Atty., of Dallas, Tex.
E. F. Nicolds, of Abilene, Tex., for defendant Jernagin.
Hartwell & Hartwell, of Commerce, Tex., for defendant Mills.
E. F. Smith, of Snyder, Tex., for defendants Bradley and Benton.
W. D. Simpson, of Cisco, Tex., for defendant Webb.
R. L. Rust, of Eastland, Tex., for defendant Jones.
Wm. H. Atwell, of Dallas, Tex., and Chastain & Nugent, of Hamlin, Tex., for remaining defendants.

JACK, District Judge. [1] The plea of immunity from this prosecution for W. B. Glass and 8 others of the 52 defendants herein is based on the allegation:

> That "they were subpœnaed before the grand jury at Dallas, and gave their testimony, under oath, concerning the offenses in said indictment charged, and that the testimony they gave before said body in fact related to the offenses charged in said indictment, and under oath produced evidence concerning the matters and things therein complained of by the government, and for and on account of which said prosecution was brought."

The offenses with which the defendants are charged are not alleged to have occurred in the Dallas division, but in the Abilene division, of the district. The United States attorney therefore concluded to present the matter to the grand jury in this division at Abilene, which returned an indictment substantially the same as that returned at Dallas. None of the defendants gave testimony before the grand jury at Abilene which returned the indictment under which they are now being tried.

Even, however, were they to be tried under the original indictment, the mere fact that the grand jury in its investigation threw out a dragnet, bringing before it all witnesses who might have any possible knowledge of the alleged conspiracy, and in this way happened to sum-

mon some of the alleged conspirators, who gave testimony without objection, would not afford them immunity from prosecution. Were it otherwise, the grand jury would be seriously handicapped in its investigations by having to summon witnesses before it at its peril. All a guilty party would have to do to escape prosecution would be to secure his own summons before the grand jury and give testimony relative to the crime being investigated.

Counsel do not base their claim to immunity on any statute, but on the constitutional provision that no man shall be forced to give evidence against himself in a criminal proceeding. This cannot be construed to mean that, if he does give such evidence, he shall be immune from prosecution. It means simply that, if asked a question tending to incriminate him, he may refuse to answer. It is not especially set up in the exceptions that the evidence given by those defendants was of such a nature as to incriminate them; if it were, they should have objected to testifying. Ignorance of the law protecting them in such rights would avail them nothing.

The plea is overruled.

On Motion to Instruct the Jury to Find for Defendants.

The government having completed its evidence, 20 of the defendants have requested that the jury be instructed to return as to them a verdict of not guilty, on the ground that the evidence fails to establish the charges against them in the bill of indictment. There are several of these defendants, to wit, George Dodson, E. B. Potter, Jim Head, J. T. Henson, Shorty Wren, E. T. Trout, and Charley Wheeler, against whom there is admittedly not sufficient evidence on which to ask a verdict of guilty, and as to whom counsel for the government have moved to dismiss. To these names, I think, should be added that of J. M. Raiborne. The jury is therefore instructed to return a verdict of not guilty as to these.

[2] In addition to this motion on behalf of certain particular defendants, there has been filed a motion to instruct on behalf of all defendants, being a reiteration of a general demurrer previously filed, based on the ground that the conspiracy alleged, if proved, was to oppose the authority of the United States in the enforcement of the provisions of a law not then on the statute books, and which might never have been passed by Congress, to wit, the Selective Draft Act, which was not finally passed until after the termination of the conspiracy by the indictment and arrest of defendants.

While there are several different offenses charged in the indictment, they all grow out of the same general conspiracy, which had for its main purpose forcible resistance by the alleged conspirators, and such others as might thereafter join them, to the authorities of the United States in raising an army by conscription. Such conspiracy, the indictment charges, was, in the language of the statute, "to oppose by force the authority of the United States," "to overthrow, put down, and destroy by force the government of the United States, and to levy war against the United States," "to incite, set on foot, assist, and engage in a rebellion or insurrection against the United States," "to commit treason against the United States," and "to restrain commerce between the several states."

It is urged in argument by learned counsel that the conspiracy to do these things, even if proved, was conditional, and only in event that Congress should pass a statute providing for the raising of an army by conscription. This, I think, the evidence shows to be true; but I cannot concur with counsel in their conclusion therefrom. The right of Congress to pass a law providing for the raising of an army by conscription is not questioned. The United States, under the Constitution, and inherently, has such authority, regardless of whether or not the authority ever be exercised through an act of Congress; and any conspiracy to resist the enforcement of such a proposed act of Congress is a conspiracy to resist the then existing authority of the United States.

Were it otherwise, defendants might have publicly and with impunity completed their arrangements and preparations to carry out their alleged conspiracy, and, had they been strong and resourceful enough, might have openly established headquarters, collected quantities of guns and munitions, thoroughly organized and officered their forces, and stood defiant, ready for rebellion and aggressive resistance the moment Congress acted; and, during all such time, the officers of the government would have been powerless to act, because the conspiracy was not absolute, but conditioned upon the passage of the Selective Draft Act, an uncertain event.

[3] This act, at the enforcement of which the alleged conspiracy was leveled, was, as a matter of fact, later passed by Congress. If the prompt steps taken by the officers of the government, in causing the arrest and prosecution of the alleged conspirators, thwarted the conspiracy and prevented armed resistance and rebellion, such of the defendants who may be proved to have been parties to such conspiracy are none the less guilty, nor does the fact that the whole scheme was chimerical and utterly impossible of success, make it any the less a conspiracy denounced by the statutes of the United States.

On trial, all of the defendants were acquitted by the jury, except Z. L. Risley, S. J. Powell, and G. T. Bryant, who were convicted on one count. They are prosecuting writ of error.

ROWE v. DROHEN et ux.

(District Court, W. D. New York. September 24, 1917.)

No. 189–B.

HUSBAND AND WIFE ⊂=149(4)—SEPARATE PROPERTY OF WIFE—RIGHTS OF HUSBAND'S CREDITORS.

Where the wife of an insolvent debtor on her own credit extended to her by reason of her ownership of certain property, engaged in business in a small way, there was no fraudulent concealment of the husband's property from his creditors by the carrying on of the business in her name, and property accumulated in such business was not subject to the claims of the husband's creditors, though the husband assisted in the business by purchasing supplies and paying for them by checks on the wife's account and by other work and labor, and at times sought to create the impression that he was the owner of the business.

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

In Equity. Suit by Murle L. Rowe, as trustee of James L. Drohen, bankrupt, against James L. Drohen and wife. Bill dismissed.

Herman J. Westwood, of Fredonia, N. Y. (Nelson J. Palmer, of Dunkirk, N. Y., of counsel), for plaintiff.

Nugent & Hefferman, of Dunkirk, N. Y., for defendant Mabel R. Drohen.

Warner & Woodin, of Dunkirk, N. Y., for defendant James L. Drohen.

HAZEL, District Judge. The plaintiff, as trustee in bankruptcy, has brought suit against James L. Drohen and wife to recover property claimed to have been fraudulently transferred to her by her husband and held by her as trustee for him. The gravamen of the bill is to recover real estate and personal property in the possession of Mrs. Drohen, and to which she has title, on the ground that title and possession were acquired pursuant to a formulated plan or scheme to conceal the property of the husband, who at the time of its acquirement was hopelessly insolvent, with liens and judgments against him, and by such concealment of property to hinder and prevent creditors from satisfying their debts by levying thereon. A mass of testimony was taken on both sides, but it will not be necessary to review it, and a statement of the essential conclusions alone will be given.

The evidence is entirely insufficient to show the existence of any plan or scheme to place the property acquired by Mrs. Drohen, and specified in the bill, fraudulently beyond the reach of her husband's creditors. There was no agreement or understanding between the defendants that the money or property of the bankrupt should be used to purchase the business in which the wife engaged, and no equitable trust for her husband was created by engaging in such business or by acquiring the said properties.

Concededly the bankrupt was insolvent in 1906, prior to the time when his wife engaged first in the notion and later in the moving picture business, and subsequent to the recovery of a judgment against him which established his insolvency. The claim of the plaintiff is that at such time the scheme in question eventuated to have the legal title to all money and property of the insolvent placed in his wife's name to prevent creditors from taking it; that as part of such scheme the husband closed his account at the Merchants' National Bank of Dunkirk in 1906, and later on in the month of December caused a reopening thereof in the name of Mrs. J. L. Drohen, since then depositing in her name and making withdrawals by signing her name to checks. But, as he was authorized by Mrs. Drohen to deposit funds and make withdrawals, no undue importance can be given thereto. It appears that the account at the bank was opened in the name of Mrs. J. L. Drohen, owing to the discount of her promissory note by the Merchants' National Bank, a note, or notes, also signed by her husband and by her mother; but, regardless thereof, the credit, as testified by the cashier of the bank, was given exclusively to Mrs. Drohen, because of her ownership of certain real estate and subsequent acquirements made possible by advances to her by her friend,

Mrs. Tuthill. It is undoubted that, when the business was started, she owned and possessed both property and credit, while her husband neither owned nor possessed any.

Mrs. Drohen did not become the agent for her husband in the conduct of the business, but, on the contrary, was the definite owner and principal thereof, with corresponding responsibilities. Although the husband rendered some assistance in the way of purchasing supplies and paying for them by checks on her account, and by performing other work or labor, the businesses and increment thereof clearly belonged to the wife, and were not acquired pursuant to any scheme of concealment, nor did she loan her money to her husband as the foundation for the enterprise. She did not at any time cheat or intend to cheat his creditors, but by venturing in business in a small way she employed her separate property and credit. Hence the creditors of her husband cannot be allowed, because of her success in her various ventures, to satisfy their debts out of her individual property and credit or the increments thereof. Under the laws of this state her separate property and credit could, with her consent, be managed by her husband, and, of course, deposits could be made by him in her name, and checks drawn on her account, and supplies purchased by him for her, without subjecting the said property or funds to the claims of his creditors. Indeed, even assuming that the businesses became profitable wholly by reason of his management and foresight, his creditors could not benefit thereby. Aldridge et al. v. Muirhead, 101 U. S. 397, 25 L. Ed. 1013. As said by Thomas, J., in Silberberg v. Wember, 173 App. Div. 717, 159 N. Y. Supp. 843:

"It is a common and legal practice that one unable by his pecuniary condition to do business should, as the agent of his wife or some other, do the work of operation. The vice of the thing is when the husband's property is covered up by such a scheme. Here the men had nothing, and, if the wives had not bought, there would have been no sale—no business. The men's future services did not belong to their creditors, and they could place them at the disposition of their wives."

This statement is believed to apply to the facts under consideration. If, however, Mrs. Drohen had had no separate estate, or if the credit necessary to embark in business had been given to her husband, instead of to her, the proposition would be different. The question of a smaller contribution of property and credit by the wife than by the husband is not presented, for the evidence shows clearly enough, not only that she was the bona fide owner of the property on the strength of which limited credit at the bank was obtained by discounting a promissory note amounting to $300, but also that it was owing to her perspicacity that the enterprises at Dunkirk and Silver Creek were initiated.

It is true that the case is not devoid of suspicious circumstances tending to indicate that the bankrupt at various times desired to create the impression that he was the owner of the businesses and rented the Jamestown theater property, representing that he owned the Dunkirk enterprise; but such assertions and false representations do not negative the wife's ownership or lack of intention to cover up the husband's property.

Importance is attached to the purchase of a piano and automobile, separate from the acquirement of the theaters and other specified properties in relation to which there was evidence; but as both the piano and automobile were unquestionably paid for out of funds derived from the moving picture businesses owned and conducted by Mrs. Drohen, and as it appears that such purchases were made on her account, the representations by her husband of ownership are not controlling.

My conclusion is that fraud has not been proven, and that the allegations of the bill are not substantiated.

Dismissed, with costs.

Ex parte HILL.

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

No. 1556.

ALIENS ⟸46—IMMIGRATION—PERSONS EXCLUDED—COMMISSION OF FELONY.

Under Immigration Act Feb. 5, 1917, § 3, providing for the exclusion from the United States of persons having been convicted of, or admitting the commission of, a felony or other crime or misdemeanor involving moral turpitude prior to entry, a Canadian soldier, who while on leave of absence entered the United States and failed to return at the expiration of his leave, could not be deported, even though he intended to desert when he applied for his furlough, and though the failure to return at the expiration of the furlough made him a deserter ipso facto, as the offense was not committed prior to his entry and the intention was not equivalent to the act itself.

Application by William James Hill for a writ of habeas corpus. Petitioner discharged from custody.

Dilworth M. Silver, of Buffalo, N. Y., for relator.

Walter H. Edson, Asst. U. S. Atty., of Buffalo, N. Y., for respondent.

HAZEL, District Judge. The petitioner, William J. Hill, an Englishman by birth, is detained by order of the Assistant Secretary of Labor, and awaits deportation to Canada under the provisions of an act of Congress approved February 5, 1917, commonly called the Immigration Act. Application for a writ of habeas corpus has been made, on the ground that the warrant of arrest and deportation by the inspector was and is illegal under the provisions of said act.

It appears that at the beginning of the present European war the petitioner was domiciled in Canada and became a volunteer in the Overseas Battalion of the Canadian Expeditionary Force. In July, 1916, he was granted five days' leave of absence by his commanding officer, and during that time he entered the United States at Lewiston, N. Y., a designated port of entry. Since then he has been domiciled at Buffalo with his family and children, and has declared his intention of becoming an American citizen. Nearly a year after coming to this country he was arrested on the warrant in question, the reason

assigned being that when he entered the United States he was a person likely to become a public charge; but this reason for his detention was abandoned, and without objection by the petitioner another reason substituted, to wit, that, his leave of absence from his battalion having expired, he was a deserter and had committed a felony, in violation of the Criminal Code of Canada and the Orders in Council made by the Governor General of Canada.

Section 3 of the Immigration Act provides for the exclusion from the United States of persons having been convicted of, or admitting the commission of, prior to entry, a felony or other crime, or a misdemeanor involving moral turpitude; and accordingly the sole question, regardless of the petitioner's denial, is whether the facts and circumstances warrant the conclusion by the inspector that the petitioner substantially admitted that he had committed a felony prior to his entry in the United States, as specified in the act. Section 19.

It is my opinion that under such provisions petitioner cannot be deported to Canada on the substituted ground, as concededly he has not been convicted of any felony, nor does the evidence show a substantial admission that he had comitted a felony, or an offense involving moral turpitude, before landing in this country.

This is not a proceeding under the extradition laws or treaties. The desertion as a completed offense did not occur until after the expiration of the furlough. No statute or treaty between the United States and England is called to my attention wherein the word "deserter" is defined; but no doubt any enlisted man leaving his regiment or battalion, without the intention of returning thereto, comes within the accepted definition. The offense in this country, I believe, is solely one of military character, punishable only by court-martial, and only a person who procures another to desert is guilty of a violation of the United States statutes.

But, assuming that soldier of the Canadian forces, who receives leave of absence and does not return at the expiration of his furlough, ipso facto becomes a deserter, the petitioner, I am constrained to hold, nevertheless did not become such until after he had been in this country several days, and hence the crime of desertion was not committed prior to entry. He disclaimed having a fixed intention to desert when he applied for his furlough, although his failure to return to his post of duty obviously suggests such an intention; but such an intention is nevertheless not equivalent to the act itself. His disloyalty to his country in deserting in time of war is not within the inhibition of the act, and accordingly relief cannot properly be refused him.

The writ is granted, and the petitioner discharged from custody.

NOYES v. PARSONS et al.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917.)

No. 2838.

1. COURTS ⟸299—JURISDICTION—FEDERAL COURTS—ALLEGATIONS AND PROOF.
In an action under Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, for the treble damages allowed by section 7 (Comp. St. 1916, § 8829) for violation of section 3 (section 8822), declaring that every contract or combination in restraint of trade or commerce in any territory of the United States shall be unlawful, the federal court is without jurisdiction other than to determine the question whether one of the classes of cases over which it has jurisdiction is involved, unless the complaint avers and it is proven that plaintiff was injured by reason of a contract or combination in restraint of trade, in violation of the act.

2. MONOPOLIES ⟸30—ACTIONS—COMPLAINT—SUFFICIENCY.
The complaint of the receiver of an insolvent corporation, seeking to recover the treble damages provided for by section 7 for violation of Sherman Anti-Trust Act, § 3, prohibiting agreements and combinations in restraint of trade, alleged that the corporation of which plaintiff was receiver, and which had been engaged in the banking business, entered into agreements with two other banking companies, whereby the three formed a combination to control the banking business at a particular point, that the corporation of which he was receiver and another of the three acquired the stock of the third banking company, and that ultimately the corporation of which plaintiff was receiver was absorbed by the second corporation. The complaint alleged as elements of damage the amount paid by the second corporation to the stockholders of the corporation of which he was receiver, which was in excess of the actual value of the stock, on the theory that the corporation was deprived of some right, and as other items of damage alleged that the corporation ultimately became insolvent to a given amount. *Held*, that the complaint stated no cause of action; it appearing that the corporation of which plaintiff was receiver became insolvent through mismanagement, and despite the combination in restraint of trade in violation of the act, which gave it advantage.

3. COURTS ⟸299—FEDERAL COURTS—JURISDICTION.
The jurisdiction of the federal court over an action for damages for violation of the Sherman Anti-Trust Act must appear by distinct averments according to the rules of good pleading, and cannot be left to inference.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation organized under the laws of the state of Washington, against W. H. Parsons and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Tort action to recover compensatory and exemplary damages, under section 7 of the act of Congress of July 2, 1890 (Sherman Anti-Trust Act), for an unlawful combination and conspiracy in restraint of trade in violation of section 3 of the same act. Defendants demur. Demurrer sustained, and complaint dismissed. Plaintiff alleges error.

The complaint in the present action was filed on January 19, 1916, in the United States District Court for the Western District of Washington, North-

ern Division, by F. G. Noyes, as receiver of the Washington-Alaska Bank, a Washington corporation, against the stockholders and directors of said Washington-Alaska Bank. It is alleged: That the Washington-Alaska Bank is a corporation organized under the laws of the state of Washington for the purpose of carrying on a general banking business in Alaska. (This corporation will hereafter be referred to as the Washington Company.) That the First National Bank of Fairbanks is a corporation organized under the national banking laws of the United States, and ever since the time of its organization has conducted a general commercial banking business at the town of Fairbanks in the territory of Alaska. That from October, 1905, until March, 1908, E. T. Barnette, James W. Hill, and R. C. Wood, as copartners under the firm name and style of the Fairbanks Banking Company, conducted a general banking business in the said town of Fairbanks. That on or about January 21, 1908, the Fairbanks Banking Company was organized as a corporation, under the laws of the state of Nevada, for the purpose of acquiring, taking over, and conducting the business of said copartnership, and that said corporation thereafter conducted the said business. (This corporation will hereafter be referred to as the Nevada Company.) That each of said companies conducted a general banking business in the town of Fairbanks and the district surrounding. That there was no other bank or banker with 350 miles of Fairbanks, or within six days' travel by regular route therefrom. That many millions of dollars of gold was taken from the placer mines of said district annually, and that the said three banks provided the only avenues through which the said gold could reach the markets therefor. That the said banks derived a large revenue from the handling of said gold, and in the issuance of domestic and foreign exchange, and from usual banking business. "That on or about the year 1905, at the said town of Fairbanks, in the said territory of Alaska, the directors of said the Washington Company, the said First National Bank of Fairbanks, and the Nevada Company, by and through their respective boards of directors, officers, and managers, secretly, unlawfully, and in violation of section 3 of the act of Congress of July 2, 1890 (commonly known and called the 'Sherman Anti-Trust Act'), agreed, combined, and conspired together to restrain trade and commerce in the territory of Alaska, and between said territory and the several states of the Union, and between said territory and foreign nations, in this, to wit: The board of directors, managers, and officers of the said three banks then and there secretly agreed together and with one another to conduct their said three several banking businesses noncompetitively, and, in order to effect and secure such noncompetitive conduct thereof, the board of directors of each of said three banks, by its managing officer, then and there entered into an agreement" providing the amount of exchange, charges, commission, interest, discount, etc., to be collected upon the various transactions comprising the bulk of the banking business of said banks, and also providing for advances of currency by any of said banks upon the request of another of said banks. That the agreement, combination, and conspiracy entered into on the date set forth in the above-written agreement (June 6, 1905), was continued up to and including January 4, 1911. That when the Nevada Company was organized as a corporation and commenced business under the name of the Fairbanks Banking Company, it also entered into and continued in the said unlawful agreement, combination, and conspiracy in the place of the copartnership theretofore carrying on business under the firm name and style of the Fairbanks Banking Company. That during all of said time the said schedule of rates and charges set forth in said agreement was unreasonably high and grossly excessive, but was, notwithstanding, substantially observed and enforced by said directors of the said three banks, and that during this period of time the said banks transacted a very large business along the various lines mentioned, all of which was done in pursuance of and in compliance with the said agreement. That, for the purpose of insuring the good faith of the parties to carry out such agreement, each party deposited a certified check for $5,000 as a penalty in the forfeit of such sum by any party violating said agreement. That on May 7, 1909, in pursuance of the said combination and conspiracy, the Nevada

Company and the directors, officers, and stockholders of the Washington Company, having become suspicious of the loyalty of the First National Bank of Fairbanks to said agreement, pretended to purchase all of the capital stock of the said First National Bank; the Nevada Company paying $62,500 for one-half thereof, and the directors of the Washington Company paying out of the funds of the Washington Company the sum of $62,500 for the remaining one-half thereof. That, having obtained the absolute control of the First National Bank of Fairbanks, and in pursuance of the combination and conspiracy mentioned above, they compelled it and its board of directors and officers to enter into another agreement, similar to that heretofore set forth, which was executed by the three banks on May 10, 1909. That upon the same day another agreement was entered into between the Nevada Company and the Washington Company, providing for a division of the earnings made by each of them with the other, and further providing for the sharing of certain business between the two companies, which agreement is alleged to have been in pursance of the said conspiracy, and illegal. That the directors, stockholders, and officers of the Washington Company and the Nevada Company, in order to effect the absolute concentration and to obtain the absolute control of the banking business in the town of Fairbanks, the Tanana valley, and the country adjacent thereto, and in order to make still more secure and to render permanent the unlawful restraint of trade and commerce, agreed together on September 16, 1909, that the stockholders and directors of the Washington Company should sell to the Nevada Company all of the capital stock and all the assets of the Washington Company, in consideration of the sum of $250,000, and in accordance with said agreement a resolution was passed by the board of directors of the Nevada Company for said sum, and the holders of all of the stock of the said Washington Company pretended to sell, transfer, and assign unto the Nevada Company all of the stock of the Washington Company, and the said sum of $250,000 was paid over to said stockholders by the Nevada Company. That in pursuance of said unlawful agreement, combination, and conspiracy in restraint of trade and commerce the said stockholders of the Washington Company agreed not to engage in the banking business in the city of Fairbanks or adjacent creeks in the territory of Alaska for the period of five years.

It was further alleged: "That on said 16th day of September, 1909, and for a long time prior thereto, the said Nevada Company was insolvent, its liabilities on said 16th day of September, 1909, exceeding its assets in the amount of five hundred thirty-five thousand ($535,000) dollars, and that said sum of two hundred fifty thousand ($250,000) dollars was paid to the defendants herein out of the moneys and funds of the depositors and creditors of said Nevada Company, all of which the defendants herein, and each of them, then and there well knew." That while the Washington Company was solvent on the 16th day of September, 1909, and had sufficient assets to pay and satisfy in full all the demands of its creditors, its capital stock did not possess a value in excess of the sum of $110,000. That the difference of $140,000 between the true value of such stock and the $250,000 paid therefor was declared by the defendants to be a bonus, but in truth and in fact was an advance of the future unlawful profits, and the share of the defendants therein, to be made by the Nevada Company for the benefit of all parties to said agreement out of the unlawful agreement and combination in restraint of trade, and was paid by said Nevada Company out of the funds of its depositors to the directors and stockholders of said Washington Company as such directors' and stockholders' share of such unlawful profits in advance, as defendants herein, and each of them, then and there well knew. That on January 22, 1910, the directors of the Washington Company surrendered, by instrument in writing, their offices as directors of the Washington Company to a board of directors designated, selected, and controlled by the Nevada Company, and thereafter the latter conducted and operated the business of the Washington Company until the 1st day of October, 1910, and thereafter and at all times down to the 4th day of January, 1911, as a pretended consolidated corporation composed of the two corporations, namely, the Washington Company and the Nevada Company, solely with a view to the welfare, advantage, and benefit

of the said Nevada Company, and without any regard whatsoever for the rights or welfare of the said Washington Company, or its depositors and creditors, and, with the knowledge and consent of the defendants herein, dissipated, wasted, and converted the assets of the Washington Company, and have never repaid or restored the same. That on October 1, 1910, the officers and directors so selected and designated by the Nevada Company as the officers and directors of the Washington Company, with the knowledge and consent of the defendants herein, falsely and fraudulently pretended to consolidate the said two banks, and caused a physical commingling of their movable property, effects, and assets, and the occupation of the same office by said two banks, and the conduct of the business of the two banks at all times thereafter as the business apparently of one consolidated or merged corporation. That on October 8, 1910, the Nevada Company, to the knowledge and with the consent of the defendants herein, changed the name to the Washington-Alaska Bank for the purpose of deceiving the depositors and creditors of said Washington Company and the public generally. That on January 4, 1911, the said Nevada Company, so conducting the business of itself and of said Washington Company, closed its doors and ceased to do a banking business. That on January 5, 1911, in a certain suit entitled Tanana Valley Railroad Co. et al. v. Washington-Alaska Bank, No. 1597 in the District Court for the Territory of Alaska, Fourth Judicial Division, said court made an order appointing a receiver for said Nevada Company and its assets; and on the following day a coreceiver was appointed. That these receivers resigned on May 12, 1911, and plaintiff was thereupon appointed receiver of the defendant in said cause, and of all its assets, with like powers to preserve and distribute the same, and has ever since been and now is such receiver. That the creditors and depositors of the Washington Company and of the Nevada Company, and the public generally in said town of Fairbanks and vicinity, and said District Court of the Territory of Alaska, and said receivers and each of them, and their attorneys, did not, prior to March, 1915, know or have notice that the pretended sale of the capital stock of said Washington Company was fraudulent, null, and void, nor that the representations that the Nevada Company and the Washington Company had lawfully consolidated and merged were absolutely false and fraudulent. That, on the contrary, the receivers, relying upon and believing said representations, under orders made in said cause, distributed dividends aggregating 50 cents on the dollar to the creditors and depositors of the Washington Company and the Nevada Company, on the erroneous assumption that those creditors were the creditors of the supposed consolidated and merged corporations. That all of the creditors and depositors of the Nevada Company and of the Washington Company also relied upon and believed said false and fraudulent representations, and had no notice or knowledge of the existence of the combination and conspiracy to restrain trade, or that the said representations and statements and said pretended consolidation were false and fraudulent, except the defendants herein and the Nevada Company, until March, 1915, when plaintiff was advised by counsel, residing in San Francisco, Cal., that the laws of Nevada did not permit of the sale and purchase by a banking corporation organized under the laws of Nevada of the stock of a banking corporation, or of the consolidation of a corporation organized under the laws of Nevada with a corporation organized under the laws of any other state, territory, or country. That said receiver and the creditors and depositors of the Washington Company were then and there for the first time advised by said counsel that the receivers appointed in said cause No. 1597 were not the receivers of the said Washington Company and its assets in Alaska, and that in consequence no receiver had been lawfully appointed for said Washington Company. That in May, 1915, as a result of the information and advice so received, one of the creditors of the Washington Company commenced a suit, No. 2113 in said District Court, against plaintiff, as receiver of the Nevada Company, who was then and there in possession of the assets and books of account of the Washington Company under the erroneous belief and assumption that said Washington Company was lawfully consolidated with said Nevada Company. That thereafter said court made an order apppointing plaintiff the receiver of

said Washington Company and of all of its assets in Alaska, and ever since May, 1915, plaintiff has been such receiver. That on July 27, 1915, the said court made an order of reference in said cause No. 2113, requiring that testimony be taken, an inquiry made, all accounts stated, and all facts disclosed and found, and conclusions of law made thereon. That in pursuance of said order, and a like order in said cause No. 1597, references were had, a full list of the creditors and debtors of the Washington Company was ascertained, and the assets and liabilities of the Washington Company and of the Nevada Company were segregated and ascertained, respectively. That it was found and concluded by the referee that the Washington Company was on January 5, 1911, and at all times thereafter, insolvent, and that said pretended sale of stock and consolidation was unlawful, fraudulent, null and void. And thereafter, on July 24 and 30, 1915, the said District Court made and entered decrees in said causes numbered 1597 and 2113, respectively, approving and adopting said findings and conclusions of the referee. That on September 8, 1915, the superior court of the state of Washington appointed plaintiff receiver of the Washington Company and of all its assets within the state. That both the Washington Company and the Nevada Company are insolvent. That by reason of the unlawful acts of the defendants the Washington Company has been injured in the sum of $110,000, being the surplus over and above its liabilities to creditors, excepting stockholders, which surplus said Washington Company owned and possessed on the 16th day of September, 1909; in the sum of $5,000, being the loss of the use of said $62,500 paid by said defendants for one-half of the stock of the First National Bank of Fairbanks; and in the sum of $512,557.17, being the amount necessary to liquidate the obligations of said Washington Company to its depositors. Wherefore plaintiff prayed judgment against defendants in the sum of $1,882,671.51, together with the sum of $50,000 as attorney's fees, and costs.

Defendants demurred, and the court sustained their demurrer upon two grounds: (1) That the complaint does not state a cause of action, as the plaintiff as receiver represents the corporation, and the corporation, being a party to the illegal combination, cannot sue under the Sherman Act for such damages as it may have suffered by reason of the combination to which it was a party; and (2) that the action was not commenced within the time limited by law. Plaintiff alleges error.

Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp, all of Seattle, Wash., Roy V. Nye, of Monrovia, Cal., and De Journel & De Journel, of San Francisco, Cal., for plaintiff in error.

Clise & Poe and Peters & Powell, all of Seattle, Wash., for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] This is an action at law, brought under section 7 of the act known as the "Sherman Anti-Trust Act" (An act to protect trade and commerce against unlawful restraint and monopolies, approved July 2, 1890, 26 Stat. 209). The act provides, among other things:

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce, in any territory of the United States, * * * is hereby declared illegal. * * *"

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee." Comp. St. 1916, §§ 8822, 8829.

The things forbidden and declared to be unlawful by the clause of section 3 of the act quoted above are "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce, in any territory of the United States," and any person who shall be injured in his business or property by any person or corporation by reason of any such unlawful act may, under section 7, sue therefor in a federal court and recover threefold the damages sustained by him, and the costs of suit, including a reasonable attorney's fee. The jurisdiction of the court and the province of the jury in such a case is to inquire whether the complainant has been injured in his business and property by reason of any such unlawful act. If it appears from the complaint, and is proven, that the plaintiff has been so injured, the court has jurisdiction, and upon the verdict of a jury is required to award the damages provided in the act. But if, on the other hand, he has not been so injured, or if he has been injured, but not by reason of anything forbidden or declared to be unlawful by the act, he cannot recover in the action. This statement of what must always seem to be an obvious rule of procedure appears to be necessary in this case, in order to direct attention to the question whether the matters alleged in the complaint really and substantially involve a dispute or controversy within the jurisdiction of the court.

In Minnesota v. Northern Securities Co., 194 U. S. 48, 65, 24 Sup. Ct. 598, 48 L. Ed. 870, the Supreme Court of the United States, referring to an allegation in the complaint in that case that the combination and consolidation between the Great Northern and Northern Pacific Railway Companies and their control of their affairs and operations by the Northern Securities Company were in violation of this Anti-Trust Act, said:

"An allegation in a complaint filed in a Circuit Court of the United States may, indeed, in a sense confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 24 Sup. Ct. 553, 48 L. Ed. 795, and Pacific Electric Ry. Co. v. Los Angeles, 194 U. S. 112, 24 Sup. Ct. 586, 48 L. Ed. 896, decided at present term. But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction, then, by the express command of the act of 1875, its duty is to proceed no further"—citing section 5 of the act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 472 [Comp. St. 1916, § 1019]).

And in Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557, the same court, referring to the jurisdiction of the federal court under the laws of the United States, said:

"The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy repecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear, not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some federal law. Hanford v. Davies, 163 U. S. 273, 279, 16 Sup. Ct. 1051, 41 L. Ed. 157; Mountain View Mining & Milling Co. v. McFadden, 180 U. S. 533, 535, 21 Sup. Ct. 488, 45 L. Ed. 656; Defiance Water Co. v. Defiance, 191 U. S. 184, 191, 24 Sup. Ct. 63, 48 L. Ed.

140; Arbuckle v. Blackburn, 191 U. S. 405, 413, 24 Sup. Ct. 148, 48 L. Ed. 239; Bankers Casualty Co. v. Minneapolis, etc., Ry. Co., 192 U. S. 371, 383, 24 Sup. Ct. 325, 48 L. Ed. 484; Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205."

[2] It may be conceded that the agreement of June 6, 1905, between the Fairbanks Banking Company, the predecessor of the Nevada Company, the Washington Company, and the First National Bank of Fairbanks, agreeing to conduct their said three several banking businesses noncompetitively, and fixing the rates to be charged by the three banks, respectively, for exchange upon drafts, telegraphic transfers, the handling of gold dust, transportation and insurance, collection rates, interest on loans, etc., and fixing a penalty for a departure from such rates by either of the banks, was an unlawful combination and in violation of the Anti-Trust Act. It may also be conceded that the agreement of May 10, 1909, upon the same subject and to the same effect, was unlawful, and in violation of the Anti-Trust Act, and that the consolidation of the three banks was, under the circumstances, open to judicial inquiry in a proper suit. But it is not alleged in the complaint that the Washington Company suffered any injury by reason of these unlawful agreements. The statement and explanation of the plaintiff in error is that the allegations of the complaint respecting these agreements had no such purpose; that they were intended only to serve as matters of inducement, inserted for the purpose of exhibiting the origin and development of the banking business at Fairbanks and the status thereof existing, and the purposes actuating the defendants when the conspiracy and combination of 1909 was entered upon by the defendants and the Nevada Company. We may then dismiss these allegations from further consideration as charging that the Washington Company suffered injuries by reason of these violations of the Anti-Trust Act.

We come, now, to the cause of action upon which a recovery of damages is sought in this case. It is charged that on September 16, 1909, while the directors, stockholders, and officers of the Washington Company were conducting and carrying on a banking business in pursuance of the unlawful combination and conspiracy in restraint of trade and commerce mentioned, in order to effect the absolute concentration and to obtain the absolute control of the banking business in the town of Fairbanks, the Tanana valley, and the country adjacent thereto, and in order to make still more secure and to render permanent the said unlawful restraint of trade and commerce, they sold to the Nevada Company all the capital stock and all the assets of the Washington Company, and the Nevada Company purchased such capital stock and assets, which included one-half of the capital stock of the First National Bank of Fairbanks; that at that time the Nevada Company was insolvent, which the defendants knew; that its liabilities exceeded its assets in the amount of $535,000. It is further alleged that on January 22, 1910, the directors and stockholders of the Washington Company surrendered their offices as directors of that company to a board of directors selected and controlled by the Nevada Company, and on the 4th day of January, 1911, the Nevada Company, conducting the

business of itself and of the Washington Company, closed its doors and ceased to do a banking business.

The injuries to the Washington Company resulting from these acts of the defendants as stockholders of that company are specifically charged as follows: That on May 7, 1909, the Nevada Company and the directors, officers, and stockholders of the Washington Company purchased all of the capital stock of the First National Bank of Fairbanks for the sum of $125,000, each corporation taking one-half of the stock, or $62,500 each. It is alleged in the complaint that there was a loss of the use of this money, which loss amounted to $5,000. This charge the plaintiff in error states was inadvertently made, and should be rejected as surplusage. The next charge is that on the 16th day of September, 1909, the defendants, as stockholders of the Washington Company, sold their stock to the Nevada corporation for $250,000. It is alleged that at that date the capital stock of the Washington corporation was worth only $140,000. The difference between the actual value of the stock ($140,000) and the sum for which the defendants sold the stock to the Nevada corporation ($250,000) is the sum of $110,000. This difference of $110,000, it is claimed, was an injury to the Washington Company caused by the defendants as officers and stockholders of the company. The next charge is that the Washington Company was insolvent on January 4, 1911, and was indebted to its creditors on that day for principal in the sum of $378,977.72, and for interest on that sum from January 4, 1911, to the 1st day of June, 1915, at 8 per cent. per annum, the sum of $133,579.45, or a total of $512,-557.17. These four items make a sum total of $627,557.17. Threefold damages—that it to say, three times $627,557.17—amount to $1,882,-671.51. From this sum must, however, be deducted threefold the damages of $5,000 claimed in the complaint for the loss of the use of the money paid for one-half of the stock of the First National Bank of Fairbanks, which claim this court is asked to reject as surplusage. This deduction leaves the claim of damages amounting to $1,867,671.-51, which it is contended the plaintiff, as receiver of the Washington Company, is entitled to recover of the defendants.

We are of opinion that this statement of the case and the object of the suit as set forth in the complaint is sufficient to show that the case does not really and substantially involve a dispute or controversy respecting the validity, construction, or effect of the Anti-Trust Act, upon the determination of which the result depends. The bank did not fail because of its consolidation with the other banks, or because of its noncompetive agreements with such banks. It failed, notwithstanding the advantage it had in the grossly exorbitant rates it was able to exact from its customers under the noncompetitive agreements. That it failed from mismanagement is clearly disclosed by the complaint, and the cause of action as stated is in all essential features a suit on behalf of creditors for damages resulting from such mismanagement, and if a recovery could be had in this suit it would be for their benefit.

[3] The argument that the injuries suffered by the Washington Company grew out of the unlawful combination of the defendants in restraint of trade and commerce is not convincing, and the jurisdiction

of a federal court, limited as it is by law, cannot be made to depend upon argument. The jurisdiction must not be a matter of mere inference, but must appear by distinct averments according to the rules of good pleading. Minnesota v. Northern Securities Co., 194 U. S. 48, 65, 24 Sup. Ct. 598, 48 L. Ed. 870, and Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557. This conclusion renders it unnecessary to discuss the question whether the receiver of the Washington Company can maintain this suit against its stockholders, or the other question whether the cause of action is barred by the statute of limitations.

The judgment of the District Court is affirmed.

EQUITABLE TRUST CO. OF NEW YORK v. GREAT SHOSHONE & TWIN FALLS WATER POWER CO. et al. (PLUMER et al., Interveners).

AMERICAN WATERWORKS & ELECTRIC CO. v. TOWLE et al.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1917.)

No. 2791.

1. CORPORATIONS ⊂=482(3)—MORTGAGES—FORECLOSURE—INTERVENTION.
Under Rev. Codes Idaho, § 3418, providing that the right of a mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, and section 4111, providing that any person may, before trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties or an interest against both, where prior to a suit to foreclose a mortgage a receiver had been appointed in a creditors' suit, the court did not err in permitting a judgment creditor and general creditors whose claims had been presented and allowed in the receivership suit to intervene in the foreclosure suit and contest the validity of the mortgage so far as it covered personal property.

2. RECEIVERS ⊂=1—PURPOSE OF APPOINTMENT—PRESERVATION OF RIGHTS.
In the absence of specific state statute or decisions of the state courts conferring special rights and powers, and where a receiver is not appointed for the purpose of impounding property for a specific purpose, the appointment of a receiver of property by a federal court is for the protection and preservation of all rights and interests therein existing at the time of such appointment.

3. CORPORATIONS ⊂=482(3)—MORTGAGES—FORECLOSURE—INTERVENTION.
Where in a suit to foreclose corporate mortgages on real and personal property, a judgment creditor and creditors whose claims had been allowed in a receivership suit intervened and contested the validity of the mortgages so far as they covered personal property on the ground that they were not accompanied by an affidavit of good faith as required by statute and obtained a decree adjudging that certain personal property was not subject to the lien, and the property was sold as a whole and the amount not subject to the lien agreed upon, it was within the trial court's discretion whether another creditor who had not availed itself of the right to intervene and contest the mortgage should be allowed to intervene and set up claim which would have taken practically the whole of the fund not subject to the lien, and the refusal to permit it to intervene was not an abuse of such discretion.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Equitable Trust Company of New York as trustee under deeds of trust by the Great Shoshone & Twin Falls Water Power Company against the Great Shoshone & Twin Falls Water Power Company and others, in which the American Waterworks & Electric Company sought to intervene and file an intervening complaint against Guy I. Towle and others. From the decree (228 Fed. 516), and from an order denying leave to intervene, plaintiff and the intervener appeal. Affirmed.

The Great Shoshone & Twin Falls Water Company was a public service corporation of the state of Idaho, engaged in generating and supplying electricity to various persons and various places in the southern portion of that state, and having a large amount of both real and personal property. It subsequently became insolvent, with a number of general creditors, and one, at least, secured one. One of its general creditors, Guy I. Towle, commenced a suit, in his own behalf and in behalf of such of the other creditors as might join therein, against the company in the court below on the 2d day of November, 1914, alleging, among other things, its insolvency, and that he was a creditor of the corporation, and asking for the appointment of a receiver of its property. The defendant immediately appeared, and by answer admitted the allegations of the bill, and joined in the request for a receiver, with the result that the court on the same day appointed William T. Wallace such receiver, and enjoined every one from attaching or levying upon or seizing any of the property of the company. Among the creditors of the power company was a corporation styled the American Waterworks & Electric Company, its claim being $1,268,434.66, or thereabouts.

Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, was a judgment creditor of the insolvent corporation, and the Equitable Trust Company of New York was sole trustee under a deed of trust made by it May 1, 1910, and under supplemental mortgages dated June 21, 1911, and April 7, 1913, respectively, covering all of the real and personal property of the power company; and on the 14th day of April, 1915, that trustee commenced in the court below a suit to foreclose the deed of trust and the supplemental mortgages, alleged to have been given to secure an issue of bonds aggregating $2,230,000, making defendants to the foreclosure suit the mortgagor power company, William T. Wallace, as receiver of its property, Towle, the complainant in the receivership suit, and the judgment creditor Carl J. Hahn, as administrator of the estate of Harry M. King, deceased. A supplemental bill was subsequently filed by the trustee, praying, among other things: "That the court find and adjudge that the principal of the said bonds issued and outstanding, as alleged in the bill of complaint herein, in the amount of $2,230,000, is due and payable; * * * that an account be had and taken of the bonds, interest coupons, and interest secured by said deed of trust and supplemental mortgages, and the amount due thereon, with the names of the lawful holders or owners thereof, be ascertained; that an account be taken of all property of every kind conveyed or pledged by said deed of trust and supplemental mortgages, or intended so to be, whether acquired before or after the execution and delivery thereof; * * * that the defendant Great Shoshone & Twin Falls Power Company and William T. Wallace, as receiver of its property, may be decreed to pay, within a short time to be fixed by the court, to the holders of the bonds and coupons secured by said deed of trust and supplemental mortgages, or to your orator as trustee for said holders, the principal amount of said bonds and the defaulted interest thereon."

To the bill for the foreclosure Hahn, as administrator, filed an answer setting up the judgment obtained against the power company, and subsequently L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, having filed their claim for allowance in the general creditors' suit, and having obtained the allowance and approval thereof, intervened by leave of the court in the foreclosure suit, and by answer to the bill of complaint therein attacked the validity of the trust deed and mortgages.

Similar steps were taken by one Jake M. Shank and the defendant Towle, and they also were permitted to intervene in the foreclosure suit and to file an answer therein assailing the validity of the trust deed and mortgages; the ground of each of the said attacks being, in substance, that in so far as the personal property was concerned the deed of trust and mortgages were void as against those creditors because of certain provisions of the statute of the state of Idaho, including section 3408 of its Revised Codes, which declares that "a mortgage of personal property is void as against creditors of the mortgagor * * * unless * * * it is accompanied by the affidavit of the mortgagor that it is made in good faith," etc.

Subsequently the complainant in the foreclosure suit moved to vacate each of the orders allowing the interventions to be filed and to dismiss each of the answers filed by the interveners, which motions were by the court denied. Thereupon the allegations in the answers of the interveners were by agreement of counsel deemed denied, and the cause came on for trial, the receiver Wallace having, by direction of the court, also filed an answer which, in addition to various admissions, alleged and denied as follows: "That at the time of the appointment of the receiver there was on hand a large and miscellaneous assortment of construction material such as poles, wire, cross-arms and insulators, transformers, and other material of like kind intended for construction purposes; that a portion of said material had been intended to be used for the construction of a line from Mountain Home to Boise, which line has been abandoned and the material therefor was on hand; that a portion of said material not needed by the defendant company or the receiver has been sold by said receiver to the Southern Idaho Water Power Company, and an accounting therefore has been made. That in addition to this, at the various offices of the company in Twin Falls, Oakley, Shoshone, Jerome, Glenns Ferry, Gooding, and Mountain Home, a stock of lamps, fans, small motors, heating devices, and other merchandise was kept on hand for the convenience of the customers of the company and to supply them with appliances which they needed, these appliances being in the nature of appliances ordinarily carried in electric stores. * * * That defendant has no knowledge, information, or belief sufficient to enable him to answer as to whether or not said bonds were lawfully or properly sold or whether the purchasers thereof obtained any title thereto, and defendant therefore denies the same."

The prayer of the answer of the receiver was: "That the court first ascertain the amount actually due upon the obligations of the Great Shoshone & Twin Falls Water Company, defendant herein, and that only so much of the property of said company be sold as is covered by the liens described in the bill of complaint herein, and that the defendant be given all proper relief."

The record shows these further facts: That before the complainant closed its case an attorney of the court informed it that he had received a telegram from the president of the power company (who was also president of the American Waterworks & Electric Company), requesting him to file an answer in the case on behalf of the power company, admitting all of the allegations of the bill and supplemental bill, and that he had prepared such an answer which he asked leave to file, which application the court took under consideration, but subsequently denied. And, further, that the claims of Jak M. Shank in the sum of $4,390, Guy I. Towle in the sum of $13,963.01, and L. M. Plumer and E. B. Scull as executors in the sum of $15,625 had been allowed and approved as claims against the power company in the general creditors' suit, and that the deed of trust and supplemental mortgages were recorded in the mortgage records of the several counties as alleged in the bill of complaint, but were not recorded in the chattel mortgage records.

A certified copy of the unpaid judgment of Hahn, as administrator, against the power company was also introduced in evidence.

The trial court held and decreed that the lien created by the deed of trust and supplemental mortgages was subject and subordinate to the claims of the intervening creditors "as to all such articles of personalty as do not form a constituent part of and are not presently necessary for the maintenance, repair, and operation of the hydroelectric, generating, transmitting, and distributing systems of the power company or reasonably necessary in conducting its

business as a public service corporation, such personalty consisting of construction supplies and materials in excess of the present needs of the power company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the power company in other corporations, which said claims have been approved and allowed in the respective amounts following, to wit:

Guy I. Towle	$13,963 01
Carl J. Hahn, as administrator of the estate of Harry M. King, deceased	6,225 15
L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased	15,625 00
Jake M. Shank	4,390 00

and there is due the said claimants respectively the sums aforesaid, with interest thereon at the rate of 7 per cent. per annum from the date hereof."

Thereupon this stipulation of the respective counsel was entered into: "It is hereby stipulated by and between the parties hereto, that in view of the decision of the court that the lien of complainant's mortgage is, as to certain personal property, subject and subordinate to the claims of certain of the defendants and the interveners, and in view of the further fact that it is to the interest of all parties to this suit and creditors of the Great Shoshone & Twin Falls Water Power Company that all the property, rights, and assets of said corporation be sold as an entirety and without delay, the decree in this cause shall provide for the sale of all of the property of the said defendant Great Shoshone & Twin Falls Power Company in block and as an entirety, but the sale of said premises shall not be construed as a waiver of the right of appeal of any party to this cause as to any matter relating to the distribution of the proceeds of sale, or as to any matter involved in the decision of the court rendered herein on the 17th day of November, 1915, but all objections that might be raised on an appeal from the decree herein may be raised with the same force and effect on an appeal taken after the sale of such property under said decree."

Subsequently, and before the making of the sale directed by the decree, this further stipulation was entered into: "It is hereby stipulated and agreed by and between the parties hereto, through their respective solicitors, that the personal property referred to in paragraph second and other paragraphs of the decree entered in this cause on December 6, 1915, consisting of construction supplies and materials in excess of the present needs of the power company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the power company in other corporations, being the property upon which the interveners and certain of the defendants were adjudged to have claims prior and superior to the lien of complainant, is of the reasonable value of $45,000. It is further stipulated and agreed that in apportioning the proceeds derived from the sale of the property of the defendant power company under said decree, said sum of $45,000 shall be placed into what is in said decree sometimes called the 'Unsecured Creditors' Fund,' to be apportioned and distributed as in said decree provided, relative to the payment and distribution of such Unsecured Creditors' Fund. This stipulation is made to avoid the necessity of a hearing for the purpose of apportioning the proceeds of sale, as provided in paragraph 14 of said decree, and nothing herein contained shall be construed as a waiver of any right by any of the parties (to) except or object to or appeal from any of the provisions of said decree, or any order hereafter made based on said decree."

On January 8, 1916, all of the property of the power company was sold at public sale under the decree of foreclosure and bid in for the sum of $2,000,000, the upset price theretofore fixed by the court, and on the following February 14th the motion for confirmation of the sale came on for hearing, and it was on that day confirmed. Thereafter the American Waterworks & Electric Company presented to the court a complaint in intervention, which it asked

leave to file, to which were made defendants Guy I. Towle, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, defendants in said cause, and L. M. Plumer and E. B. Scull, administrators of the estate of L. L. McClelland, deceased, and Jake M. Shank interveners therein, the record reciting, "And the above and foregoing amended complaint, when presented to the court on the 28th day of February, 1916, was unverified, and the court stated at the hearing that the amended complaint in intervention might be used in its unverified condition in the presentation of application for leave to intervene, with the understanding that the said amended complaint in intervention should be verified by the proper officers, and when so verified might be lodged as of date the 28th day of February, 1916. This permission to hear the application of the American Waterworks & Electric Company on its unverified complaint in intervention was granted to the American Waterworks & Electric Company for the reason that petitioners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, Jake M. Shank, Guy I. Towle, and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, had noticed for hearing at 10 a. m. on the 28th day of February, 1916, their petition for an order upon the special master to pay the prior lien claims of these petitions, and counsel for the American Waterworks & Electric Company had asked leave of the court to present the application of the American Waterworks & Electric Company on the unverified complaint in intervention in order that the two matters might come before the court on the same morning." The application was by the court denied.

The appeals are by the trustee and the American Waterworks & Electric Company.

Murray, Prentice & Howland, of New York City, and Richards & Haga and J. L. Eberle, all of Boise, Idaho, for appellant Equitable Trust Co. of New York.

Wyman & Wyman, of Boise, Idaho, for appellant American Waterworks & Electric Co.

Martin & Cameron, of Boise, Idaho, for appellees Plumer and Scull.

Alfred A. Fraser, of Boise, Idaho, for appellee Jake M. Shank.

James H. Wise, of Twin Falls, Idaho, for appellee Hahn.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] We readily concede that none of the intervening creditors of the insolvent corporation had or acquired any lien on any of its personal property, but are unable to sustain the contention of the appellant that the court below erred in permitting the intervention of such of the general creditors who asked to intervene prior to the entry of the decree of the court. One of such creditors had obtained judgment against the insolvent, and the demands of the others of them had been presented and allowed as claims against the insolvent debtor. Section 3418 of the Revised Statutes of Idaho provides, with reference to mortgages upon property within the state, as follows:

"The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which purpose an injunction may issue if necessary."

And section 4111 of the same Code reads:

"Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third

person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint."

While the Supreme Court of Idaho held in the case of Union Trust & Savings Bank v. Idaho Smelting & Refining Co., 24 Idaho, 735, 135 Pac. 822, that the appellant there was not entitled to intervene in the foreclosure suit there involved, having failed to allege the insolvency of the corporation which executed the mortgage, or to show that the party claiming the right to intervene had prosecuted its claim to judgment, or had made any effort to collect the same from the debtor, or that an attempt to do so would have been useless, yet held that if the appellant had "first shown the existence of its claim, and that it had exhausted all of its legal remedies, or that those remedies were useless, and it would be vain to pursue them, and that the only way it could secure and collect its claim would be out of the property covered by this mortgage, then it would have been in a position to contest the validity of the mortgage and to raise the question as to whether or not" the bonds there involved had been issued and the mortgage had been executed in violation of the provisions of the Constitution of the state, citing section 4111 of the state statute, and declaring that:

"Any third party may intervene in an action in this state who has 'an interest in the matter in litigation, in the success of either of the parties, or an interest against both.' "

In the present case the interventions allowed by the court below met the requirements of the case just cited. The previous case in the same court of Neustadter Bros. v. Doust, 13 Idaho, 617, 92 Pac. 978, is wholly unlike the present one. There the action was against a sheriff to restrain and enjoin him from selling certain personal property described in the complaint under a chattel mortgage which had been previously executed by the copartnership of Lang & Wunderlich in favor of the Exchange National Bank of Cœur D'Alene City; and the question was as to the sufficiency of the complaint. It alleged, among other things, that Lang & Wunderlich executed to the bank their certain chattel mortgage, which was made a part of the complaint, and that:

"The said chattel mortgage, as to any of the creditors of said Lang & Wunderlich, was void from the beginning, and that as to the said creditors and any and all of them, the said chattel mortgage was and still is null and void and of no force and effect whatsoever or at all."

In holding the complaint insufficient, the court said:

"The plaintiff makes no attempt to show that Lang & Wunderlich had no other property out of which to pay their indebtedness. It contains no allegation of insolvency, nor does it allege any facts from which insolvency can be reasonably inferred. It does not state that the plaintiff has ever made any demand on Lang & Wunderlich for the payment of the debt due, nor does it show any steps taken toward the collection of the same. They are

not made parties defendant in the action against the sheriff, nor has the plaintiff reduced his claim to a judgment. He has commenced no action against Lang & Wunderlich, has never attached this or any property, and in no way connects his right, interest, or claim with the property that he seeks to restrain the sheriff from selling, and no assurance is given when he will prosecute his action or that he will ever obtain a judgment against them. It can make no difference to the plaintiff whether the sheriff sells this property or not, if Lang & Wunderlich pay the plaintiff. If they should have the means with which to pay their indebtedness to the plaintiff, or if they have other property, either merchandise or cash, then there can be no reasonable objection to their paying their other debtor, the Exchange National Bank."

We do not understand the case last cited to hold that under the provisions of the Idaho statute that has been cited a chattel mortgage, unaccompanied by the affidavit of good faith and not recorded as required by the state statute, is valid as against all creditors of the mortgagor, except such as have a lien upon the property; nor do we understand the case of Ryan v. Rogers, 14 Idaho, 309, 94 Pac. 427, or Martin v. Holloway, 16 Idaho, 513, 102 Pac. 3, 25 L. R. A. (N. S.) 110, cited by the appellants in support of the contention, to so hold. In the first of these cases what the court held was that where the mortgagor remains in possession of the chattels and with the knowledge and consent of the mortgagee and continues to sell and dispose of the same without applying the proceeds of the sale to the reduction of the mortgage debt, the existence of such facts, whether shown by the mortgage itself or by evidence aliunde, will invalidate the mortgage as against creditors and other interested third parties, and that although such mortgage be defective or invalid as to third parties, if the mortgagee take possession of the property covered by it prior to the acquiring of a claim thereto by attachment, execution, or other lien, the possession of the mortgagee will be protected and his security be held valid to the extent of his claim.

In the second of the cases last cited it was held that the mortgagor and mortgagee to a chattel mortgage may make an agreement, valid as between themselves, that the possession of the property mortgaged shall remain in the mortgagor, with power on his part to dispose of it and apply all or any part of the proceeds in payment of the mortgage indebtedness, and that section 3409 of the Revised Codes of Idaho recognizes the right of a mortgagor and mortgagee to such a mortgage to agree that the possession of the mortgaged property may remain in the mortgagor, or be transferred to the mortgagee, in which latter event such possession by the mortgagee is equivalent to the recording of the mortgage, and gives to the world the same notice that the recording of the mortgage would give.

In all that we see nothing inconsistent with the sections of the Idaho Statutes that we have above quoted, or with the decision of that court in the case of Union Trust & Savings Bank v. Idaho Smelting & Refining Co., supra, or with what we have above held.

[2] We quite agree with the learned counsel for the appellants that, in the absence of specific state statute or decisions of the state courts conferring special rights and powers, and where he is not appointed for the purpose of impounding it for a specific purpose, the appointment of a receiver of property by a federal court is for the protec-

tion and preservation of all rights and interests therein existing at the time of such appointment. Authorities to this effect are so numerous that we think it is unnecessary to cite them.

[3] The receiver in the present suit, therefore, held all of the personal property of the insolvent corporation, to which the trustee's liens did not apply, for the benefit of the complainant in the receivership suit and for such of the other general creditors of the insolvent debtor as should join therein. So far as appears all such general creditors did so join except the appellant American Waterworks & Electric Company, which company, while having actual notice of all the litigation in question, for some reason or reasons abstained from intervening during the progress of the trial. But after its conclusion and after the entry of the decree in the cause and the creation of a specific fund by stipulation of the respective parties to the suit, which was the agreed value of that portion of the personal property to which the court held the trustee's liens did not apply, and which was therefore subject to the payment of the claims of the general creditors who had intervened in the receivership suit, and after the sale of all the property covered by the deed of trust and supplemental mortgages the appellant American Waterworks & Electric Company presented to the court a petition to intervene, which petition was directed only against the general creditors of the insolvent debtor who had intervened in the foreclosure suit; alleged their respective claims and an allowance thereof in and by the decree of the court; that the amount realized from the personal property held by the court not to be covered by the trustee's liens was $45,000, and, among others, made these further allegations:

"That all of said claims and a large number of other claims aggregating upwards of $4,000,000, the exact amount thereof being to your intervener unknown, were filed with the receiver in said cause pursuant to the order of the court and the notice of the receiver requiring the filing of claims against the power company for allowance by the receiver and court, to the end that the same might be entitled to share in the equitable distribution of the assets of such receivership estate pursuant to law and the principles of equity governing the administration and distribution of assets of insolvent debtors by courts of equity in suits brought by one or more creditors in behalf of themselves and all other creditors of the insolvent debtor. * * * That in addition to said sum of $45,000 this intervener is informed and believes that there is approximately $25,000 in the hands of the receiver of said power company that may also be available for the payment of claims of general creditors, making in the aggregate approximately $70,000 available for the payment of claims aggregating upwards of $4,000,000; that the other property of said power company subject to complainant's deeds of trust and mortgages was sold for $2,000,000 by the special master under the decree of foreclosure, which amount was less, as this intervener is informed and believes and so alleges the fact to be, than is due the said plaintiff under said decree of foreclosure."

Notwithstanding the allegation in the complaint of intervention thus sought to be filed by the American Waterworks & Electric Company that there were a large number of other claims against the power company, none of those alleged other claimants at any time intervened or sought to intervene in the foreclosure suit, although the record shows that notice was mailed to each known creditor of the insolvent

company, and a like notice published once a week for four successive weeks in two designated newspapers by the receiver under the order of the court made May 4, 1915.

That the appellant American Waterworks & Electric Company had the same right to intervene in the foreclosure suit and set up its claim to that portion of the personal property upon which the trust deed and supplemental mortgages were not a lien as had any and every other creditor of the insolvent debtor is clear, and that it had full opportunity of so doing is equally apparent from what has already been said. But instead of availing itself of that right and opportunity, it allowed the contest to be carried on by and at the expense of those of the general creditors of the insolvent that have been named, resulting in the decree and funds that have been referred to. Not until after the suit in which it could have intervened had been ended by the final decree therein and the sale of the property thereunder did that company manifest any intention of intervening, and not until those creditors had made application to the court for the payment of their claims out of that fund, did the appellant American Waterworks & Electric Company appear with its verified complaint in intervention, claiming such an amount as would practically take the whole of the fund in question.

We think that the most favorable view that can be taken of the application of the Waterworks & Electric Company is that it was addressed to the sound discretion of the court below, and are of the opinion that such discretion was not abused by the denial of the application. In denying it the court, after referring to the laches of the petitioner, said, among other things:

"It appears from the record in the case that during the entire time of the pendency of the foreclosure suit all the bonds were held by the National Securities Corporation, and it now appears from the amended petition that there was some sort of an arrangement between that company and the petitioner for the purchase of this claim. In view of the record in the receivership and in this case, it is thought to be incumbent upon the petitioner, before it can ask the court to exercise a liberal discretion in its favor, fully and frankly to negative the proposition that it stood with the holders of the bonds in the attempt to defeat the interveners in procuring the relief, whereas now it seeks to appropriate to itself substantially all that they have succeeded in wresting from the bondholders, at their own expense and peril. But be that as it may, I have been unable to see any substantial ground on which the right of the petitioner to intervene may be predicated. When the matter was first presented to me upon the 14th of February I had the impression that while it would not be permitted to intervene to share pro rata in the decree, the intervention might be allowed for another purpose. To explain, there is a fund, the precise amount of which has not yet been determined, in the hands of the receiver in the creditors' suit, which presumably will ultimately be distributed to the unsecured creditors, including the interveners and the petitioner, and also the plaintiff trustee for such deficiency judgment as may be awarded to it after applying the proceeds of the sale to the liquidation of its claim. My thought was that by paying the $45,000 to the interveners the proceeds of the sale would be diminished by that amount, and therefore the deficiency judgment would be correspondingly increased, and the aggregate of the unsecured claims entitled to share in the receivership fund would be equally increased, and thus the petitioner would receive a smaller dividend than would have been distributed to it if the interveners had stayed out of this suit. It occurred to me that perhaps it could be properly held—although

that seemed extremely doubtful—that a duty rested especially upon Towle, the plaintiff in that action, and possibly upon other interveners, not to do anything even in another suit by which they would be benefited to the disadvantage of other creditors. But whether such was or was not their duty, upon reflection it now appears clear to me that the petitioner would not suffer the slightest prejudice even in this respect. Indeed it is practically conceded by counsel that the petitioner's position is precisely the same, and the share it will receive out of the funds in the hands of the receiver is precisely the same that it would have been had the interveners never come into the foreclosure suit. The aggregate of the claims to participate in the distribution of that fund will not be increased, because in so far as the deficiency judgment is increased the claims of these interveners will be diminished, so that the aggregate will remain precisely the same. Even if therefore it be assumed that for some reason not made clear the interveners owed the petitioner the duty to take no action which would prejudicially affect its distributive share in the receivership fund, it cannot invoke the principle of equitable estoppel here as a ground for intervening, because admittedly it has suffered and will suffer no injury. The interveners have done nothing against good conscience or to the prejudice of the petitioner in securing and appropriating to their own use the judgment in the foreclosure case. They were under no contractual obligations to the petitioner, and I am unable to perceive how it can be held that they have violated any duty or obligation in seeking payment of their claims out of a fund which in whole would have otherwise gone to the bondholders, and not at all to the unsecured creditors. The judgment is entirely the fruit of their diligence, in the exercise of which they took nothing from the petitioner. The petitioner had the same right as they to come into the suit, of the pendency of which it undoubtedly had knowledge. If it did not join hands with the plaintiff to defeat the interveners, still, having knowledge of the pendency of the foreclosure suit, and presumably being advised of its legal rights, it chose to remain silent and inactive, thus avoiding the expense and peril of litigation, until after these interveners have succeeded, and then, when they are about to receive the fruits of their diligence, it seeks to step in and seize the same. It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the payment of the bonds, it never lifted a finger in resistance, or suggested that the receiver do so."

The decree and orders appealed from are affirmed.

AMERICAN WATERWORKS & ELECTRIC CO. et al. v. TOWLE et al. (BOISE TITLE & TRUST CO. et al., Interveners).

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917.)

No. 2902.

CORPORATIONS ⊂=566(2, 3)—RECEIVERSHIP—PRIORITIES OF CLAIMS.

Const. Idaho, art. 11, § 15, provides that the Legislature shall not pass any law permitting the leasing or re-leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities contracted or incurred in the operation, use, or enjoyment of the franchise or its privileges. Rev. Codes Idaho, § 2769, as amended by Sess. Laws Idaho 1909, p. 163, authorizes corporations to purchase and hold property and to sell, lease, or transfer any rights, privileges, franchises, or other property, etc. A light and water company sold its property to a power company, part of the price to be paid in installments out of the income from operating the system and delivered a deed in escrow. Thereafter a barn was burned as a result of the negligent construction, maintenance, and operation of a line of the light and water com-

pany, and the owner of the barn recovered a judgment against the power company. *Held*, that on a receivership of the power company, the judgment was a preferred claim against the proceeds of the sale of the light and water company's system over the claims of bondholders under a mortgage executed by the power company and covering after-acquired property and over the claims of other creditors of the power company.

Appeal from District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by Guy I. Towle against the Great Shoshone & Twin Falls Water Power Company in which a number of other parties intervened and in which a receiver for the defendant power company was appointed. From an order (232 Fed. 733) allowing the petition of the Boise Title & Trust Company for allowance of a preferred claim, the American Waterworks & Electric Company and another appeal. Affirmed.

Wyman & Wyman, of Boise, Idaho (Frank T. Wyman, of Boise, Idaho, and Graham Sumner, of New York City, of counsel), for appellants.

S. H. Hays, of Boise, Idaho, for appellees.

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

HUNT, Circuit Judge. Appeal by the American Waterworks & Electric Company, as a creditor, and William Wallace, as receiver of the Great Shoshone & Twin Falls Water & Power Company, called the Great Shoshone Power Company, from an order of the District Court directing the receiver to pay a judgment for $1,228.55, recovered by J. W. Newman against the Great Shoshone Power Company from the proceeds of the sale of a water system in the town of Shoshone, Idaho. The order of the District Court was made pursuant to a petition presented by the Boise Title & Trust Company, which had given bond to secure the judgment in Newman's favor pending appeal.

Prior to July 1, 1912, the Great Shoshone Power Company, of Delaware, owned and operated electric power plants in Idaho, and the Shoshone Light & Water Company, of Idaho, owned and operated a power plant and waterworks in Shoshone, Idaho. On that day, July 1, 1912, the Shoshone Light & Water Company contracted with and transferred to the Great Shoshone Power Company possession of all its power plants, real estate, and other property in consideration of $55,000, $15,000 to be paid in cash, the balance payable from gross earnings of the plants in monthly payments until the balance should be fully paid. On February 12, 1913, the Shoshone Light & Water Company delivered to a bank of Shoshone a deed in favor of the Great Shoshone Power Company, to be held under escrow agreement, dated February 6, 1913. The Great Shoshone Power Company operated the property of the Light & Water Company until November 2, 1914, when, because of insolvency, a receiver was appointed for all the property of the Great Shoshone Power Company. In April, 1913, a barn, owned by one Newman at Shoshone, was burned. Newman

brought suit in the state court against the Great Shoshone Power Company, charging negligence in respect to construction and operation of electric wires, and on April 24, 1914, recovered judgment for $1,079.80, and threatened to issue execution. The Boise Title & Trust Company gave a bond to secure the judgment and stay execution pending an appeal to the Supreme Court of Idaho, and appeal was actually pending in April, 1913, at the time of the appointment of the receiver of the Great Shoshone Power Company. Thereafter, in March, 1916, the Supreme Court of Idaho affirmed the judgment in favor of Newman. 28 Idaho, 764, 156 Pac. 111. This occurred after the power company had paid a considerable sum in excess of the amount of Newman's judgment on account of the purchase price of the property covered by the contract of July 1, 1912. Afterwards the receiver completed the purchase of the property, and from the income paid more than $7,000. In 1910 and 1911, the Great Shoshone Power Company made mortgages to the Equitable Trust Company as trustee, covering all its properties, to secure bonds, and in April, 1915, foreclosure was had by the Equitable Trust Company of New York as trustee.

The District Court held that the judgment in favor of Newman was entitled to a preference in the distribution of the proceeds of the sale of the Shoshone water system, over and above the mortgage bondholders and other creditors of the Great Shoshone Power Company. It was the opinion of the court that the claim for preference should be sustained upon this ground: That section 2769 of the Revised Codes of Idaho, as amended in 1909 (Session Laws 1909, p. 163), which purports to confer upon corporations the power to "purchase and hold personal estate as the purposes of the corporation may require; * * * and to sell, lease, * * * transfer, mortgage, or convey, any rights, privileges, franchises" or other property "other than its franchises of being a corporation; and to purchase, own, vote or hypothecate the stock and bonds of other corporations"—should be read with relation to the limitations of section 15 of article 11 of the Constitution of the state of Idaho, which provides that the "Legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation [or] use, or enjoyment of the franchise or any of its privileges;" and that when read together the correct view is that if Newman had sued the Shoshone Light & Water Company alone, as he had a right to do, or had joined it as a defendant with the Great Shoshone Power Company, and had secured judgment against it, it could not, by transferring its property, have put it beyond the reach of Newman's judgment; and, furthermore, that the execution and putting in escrow of the deed by the light and water company after it had negligently constructed the line, and the delivery of the deed to the Great Shoshone Company after the accident, could not, in view of the provisions of the state Constitution heretofore referred to, defeat Newman's right to pursue the property conveyed and to require that it should first be devoted to the satisfaction of his judgment.

The agreement of July, 1912, between the light and water company and the power company was a contract for sale for all power plants, transmission lines, real estate, and all other property owned by the light and water company, as shown by the inventory of June 1, 1912. Under this contract the power company had taken possession on July 1, 1912, and was acquiring the property of the light and water company by payments out of the income accruing to it from operating the system. As a fact, before the bond was given to stay execution upon Newman's judgment, the power company had paid to the light and water company more than enough to pay the judgment claim, and subsequently, out of the income continued to pay, and after the receivership came the receiver went on and made further payments in excess of $7,000. When Newman sued the power company, September 10, 1913, he alleged that the light and water company maintained and operated the system under a franchise from the village of Shoshone until July 1, 1912, when the power company purchased and took over the system in its entirety, together with the franchise, and maintained and operated the system thereafter; that in 1911 the water company negligently extended its wires across the property of Newman and attached them to his barn; and that the power company, after the purchase and up to April 11, 1913, negligently maintained and operated the poles, wires, and electric system, and permitted electricity to pass through a side of his barn, and the current coming in contact with the barn and contents set the building on fire; and that by reason of negligence in construction by the water company, and because of negligence in maintenance by the power company, fire resulted.

The District Court correctly held that under the facts stated in Newman's complaint he could have sued the two companies in negligence—one as constructor and the other as operator. But he elected to claim damage from the power company, the sole operator when the damage was done. Having assumed such a position, the question is this: Is it equitable that, although the lien of the trustee and bondholders attached to the plant and properties of the light and water company transferred to the power company, solely by virtue of the covenant of the trust deed of the power company that the mortgage should embrace after-acquired property, such lien attached, free of any obligation to pay Newman's claim against the property of the corporation? To so hold, we think, would be a narrow construction. It is true, the originating delict was faulty construction by the water company, and that the immediate cause of action arose out of careless operation by the power company, but it arose while the operating company was acquiring the property by using the income from operation, and before the deed in escrow was delivered to the power company. Where there has been such an interrelation of possession and operation and method of payment, no principle will prevent the doing of equity as between mortgagor and mortgagee and creditors, by treating the Newman claim as entitled to preference over the claim of bondholders, especially if payment of it can be had out of funds realized from the sale of specific property or any part of it which was turned over by the constructing company to the buying operating company under the agreement of sale.

It is true, there was no lease between the two corporations, but there was an agreement to sell the property of the water company, and a deed placed in escrow. The legal title was in the water company, the equitable title in the power company, and if we assume that as between the vender and vendee, when the final payments were made to the water company and the deed was delivered, it related back to the time of its execution, nevertheless, under the circumstances the ends of justice do not require the application of that usual rule so as to defeat the claim of Newman. It is no strain to draw an analogy between such an actual situation and that which would have been presented if there had been a lease by the water company to the power company. There was an alienation. That the franchise itself may not have been under contract for transfer does not materially affect the question; for equity will treat the claim of Newman as if it were a fixed pre-existing liability of the water company, incurred in the enjoyment of a franchise before the property was finally sold, and therefore to be protected under the constitutional provision quoted. Seymour v. Boise R. R. Co., Limited, 24 Idaho, 7, 132 Pac. 427.

The District Court proceeded under the conviction that equity should protect the preference by taking hold of a fund directly traceable to the sale of certain property which had belonged to the water company. We think this was proper, and that it is just to order payment of the claim by the power company as an expense incident to operation by it. If, in the course of operation of an electric system, taken possession of under contract of purchase, such as there was here, the buying company carelessly allows an uninsulated wire, put up by the selling company to come in contact with a corrugated iron barn, and as a result of such negligence fire occurs, and damage is done, and judgment against the operating company is obtained, it seems to be no strain upon accounting methods to say that the payment for such damage may fairly be counted as an expense incident to the operation of the system, when the object of operation has been to make money wherewith to acquire title to the plant which has become part of the mortgaged property of the buying company.

Affirmed.

NEW v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917. Rehearing Denied December 3, 1917.)

No. 2948.

1. POST OFFICE ⊂=35—OFFENSES AGAINST POSTAL LAWS—USE OF MAILS TO DEFRAUD.

The making of pretensions and promises which were false and fraudulent for the purpose of obtaining money and other things of value from others, and the depositing in the post office of letters in pursuance of the fraudulent scheme, were all the essential elements of the offense of using the mails in execution of a scheme to defraud.

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

2. CONSTITUTIONAL LAW ⊂=84—POST OFFICE ⊂=35—USE OF MAILS TO DEFRAUD—RELIGIOUS LIBERTY.
Notwithstanding the provisions of the Constitution of the United States securing to every citizen the right of religious freedom, it was a violation of the statute forbidding the use of the mails in execution of schemes to defraud for defendant to pretend to believe that he had obtained a supernatural state of self-immortality by righteous conduct, which power enabled him to conquer disease, death, poverty, and misery, and could be transmitted to others willing to pay therefor, for the false and fraudulent purpose of securing money and other things of value from third persons by use of the post office, and to use the post office for such false, fraudulent, and illegal purpose.

3. POST OFFICE ⊂=49—OFFENSES AGAINST POSTAL LAWS—EVIDENCE.
On a trial for using the mails in the execution of a scheme to defraud, letters alleged to have been deposited in the mails in pursuance of such scheme were admissible.

4. POST OFFICE ⊂=49—OFFENSES AGAINST POSTAL LAWS—EVIDENCE.
In a prosecution for using the mails in execution of a scheme to defraud through companies, associations, and corporations to be organized for the ostensible object of publishing and selling books, printing and publishing magazines, educating and instructing eligible persons, and conferring upon them supernatural gifts and powers, which defendant pretended to believe he had acquired, evidence *held* sufficient to support a finding that defendant used the mails as a means of obtaining money in pursuance of a grossly fraudulent scheme and with intent to defraud.

In Error to the District Court of the United States for the Southern Division of the Northern District of California.

John Fair New was convicted of an offense, and he brings error. Affirmed.

Reisner & Honey, of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was convicted under the second, third, and fourth counts of an indictment containing seven counts, charging him and one Marie T. Leo, alias Maria Tully, alias Marie Graham, with devising a scheme to defraud, to be executed by means of the post office establishment of the United States, and that they in fact did use the mails in such execution. The codefendant of the plaintiff in error was acquitted as to all of the counts, and he was acquitted as to counts 1, 5, 6, and 7 under the instruction of the court; there having been no proof of the depositing in the mails of the letters respectively alleged in those counts to have been so placed.

In the court below the validity of the indictment was questioned, both by motion to quash and by demurrer, and here it is strenuously contended in behalf of the plaintiff in error that it is in legal effect based on the religious belief of the plaintiff in error, in contravention of that provision of the Constitution of the United States securing to every citizen the right of religious freedom.

[1] It alleges various pretensions and promises of the defendant, New, which are alleged to have been false and fraudulent, and to have

been made for the purpose of obtaining money and other things of value from others, and it alleges that in pursuance of that fraudulent scheme he deposited in the post office certain letters, one of which was set out in each count of the indictment. Those alleged facts are essential elements of the offense denounced by the statute upon which the indictment was based, but all that are essential. Stokes v. United States, 157 U. S. 188, 15 Sup. Ct. 617, 39 L. Ed. 667; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581; Miller v. United States, 133 Fed. 337, 66 C. C. A. 399; Stewart v. United States, 119 Fed. 89, 55 C. C. A. 641.

[2] The government in no way sought by the indictment to prevent the defendants from honestly and sincerely entertaining the views the indictment alleges they pretended to entertain, nor from honestly and sincerely endeavoring to persuade others, by any legitimate means, to embrace the same notions. But what the government did undertake to do, and what it had the statutory authority for doing, was to prevent by indictment the defendants thereto from pretending to entertain the views therein specifically alleged for the false and fraudulent purpose of procuring money or other things of value from third parties by use of its post office establishment, of which use the indictment alleges the defendants availed themselves for the said false, fraudulent, and illegal purpose. That is this case, and the whole of it, in so far as concerns the point already mentioned. In such cases, as held by the Circuit Court of Appeals of the Fifth Circuit in the case of Post v. United States, 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989, the question of the defendant's good faith is the cardinal question. See, also, United States v. White (D. C.) 150 Fed. 379, where the pretensions of the defendant to the indictment and the matter sent through the mails, while of the somewhat general nature of those here involved, were insignificant in comparison, and where the court instructed the jury that the point that they were to consider and determine was, not whether it was possible that the things which the defendant promised to do could be possibly done by any one, but whether it had been proven that the defendant did not intend to do what he promised he could and would do. In determining that question, said the court:

"You are entitled to consider and weigh every fact and circumstance which you find to have been proved which in your judgment throws light upon his good faith. The question is: Did he honestly, in good faith, intend to do the things which he promised he could and would do, as the consideration for the money which he proposed to himself to obtain from those with whom he opened up communications through the post office as charged in the indictment?"

[3] That the letters alleged in the indictment to have been deposited in the mails in pursuance of the alleged scheme were admissible in evidence, of course, goes without saying, and that there was sufficient evidence given to justify the jury in finding that those specified in the counts on which the plaintiff in error was convicted were so deposited is, we think, equally clear. Their character is of no consequence. United States v. Young, 232 U. S. 155, 161, 34 Sup. Ct. 303, 58 L. Ed.

548; United States v. Kenofskey, 243 U. S. 440, 37 Sup. Ct. 438, 61 L. Ed. 836.

[4] It is, however, further contended on behalf of the plaintiff in error that the trial court should have directed a verdict in favor of the plaintiff in error on the ground that there was no evidence tending to show that he formed any scheme or artifice to defraud, which point calls for a brief statement of what constituted the alleged scheme, and for some reference to some of the testimony introduced tending to show the commission by the plaintiff in error of the alleged offenses.

Except as to the letters alleged to have been deposited by the plaintiff in error in the mails, the three counts under which he was convicted are, in substance, the same, and alleged that he and his codefendant at a certain specified time and place, within the jurisdiction of the court below, devised a scheme and artifice to defraud various persons and the public generally, and particularly certain specifically named persons, termed in the indictment "victims," and divers other persons to the grand jurors unknown, which scheme and artifice was to be effected by means of the post office establishment of the United States, and was, in substance, as follows:

That the defendants would pretend that New was a human being who had attained the supernatural state of self-immortality in the body, by a course of righteous conduct consisting in abstinence from the use of meats of any kind as food; abstinence from the use of intoxicating liquors of any kind; abstinence from the use of indecent or profane language of any kind; abstinence from telling falsehoods and bearing false witness against his neighbors; and, lastly, by abstinence from the sin of committing adultery by acts committed, evil desires, or lustful eyes, or otherwise. That such supernatural power had enabled him to conquer disease, death, poverty, and misery. That this power could be transmitted by him to others who were willing to accept his teachings and pay therefor the sums demanded by him. That the defendants would likewise pretend that New was of divine origin and birth, a son of the Holy Ghost, greater in authority, majesty, and power than was Moses, Elijah, or John the Baptist; yes, that the mantle of the "Man Galilea" had fallen upon him, and he had received the "keys of the kingdom of Heaven." That each and every of such pretensions would be false and untrue, and known by the defendants and each of them so to be, and that New had no supernatural power or authority of any kind or character, but was an impostor, an heretic, a seeker of vainglory, a covetor of his neighbor's goods and his neighbor's wife, and was also an habitual indulger in each and every of the sins and practices he pretended to condemn. That the defendants, in order to obtain money and other things of value from the said victims, would pretend that New was the author of a large number of books, to wit, 100, then published, treating of the said supernatural gifts and power, and its transmission to others, the said New not being the author of but one book, as the defendant well knew, and that volume consisting only of a small compilation of platitudes and garbled extracts from other works. That he would organize in various cities of the United States, companies, associations, and corporations

of various kinds, with the ostensible object of publishing and selling said 100 books, and of printing and publishing magazines, educating and instructing eligible persons and conferring upon them said supernatural gifts and powers, the defendants intending thereby to appropriate to their own use the sum or sums so invested, well knowing that no books of any kind other than the said one volume was being published, or was to be published by the defendants, and well knowing that no magazine was being published, or was to be published, by the defendants, and also then and there well knowing that it was not the intent of said defendants or either of them to publish any books or any magazine, or give anything of value for said money so invested, the true intent of said defendants being to appropriate to their own private use all moneys received, and, when said fraudulent acts became known, to remove themselves to another city of the United States and organize similar concerns and corporations and make the same false pretensions, under the name of different corporations or associations, and using assumed and fictitious names for themselves for such purpose. That likewise it was a part of said scheme that defendants should advertise and claim that they had organized, according to law, and were so conducting an educational university which had for its object the instruction and graduation of eligible persons applying, in the said art and power of supernatural healing and teaching, and that defendants should advertise that 70 free scholarships had been endowed by a man of great wealth, and that those getting said scholarships would pay only $10 for enrollment, and $5 more on graduation, and that those students not possessing said scholarships would have to pay $100 extra—the true intent and purpose of the defendants being, as they then and there well knew, to induce as many enrollments at $10 each as they could get, and that the victims might be thus induced to believe that a bargain or exceptional opportunity was being offered them to graduate and receive a lawful degree from said university, and might also be induced to invest money in said university in exchange for an alleged position or office therein, the defendants further then and there well knowing that no scholarships of any kind were endowed, and that it was not their intention to limit the issue of said scholarships to 70, or to any other number, and further then and there well knowing that no efficacy or power was lodged in said teachings or said alleged university, and further well knowing that the said victims were to receive and would receive nothing of value for the money so invested by them. That it was likewise a part of said scheme that said defendants should make a false and fraudulent application of sections 602 and 602a of the Civil Code of the state of California relating to the creation of corporations sole out of religious societies in this:

That defendants should pretend and claim, for the purpose of inducing the said victims to invest money in said corporations and associations, and subscribe for said magazines, and take and pay for said scholarships, and purchase said book, that the Newthot Church was a national organization, consisting of many branches situated in various parts of the world, and that pursuant to the regular adoption of rules and regulations a Newthot Congress had been duly called and

held in San Francisco, in the state of California, and that the defendant New, under the name and guise of Newo Newi New, had been elected Head Bishop or Archbishop of said Newthot Church for life, with the power of transmission by will or otherwise, to his successor, of the powers so conferred, and that among said powers so conferred on said Head Bishop was the power to bestow the titles of healer, pastor, and bishop upon the graduates of said alleged university, and the investors in said corporations or associations, and the subscribers to said magazines, and the purchasers of said scholarships and said books; that to that end the defendants should cause to be filed with the county clerk of the city and county of San Francisco, state of California, an affidavit required by said sections 602 and 602a of the Civil Code of the state of California, showing that the defendant New has been regularly elected to said office of Head Bishop; that a position of pastor, healer, or teacher in said Newthot Church should be promised to the said victims in order to induce them to invest their money in the various branches of said scheme, the defendants then and there well knowing that the Newthot Church, with which the defendants claimed to be identified, had no existence at any time or place, national or otherwise, and that no Newthot Congress had been called or held, and that no machinery existed whereby such a Congress could be called or held, that no material existed from which to convene such a Congress, and that said affidavit would be false and untrue, the true intent and object of the defendants being to falsely and fraudulently assume and claim and pretend that the defendant New had attained power and authority to which he was, as defendants well knew, not entitled, and in fact did not possess, in order to obtain money and other things of value from said victims in connection with the matters alleged; that in furtherance of said scheme and artifice to defraud, to be effected as alleged, the defendants did, at San Francisco, in the state and Northern district of California, on a specified day, willfully, unlawfully, knowingly, fraudulently, and feloniously deposit in the post office establishment of the United States a certain envelope upon which the postage was fully prepaid, which said envelope was addressed in a designated way—that set out in count 2 being addressed to Mr. Henry H. Doolittle, 511 So. Olive St., Los Angeles, Cal., and which envelope, so addressed, stamped, and deposited, contained a letter in words and figures as follows, to wit:

"Mr. Henry H. Doolittle, 511 So. Olive St., Los Angeles, Cal.—My Dear Brother: We are in receipt of your valued favor of recent date and thank you very much for your cordial and fraternal words of welcome.

"In answer to your question would say, that we have a fine copy of our three dollar book on the Newthot Science. This is the revised edition of the book we wrote you in regard to some time ago, the price of which was two dollars. This book is handsomely bound in cloth and stamped in gold and sells for three dollars, but, if you wish us to send it to you, you may send along the two dollars, and we will at once send it to you prepaid and call it square, as we are desirous of having you own a copy of this book, which we feel that you will enjoy immensely.

"With the hope of hearing from you soon, I remain, my dear brother and friend, always,

"Faithfully thine in truth, love and peace.

"[Signed] N. N. New (Bishop).

"The Newthot Temple, Inc., Palace of Education, P. P. I. E., San Francisco, Calif."

Regarding the contention on the part of the plaintiff in error that the evidence did not tend to show that the alleged scheme was fraudulent, it will be sufficient to make but a few references to the voluminous record, from which it appears that the plaintiff in error commenced his operations in the East and in New York, undertook the sale of a book called "New Life Theology, the New Life Science," written by his father, but from the front of which he removed a page and inserted in the place of it a photograph of himself; that in New York he also organized a corporation called the "New Life Publishing Company," for the ostensible purpose of publishing a large number of books—about 50—of which he claimed to be the author, and from the sale of the stock of which corporation he obtained from various persons various sums of money, and the use, at least, of some furniture. The witness Florence K. White gives this account of some of the operations of the plaintiff in error there:

"I first met Dr. New at the Broadway Central Hotel about the middle of September, 1910, through an introduction by Mrs. Anna Louise Johnson, who was a friend of mine, who was in New York trying to publish a book of hers called "New Dawn." Dr. New told me that he had a business that he wanted to formulate in the way of editing a book or a magazine, and that he wanted to promote the New Life Publishing Company; he wanted to organize it and to incorporate it. He asked me if I would like to join them, and I then asked him questions regarding the business and what would be necessary for me to do to go into the work. I asked him what he had to back the incorporation. I said: 'If it is a new thing, I do not care to go into it, for I have no money to lose.' He said there was no chance of losing any money, for it was an old established business. He said he had from his mother's estate $50,000 and from his father's estate $60,000 that he had already invested. I said, 'Have you a church established in New York?' and he said he had, with a membership of 800 people. He also told me that he had spent all his life in the work and had spent more than the money his parents gave him for the promulgation of the work. I asked him who he had for workers at that time, and he said, 'I have not got established yet;' but Mrs. Stetson is a lady who is going to raise the finances for the mother church. He said, 'Mrs. Stetson has already put in $1,500.' I said I did not care to go into anything that I have got to put money into, unless I am pretty sure that it is an established business; then he said to me, 'This will be a success.' He also told me he had Mr. Leech, a gentleman from Ohio, who would also put in $1,500, and if Mr. Leech found it necessary he was going to have several of his friends in his native city also invest $1,000 apiece, and there were three or four of them. He also told me that they had an apartment in one of the wealthy portions of New York City, 65 Central Park West; that they had secured that apartment for the home of the New Life Association, therefore he would like to have me go and look at this apartment with Mrs. Johnson. That was on the first day that I met him. I went up and looked at the apartment a day or two after this. He said that they wanted to take the apartment, and that there was $25 paid on it, which Mrs. Johnson had paid, and he would have to have it by the 1st of October, and he was very anxious to have me take hold of the proposition at once, which I did. I invested altogether $1,000. I also put in furniture that I had stored in Boston; I told him that I had furniture over there; I was really going to Boston to visit my people, and I stopped in New York to visit some friends there. I asked Dr. New what inducements he would give me; that I could not afford to give my services for nothing; and he said, 'Well, I guess we will start you out for $35 a week,' I to have a room in the New home and to come and go to work whenever I saw fit to do so. I asked him how much money he wanted from me at first, and he asked me how much I wanted to put in; and I said, 'I don't know as I want to put in much, if any,' for I had no money to lose,

and he said, 'Well, if you can let us have $1,000, I will accept that.' I had $500 in cash, which I gave him. For the $1,000 I got 200 shares of stock, valued at $5 a share. Mrs. Johnson and myself went to that house and worked there about two weeks before it was finished, and then he came into the house, and after he was in the house about a week or so, he brought me this book, and said it was for the money that I had given him. Then he asked me what I was going to do with the furniture that I had moved there. My furniture was worth about $1,200; and he says, 'Are you going to put it into the society?' And I said, 'I certainly am not until you make good and show me what you are going to do with the society.' Mrs. Johnson and myself first went there, and Mr. New and Mr. Leech came up there. Mr. Leech occupied one of the rooms. After he had been there a few days, Dr. New said that there would be no other people in the house but Mrs. Johnson, who would be one of the teachers, and Mr. Leech and myself and himself, and he was to get a maid to do the housekeeping. One day he came home and said: 'There are a couple of ladies coming to the house, old friends of mine, and the younger lady is going to be the housekeeper; she will take charge of the house; she is not a common housekeeper, and I do not want you to treat her as such.' However, she took care of the house; she and her mother were there. I knew her by the name of Marie Tully. I was introduced to her as that. While I was stopped at this place, we all had our meals there together. I paid for the meals a part of the time, and the rest of the time I don't know as to whether the bills have been paid. We had everything there was good to eat, as far as that went; we had meat of all kinds, vegetables, fruit, and so forth. The second day we were at dinner we had, I remember perfectly well, beefsteak. Every time Dr. New was at the table with me he ate meat; we had meat every day, twice a day. As to eating meat he said: 'We preach that we do not eat meat to the outside world; but we can have what we like at our own private table.'

"I heard a conversation between Mrs. Johnson and Dr. New with reference to money invested in the company by her. Mrs. Johnson said that she did not care to take stock and give her writing for it—her 'New Dawn' writing, which he wanted to put into the company as his own work. Mrs. Johnson was a dramatic writer by profession; she had a manuscript for a work called 'New Dawn.' Dr. New said that he would like to have the 'New Dawn'; that he might put it into his work and have it come out as his work; and I said, 'Dr. New, how could you dare to do such a thing, when you know that Mrs. Johnson is the author of it, and everybody else knows it.' He said to me, 'What business is it of yours?' After I had stopped at these apartments awhile, I went to Philadelphia; Mrs. Johnson left the apartment with me. She got her manuscript. I know she invested something in the concern, but I don't know how much. I heard a conversation between her and Dr. New with reference to the money she invested in the corporation. The last meeting that we had we were told by Dr. New that we must get out; this was the second month; he asked me to try and raise the money, which was $125, to pay the second month's house rent. He called a meeting of Mr. Leech, Mrs. Johnson, and myself, and Mrs. Stetson and Miss Tully were present, to see if we could not raise more money to carry us over the holidays, to pay the second month's rent, and I said, 'Where is the money that we put into it?' and he said, 'It has been spent.' I said: 'The furniture is all paid for; why can't we raise $200 or $300 on the furniture until after the holidays, and then Mr. Leech's friends would be coming forth with their money?' And he said, 'We can't do that, for the furniture is already mortgaged.' I said, 'How is that?' He said, 'Well, I mortgaged it for $500 to Miss Tully.' The money that I invested in the corporation for this stock went to the treasurer, who was Dr. New. I don't know what he spent it for; I never saw it in his books or anything; he always took the money and took care of it; we never saw it again. He told me that he had spent part of this money in incorporating, $150, the New Life Publishing Company. The purpose of that corporation was to publish 49 books. The capital stock of the corporation was $100,000, and the stock was to be sold at $5 a share. Mr. Leech was to be the promoter. I can identify this New Life Theology or New Life Science.

He said he got $5 for that book. He told me that he had the manuscript for 49 more, but I never saw any of the manuscripts. He said he was the author of this book. I asked him for the manuscripts of the other 49 books, and he said that he would show them to me some time; but I never saw them. The incorporation only lasted two months. During the time I was with him he never published any books. In regard to the last meeting we had to raise money for the furtherance of the incorporation, he asked us all if we could raise more money for him, and he took me into his private office and he said, 'Mrs. White, you say that you know a good many rich people in the city; can't you get some of your friends to put some money into this?' and I said, 'Certainly not; I certainly cannot do it.' Then we had our meeting and he asked us all to resign; after we said we would not raise any money, he said, 'Well, it is up to me to raise the money; I have some more friends down town, wealthy gentlemen, whom I have seen, and they have said that they would come into this corporation and spend $5,000 apiece the first of the week.' He said, 'I have got it so that they will come in the first of the week.' He said, 'But you will have to resign; you people who hold positions will have to resign.' I was one of the directors, and so I said, 'Well, I am willing to resign or do anything to further the cause of the company;' and Mr. Leech said he was, and Mrs. Johnson also resigned. We resigned that night, and he went down town. I didn't see anything of him until the following Monday morning; that was Saturday night. He had given instructions that Mrs. Johnson and I should give up our rooms that day, as these gentlemen were coming to occupy the rooms. I got very angry and I told him—I asked him what he meant by telling us to get out. We got out that week, and I said, 'What are you going to do with Mrs. Johnson, when you have taken every dollar from her?' This statement was made Monday morning. I said, 'What are you going to do with Mrs. Johnson, when she has not a dollar in the world, and only has what little I can give her?' and he said, 'I have not got any money either.' I said, 'Are you going to turn the poor old woman out into the street in the winter time, without a dollar or a place to go, or anything to eat?' and he shrugged his shoulder, and he said, 'I can't look out for Mrs. Johnson any further.' Then he said, 'She can go down to the Broadway Central," where he had these rooms; he had not given those up until the first of the year. So the arrangement was made that Mrs. Johnson should go down there and occupy these rooms until the 1st of the year. Mrs. Johnson had nothing to eat, only what Mrs. Stetson and myself furnished her while she was there.

"Mrs. Stetson and Mr. Leech were officers of the corporation with Dr. New. Afterwards, when I called on Dr. New and asked him if he had got these four men with their $5,000, he said, 'No; it slipped up,' as it always did. Then he asked me if I would not like to buy out the apartment and run the business, and I said, 'No; I had nothing to buy it out with.' When I said I would not give the furniture to the corporation, he said, 'What will you do with it?' and I said, 'The only thing I can do with it is to lend it to the corporation, say for a year, and by that time we will know whether we want to work together or not;' so it was agreed upon that way, and I left my furniture at his house—at the apartment. And after that I went to Philadelphia, and he remained in the apartment until about the last of January, and I received word to come and get my furniture, that they were breaking up, and when I arrived at the apartment everything was taken out of the apartment but my things, and I asked him for the furniture, and he said that he would deliver the furniture to me, but that I would have to sign a paper to get relief from this, and I said, 'I have signed the last paper that I am going to sign for him;' and he said, 'You will not,' and an oath, 'take a thing out of this house until you have signed that paper.' He used the oath at that time, 'damn'; I have heard him say 'damn' on several occasions. I saw them at least three times after I left the house, and Miss Tully and her mother and Mr. New were occupying the house. He said that he had written 49 books at that time. He said, as to his age, that he was 79 years young. He told Mrs. Johnson that she ought to say that she was 150, she was so well preserved; her hair was very white; she had a very fair complexion; she was a woman about, I

should judge, 70. Dr. New told her that; he was speaking of ages one day, and he said that. I don't know what his true name is. I asked him what his name was one day, and he said, 'John Fair New.' He said Fair was his mother's name. This edition of the books that I saw was the same as the one I have looked at there, that had already been published. There was a supply of them on hand. It has this frontispiece in it. I have seen that letter that they used, like that (Exhibit 12). At the time I was identified with this institution a book called New Life was being put on the market. He said he wanted to edit a magazine, or publish a magazine. At that time he was circulating such literature as this; there was a supply of this on hand. At the time that I put money into this concern, I got the individual stock of Dr. New. He said so much stock was issued to him for so many volumes of books. I think Dr. New was supposed to own $25,000 of the capital stock of the corporation, from what he said to me. John Fair New was the president of this corporation. There was no effort made by him to publish any book while I was there. He spent most of his time going up and down town; I don't know what he did down town, of course, but he would come in, and while he was around the house he was trying to plan to do something, that is, in the way of getting his company going, and as time went on I said, 'We are losing time here; aren't we going to do anything?' and he said, 'Well, we must get a large theater for me to lecture in on New Life movement.' I went around several times looking for a theater that would suit him, and nothing seemed to be good enough for him. He spent a good deal of his time in the house talking about the work. When Miss Tully and her mother came into the house they brought their trunks. I smelled liquor on his breath at the time that I went to get my furniture from him; that was in January. I couldn't say that I smelled liquor on his breath more than once, but I did that time, I am quite sure. He said he visted the clubs around New York City; that he was going to meet some of his friends there on several occasions. For the $5,000 these men were to put in he was going to sell this stock; there was nothing else to sell; there was nothing absolutely to back him in this corporation that I ever saw. As to this $110,000 he had received from his parents, he told me that he had done a great deal of traveling; he had traveled all over the world in the promoting of this work. When I went into the work, he impressed on me very forcibly that he had the business established, or I would not have put my money into it. While I was associated with the work, nobody was healed. He could not even heal himself."

From one of the publications of the plaintiff in error—and, according to the contention of the government's attorney, the only one he did publish—the "Newthot Science," we extract the following clauses:

"*Original Thinker.*—Twenty thousand years ago, possibly longer, during the Golden Age, before the Fall of man, when all men lived by the Newological Law of Correspondence and held direct communication with God, the Newologist sat in the solitude of the mountain, desert, forest and plain, in the profoundest abstraction, endeavoring to think out the Newological problem of human existence. Aristotle, Berkeley, Comte, Hegel, Kant, Plato, Socrates and others, adown the centuries, have been seeking a solution to the problem of immortality in the body. Akin to the ancient seers, isolating himself from the world, seeking silence and solitude, surcease from busy humanity, Newology has its studious sage, its wanderer thru the field of thot, its searcher for an endless life. And so our Great Newologist, quietly seated in mental abstraction so profound that for years he was unconscious of all physical environment, even oblivious to heat and cold, rain and storm, noise and confusion, sleep and exercise, hunger and thirst, until at last in the most glorious moment of his life, he discovered Newology by which he is now to redeem humanity from all the ills of the past. * * *

"*Blonde Hercules.*—The author belongs to a class by himself. Physically he is a blonde Hercules, with square massive shoulders, huge arms and legs, smooth-shaven face, almost boyish in general aspect. His eyes are a keen gray, overtopped with blonde silken eyebrows. His attire is usually a com-

plete suit of white broadcloth, including frock coat and well-creased trousers. He greets you with a smile. He is opposed to everything that savors of death. He would revise every dictionary and cast from their pages every word symbolical of the ending of life. The words ancient, old, dead, dying, fading, sorrow and pain should never be spoken, and to the mouths of Newologists such utterances are tabooed. Talk of prolonging life. Think of living forever. Believe that you will exist perpetually. Get ready to live forever."

From New York, according to the record, the plaintiff in error went to Seattle and from there to Los Angeles, in both of which cities he appears to have organized like publishing companies, and in the latter city addressed to one of his female associates the following letter:

"Hollenbeck Hotel,

"Los Angeles, Cal., Friday, P. M.

"Dear Dr. Claire: Your welcome letter recd. Am very glad to hear from you. Now sister if any one calls, man or woman, to ask about the Book Company, Church or the University, be sure and always have and tell a prosperous financial business story as I have referred some parties there or rather gave them the street and number and said their friends (who live there) could call there at our offices and see the progress for themselves. I am writing to Marie the same. I gave her name as V. Pres. and yours as Sec. and local Pastor, so be ready both of you at all times to tell the fine condition of the business generally. This is very important so talk it over with Marie and be ready. Always easy and never embarrassed in the least and always most prosperous.

"Also we are to have the New Auditorium for the Newthot World Congress etc. I will tell Marie to see you and talk it over so as to be ready. Read her this letter and remember your offices, etc. May God bless you both and helpt and keep you. Bye and Bye. N.

"Also many students all over the world, etc. etc. etc. etc. It is the Newthot Co.'s doing business now there. See. Large sales of books, etc. etc. etc."

In Los Angeles the witness Julia Etta Marston, according to her testimony, had the following experiences with the plaintiff in error:

"I first met Dr. New on the 10th of June, 1914. In regard to my first meeting the doctor, there was an article in the Times telling of the work and what it meant; he believed in immortality in the physical body, and I believed that since 1890, when I was given up by physicians to die. I had believed that, and when I read this in the paper, I had never found any religious organization that had attained that knowledge, and when I would talk about it they thought I was crazy. After reading that article, I wrote up to him for some literature, and he sent it to me; after reading the literature, I sent for a bible, and he sent it to me; I sent $2.50, and I got one with a paper cover, and I read it, and then I took the course; I sent an application and took the course through the mail; I took this course, and if I made 90 I would not have to take but one course, but if I did not I would have to take the two; my first work was 92½ and the next 94½; then after I had gotten that far along, my duties were such in Los Angeles that I could not take any more through the mails, and I wrote to him I would have to give it up; so he said he would come down and give me personal lessons, which he did, which lasted about a week, from the 14th of June until the 18th of June, and then he came back in July and I finished my lessons, and he brought my diploma with him; that is how I met Dr. New. It was of my own seeking. I got a diploma. It is in my trunk. I could have brought it, if I had known you wanted it. I cannot identify these as circulars that he sent through the mail. He had two little ones; one is in regard to the university. It stated it was $10 for application and $110 for a scholarship; as he had come down and incurred expense, I paid him $100 when I got my lessons through. I took the regular course and paid for it. I paid him $100; I paid him $10 when I

sent the application, and when I completed and got my diploma I gave him $100. When he came to give me personal lessons, the lessons consisted of asking me Bible questions and I would answer them, and I also had to lecture before him. When I was lecturing, he simply sat and listened. Once when I was lecturing, I remember that he went to sleep. He said: 'Sister, does it matter if I close my eyes? I can hear you.' And I said, 'No.' After awhile he was shaking his shoulders and laughing, after I got through, and I said 'What is the matter?' And he says: 'Well, it is too good to keep. I slept fifteen minutes, and waked up, and you were going on just the same.' As to my being prepared to take up the advanced work, he said that I was the best qualified, and one of the best Bible students he had ever met."

When the plaintiff in error reached San Francisco in his movements, he appears to have organized four corporations, namely, "The Newthot Publishers," "The Newthot University," "The Newthot Church," and "The New Order," stock of which companies he proceeded to sell. One of the paragraphs of the articles of incorporation of "The Newthot Publishers" reads as follows:

"The names of those who have subscribed money or property to assist in founding the Newthot University, together with the amount of money and description of property subscribed, as follows, namely, to wit:

Dr. Newl Newo New, Publisher Newthot Church.....$990,000
Dr. M. L. Claire, Pastor Newthot Church..... 10,000"

If the plaintiff in error paid in any portion of the $990,000 so subscribed, we find no evidence of the fact in the record. It further appears from the record that the plaintiff in error was carrying on his operations on the fair grounds of the World's Fair of 1915, and that he was arrested at his apartment by deputy marshals about half past 6 o'clock in the morning of the 1st of October under circumstances thus detailed by the witness Crowley, whose testimony is corroborated by that of the officers:

"I was out at the apartment of Dr. New the morning that he was arrested, about half past 6 in the morning, October 1st, last year. Mr. Jessen, Mr. Bohn, and Mr. Conlan, deputy United States marshals, were there. I saw an entrance effected into the apartment. Mr. Bohn knocked on the door, and he knocked several times, and a lady's voice answered, and he asked if Dr. New was in there, and the woman replied, 'No.' Then he said, 'You will have to let me in.' She said, 'You can't come in here.' Mr. Bohn said, 'You had better open the door, because we are coming through anyway.' So in the course of a few minutes the lady opened the door. I saw Dr. New in there; he was in bed in the front room, known as a wall bed. He had some of his street clothes on; he was in his underwear. The bed was directly in front of the door. It was mussed up; I could not say as to whether it had been occupied by more than one person. Mrs. Graham had on a kimono. I saw some lady's apparel in Dr. New's room. Some of it was on that window seat, and part of it was on the chair in front of the bed. I don't know that I could describe the wearing apparel. The best way to describe them would be to say a lady's lingerie; that is, stockings, corset, and the rest of the lingerie. I was there in the capacity of the newspaper reporter. I was detailed by my city editor to go there. There was false hair lying on the dresser; there was what is known as a switch lying on the dresser."

We think enough has been stated to show that the plaintiff in error was not the immaculate personage he pretended to be, and that the jury was entirely right in finding in effect that he used the mails of

the government as a means of obtaining money of others in pursuance of the grossly fraudulent scheme devised by him as alleged in the indictment and with the intent therein specified.

The judgment is affirmed.

UNITED STATES v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1917.)

No. 2790.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—CONTINUITY OF SERVICE.
Where members of train crews were released from duty at a division terminal for an hour to an hour and a half, while refrigerator cars were being iced and trains were being switched, made up, and broken up, but the releases were not absolute, and the time limit, if a time limit was specified, was subject to change, and the men were required to hold themselves in readiness to respond to a call, and to be within reach in case their services were needed within the designated period of the release, such release did not break the continuity of the service within the Hours of Service Law, and where there was evidence tending to show that releases were of this character, it was error to refuse to charge that a release, to break the continuity of service, must be such that all the facts and surrounding circumstances would permit of the employés being absolutely free to come and go at will, and not so restricted that the complete enjoyment of the release might be hampered by the fear that the employé might be wanted during the time of the release.

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—EXCUSES FOR EXCESSIVE SERVICE.
That rainfalls a few days previous had affected the track, roadbed, and bridges of a railway company, so that trains were subjected to delay, and it could not be told how long a trip would take, did not bring the excessive hours of service of members of train crews within the proviso of Hours of Service Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415 (Comp. St. 1916, § 8679), providing that such act shall not apply in any case of casualty, unavoidable accident, or act of God, nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of the employés at the time the employés left a terminal, and which could not have been foreseen, where it was known at the time the trains left the terminal that they might be subject to delay, and it was only the duration of the delay that was unknown.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action for statutory penalties by the United States against the Southern Pacific Company. Judgment for defendant, and the United States brings error. Reversed and remanded.

The United States brought an action against the Southern Pacific Company to recover penalties for violation of the federal Hours of Service Law (34 Stat. 1415). The complaint contained 30 counts, involving the hours of service of five train crews, each with six employés. The complaint alleged that the crews were required and permitted to be and remain on duty for periods longer than 16 consecutive hours on trains running between Los Angeles and Indio, in the state of California, and between Palm Springs and Los Angeles, on dates between February 2, 1914, and March 13, 1914. The answer of

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

the defendant was that the hours of service so alleged in the complaint were interrupted at the station of Colton, Cal., by periods of full and absolute release, during which each employé was not called upon to perform any duty, and was entirely relieved from any duty in connection with his employment. To counts 7 to 12, inclusive, the answer pleaded the additional defense that the operation of the defendant's trains was interfered with by an unprecedented rainfall, which so injured and damaged the defendant's track that it was impossible for the defendant to operate its trains in such manner as to comply with the rules and regulations relative to the 16-hour law, and that said flood was unexpected, and could not in any manner have been guarded against by the defendant. To the ninth count the defendant, by a second amended answer, alleged in further detail the nature and extent of the rainfall which occurred on February 19, 20, 21, and 22, 1914, whereby the defendant's track became soft and uncertain, rendering it impossible for the defendant to know with any degree of certainty the exact time within which any number of miles could be made over said track between given points, or the speed to be traveled by the trains, and any delay which occurred from that cause could not have been foreseen or guarded against by the defendant. To the defenses so pleaded, relating to the flood conditions, the plaintiff demurred, but no action was taken by the court on the demurrer.

The court instructed the jury on the alleged release in substance as follows: That in determining whether or not the men had a reasonable opportunity for rest and recreation during the time they were released from duty the jury should take into consideration all the facts and circumstances connected with such release, whether it was a release in good faith, whether or not the men had, during the period they were released, the right to do as they pleased, whether they were masters of their own time, and whether they really had a substantial and opportune period of rest; that if they found that the release from duty at Colton was a break in the hours of service within the meaning of the law, then they should find for the defendant upon that issue; but if, on the other hand, they should find that the employés were not released in such a manner that they were masters of their own time, and did not have a reasonable and fair opportunity for rest and recreation, they should find for the plaintiff upon that issue. The court denied the following instruction requested by the plaintiff: "A release, to break the continuity of service, must be such that all the facts and surrounding circumstances will permit of the employés being absolutely free to come and go at will, and not so restricted that the complete enjoyment of such release may be hampered by the fear that such employé may be wanted by his employer at some particular place during such time of release for duty in connection with his regular work. It is not sufficient that the carrier state to the employés that they are released and free to go wherever they choose, when the employé at the same time is given to understand that he shall keep himself in readiness to respond whenever called for or needed to resume regular duty." The jury found for the defendant.

Albert Schoonover, U. S. Atty., of Los Angeles, Cal., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff assigns error to the refusal of the court below to instruct the jury to find for the plaintiff on each of the three groups of cases set forth in the complaint, and to the refusal of the plaintiff's requested instruction.

It was shown that Colton is a division terminal, and that all freight trains were stopped at that station, and train and engine crews were

relieved for the length of time of the necessary detention of trains for icing the refrigerator cars, and switching, making up, and breaking up of trains. This work was done by others than the train or engine crews which brought the trains into Colton. It was stipulated between the parties that as to the first group of counts the employés were given by the defendant at Colton what was designated by said defendant at said time a release of one hour and thirty minutes, and the same stipulation was made as to the second group of counts, except that the release was designated as one hour and twenty minutes, and the same stipulation was given as to the third group of counts, except that the release was designated by the defendant as one hour. Several of the employés testified as witnesses in the case, as did also the superintendent of the Los Angeles division and the assistant superintendent of the Southern Pacific at Los Angeles. The testimony of the employés is to the general effect that the employés, after receiving the release at Colton, were at liberty to do what they pleased, but were to return to their duty at a time approximately given by the yardmaster, that they had a right to go anywhere within reasonable limits, but not too far away from the yard, where they could be found in case of necessity, and that they were at all times supposed to be within calling distance; the time limit being subject to change. Gibson, a conductor, testified that:

"When the yardmaster gave us our release, he usually says, 'You are released for two hours,' or more, whichever it might be, whichever was the case. * * * It is a verbal release. I do not remember the form of the expression used on this particular day."

He further testified that:

When given a release for a definite time, "I had a right to go anywhere I wanted to in that time within the limits; that is, within reasonable limits. What I mean by that is, not to go too far away from the yard, but where they could find me in case of necessity. * * * My instructions were that I was released for a certain period of time, and that I had absolutely nothing to do during that time. * * * We were at all times supposed to be within calling distance, and for that reason during these releases I would stay within calling limits, which, I believe, is one mile."

Richardson, an engineer on the same train, testified:

"From the time we reach the station at Colton, and turn the train over to the yard crew, we had no duties to perform in relation to it. * * * We are at liberty, if we see fit, to go and play a game of ball, and we are to return to our duties at a time approximately to be given us by the yardmaster."

Lindley, a freight conductor, testified that:

On arriving at Colton the trainmaster, "if he sees there is quite a bit of delay, says, 'You are released until called to finish the trip.' I was released there this day for an hour and thirty minutes."

Winters, a train engineer, testified:

"I was relieved for an hour and thirty minutes at Colton, but I don't remember the terms of that release. It meant that we were to be released; the watchman would take charge of the engine, and we were to get off and stay away from the engine until the time was up, unless they called me. * * * We had to be accessible at the expiration of the hour and thirty minutes, but we had a right to be any place so far as I could see."

Whalen, the superintendent of that division of the defendant's road, testified:

"The purpose of that release was to give them a rest. We did not need them there while we were doing the work. If we had not released them, the hours of service would have continued. If they had not been released under the form that they were released, they probably would not have reached their destination within the 16 hours. When the release was given, it was not given with the anticipation necessarily that the crew might not reach their destination within 16 hours. We did not need them; so we gave them their freedom. * * * All of these employés were paid for the time that they were released at Colton. * * * When they are released, they can do anything they see fit. When released, they would probably say: 'You will find me at such and such a place. I will be down at the bunkhouse, or at the hotel, or getting lunch.' * * * When these men were released, they did not know when they would be called again. They might not be called for two hours, or they might be called within an hour. The form is, 'You are released.' That means that he is released from responsibility until called. * * * When these men were released for an hour and thirty minutes, in these particular cases, that meant that they were released, that they were as free men as there is in the world until the call boy gets them again."

Sloan, the assistant superintendent of the division, testified that:

The system of release followed at Colton during February and March of 1914 was that the men were released from duty on their arrival until they were called to leave. "Released until called meant that they understood that they were off duty; that they were not in any way employed. They are absolutely free, and they would be called when they were needed, just the same as for their initial trip. The release was for an indefinite period."

[1] It will be seen that there was evidence clearly tending to show that although the employés were relieved from duty for periods of one hour, one hour and twenty minutes, or one hour and thirty minutes, as the case might be, the releases were not absolute; that the time limit of the releases, if a time limit was specified, was subject to change; and that the men were required to hold themselves in readiness and to be within reach in case their services were needed at any time within the designated period of the release. A release of such a nature would not, we think, be sufficient to break the continuity of service. As was said in Missouri, K. & T. Ry. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144, men who are thus released nevertheless "stand and wait." In Northern Pac. Ry. Co. v. United States, 220 Fed. 108, 136 C. C. A. 200, the crew were told that they were relieved from duty for one hour and thirty minutes while waiting at a station for other trains to pass. In that case we held that there was lack of freedom from restraint, and of that release from the duty to stand by and wait for orders which prevent the full and free exercise of an opportunity to rest. In United States v. Minneapolis & St. L. R. Co. (D. C.) 236 Fed. 414, Judge Wade said:

"Rest is largely psychological. The circumstances must be such as to induce rest. * * * The public is interested in actual rest, not in opportunities for rest."

In harmony with this view of the statute are United States v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 624, United States v. Northern Pac. R. Co. (D. C.) 213 Fed. 539, United States v. Chicago

& N. W. Ry. Co. (D. C.) 219 Fed. 342, and Minneapolis & St. Louis Railroad Co. v. United States, 245 Fed. 60, — C. C. A. —. Under the facts as they were disclosed by the evidence, and especially as they were testified to by the defendant's superintendent and assistant superintendent, we think that the plaintiff was entitled to an instruction to the jury substantially as requested, and that to deny such an instruction was reversible error.

[2] It remains to be considered whether or not the special defense pleaded to counts 7 to 12, inclusive, was sufficient to bring the excessive hours of service involved in those counts within the proviso of section 3 of the act. The service referred to in those counts was rendered on February 27, 1914. The evidence was that a heavy rainfall occurred on February 18th, 19th, and 20th, and a slight rainfall on the 21st. Sloan, the assistant superintendent, testified that the rains and resulting floods delayed the trains by washouts, but that on the 26th and 27th the company moved more equipment than usual in handling delayed freight. Referring to conditions on the 27th, he said:

"All trains show a delay and lost time in there. The dispatcher's notes show the time lost on account of soft tracks, slow orders, etc. It was necessary to restrict the speed of all trains to that of safety in that vicinity, and it was many days before we got the track fixed up so that they could make anything like reasonable speed. There was no way by which it could be definitely determined by the dispatcher as to what time could be made on this soft track. That was a matter which was necessarily placed largely in the discretion of the crew in actual operation. When a freight train under those conditions left Los Angeles, the dispatcher couldn't tell whether he could move to Colton in six hours or nine hours. In the first place, the track conditions and the slow trains he had to meet, and his delays waiting for them, and then other delays waiting for him when he got started over this slow trip. It was awfully slow work, and delays trains something terrible. So far as I am concerned, I know of no way of foreseeing this track difficulty. I couldn't tell how much they were going to lose."

Referring to the train in question in counts 7 to 12, inclusive, which left Indio for Los Angeles February 27th, he testified:

"I do not know of anything that occurred subsequent to the departure of that train from Indio that affected its movement, except track conditions, and the condition of the track was known at the time the crew left the terminal, in a general way, but the condition of the track was not such that we could tell the exact running time."

The facts so testified to do not bring the case within any of the exceptions of the proviso. "If affirmative defenses are pleaded, the proof should bring the case clearly within the letter, as well as within the spirit, of the proviso." United States v. Great Northern Ry. Co., 220 Fed. 630, 136 C. C. A. 238. It is not shown, indeed, that any delay of the train in question was caused by the condition of the track. It is clear that the delay, if there was a delay, was not caused by a "casualty," or an "unavoidable accident," or by an "act of God." The heavy rainfall, which is presented as an act of God, had occurred several days before, and the condition of the track, the roadbed, and the bridges was well known on February 27th. The only change then to be expected was a daily improvement of the conditions. It was well known on that day that trains which traveled between Indio and Los

Angeles might be subject to delay on account of the condition of the track and the congestion of travel. If there was a delay, therefore, it was not "the result of a cause not known to the carrier or its officer or agent in charge" at the time when the train "left a terminal." The causes of probable delay were known. It was only the duration of the delay that was unknown. The delay in such a case is similar to that which occurs from a hot box, an extraordinary head wind, or an unusually heavy movement of freight, in all which cases the delay results from a cause which is known, or should be known, to the carrier at the time when the train leaves the terminal. Great Northern Ry. Co. v. United States, 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408. In San Pedro, L. A. & S. L. Co. v. United States, 220 Fed. 737, 136 C. C. A. 343, this court said:

"In order for the carrier to justify the excess of service beyond the fixed period prescribed by the act, it must show that the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but was the direct result of an act of God, a casualty, unavoidable accident, or of delay that 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 latter left a terminal, and which could not have been foreseen."

See, also, Northern Pac. Ry. Co. v. United States, 213 Fed. 577, 130 C. C. A. 157; Denver & R. G. R. Co. v. United States, 233 Fed. 63, 147 C. C. A. 132; United States v. Atchison, T. & S. F. Ry. Co. (D. C.) 236 Fed. 154.

The judgment is reversed, and the cause is remanded for a new trial.

BLUE GOOSE MINING CO. v. NORTHERN LIGHT MINING CO. *

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917.)

No. 2880.

1. JUDGMENT ⊂=944—ACTIONS ON JUDGMENT—EVIDENCE—APPEARANCE.
In an action on a foreign judgment, the record of the judgment, showing defendant's appearance by counsel, was prima facie evidence that the appearance was authorized.

2. TRIAL ⊂=60(1)—JUDGMENT AS EVIDENCE—PRELIMINARY EVIDENCE.
In an action on a foreign judgment, the record of which showed service on defendant, and that defendant appeared and filed a demurrer and answer, the court did not err in refusing to receive evidence to prove want of jurisdiction preliminary to admitting the judgment in evidence, as this was properly affirmative defense, to be shown when defendant reached its case.

3. EVIDENCE ⊂=347—CERTIFIED COPIES—JUDICIAL RECORDS.
In an action on a foreign judgment, certified copies of the record on appeal from such judgment, showing affirmance, were properly admitted.

4. JUDGMENT ⊂=538—WHEN FINAL—PENDENCY OF APPEAL.
When appeal is taken under California practice, the action is still pending, and the judgment does not become final until the appellate court has passed its order.

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

*Rehearing denied January 7, 1918.

5. JUDGMENT ⊂⊃818(5)—FOREIGN JUDGMENT—IMPEACHING RECORD.
The recitals in the record of a foreign judgment against a foreign corporation may be assailed by proof that defendant was not served and did not appear, or that the appearance entered was unauthorized, even though such proof contradicts the record.

6. CORPORATIONS ⊂⊃669—FOREIGN CORPORATIONS—ACTIONS—EFFECT OF APPEARANCE.
Where a foreign corporation voluntarily appears in an action against it, upon a judgment on a contract made in the state in which the appearance is had, it is immaterial whether or not it is engaged in business in the state, or has property therein, or has complied with the state statute requiring the designation of an agent upon whom service may be had.

7. CORPORATIONS ⊂⊃407(2)—EMPLOYMENT OF ATTORNEY—AUTHORITY OF PRESIDENT.
The president of a corporation, who under its by-laws was the general executive officer, had power to employ counsel to defend an action against the corporation, unless forbidden to do so, though not directed by the directors to employ counsel or to appear.

8. CORPORATIONS ⊂⊃407(2)—EMPLOYMENT OF ATTORNEY—AUTHORITY OF PRESIDENT.
By-laws of a corporation, providing that the president should be the general executive officer, and sign all contracts, and perform generally all duties usually appertaining to such office, and that he should have general charge (subject to the control of the board of directors) of the business affairs of the corporation, but should have no power, without the previous consent of the board of directors, to incur any debt in excess of $500, or to bind the corporation by any obligation involving a liability in excess of such sum, did not deprive the president of power to employ counsel to defend an action against the corporation, since, while his general charge of the business was subject to the control of the board, his power was not limited, unless the board took some action.

9. CORPORATIONS ⊂⊃407(2)—EMPLOYMENT OF ATTORNEY—AUTHORITY OF PRESIDENT.
The president having authority to employ counsel by virtue of his general charge of the business of the corporation, the employment of counsel was not rendered invalid by the president's agreement to pay him more than $500.

In Error to the District Court of the United States for the Second Division of the District of Alaska; J. R. Tucker, Judge.

Action by the Northern Light Mining Company against the Blue Goose Mining Company. Judgment on a directed verdict for plaintiff, and defendant brings error. Affirmed.

A California corporation, the Northern Light Mining Company, defendant in error here, but called plaintiff, brought action in Alaska on a foreign judgment obtained against the Blue Goose Mining Company, an Alaska corporation, plaintiff in error here, to be called defendant, in the superior court within the state of California. The action arose out of contracts made in California. Judgment was ordered in favor of the Northern Light Mining Company on an instructed verdict, and by writ of error the Blue Goose Mining Comany brings the case here.

After alleging the institution of action against the defendants in the courts of California and the issuance of summons on June 2, 1911, it is set forth that summons was duly served on the Blue Goose Mining Company "personally" in San Francisco, California, by serving a copy, that the defendant duly appeared in the state court and filed its verified answer, and that thereafter, on March 22, 1912, judgment was given for $10,986.68 and interest, in favor of plaintiff and against defendant. The amended answer denies knowledge of the bringing

of the action heretofore referred to, and denies that summons was ever served personally or otherwise upon it, or that it appeared, or that the state court ever had jurisdiction over the defendant to render any judgment. Defendant pleads that, when the action referred to was commenced in the state court and the judgment therein was rendered, the defendant was an Alaska corporation and resident in Alaska and not elsewhere; that it was not served with process, had no notice of the pendency of the alleged action in the state courts of California, never appeared therein, and at the time of the commencement of the alleged action, and the pretended service of summons and entering of judgment, it did not live within California, or have any agent or representative in that state authorized to accept service of process, or upon whom service of process could be made, and had no property or business in California, or within the jurisdiction of the superior court of California.

G. J. Lomen and O. D. Cochran, both of Nome, Alaska, and Metson, Drew & MacKenzie and E. H. Ryan, all of San Francisco, Cal., for plaintiff in error.

Ira D. Orton, of Seattle, Wash., and George B. Grigsby, of Juneau, Alaska (W. S. Andrews, of San Francisco, Cal., of counsel), for defendant in error.

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

HUNT, Circuit Judge (after stating the facts as above). The vital point in the case is as to the jurisdiction of the state court of California to render the judgment which the Blue Goose Company complains of. The judgment roll in the state court recited that: W. S. Andrews, Esq., and A. H. Brandt, Esq., appeared as counsel for the plaintiff, and Messrs. Fink and White appeared on behalf of the defendant, and continued:

"It appearing to the court that the defendant had been regularly served with a copy of the summons and complaint in said cause in the city and county of San Francisco, state of California, and that the defendant had duly appeared, by filing a demurrer and answer in said action, and had not objected to the jurisdiction of said court, the court proceeded to hear the said cause. * * * That the defendant is, and at all time involved herein was, a corporation organized and existing by virtue of the laws of the district of Alaska."

[1, 2] Unquestionably the record of the judgment of the superior court of California that defendant appeared by counsel was prima facie evidence that the appearance of counsel was authorized. 23 Cyc. 1581; Kline v. Insurance Co., 80 Wash. 609, 142 Pac. 7. Defendant, however, complains because, when plaintiff offered the judgment, the court declined to receive evidence offered by it to prove the want of jurisdiction in the state court preliminary to admitting the judgment in evidence. We do not perceive that the court was in error in so ruling. The plaintiff, having to make a prima facie case, met the demand by the introduction of the judgment roll. Until the defendant advanced to its case the court was not obliged to permit the defendant to refute the prima facie case by the introduction of matter which was properly affirmative defense. 38 Cyc. 1352.

[3, 4] Nor was there error in the action of the court in permitting the certified copies of the record on appeal from the judgment, which appeal appears to have been taken from the superior to a higher court

in the state. The rule of practice is that, when an appeal is taken, the action is still pending, and the judgment does not become final until the appellate court has passed its order. Affirmance of the judgment was had on August 7, 1917. Code Civ. Proc. Cal. § 1049; Sewell v. Price, 164 Cal. 270, 128 Pac. 407.

[5-7] There can be no successful dispute over the argument that the recitals in the record of a judgment given in one state against a foreign corporation may be assailed by proof that the defendant was not served and did not appear in the action, or that where an appearance has been entered by an attorney that the appearance was unauthorized, and that such proof is proper even where it contradicts the record. Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808. But these contentions are for the larger part inapposite in this case, for here it is conceded, and correctly, too, that the record showing that counsel did appear in the action in the state court, filed demurrer, then an answer, acted for the corporation at the trial, and until after judgment was rendered made a prima facie case of authority of counsel to appear. Here, inasmuch as the evidence shows without dispute that the president employed such counsel to represent the corporation in the action in California, it is plain that if, in employing them, he did not exceed his authority as president, then the case resolves itself into one where the corporation voluntarily appeared; and, if that is found to be correct, it would be immaterial whether or not the corporation was engaged in business in California, or had property therein, or had complied with the state statute requiring the corporation to designate an agent in the state upon whom service might be had. We say this because we think it logically follows the indisputable proposition that a corporation of one state may by its legally constituted board of directors adopt a resolution directing the president of the company to employ attorneys to represent it in a suit against it in another state, and that such action may be had without regard to the question of ownership of property or doing of business where the suit is pending.

Accepting this general rule, the inquiry here is at once narrowed to determining whether, by virtue of his official relationship to the corporation and under his authority conferred by the by-laws, the president could employ counsel to appear in behalf of the company. Our conclusion is that Lindeberg, as the "general executive of the corporation" as president, had power to employ counsel to defend the corporation unless forbidden to do so. Beebe v. Beebe Co., 64 N. J. Law, 497, 46 Atl. 169. If the court had permitted the defendants to prove by the minutes of the directors' meeting that there was no direction on the part of the directors to employ counsel or to appear, it would not affect the question, because the minutes of the corporation failed to show that the directors ever took any action whatsoever in the matter of the suit in the California courts. Had defendants offered to prove the expression of a positive or express direction not to employ counsel, or that there was a general direction to the president to take no steps to defend any action brought against the company, and the court had rejected such offer, clearly it would have been error. But, the rule being that the president of a corporation, with general executive au-

thority, has authority to employ counsel to appear in defense of an action against his corporation, and to manage the defense, omission to confer such authority is immaterial. Winfield Trust Co. v. Robinson, 89 Kan. 842, 132 Pac. 979, Ann. Cas. 1915A, 451.

[8] It is said, however, that the by-laws which were offered by defendant negative such power in the present case as the president assumed to exercise. The by-laws seem to us to affirm rather that to deny the general implied power. They provide that:

"The president shall be the general executive officer of the corporation, * * * shall sign all stock certificates and written contracts of the corporation, and perform generally all the duties usually appertaining to the office of president of a corporation. He shall have general charge (subject to the control of the board of directors) of the business affairs of the corporation, may sign and indorse bonds, bills, checks, and promissory notes on behalf of the corporation, and may borrow money in its name; but he shall have no power without the previous consent of the board of directors to incur any debt on behalf of the corporation in excess of the sum of five hundred dollars, or without such consent to bind the corporation by any obligation involving a liability in excess of said sum. He shall at all times keep the directors advised as to the affairs of the corporation."

Of course, the "general charge" of the business vested in the president was subject to the control of the board of directors. But, unless the directors otherwise provided or took some action in the matter, there was no subtraction from the power of the president, with managing authority, to employ counsel to defend the suit against the corporation. As more or less pertinent to the questions involved we cite: Knowles v. Gaslight & Coke Co., 19 Wall. (86 U. S.) 58, 22 L. Ed. 70; Moulin v. Insurance Co., 24 N. J. Law, 222; Moulin v. Insurance Co., 25 N. J. Law, 57; National Condensed Milk Co. v. Brandenburgh, 40 N. J. Law, 111; Colorado Iron Works v. Sierra Grande Mining Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433.

[9] In his testimony the president said that he paid $1,000 to the attorneys employed by him, payment being made out of the funds of the Pioneer Mining Company, and that afterwards this sum was charged to the account of the Blue Goose Mining Company. It is urged that in agreeing to pay more than $500 without the previous consent of the board the president had exceeded his power under the by-law heretofore quoted. But, if we are right in the view that the president had authority to employ counsel in his "general charge of the business" of the corporation, the fact that he had agreed to pay counsel more than $500 would not make the employment invalid.

As these views lead to an affirmance of the judgment, it is unnecessary to consider whether there was a ratification of the act of the president.

Affirmed.

PATTERSON et al. v. STROECKER.*

(Circuit Court of Appeals, Ninth Circuit. October 8, 1917.)

No. 2923.

1. MINES AND MINERALS ⟸64—LEASES—RIGHT TO ROYALTY.

A husband, to whom an owner of a mining claim had contracted to convey a one-fourth interest if he would pay the expense of sinking a hole and do the assessment work, agreed with his wife, that she should have such interest in consideration of paying the necessary expenses of carrying out the agreement. Thereafter he took a lease from the owner of the three-fourths interest, which provided that, as part consideration therefor, the undivided one-fourth interest should be covered and included in such lease, and that the claim should at all times be worked and considered as a whole. Thereafter, and before mining operations began, he conveyed the one-fourth interest to the wife, and at the same time sublet to a third person under an agreement whereby the sublessee was to pay him a royalty of 5 per cent. in addition to the 25 per cent. agreed to be paid the owner of the three-fourths interest by the original lease. *Held*, that the 5 per cent. of the output of the mine equitably belonged to the wife rather than the husband, and she could compel payment thereof without any transfer or assignment from the husband.

2. APPEAL AND ERROR ⟸1097(3)—SUBSEQUENT APPEALS—LAW OF THE CASE.

Where, on a former appeal in a suit by the husband's trustee in bankruptcy against the wife, it was decided that the trial court erred in dismissing the bill at the conclusion of the testimony, on the ground that the husband's deed to the wife conveyed the interest in the royalty, and that the burden was cast on the wife to show the good faith and honesty of the conveyance, such holding was not conclusive against the rights of the wife on a subsequent appeal, after a trial on which the good faith and honesty of the conveyance was shown.

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Suit by Edward Stroecker, as trustee of H. J. Patterson, bankrupt, against Mariam A. Patterson and another. From a decree in favor of plaintiff, defendants appeal. Reversed and remanded, with instructions.

The appellee, as trustee of the estate of H. J. Patterson, a bankrupt, brought a suit for the benefit of the creditors of the bankrupt against the bankrupt and his wife to recover a one-fourth interest in the Daly Bench placer mining claim and gold dust of the value of $5,174.66 extracted by certain lessees from the claim. The case was on appeal to this court in Stroecker v. Patterson, 220 Fed. 21, 135 C. C. A. 597, in which this court reversed a decree rendered against the trustee upon the conclusion of the complainant's evidence in the case, holding that, in view of the circumstances and the testimony, the burden was cast upon the defendants in the suit to show the good faith and honesty of the conveyances in question, and that the court below was in error in dismissing the suit upon the conclusion of the complainant's evidence, saying: "The law is well settled that entire fairness is required in dealings between husband and wife, so far as they affect the rights of creditors." Upon the second trial the court below found against the trustee on his claim to a one-fourth interest in the mining claim, but found in his favor on his claim to the gold dust. The court below found in substance the following facts:

On September 19, 1910, James Wickersham, the owner of the Daly Bench placer claim, entered into a written agreement with H. J. Patterson to convey

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

*Rehearing denied January 7, 1918.

to him an undivided one-fourth interest in the claim, if he would pay the expense of sinking one hole to bedrock on the claim, and do the assessment work for the year 1910. Thereafter Patterson entered into an agreement with his wife, whereby the latter, in consideration of paying the necessary expenses of carrying out the agreement, should be the owner of the one-fourth interest when title was acquired thereto, and she thereafter paid said expenses out of her own funds and her separate property. On October 14, 1911, Wickersham conveyed to Patterson an undivided one-fourth interest in the claim, pursuant to the contract. Said deed was so executed to H. J. Patterson without the knowledge or consent of his wife. At the time of the conveyance Wickersham said: "I will give you the deed, and you can make the deed to any one you like." Prior to the execution of said deed, and on October 12, 1911, Wickersham executed a lease to Patterson of the placer mining claim. In the lease there was the following provision: "As part consideration of this lease the party of the second part [Patterson] agrees that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease, and shall also at all times be subject to any debts, defaults, or damages resulting from the working under this lease or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease, and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part for the payment of the royalty reserved to the party of the first part, and the performance of the terms of this lease." The lease was for four years, and the royalty reserved to the lessor was 25 per cent. of the gross amount of the clean-ups. The lease recited that Wickersham was the owner of an undivided three-fourths interest, and that H. J. Patterson, the lessee, was the owner of an undivided one-fourth. On November 27, 1911, Patterson sublet the claim to one Hamilton, on the same terms as stated in the lease from Wickersham, but requiring Hamilton to pay to Patterson, in addition to the royalty due to Wickersham, 5 per cent. of the gross amount of each clean-up. Mrs. Patterson had knowledge of the terms and conditions of the lease from Wickersham to her husband, and also of the sublease to Hamilton. On November 27, 1911, Patterson executed to his wife a quitclaim deed for the one-fourth interest in the claim, in consideration of the money paid by her for work in sinking holes on the claim. Patterson did not at any time transfer to his wife any of his rights in the contract with Hamilton, and did not transfer to her the 5 per cent. of the gross output which he was to receive from Hamilton. Patterson was insolvent on November 27, 1911, and on April 16, 1912, he filed his petition to be adjudged a bankrupt. The $5,174.66 in controversy are the proceeds of 5 per cent. of the gold dust taken from the mining claim during the year 1912.

As a conclusion of law the court found that the 5 per cent. of the gross output from the mine was reserved to Patterson as lessee of the mining claim, and not as the owner of an interest therein; that the deed which he made to his wife did not transfer to her any part of that 5 per cent., and that she acquired no right therein; that she received her one-fourth interest in the claim subject to all the burdens theretofore placed upon the same by her agent, H. J. Patterson, and acquired no right, title, or interest in or to any of the royalties under the lease or the sublease.

A. R. Heilig, of Fairbanks, Alaska, and Thomas R. White, of San Francisco, Cal., for appellants.

McGowan & Clark, Thomas A. McGowan, John A. Clark, and H. E. Pratt, all of Fairbanks, Alaska, and Charles J. Heggerty and Knight & Heggerty, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellee asserts that the question for decision is whether or not

the deed made by Patterson to his wife on November 27, 1911, carried with it an asignment or conveyance of the sublease made by Patterson to Hamilton on the same day, under which sublease Patterson retained 5 per cent. of the gross output of the whole claim. We think the question for decision is not thus limited, and that it involves a broader view of the equitable rights of Mrs. Patterson as the owner of a one-fourth interest in the mining claim. The proof on the second trial clearly established that the money furnished by Mrs. Patterson, whereby the one-fourth interest was so acquired, was her individual and separate property.

The situation should be viewed as it would be if the marriage relation did not exist. It may be expressed in this manner: A. holds the legal title to a one-fourth interest in a mining claim, in trust for B., who is the equitable owner thereof. The owner of the three-fourths interest enters into an agreement of lease with A., whereby the latter is to operate the whole claim, and pay the former 25 per cent. of the total output. A month later, and before the mining operations begin, A. deeds the one-fourth interest to B., and at the same time he sublets to C. under an agreement whereby C. is to pay him 5 per cent. of the gross output, in addition to the 25 per cent. agreed upon to be paid to the owner of the three-fourths interest. Whose is the 5 per cent. which was realized under the sublease? Does it belong to A., or does it belong to B.? It seems to us that in equity it clearly belongs to B.

When Patterson entered into an agreement of lease, by which the interest of his wife was bound for a four-year term, it is not to be assumed that she was to get nothing out of it. In case he realized profits from the lease, he was accountable to her for her share of those profits. If she had been paid for her interest at the same rate that Wickersham was paid, she would have received considerably more than 5 per cent. of the gross output. When Patterson sublet the property in such a way as to secure to himself the payment of 5 per cent. of the gross output, we think that Mrs. Patterson could have required him to turn over to her that 5 per cent. At the first clean-up she claimed it, and, but for an injunction, it would have been paid to her. She testified that Patterson, when he told her of the sublease, told her that he had reserved 5 per cent. for the one-fourth interest, and that she assented to it. Patterson testified to the same effect.

[2] It is contended that the decision of this court on the first appeal finally determined that Patterson's deed to his wife did not convey to her the 5 per cent. reserved to him in the assignment of the lease, and thereby settled the law of the case upon the present appeal. The decision of the court below on the first trial of the case was based wholly upon the effect of the deed from Patterson to his wife. On the appeal from that decision we held that the court below erred in holding that the deed conveyed to her the interest in the royalty which Patterson had reserved, our opinion saying:

"That deed did not purport to convey to the defendant Mariam A. Patterson any part of her husband's interest in the amount then due or to become due to him from Hamilton under the lease by which the latter worked the ground, and certainly did not convey to her any part of the five per cent. of the gross

mineral output which was derived from the undivided three-fourths of the claim owned by Wickersham."

We also held that the evidence in the case indicated that the conveyance by Patterson to his wife was for the purpose of defrauding his creditors, and that error was committed on the first trial in dismissing the complainant's bill at the conclusion of the complainant's testimony. We said "the burden was cast upon the defendants to show the good faith and honesty of the conveyance in question," and we remanded the cause for a new trial. Now, upon the second trial, the defendants have shown the good faith and honesty of the conveyance, and have shown that Mrs. Patterson is in equity entitled to the 5 per cent. which represented, as both she and her husband testified, her interest in the leased property. On the second trial the court below found against Mrs. Patterson, not on the ground that the question of her right to the 5 per cent. had been adjudicated by our decision, but on the ground that Patterson had not at any time assigned or transferred that 5 per cent. to his wife. We hold that no such transfer or assignment was necessary, that Mrs. Patterson's interest was not created by the deed which her husband made to her, that in equity she is entitled to all that her husband got out of the lease of her property, that she is the equitable owner of the 5 per cent. reserved, and could have compelled him to pay it. Our former decision is therefore not an adjudication of the merits of the controversy as they are now established by the evidence adduced on the second trial.

The decree, so far as it awards the appellee the proceeds of the gold dust in question, is reversed, and the cause is remanded, with instructions to enter a decree awarding the same to Mrs. Patterson.

ROSS, Circuit Judge (dissenting). The record of the case on the present appeal, as well as the record before us on the former appeal (220 Fed. 21, 135 C. C. A. 597), shows without dispute that the $5,174.66 in the registry of the court below was 5 per cent. of the gross amount of gold taken from the Daly Bench mining claim by H. C. Hamilton under the assignment made to him by H. J. Patterson of the lease to the latter from Wickersham. In the judgment of the court below dismissing the former suit appears the following respecting that money:

"And it further appearing from the records of this action that, on the 17th day of May, 1912, an order was made in this cause, directing H. C. Hamilton, as lessee of the Daly Bench, described in the complaint herein, [to] deposit with the clerk of this court 5 per cent. of the gross amount of gold mined by him upon said mining claim during the pendency of this action, as royalty accruing to the owner of the undivided one-fourth interest in said Daly Bench, the title to which is in controversy in this action, to be held to await the determination thereof, and that the value of the said 5 per cent. of the gross amount of gold so mined by the said Hamilton is $5,174.66. It is further ordered that, in the event that, within 10 days from the date of this judgment the plaintiff has not filed with the clerk of this court a supersedeas bond, approved by the court, for an appeal from this judgment, the clerk of this court pay to the said Mariam A. Patterson, or her attorney, A. R. Heilig, the said sum of $5,174.66, if said gold dust or money has been deposited with him, and that, if the said Hamilton has deposited said gold dust with the American Bank of Alaska, then said bank pay said sum to the said Mariam A. Patterson, or her said attorney."

The identical written instruments appearing in the record of the present appeal were also shown on the former one, including the lease of the Daly Bench claim to H. J. Patterson for a term extending to October 12, 1915, reciting, among other things, the ownership by Wickersham of the undivided three-fourths thereof and the ownership by H. J. Patterson of the remaining one-fourth and reciting that Patterson had applied to Wickersham for a lease covering the entire claim upon certain terms and conditions which Wickersham thereby granted; that lease further reciting, among others things, that:

"As part consideration of this lease the party of the second part [H. J. Patterson] agrees that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease, and shall also at all times be subject to any debts, defaults, or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease; and it is especially agreed that the party of the first part [Wickersham] shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part, for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease. * * * And the party of the second part [H. J. Patterson] does hereby specially agree not to assign this lease or lay, or any interest therein or thereunder, and not to sublet or sublease the said demised premises, or any part thereof, nor to permit the same, nor any part thereof, nor any interest therein, to pass to any other person whatever, without the written consent of the party of the first part [Wickersham] had and obtained, and this prohibition shall extend to the undivided one-fourth interest belonging to the party of the first part."

In discussing the deed from H. J. Patterson to his wife, and its effect, we said on the former appeal:

"The deed from the latter to his wife was made November 27, 1911, expressing a consideration of $1 and quitclaiming to her 'all his right, title, and interest, being an undivided one-fourth interest,' in the Daly Bench claim. That deed did not purport to convey to the defendant Mariam A. Patterson any part of her husband's interest in the amount then due or afterwards to become due to him from Hamilton under the lease by which the latter worked the ground, and certainly did not convey to her any part of the 5 per cent. of the gross mineral output which was derived from the undivided three-fourths of the claim owned by Wickersham. It is therefore impossible to sustain the judgment of the court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim under the lease assigned to him."

Accordingly we reversed the judgment there appealed from, which had awarded to Mrs. Patterson the 5 per cent. of the gross output of the claim in controversy realized by Hamilton in the working of the claim under the lease assigned to him by H. J. Patterson. That the former judgment of this court in respect to the same money again in controversy—the pleadings and facts in the two cases being, so far as the present question is concerned, precisely the same—is the law of the case seems to me to be very plain. And especially difficult is it for me to see how equity can award to Mrs. Patterson any portion of the 5 per cent. of the gross mineral output of the claim that was yielded by the three-fourths thereof owned by Wickersham.

I therefore respectfully dissent from the judgment now given.

In re ZEIS.

In re McCARTHY BROS. & FORD.

(Circuit Court of Appeals, Second Circuit. April 24, 1917. On Rehearing, July 10, 1917.)

No. 187.

1. EXECUTION ⟸113—DORMANT LEVY—REVIVAL.
Where an execution becomes dormant after levy, by reason of instructions to the officer not to sell, it loses its priority of lien as against later levies or other liens acquired during the period of dormancy; but its lien is not extinguished as against the defendant, and on directions to proceed with the sale its right to priority is revived as against any subsequently acquired liens.

2. BANKRUPTCY ⟸196—LIENS—DORMANT LEVY OF EXECUTION.
A trustee occupies the position of a creditor with an execution issued and levied on the date of the filing of the petition in bankruptcy, but at no earlier date; and where an execution levied more than four months prior to such date had been allowed to become dormant by successive postponements of the sale with the consent of the plaintiff, but had been revived by orders to sell on a fixed date, the lien of the levy was effective against subsequent proceedings in bankruptcy against the defendant.

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

In the matter of George J. Zeis, bankrupt. From the judgment of the District Court, McCarthy Bros. & Ford appeal. Reversed.

For opinion below, see 229 Fed. 472.

August Becker and J. Ralph Ulsh, both of Buffalo, N. Y., for appellants.

Arthur J. Adler, of Buffalo, N. Y., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. This is an appeal under section 25a (3) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]), taken March 6, 1916, from a judgment of the District Court rendered February 8, 1916, refusing to give the appellants priority over the trustee in respect to execution issued upon the judgment recovered by them against the bankrupt more than four months before the petition was filed. Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. The court found that the appellants had allowed the execution issued on their judgment to become dormant.

The court below was without jurisdiction:

First. Because the appeal was not taken within ten days after the judgment was rendered as required by the act. In re Martin, 201 Fed. 31, 33, 119 C. C. A. 363; Conboy v. Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128.

Second. Because a claim of priority, the debt not being disputed, is not "a debt or claim" within the section. The judgment of the court

neither allowed nor disallowed any sum, but only denied priority. Holden v. Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

The appeal is dismissed.

On Rehearing.

ROGERS, Circuit Judge. When this case was here before, this court dismissed the appeal on the ground that the court was without jurisdiction; the appeal not having been taken in time. A rehearing was asked and granted, and upon reargument we are satisfied that the appeal was taken in time. The confusion arose from the fact that the caption of the judgment bears date of February 8, 1916, which is the date on which the District Judge handed down his opinion; whereas, the fact is that the judgment was not prepared and entered in the clerk's office until March 3, 1916, and the appeal was taken and allowed within three days after the entry of the judgment.

This brings us to a consideration of the case upon the merits. The appellant recovered a judgment on October 22, 1912, against the bankrupt, for the sum of $726.95, and on that day an execution was issued upon the judgment, and the sheriff on the same day duly levied on certain personal property. The petition in bankruptcy was filed on March 12, 1913. The sheriff was restrained from selling under appellant's execution by a temporary restraining order served on March 12, 1913, and made permanent on March 18, 1913. There were various other creditors, who obtained executions against the personal property subsequent to that of the appellant and prior to the bankruptcy; but they also consented to the postponement of the sale under their executions, and they stand in a like position as the appellant in respect thereto, and there is no controversy as between them and the appellant as to whether they obtained priority by virtue of the appellant's consent not to proceed.

The property covered by the levy was thereafter sold by the bankruptcy court and the proceeds stand in place of the property itself. It appears that at the time that execution of the appellant was issued and levied the sheriff held two prior unsatisfied executions against the bankrupt, under which levy had been made. The property had been advertised for sale by the sheriff pursuant to the levy, but the sale had been adjourned from time to time until October 28, 1912. Thereafter there were further adjournments of the sale, and on December 13th the two prior executions were satisfied; the execution of the appellant on that day becoming the first lien. After this date there were adjournments of from three days to two weeks, 11 in number, until on March 6, 1913, the sale was set for March 13th, and on March 12th this sale was enjoined. There were in the sheriff's hands also a number of executions subsequent to the appellant's, and all of the execution creditors acquiesced in the adjournments.

[1] Upon objections filed by the trustee in bankruptcy to the appellant's claim to the proceeds of the property by virtue of its execution, the referee in bankruptcy held that the appellant's execution had become dormant when bankruptcy intervened and was not a lien on

the property levied upon. The District Judge affirmed the order of the referee and disallowed the appellant's claim. At the time this execution was taken out two prior executions had been levied on the bankrupt's property, which had not been satisfied; and the sheriff had failed to proceed under any of them. The reason why he did this was given by him on the stand as follows:

"I do not mean to give the impression here that the day before the sale Mr. Becker [plaintiff's lawyer] called up and said: 'Mr. Bernhard, will you please adjourn that sale until to-morrow?' I used to call you, I think. It was a fact that money had been paid on the first executions, and that they had been paid. I was having conferences with Mr. Zeis up to that time, and he was making promises to me to pay the money. He was telling me of deals that would bring him money, and, if I would hold the sale a week or so, he would have the money; and he would say: 'If you will adjourn the sale, I can get the money within a few days.' After such promises were made, I would communicate the circumstances to you or Mr. Becker, and tell of the adjournment that had been had, and the money that had been paid. I would tell everybody what Mr. Zeis told me, that he paid so much money and it looked as though he was going to pay the balance, and upon that theory the execution creditors consented to the adjournment. I suppose you refused to adjourn that sale more than any other execution creditor."

He also testified:

"But Mr. Becker did not come to me in the first instance and ask me to hold this sale. Mr. Becker, of his own initiative, never came to me and said, 'Mr. Bernhard, don't sell Mr. Zeis' property;' but he consented to adjournment, asked me what I thought about getting the money."

He stated that all the adjournments were made "from time to time in hopes that Mr. Zeis could realize from the sale of some real estate and purchase all these judgments." It appears that the various adjournments were made with the consent of the execution creditors, and on representations made to them by the sheriff that Zeis wanted and expected to pay, and that payment would be made out of a sale of certain of his real estate, and that unless the sale under the executions was postponed Zeis would be thrown into bankruptcy.

It is conceded that under St. 13 Eliz. c. 5, and like statutes, executions taken out with the intent to hinder, delay, or defraud creditors or others are, as against the persons sought to be hindered, delayed, or defrauded, utterly void. It may also be conceded that, when the object of the writ is simply to obtain better security for the debt, the writ is fraudulent as against subsequent purchasers or incumbrancers, and that it would be outranked by subsequent executions. If, after a levy is made, the officer is instructed not to sell, the execution becomes dormant, and during the period it remains dormant the plaintiff is liable to lose the benefit of his writ through the sale or incumbrance of the defendant's property. But the lien is not vitiated as against every one by the instruction not to sell. The correct rule is laid down in Freeman on Executions, § 206, as follows:

"Liens of executions may be lost as against junior judgment creditors, mortgagees, or vendees acquiring rights during the time execution may be stayed by order of the plaintiffs. But as against the defendants in execution, or his personal representative or heirs, or others not acquiring rights or liens, the mere suspension of the execution has no effect on its lien."

So in 11 Am. & Eng. Encyc. of Law, p. 694, the law is stated as follows:

"It is a well-settled principle of law that the office of an execution is merely to enforce payment of a debt, and consequently an attempt to make use of it for purposes of security merely, or to shield the property of the debtor from seizure by other creditors, is a perversion of the writ, and will postpone it to other executions subsequently issued. Hence, if a plaintiff delivers an execution to the sheriff with a direction not to levy at all, or until further orders, or to levy and hold without sale, it creates no lien on defendant's property as against a creditor issuing and proceeding with a subsequent execution; and the same is true if similar orders be given after delivery or after levy, or if such be the intent of the creditor though no express orders to that effect be given."

If it be assumed that the appellant's levy became dormant because of the failure to proceed promptly thereunder, it is nevertheless true that it was, as against the defendant in execution, good during the whole period from October 22, 1912, the time when it was made to the time of the adjudication in bankruptcy. It was also good during that whole period as against the execution creditors who levied subsequently to the levy of the appellant, and who acquiesced and consented to the various postponements of the execution sale, and did nothing other than the appellant did as respects the enforcement of their levy.

Still, assuming it to have become dormant, it was revived by the directions given to the sheriff to proceed with the sale, given six days prior to the filing of the petition in bankruptcy; and it was the direction to proceed with the sale that led to the filing of that petition. The various postponements of sale which the execution creditors had been consenting to from time to time had been given, as I have already noted, in the hope that bankruptcy proceedings might be avoided. The appellant, however, could no longer be induced to consent to further delay, and the bankruptcy proceedings were instituted. The effect of the instructions of the appellant to the sheriff to proceed with the sale is stated in Freeman on Executions, vol. 2, § 206, p. 1043, as follows:

"If the plaintiff, after staying or suspending its execution, directed the officer to proceed, the lien will be revived and made paramount to all writs received by the officer after such direction to proceed."

[2] Unless, therefore, it can be said that the trustee acquired the rights or status of a bona fide purchaser or junior execution creditor during the time proceedings were suspended, the lien is good as against him, and must be recognized by the bankruptcy court. It is clear that a trustee in bankruptcy is not a bona fide purchaser. Zartman v. First National Bank, 216 U. S. 134, 138, 30 Sup. Ct. 368, 54 L. Ed. 418. And also it is settled that the trustee occupies the position of a creditor with an execution issued and levied upon the date of the filing of the petition in bankruptcy, and not earlier. Bailey v. Baker Ice Machine Co., 239 U. S. 269, 36 Sup. Ct. 50, 60 L. Ed. 275.

The revival arising from an instruction to proceed to sell was not the revival of the lien, but a revival of the priority of the lien. No new lien was created, which would be void because within the four-months period under section 67f of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. 1916, § 9651]). When an execu-

tion is deemed to be dormant, it simply means that the lien has lost its priority in favor of another execution or person acquiring certain rights during the period of dormancy. The lien as such, which is the right to satisfy the debt out of the property levied upon, still remains. The property is still charged, with that lien while the execution of the writ is suspended; the only difference being that other executions, etc., may come in and fasten on the property and be satisfied first. If the property is sold under such circumstances, while the later executions may successfully claim to be satisfied ahead of the one which became dormant, the so-called dormant execution will be paid out of any surplus remaining after the satisfaction of the others. That is all that has ever been held to result from a dormancy, so-called. See Peck v. Tiffany, 2 N. Y. 451; Keel v. Larkin, 72 Ala. 493, 502, 503.

For the reasons stated, the decree and order of the District Court should be reversed; and it is so ordered, with costs of this appeal.

Decree reversed.

In re MONARCH ACETYLENE CO.

In re BEALS & CO.

(Circuit Court of Appeals, Second Circuit. April 24, 1917. On Rehearing, July 10, 1917.)

No. 188.

On Rehearing.

BANKRUPTCY ⊂=440—APPELLATE PROCEEDINGS—MODE OF REVIEW—CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS—"PROCEEDING IN BANKRUPTCY."

An order establishing as a lien on property of a bankrupt a claim not contested as a general claim is not one in a "controversy arising in bankruptcy proceedings," within Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (Comp. St. 1916, § 9608), but is one made in a "proceeding in bankruptcy," reviewable only on appeal taken within 10 days, under section 25a (Comp. St. 1916, § 9609).

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Controversy Arising in Bankruptcy Proceedings; First and Second Series, Bankruptcy Proceedings.]

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

In the Matter of the Monarch Acetylene Company, bankrupt. From a judgment of the District Court, Beals & Co. appeal. Appeal dismissed.

For opinion below, see 229 Fed. 474.

August Becker and J. Ralph Ulsh, both of Buffalo, N. Y., for appellants.

Frederick O. Bissell, of Buffalo, N. Y., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. This case is exactly like that of In re Zeis, 245 Fed. 737, — C. C. A. —, in which an opinion has just been handed

down, except that there is an additional defect, in that the amount involved is less than $500, the jurisdictional amount prescribed in section 25a (3) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]).

The appeal is dismissed.

On Rehearing.

ROGERS, Circuit Judge. This case is here on a rehearing. We are satisfied that the former opinion of this court, dismissing the appeal, was right. The question involved relates to a claim secured by a lien on the assets of the bankrupt. Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, shows that the question presented is not "a controversy arising in bankruptcy proceedings" under section 24a of the Bankruptcy Act, but is "a proceeding in bankruptcy" under section 25a. As such the appeal had to be taken within 10 days, and it was not so taken. The petition on appeal discloses that the judgment was entered on February 18, 1916, and that the appeal was not taken until March 6, 1916.

Appeal dismissed.

WOOD et al. v. NOYES.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1917.)

No. 2529.

BANKS AND BANKING ⟸54(1)—DIVIDENDS—OFFICERS' LIABILITY.

Officers and directors of a banking corporation, who participated in the declaration of a dividend out of the capital of the corporation, which was then insolvent, are liable to the receiver to the amount of dividends received by them.

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; F. E. Fuller, Judge.

Suit by F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, against R. C. Wood and others. From a decree for complainant, defendants appeal. Affirmed.

McGowan & Clark, A. R. Heilig, and John L. McGinn, all of Fairbanks, Alaska, and Metson, Drew & Mackenzie, Curtis Hillyer, and Charles J. Heggerty, all of San Francisco, Cal., for appellants.

O. L. Rider, of St. Louis, Mo., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellee, as receiver of the insolvent bank, brought suit against the appellants, who had been directors and officers of the bank, and against other stockholders, to recover the amount of a dividend paid to and received by them under a resolution adopted by the board of directors of the bank on the 12th day of April, 1910; the complaint alleging, among other things, that:

"On and for a long time prior to said April 12, 1910, said Washington-Alaska Bank, then known as the Fairbanks Banking Company, was in a

grossly insolvent and bankrupt condition, and its assets were insufficient in value by more than $100,000 to pay its deposits and other liabilities. Notwithstanding the said grossly insolvent and bankrupt condition of said bank, the board of directors thereof did on said 12th day of April, 1910, wrongfully and fraudulently declare and order to be paid to the then stockholders of said Washington-Alaska Bank, then known as the Fairbanks Banking Company, a dividend of 20 per cent., or $20 per share, on its then outstanding capital stock of $168,800. On said 12th day of April, 1910, said Washington-Alaska Bank owed to depositors the sum of $876,972.28 and had other liabilities amounting to $83,717.53."

By their amended answer the defendants put in issue those allegations of the complaint, and, among other things, by further and separate answer the defendants McGinn and J. A. Jessom alleged, in substance, that at the time the dividend was declared and at the time they received the same the bank was solvent, and that they believed it so to be, and received their portion of the dividend in good faith and believing that it came out of the profits of the bank and not otherwise; and the defendant Wood, for a further and separate answer alleged that the portion of the said dividend so paid to him was paid to him for the use and benefit of one Joseph Conta, who was the true owner of the shares of stock standing in his name on the books of the bank, and that at the time the dividend was declared and at the time he received the same the said bank was solvent, and that he believed it to be so, and received the portion of the dividend so received by him prior to any notice that the bank was insolvent and could not meet its liabilities. These affirmative allegations were put in issue by the reply of the plaintiff.

Each of the defendants also set up in defense certain matters also pleaded by them in a suit brought by the same receiver against them, together with the other officers and directors of the said bank, namely, E. R. Peoples, James W. Hill, and Ray Brumbaugh, charging them with wrongful and negligent acts and conduct whereby the bank had been injured and its assets wasted, so that it became unable to pay its creditors, and praying that an accounting be had and judgments rendered against the defendants to that suit for the amounts found to be due from them respectively, in which suit the other defenses referred to were, on appeal from the judgment there given by the trial court, held by this court at the last term to be of no avail, so that no further reference to those defenses need now be made. 245 Fed. 46, —— C. C. A. ——.

The present suit was tried by agreement of the respective parties before the court without a jury, and the court found the facts to be in substance as follows:

(1) That the bank of which the plaintiff was receiver was incorporated under the name of Fairbanks Banking Company under the laws of the state of Nevada, January 21, 1908, with an authorized capital stock of $300,000, divided into 3,000 shares of the par value of $100 each; that subsequently, by amendment to its articles of incorporation, the name was changed to Washington-Alaska Bank.

(2) That the bank commenced business at the town of Fairbanks, Alaska, March 16, 1908, and continued to carry on a general banking

business there until June 4, 1911, when it suspended business and closed its doors.

(3) That on April 12, 1910, the said Fairbanks Banking Company by its then board of directors declared a 20 per cent. dividend on the par value of its then outstanding capital stock of $168,000, amounting to $33,720, which dividend was paid to the then stockholders of the bank, either in cash or by crediting the amount thereof upon notes owing by such stockholders to the bank, in the amount set forth in the complaint.

(4) That of said stockholders J. A. Jessom, J. W. Hill, G. W. Palmer, E. R. Jessom, M. F. Hall, John F. McGinn, Dave Petree, John Zug, Mrs. Mary Anderson, R. C. Wood, J. L. Sale, G. A. Coleman, George Preston, and J. A. Healey joined issue with the plaintiff upon the matters and things set up in the complaint, and were then before the court.

(5) That the defendants J. A. Jessom, McGinn, and Wood were directors of the bank at the time the said dividend was declared and paid, and gave their consent to the same; that McGinn was at the time the owner of shares of the capital stock of the bank of the par value of $10,000, and that there was paid to him thereon of said dividend $2,000; that J. A. Jessom was at the time the owner of shares of the capital stock of the bank of the par value of $10,000, and that there was paid to him of the said dividend the sum of $2,000; that Wood was at the time the owner of shares of the capital stock of the bank of the par value of $2,500, and that there was paid to him of the dividend the sum of $500; that none of the other defendants mentioned were officers or directors of the bank at the time of the declaration of the dividend, or at the time of the receipt of their portion thereof.

(6) That at the time the said dividend was declared and paid the said Fairbanks Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid, and that the said dividend was paid out of the capital of said bank, which facts were known to the defendants McGinn, Wood, and J. A. Jessom, and to each of them, at said time, or could have been known to them by the exercise of reasonable diligence.

(7) That the dividend so paid to the defendants Hill, Palmer, E. R. Jessom, M. F. Hall, Petree, Zug, Mrs. Mary Anderson, Sale, Coleman, Preston, and Healey was received by them without knowledge on their part that the said bank did not have any surplus or undivided profits out of which the said dividend could be declared and paid, or that the same was paid out of the capital of said bank, and they and each of them received the same in good faith and in the honest belief that the same was declared and paid to them out of the surplus and undivided profits of said bank.

(8) That said dividend was declared and paid in violation of the laws of the state of Nevada, under which said corporation was organized, and in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.

(9) That the assets of said bank now in the hands of said receiver

are insufficient to pay its liabilities, and the amount of said liabilities is more than $470,000 in excess of the par value of said assets.

The findings covered the material issues made by the pleadings, and upon the record we cannot hold that the evidence was insufficient to justify the findings made, or that the court below erred in refusing to make the numerous findings requested by the appellants. From the facts so found the court concluded as matter of law that the defendants J. A. Jessom, McGinn, and Wood are liable to the plaintiff for the amount of the dividend paid to and received by them, respectively, and gave judgment against them accordingly, and in favor of the other defendants.

For the reasons set forth in the opinion filed in the other suit above referred to, we think the judgment here appealed from right, and it is accordingly affirmed, with the provision that, upon the payment of the joint and several judgment entered in the aforesaid suit against the present appellants as directors, the judgment here affirmed also becomes thereby satisfied and extinguished.

WONG GOON LET v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917.)

No. 2976.

1. CRIMINAL LAW ⊜656(1)—TRIAL—CONDUCT OF JUDGE.
   In a prosecution for adultery, remarks by the trial judge to accused's alleged paramour, who was called as a witness, that no one would hurt her, that she should not cry, and should speak so she could be heard, did not show prejudice against accused, though the trial judge adressed the alleged paramour as little girl, and advised her of her rights against self-incrimination.
2. ADULTERY ⊜14—EVIDENCE—SUFFICIENCY.
   Evidence *held* sufficient to sustain a conviction of adultery.
3. ADULTERY ⊜8—INDICTMENT—VARIANCE.
   Where, in a prosecution for adultery, there was evidence that at the time of the offense accused was married to one other than his alleged paramour, variance between the allegation and evidence, as to the name of accused's wife, was immaterial.

Appeal from the District Court of the United States for the Territory of Hawaii; Horace W. Vaughan, Judge.

Wong Goon Let was convicted of crime, and he appeals. Affirmed.

Bitting & Ozawa, of Honolulu, T. H., for appellant.

S. C. Huber, U. S. Atty., and James J. Banks, Asst. U. S. Atty., both of Honolulu, T. H., and John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

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

HUNT, Circuit Judge. Wong Goon Let, alleged to be married to Wuai Kam Let, was convicted in Hawaii of adultery with one Kum

Sing Hee, and asks reversal upon the grounds of the prejudice of the judge who presided at the trial, insufficiency of the evidence to warrant conviction, and variance between the allegations of the indictment and proof.

[1] Prejudice of the judge is based upon the following incidents: Upon the trial, the woman, Kum Sing Hee, who gave her age as 21, was called to testify. The record does not disclose that the woman was crying, but states that the court told her that no one was going to hurt her, and that she must not cry. "Now, little girl," said the court, "speak loudly, so that these gentlemen here can understand what you have to say." The judge also carefully explained to her that she could not be compelled to give evidence of her own wrongdoing, if she were guilty of any wrongdoing, and that she could claim the right to refuse to answer questions which would incriminate her. The argument of the defendant is that "the attitude of the judge and the manner of addressing the Chinese woman in the presence of the jury" prejudiced the jury against the defendant. But, in the absence of some substantial showing, it is not for this court to infer that the trial judge assumed a manner whereby the defendant's rights were disregarded. If the witness was nervous or timid, it was wholly proper for the judge to assure her that no one wished to harm her, and that she must speak so that the jurors could hear her. We cannot see that by addressing her as "little girl" the court could have prejudiced the jury against the defendant. No possible intimation of a belief in the guilt of the defendant was conveyed by the use of the language, and there is nothing to justify any opinion other than that the judge was merely trying to have the witness appreciate that she need feel no fear while in the court.

[2] The evidence in support of the verdict was very strong. It showed that the defendant and the woman were alone at night; that defendant took the woman to a house some distance away from the point where he met her; that defendant left his automobile with the lights turned off and under some trees; that the two remained in the house some time; that the officers found them together in a room with the door locked; that the lights were dimmed; that when discovered they were in such conditions of dress and in such positions in the room as to indicate adulterous relations.

[3] Variance between the allegations of the indictment and the evidence is urged, because the indictment alleged that defendant was married to Wuai Kam Let, while the proof showed that the wife's name was Foo Kwai Kim. But as there was evidence that at the time of the offense charged the defendant was lawfully married to a woman other than the alleged paramour, the variance between the name of his wife as pleaded in the indictment and as shown on the trial was immaterial. Bodkins v. State of Texas, 75 Tex. Cr. R. 499, 172 S. W. 216; Simmons v. State of Texas (Tex. Cr. App.) 184 S. W. 226; Corpus Juris, vol. 2, p. 20; Hall v. United States, 168 U. S. 633, 18 Sup. Ct. 237, 42 L. Ed. 607.

No ground for reversal being shown, the judgment is affirmed.

Affirmed.

CHAIN BELT CO. et al. v. NEW YORK SCAFFOLDING CO.

(Circuit Court of Appeals, Seventh Circuit. August 10, 1917.)

No. 2408.

PATENTS ⊜328—VALIDITY AND INFRINGEMENT—SCAFFOLD.

The Henderson patent, No. 959,008, for scaffold-supporting means, claims 1 and 3, *held* valid, and infringed by the use of the scaffold hoist of the Whitney patent, No. 998,270, but not infringed by the device of the Whitney patent, No. 1,114,832, in which there is no hoisting drum, as in the Henderson device.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit in equity by the New York Scaffolding Company against the Chain Belt Company and Egbert Whitney. Decree for complainant, and defendants appeal. Reversed.

Appeal from decree awarding injunction and accounting for infringement by appellants of claims 1 and 3 of the United States patent to Henderson, No. 959,008, May 24, 1910, for scaffold-supporting means. The claims are as follows:

"1. A scaffold consisting in the combination of crossbeams, floor pieces extending between such beams, and a hoisting device associated with each end of each beam, each hoisting device consisting of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, and a hoisting drum rotatably supported by the side members of such bar."

"3. A scaffold consisting of a plurality of U-shaped bars arranged in pairs, a crossbeam laid in and extending between each pair of such U-shaped bars, a floor laid upon said crossbeam, a drum rotatably supported between the upwardly extending side members of each of said U-shaped bars, and means for controlling the rotation of said drum."

Figures 1 and 5 of the patent drawings are as follows:

FIG. 1.

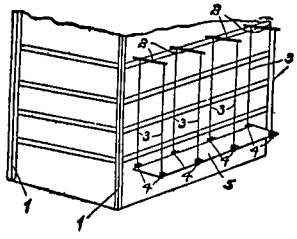


FIG. 5.

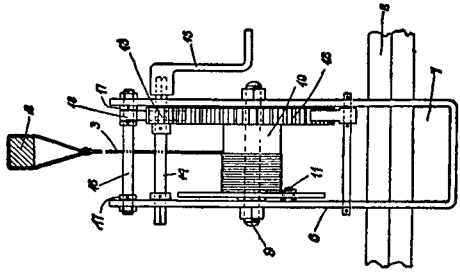


Fig. 1 shows a typical scaffold *5* in this art, suspended by ropes or cables *3*, which hang from outriggers *2* attached to the building *1*. The hoisting machines *4* are located on the platform and are manually operated to raise and lower the platform. Fig. 5 shows Henderson's hoisting machine, which, in association with the other enumerated elements, constitutes the combination of the claims in issue. The frame *6* extends downward, and is of

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

U-shape, adapted at 7 to receive, surround and support the ends of the crosspieces or putlogs laid therein, which in turn support the platform boards 8, laid upon them. The upright sides 6 of the frame hold the revolving drum 10 to which the cable is fastened, and by means of a lever and handle 15 the drum is revolved by the operator and the scaffold platform thereby raised or lowered.

The defenses were noninfringement and invalidity of the patent through anticipation, prior use, and want of invention or patentability.

Robert H. Parkinson and Wallace R. Lane, both of Chicago, Ill., for appellants.

Paul Bakewell, of St. Louis, Mo., and C. P. Goepel, of New York City, for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). 1. The claims are for a combination, no element of which possesses novelty, and the combination itself shows but slight advance over the prior art. Patent No. 854,959 (1907) to Murray presents all the elements of the Henderson combination, except the U-shaped bar forming the bottom of the frame in which the crossbeams or putlogs are laid. In Murray's frames the side bars extend below the floor, and are bolted or riveted to the angle iron putlogs there shown. The frame has a revolvable drum extending between the sides of the frame, with handle and ratchet for operating the drum on which the cable is wound. In this construction the frame holding the drum is necessarily set at right angles to the building. Patent to Bowyer (1888) and to Sladek (1898) show painters' scaffolds having a frame U-shaped at the bottom, and supporting a hoisting drum between the upright sides of the frame; the lower U supporting directly the scaffold boards laid in them, without the intervention of putlogs. The evidence fairly establishes that in 1908, prior to Henderson's invention date, appellee, who owned the Murray and other patents for scaffolds, and had built up a large business in the supplying of scaffolds for the erection of high buildings, had furnished for the erection of the Blackstone Hotel at Chicago, scaffolds in which there was the U-shaped bar frame similar to that of Henderson, but with putlogs composed of two angle irons bolted together, the U-frame extending down between them, and the connecting bolts resting on the top of the under web of the U, the floor boards of the scaffold being, as in Henderson, laid parallel to the building. This employment of the U-bar did not change the position of Murray's machines, which, as shown in his patent drawings, was at right angles to the building. Henderson's contrivance having the ends of the putlogs laid directly in the U-frames at 7, necessitates the setting of the frames parallel or broadside with the building.

The evidence of prior art does not show a complete scaffold wherein, as in Henderson, the pairs of frames are so disposed that putlogs are laid directly into the bottoms of the frames without the intervention of bolts or equivalent contrivances. The special advantages claimed for the Henderson combination over others were testified to

be the saving of space in the width of the platform, greater security, and greater facility in the installation and removal of the scaffolding. All these, save the first, are quite dubious. There is in these drum machines necessarily considerable width of frame to accommodate the hoisting drum, which must be wide enough to hold 100 feet of cable. The frames and drums when set on the scaffold in pairs—two for each putlog—and at right angles to the building, might appreciably obstruct the width of the scaffold, and in so far as Henderson shows a combination wherein these drums might extend broadside of the building, he made advance to the extent that there was thereby effected substantial saving of room on the platform, although neither in the specifications nor the claims is mention made of the position of the drums with reference to the building wall.

We do not find in the prior art, or in the prior use, any operative scaffold of this general nature which seems to embody all of the elements present in Henderson's combination. His advance, however slight, is not so wholly wanting in invention or novelty as to justify a finding contrary to the presumptive validity of the grant to him, and we therefore conclude that his claims in issue here are valid. The validity of these same claims was recently in issue in a suit in Nebraska wherein appellee herein was plaintiff and appellant Whitney defendant. The District Court found for the defendant, but on appeal the Circuit Court of Appeals for the Eighth Circuit held the claims valid (New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138), although the District Court for the Western District of Pennsylvania, in a suit by appellee herein upon the same claims reached an opposite conclusion, holding the claims invalid as not disclosing invention (New York Scaffolding Co. v. Liebel-Binney Construction Co., 243 Fed. 577, — C. C. A. —, October term, 1914), the decree therein having been recently affirmed by the Court of Appeals for the Third Circuit.

2. The infringement alleged is in the manufacture and sale of two articles known as the Whitney scaffold hoist and the Little Wonder machine, made pursuant to patents to Whitney, numbered respectively 998,270 (1911) and 1,114,832 (1914). These patents are for devices for hoisting scaffolds, and the suit here was brought against appellant Chain Belt Company, on the claim that it manufactured the hoisting mechanism of these two patents, and knowingly sold or delivered them to users who would so apply and combine them with putlogs and scaffold floors as thereby to present all the elements of the combination of Henderson's claims 1 and 3, whereby in such manufacture and sale there was contributory infringement by the Chain Belt Company. Appellant Whitney intervened, alleging that all the machines made by the Chain Belt Company were made for him, that they had ceased making the Whitney scaffold hoist, that the Little Wonder did not infringe, and he asked that appellee be enjoined from prosecuting various suits it had instituted against users of the Little Wonder.

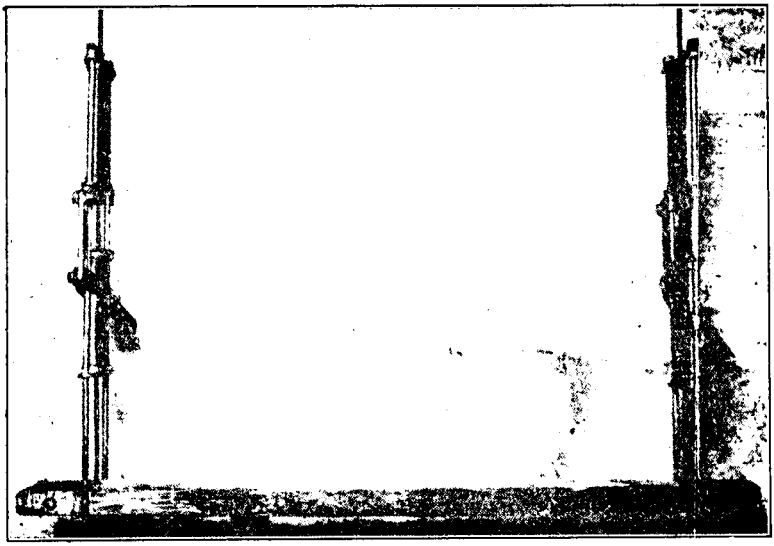
Upon the question of infringement we will consider first the Whitney scaffold hoist. This shows a hoisting drum revolubly mounted in a frame which has a straight rod or bar bolted to the lower ends

of the frame. When this frame is used by setting it on the scaffold broadside to the building, putlogs may be laid in and held by the bottom of the frame, as is contemplated by the Henderson patent, and, when in such position, the Henderson claims in issue are readable upon such structure, unless it may be said that the bottom of this Whitney frame, by being bolted to the sides, is not in effect the continuous U-shaped bar of Henderson. But in so far as the function of this bar is to support, by laying therein, the putlogs, it is not of essential materiality whether the continuousness of the frame is effected through one or several pieces of metal, or whether the corners are rounded or rectangular. Inasmuch as this bottom affords support extending around and holding the putlog laid therein, it does not seem important whether it is the precise bar described by Henderson, or its manifest equivalent, capable of performing this same function in the same manner as in the Whitney scaffold hoist, if otherwise all the elements of Henderson's combination appear. It was this same Whitney scaffold hoist whose manufacture and sale for the alleged purpose of its use in a like combination was the contributory infringement charged in the above-named Nebraska suit; and the Circuit Court of Appeals there further found that in such cases where the Whitney scaffold hoist having the drum was shown to have been made, and sold to be set broadside of the building, and used in pairs with putlogs laid therein after the manner of the combination of the Henderson claims, it contributed to the infringement thereof, and should be dealt with accordingly.

It was sought to show by the evidence that the Whitney scaffold hoist was intended to be used, and in most instances was used, by setting it with its hoisting drum at right angles to the building, and employing the double angle iron putlogs bolted together, with the bolts resting on the lower crosspiece of the frame, as has been referred to in connection with the Murray hoist on the Blackstone Hotel job. While there was evidence that these frames and drums had been so used, there was also evidence of their use broadside of the building with wooden putlogs laid therein, as in Henderson, and some evidence which would warrant the conclusion that in some cases it was intended or expected that they would be so used broadside of the building, with putlogs. In such cases, if intended by appellants for such use, the alleged contributory infringement appeared, and notwithstanding there is no evidence of any manufacture or sale of the Whitney scaffold hoist for a period of nearly two years next before the filing of the bill herein, relief was properly granted for whatever of contributory infringement there appeared through evidence of the intended manufacture and sale of the Whitney scaffold hoist with hoisting drum, where intended by appellants for use broadside the building, with putlogs laid therein, as in Henderson, and due restraint against future offending in this respect was likewise properly decreed.

3. The Little Wonder machine shows a pair of side bars or rods about six inches apart with cross rods bolted to top and bottom, forming a rectangular frame, between the uprights of which there is a complicated mechanism having series of oppositely arranged toothed

jaws operated by a lever. Below is a cut of "Plaintiff's Exhibit 20," which purports to be a photograph of a pair of the Little Wonders in actual use equipped with a putlog.



The cables shown are attached to outriggers, and may hang from the top to the bottom of the wall to be served by the scaffold. Moving the lever of the machine up and down, with a pump-handle motion, causes the mechanism alternately to release, clutch, and hold the cables, and thereby raising or lowering the machine, very much as a man would climb a rope, leaving the frame firmly held to the cable at any desired point. In this mechanism there is no drum whatever, or anything like a drum. The cables remain suspended their entire length as they are hung from the outriggers, and there is no winding, and no occasion for any drum. In the use of the Little Wonder there is thus omitted the element of the drum as included in the Henderson claims.

The charge of infringement is based on the identity of the frame of this machine with Henderson's U-bar frame, the equivalency in the combination with the Little Wonder mechanism to the specified drum machine, and the manufacture and sale of the Little Wonder for intended use in scaffolds after the manner of the Henderson claims. The ends of this putlog have holes to accommodate the cables which must pass through. The putlog appears too wide for the frame, and seems to be cut out to accommodate the side rods. Indeed, the evidence shows that in many, if not most, instances there are two more holes in each end of the putlogs for the side rods to pass through, and that they are placed in position by first unbolting and removing the lower cross rod, putting the side rods through the holes made for them, and replacing and bolting the lower rod. In this wise the putlog is held

absolutely, though not necessarily rigidly. While Henderson's claims do not, except inferentially, indicate that the putlogs should not be fastened to the frame, it appears from the file wrapper that after rejection of his claims the patent was finally granted partly on the representation by Henderson "that the connection between the U-shaped bar and the crossbeams is absolute and positive and no rivets, bolts or other auxiliary means are employed," from which it is inferable that his putlogs were held by the U-bar alone without fastening of any kind such as the rods and cable may be said to constitute in the use of Little Wonder. While this alone might not patentably distinguish the two combinations, it is well to be considered in connection with other differences.

It is contended that, while a drum is included as an element of the combination in each of the Henderson claims, yet this describes only the hoisting mechanism of the combination, and that any other hoisting mechanism would be its mechanical equivalent in the combination. Any substantial patentable advance shown in this patent bears a particular relation to the drum mechanism of the claims, not to be found in its relation towards the other mechanism under consideration. As has been pointed out, the drum construction is necessarily of considerable width to accommodate a drum wide enough to hold the cable to be wound thereon. The entire absence of the drum makes possible the comparatively extreme narrowness of the Little Wonder machine, rendering it practically immaterial in this respect, whether it is set at right angles or broadside to the building. If set at right angles, it would occupy scarcely more of the width of the platform than the Henderson machine set broadside.

The same question of infringement of these claims by this use of the Little Wonder was very recently before the federal court in Nebraska. The District Court, in litigation between appellee here and Whitney, involving the same alleged infringement held it to infringe, but on appeal to the Circuit Court of Appeals it was held, in an exhaustive opinion filed April 2, 1917 (243 Fed. 180, —— C. C. A. ——), there was no infringement of Henderson, in any use of the Little Wonder, whether set at right angles or broadside. It is our view that the Little Wonder is not the mechanical equivalent of the drum mechanism stated in the claims in issue as an element of that combination, and that through the entire absence of the drum a scaffold equipped with the Little Wonder does not respond to the Henderson claims, and thus does not infringe.

We conclude that the decree of the District Court is correct in finding the claims valid, and that there was contributory infringement of claims 1 and 3 by appellants, in making or selling the Whitney scaffold hoist, in those cases where made or sold with intent or knowledge on the part of appellants that they would be used in scaffolds in the manner of the Henderson patent as above pointed out, but that the decree is erroneous in finding infringement in the manufacture or sale or in any use of the Little Wonder machine.

The decree of the District Court is therefore reversed, with direction to enter a decree in accordance with the foregoing views; appellants and appellee each to pay half the costs of this appeal.

JAMES CLARK, JR., ELECTRIC CO. v. UNITED STATES ELECTRICAL TOOL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. August 10, 1917.)

No. 2266.

PATENTS ⊂=328—INFRINGEMENT—ELECTRIC DRILL.

The Willey patent, No. 750,744, for an electric motor driven portable drill, *held* not infringed, on evidence showing that the alleged infringing device was in public use more than two years before application for the patent was filed.

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

Suit in equity by the James Clark, Jr., Electric Company against the United States Electrical Tool Company and the Schneider Sales Company. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 217 Fed. 252.

George L. Wilkinson and Thomas F. Sheridan, both of Chicago, Ill., for appellant.

Samuel E. Hibben, of Chicago, Ill., for appellees.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

BAKER, Circuit Judge. Appellant's bill for alleged infringement of patent No. 750,744, January 26, 1904, to Willey, for an electric motor driven portable drill, was dismissed for want of equity.

Defenses were lack of invention, noninfringement, and prior knowledge and prior use by appellee's president, Smith.

It is unnecessary to consider separately the questions of patentable novelty and infringement, because we find that the drill, manufactured and sold by appellee and alleged to be an infringement, was independently devised and perfected and publicly used by Smith, appellee's president, more than two years before Willey filed his application, March 5, 1903.

Smith, according to the records of the Wadsworth Watch Case Company of Dayton, Ky., was in charge of that company's steam plant and electrical apparatus from July 19, 1900, to October 27, 1904. Prior to that he had had 20 years' experience with electric apparatus, particularly motors.

A distinguishing feature of the drill of the Willey patent is that the chuck for the tool is not at the end of the armature shaft, but is carried on an offset shaft which is rotated by the armature shaft through reduction gears. Before entering the Wadsworth Company's service, Smith had begun the construction of an electric drill with the chuck at the end of the armature shaft. He testified that he did not finish the drill of that type; that, shortly after he went to the Wadsworth Company, he began to organize the motor, casing and other materials he already had, together with additional materials purchased for cash or picked from scrap, into an electric drill of the type now made by

appellee, with the tool shaft offset from the armature shaft; that he completed this drill in the latter part of 1900; that he and others during 1900 and 1901 publicly used it as a completed and efficient drill; and that he began endeavors to procure financial assistance to make and market the tool. Appellee introduced an exhibit which Smith identified as the original drill completed by him in 1900. Its material and workmanship evidence a patchwork origin.

By 1904 appellee was in the market, competing for trade. Appellant filed its bill in 1913. Appellee's depositions were taken in 1914. This lapse of ten years has deprived appellee of some witnesses named by Smith, and possibly of others forgotten, and has forced the attending witnesses, who undertook to corroborate Smith and identify the exhibit, to search the dregs of memory unfortified by records that might have been available, if suit had promptly been brought. This testimony, while coming from apparently disinterested and credible witnesses and quite persuasive in its character, does not alone come up to the required standard. But there remain one witness and one record whose reliability is certain.

Thomas McGovern was an experienced and competent electrical machinist. He identified the exhibit as either the drill itself or one identical in construction, principle, and operation with the drill he saw in Smith's possession and use while they were both in the Wadsworth Company's service. On the record he stands as a disinterested and reliable witness. No attempt was made to impeach his character. Nothing in the record contradicts his testimony; and the somewhat hazy testimony of other witnesses, above referred to, tends to corroborate it. Doubt is sought to be injected by appellant's suggestion that McGovern confused the exhibit with Smith's first work on a drill having the chuck at the end of the armature shaft (which Smith testifies he had abandoned before entering the Wadsworth Company); but the two types are so distinctive in construction and operation that it is incredible that an expert electrician and machinist should confuse the one with the other.

McGovern's recollection concerning dates was fortified by the unquestioned records of the Wadsworth Company, showing that he began service in July, 1900, and quit January 17, 1901. From then till after this suit was instituted he had no opportunity or occasion to see or know of Smith and his drill.

As triers of the fact we are convinced beyond any reasonable doubt that Smith built and used the alleged infringing structure in the latter part of 1900, more than two years before Willey applied for his patent.

The decree is affirmed.

SAFETY CAR HEATING & LIGHTING CO. v. GOULD COUPLER CO.

(District Court, W. D. New York. September 11, 1917.)

No. 153–B.

1. PATENTS ⟸328—INFRINGEMENT—ELECTRICAL REGULATION.
   The Creveling patent, No. 747,686, for a system of electrical regulation for use in car lighting, *held* limited to a constant current regulator, as distinguished from a constant potential regulator, and, as so limited, not infringed.
2. PATENTS ⟸243—INFRINGEMENT—COMBINATIONS.
   To establish infringement of a patent for a combination of old elements, it is not enough to point out substantially the same elements in combination in defendant's structure, but it must also be shown that defendant's system performs substantially the same function in substantially the same way as complainant's; and where the result is attained by a new combination operating upon different principles, and constituting a radical departure from complainant's patent, there is no infringement.
3. PATENTS ⟸327—INFRINGEMENT SUITS—EFFECT OF DECISION.
   In a patent infringement suit, it is the duty of the court, regardless of prior decisions on the question of anticipation, to give force and effect to the evidence in the pending case, and resort to the testimony of other expert witnesses in a prior action is not warranted.

In Equity. Suit by the Safety Car Heating & Lighting Company against the Gould Coupler Company. Bill dismissed.

See, also, 230 Fed. 848.

Randolph Parmly, of New York City (Robert S. Blair, Lucius E. Varney, and Delos G. Haynes, all of New York City, of counsel), for plaintiff.

Kenyon & Kenyon, of New York City (Wm. Houston Kenyon, Richard Eyre, and Theodore S. Kenyon, all of New York City, of counsel), for defendant.

HAZEL, District Judge. The John L. Creveling patent in issue, No. 747,686, granted December 22, 1903, for a system of electrical regulation, has heretofore been considered by this court, and held infringed, in an action brought by the plaintiff herein against the United States Light & Heating Company (222 Fed. 310, affirmed 223 Fed. 1023, —— C. C. A. ——), and held not infringed in a case against its successor, the United States Light & Heat Corporation; it being shown in the latter case that defendant had not used Creveling's constant output generator regulator, but had adapted a so-called double relay ampere hour system, including the constant potential lighting system, described in the McElroy patent No. 893,533, of earlier date. In still another action against the Gould Coupler Company, the defendant herein, on patent No. 1,070,080, granted to H. G. Thompson for a specific improvement of the Creveling patent with relation to charging the storage battery and protecting it from injurious overcharge, the decision of this court (229 Fed. 429) that infringement was proven was reversed by the Circuit Court of Appeals on appeal (239 Fed. 861, 152 C. C. A. 645). A motion for preliminary injunction herein was denied by Judge Ray.

The case now coming before me at final hearing, the defendant company renews its attacks upon the validity of the patent in suit and the scope accorded the claims in the earlier litigation, denies infringement, and contends, inter alia, that the invention was for a specific addition to a known car-lighting system, to wit, the addition of a control setting or readjusting attachment for the regulator, which operated automatically in obedience to the state of the battery charge, and that in defendant's apparatus, which comprises a constant potential system claimed to operate upon an essentially different principle from plaintiff's constant current system, there are no means for resetting or readjusting the regulator to determine the current remaining constant during speed changes.

Before referring to the claims involved, it should be understood that it was concededly old at the date of the patent in suit to combine a dynamo driven at variable speed from the car axle, a storage battery, and lamps, means for charging the battery from the generator and for disconnecting the generator from the battery while the battery is supplying current to the lamps. Improvements on such system eventuated, which made it possible to supply current to the battery and lamps at the same time or alternately. It is therefore with specific means for maintaining a constant generator current for charging the battery throughout speed changes, and also for regulating means for protecting the battery from overcharge, that we are herein concerned. Claims 1 to 8, inclusive, are involved; but it will suffice to reproduce claims 1, 5, and 8, which are characteristic of the others:

"1. In a system of electrical distribution, the combination with a generator adapted to be driven at variable speeds and a storage battery charged thereby of a regulator adapted to maintain given charging currents throughout changes in speed of the generator and means operated by changes in the difference of potential of the battery determining the said charging currents."

"5. In a system of electrical distribution, the combination of a generator, an accumulator charged thereby, means for maintaining the current output of the generator practically constant throughout changes in speed, and automatic means controlled by voltage of the accumulator for altering the current upon changes in voltage of said accumulator."

"8. In a system of electrical distribution, the combination of a generator, an accumulator, a regulating device for regulating the output of the generator, and supplemental means controlling the regulating device, to determine the said output."

These claims include the combination of (1) a dynamo driven at speed corresponding to the variable speed of the train, (2) a storage battery receiving its supply of current from the dynamo, and (3) a regulator maintaining charging current constant throughout speed changes and means which come into operation by changes or alterations in the potential or voltage of the battery for protecting the battery from injurious overcharge. Claim 8 is limited, and does not refer to battery protection. Such means were not essential to the supplemental means for determining the generator output to be maintained, and hence need not be read into the claims by implication.

The specification referring to the objects of the invention says:

"My invention relates to systems of electrical regulation, and has for its primary object to produce means for charging storage batteries from a genera-

tor running at variable speeds and to maintain a desired constant voltage upon the work circuit regulating the voltage directly by the output of the generator.

"A further object of my invention is to produce a construction whereby, when the batteries shall have reached a certain voltage—that is, when they have become practically charged—the charging rate will be automatically changed, it being well understood that the voltage necessary to charge the cells at the normal rate will remain almost constant until the cells are practically charged, when a considerable rise in voltage is necessary to maintain this normal charging current. I have shown means which, when this rise in voltage takes place, operate to lessen the charging rate, thereby avoiding a useless waste of current and evaporation of electrolyte due to violent gassing of the cells.

"My invention also, broadly considered, embodies a regulator adapted to maintain a constant current from a generator driven at variable speed and an interdependent regulator for determining the current which the regulator shall hold constant."

A statement of the principal characteristics of the invention with brief reference to the conclusions arrived at in the original suit may assist in understanding the respective contentions of the parties herein. The patent relates essentially to an apparatus for supplying electricity for separately lighting railroad cars, regardless of whether or not they are connected to other cars. In prior constant current regulators it was concededly difficult to correct the field current during the charging period because of speed variations. It was impossible to continue charging the battery from the dynamo and at the same time maintain a desired constant voltage or pressure upon the conductors or circuits, so as to actuate the necessary instrumentalities to regulate the voltage directly by the current output. It was a problem not easily solved. Indeed, Professors Scott and Puffer, testifying in this action for defendant, said that, in car axle lighting systems generally, correction for speed was the important question, and this court in the original suit practically decided that Creveling substantially solved the problem by regulating for a practically constant current, to wit, by his combination of means for controlling the current output for charging the battery and also automatically changing such current or charging rate by changing the voltage of the battery when it reached certain voltages or when the battery reached full charge, thus protecting it from injurious overcharge. By his combination of elements—old elements combined in a new and novel way—he achieved regulation for constant current from a variable speed generator, and by inclusion of another element, consisting of a voltage regulator or solenoid *31* (Fig. 1) and automatically bringing into regulating action field coil *9* (opposing coil *8*) located in shunt to the battery circuit, he altered or cut down the current, so as to protect the battery or determine the current which the regulator should hold constant.

In the original action a so-called stop charge apparatus, which operated to eliminate the charging current, and an apparatus with means for tapering off the current, were held infringements, since it was shown that a current regulating coil for maintaining constant current during speed changes, together with a voltage control device for regulating the current output were there employed. The proofs herein, as in the original suit, show that in Figures 1, 2, and 3 of the patent drawings there are traced a few structural modifications of the means

for carrying out the invention. In Figure 1 the current regulating coil is in the main circuit and as arranged predominates the voltage coil to decrease the generator output; while in Figure 2 the regulating coil is put in the battery branch and the device is provided with two windings in the lamp circuit for the purpose of varying the resistance (wires in shunt with the field coil) for making contact with the rheostat. The effect of such arrangement of wires was to permit the solenoid or relay to determine the charging rate which "is varied by varying the effect of coil *8*." When the lamps are turned on, the current goes to the solenoid or relay *31*, and through wires or neutralizing coils to obtain a constant battery charge, but upon turning the lamps off constant current is maintained during the period of battery charge, and is automatically cut down on the completion of the charge. In Figure 3 the pilot motor has two armature windings and a field winding (instead of two field windings and one armature winding, as in Figures 1 and 2), which function to increase the rotation of the motor in one direction and cause a rotation in the reverse direction upon one coil becoming stronger than the other, and in substantially this way the solenoid or relay wires protect, not only the battery from overcharge, but determine also the current to the battery which the regulator shall hold constant.

[1] Referring, now, more particularly to the evidence and contentions presented herein. The expert witnesses disagree widely as to the effect of the modified forms of the apparatuses described in the drawings and specifications to which reference has been made—that is, as to whether the regulations in Figures 2 and 3 are both for maintaining battery current constant and not the generator current; but I think it is unnecessary to enter at length into the details of the conflicting opinions as I believe that the solenoid *31* and wire connections or means for determining the current output, though differing in form for attaining the result, related essentially to a constant current regulator as distinguished from a constant potential regulator, and accordingly that the claims are limited to such a regulator. Concessions by the patentee in the Patent Office on interference with McElroy acknowledge such limitation. The difference between such modes of regulation, tersely stated, is that a regulator for constant current includes devices for modifying the voltage while the constant potential regulator of McElroy modifies or changes the variations of the current. The form of the apparatus or solenoid traced in Figures 2 and 3 is quite likely adjustable to correspond to lamp load, as testified by Mr. Hammer, for the purpose of regulating the battery charging current and maintaining it constant, but I think that such was not the intention of the patentee. Upon this point Mr. Waterman has made it clear that, if the patentee had wanted to provide for constant battery current regardless of lamp load, it would have been much easier to have arranged current coil *8* which receives the major portion of the current, in the battery branch of the main lead where it would have been affected only by the voltage changes, without the necessity of relying upon coil *31* to perform an additional function.

The patentee's method of arranging his wires, coils, and circuits persuasively indicates that the modified forms of the invention were, as

claimed by defendant, to stop the solenoid from functioning when the lamps were turned on, for in such case the danger of overcharge was much lessened or entirely eliminated. Several of the claims, it is true, refer to "charging currents," "determining the charging rate," and "altering the currents upon changes of voltage," causing one to suppose that the regulation was also for constancy of battery charging current; but the specified terminology seems to me to be equally readable upon the McElroy constant voltage regulation, and the scope of the patent in suit cannot be broadened to include such system. Mr. Waterman's testimony regarding the adaptability of the solenoid, acting alternately upon the current regulator, to determine its standard of regulation, and its operation to readjust or reset the known generator regulator finds corroboration in the specification, Complainant, however, contends that claim 8 is expressly limited to a regulating device substantially responding to such resetting or readjustment feature, but such supplemental means relate particularly to means for regulating the regulator, to the end that the generator output shall at all times and under all conditions be regulated and remain in a state of regulation, and not that it shall be responsive to voltage or battery control.

Defendant's regulator, as shown in Model Exhibit 4 and in Exhibit M–6, embodies a variable speed dynamo, a storage battery charged by it, a field winding, and lamps, together with a carbon pile resistance located in the field circuit. There are also concededly means (automatically operated) for keeping the generator current substantially constant during speed changes which are controlled by the voltage of the battery for changing or modifying the current upon changes in voltage of the battery. Such means, however, are not believed to be the equivalent of the means described in the Creveling patent under consideration. In lieu of a voltage controlled relay for readjusting the regulator relative to the state of the battery the defendant adapts in its so-called simplex system two independently acting generator regulators, without providing any readjusting or resetting device for determining their action. The first regulator embodying in its structure a voltage coil *8* across the generator which operates to pull its core upward, so as to move the end of a lever attachment on the device upward, by a projection contacts the carbon pile to increase the resistance by separating the discs. When the voltage coil *8* rests on its shoulders or stops regulation ceases. The second regulator has a current coil *5* in series with the battery acting through its core on the end of a lever attachment which engages the carbon pile opposite the lever attached to the first regulator, each lever operating to increase or decrease the carbon pile resistance by separating the carbon discs. By their engagement with the carbons such levers effect the regulation of the generator to maintain constant battery current. When the core of coil *5* is inactive, the core of coil *8* raises above its base, and thereupon a short interval of constant voltage regulation results; but this is due to the weakness of the core. At such time the regulator is inoperative. The expert, Waterman, describing the operation of defendant's regulator, says:

"If the battery is in a discharged state, its voltage will be very low, and as soon as the speed of the train gets up high enough, a large current will flow

through it. This voltage being low, coil 8 will not be acted upon, but, there being a large current, coil 5 will be; so coil 5 will instantly assume the control by pushing up and down, as circumstances require with the varying speed, the regulator arm 4. *Whichever operates, the system is a constant potential one.* This has reference to the fact that coil 5 is not, in this instance, in the generator circuit, but in the battery circuit; so that the characteristic attribute of the constant potential system—one of the characteristic differences between constant current regulation and constant voltage regulation—is that with the constant current regulation, properly so called, the generator cut-out is constant; the current is the same, whatever the regulator is set for. On this form of regulator, where the coil 5 is connected in the battery circuit, the current is not constant—the output is not constant—but it varies with the lamps; the more lamps, the more current; and that is an attribute of a constant voltage system; so a system arranged with this coil 5 is not in the main circuit, but in the battery branch, is more like a constant voltage system than it is like a constant current system. It has that characteristic of the constant voltage system, and since the battery voltage does not vary very widely, it is in effect a constant voltage; and as I shall show on further consideration, when the battery voltage begins to rise, its regulator ceases to act; so that with this defendant's apparatus *the generator is furnishing at all times a substantial constant voltage and it is never at any time furnishing a constant generator output.*"

[2] Complainant rejoins that infringement is not avoided as a constancy of current from the generator is evidently maintained during the period of charging the battery, and only upon nearing full charge is the voltage coil caused to operate automatically, resulting in a practical tapering off of the current to protect the battery. Defendant's adaptation of the voltage coil not improbably acts to attain this result; but in patent law it is nevertheless established that there is no infringement, where the result is attained by a new combination operating upon different principles, constituting a radical departure from the patent which is the subject of the suit.

It is not enough, where the patentee's claims are also for a combination of old elements, for a complainant to point out substantially the same elements in combination in a defendant's structure. It must also be shown by preponderating evidence that a defendant's system performs substantially the same function in substantially the same way. Complainant's patent in suit is for a certain mode of regulating a constant current generator throughout speed change, with battery protection, the elements forming the combination performing their functions in a specified way, while the elements in combination in defendant's apparatus, though perhaps at times incidentally operating to accomplish a similar result, are believed nevertheless to be dependent upon a widely different principle of operation. No solenoid for readjusting the voltage regulator is employed in defendant's structure to maintain constant its voltage regulator; it being shown that changes in the lamp load only bring about change of current and not change or alteration of potential.

In the original action (222 Fed. 310) it was not intended to accord the claims in suit such latitude as to include a regulator having no means for determining or altering the current that is maintained constant or one that is shown to regulate by independent means for constant voltage, but which likewise does not maintain the current con-

stant. The tests made by Professors Scott and Puffer, as indicated by the charts in evidence, are believed, notwithstanding complainant's criticism thereof, to support this mode of operation. See Exhibits L–4, L–6, L–8, L–9, and Q–5.

Defendant claims that the Creveling patent is anticipated by the prior patent to Sellon, No. 299,021, and especially by the Dick patent, No. 682,978, dated September 17, 1901, and as to claims 3, 4, and 8 by the Kennedy patent, No. 681,712. In Sellon's patent there are elements in combination, such as a variable speed generator, battery lamps, and constant current regulator for preventing overcharging the battery; but I think it fairly appears from the specification that the object of the patentee was to regulate for constancy of voltage only, and not for constant current throughout speed changes. His specified means for protecting the battery did not include a voltage control of the battery, and the float control or magnet shown, was, I think, incapable of performing such function. Neither the combination of Creveling, nor a regulation or control of the voltage of the battery is shown, and hence the patent was not anticipatory. The Dick patent is again strongly urged as completely anticipating all the claims in suit, and defendant's expert, Waterman, unequivocally testifies that in all material respects the Dick system therein described is the same as Creveling's. Such testimony is not contradicted.

The importance of the Dick patent was appreciated in former litigations, but it was believed not indistinguishable, as it relates mainly to train lighting with batteries on separate cars and in a different state of charge as the cars are connected or disconnected. From the opinion of the court it appears that disadvantages arose in such system from the placing of the current modifying coil on the generator side of the automatic switch or across the main terminals, which resulted in energizing the modifying coils, even while the train was standing, from which its impracticability was implied. Moreover, there was evidence apparently to show that the charging of the battery was not automatic, but required hand adjustment. However, in this case it is shown that Dick disclosed means for determining or altering the current output, maintained constant by a current coil for the purpose of protecting the battery from overcharge. Such means were not the means of Creveling, but on the evidence herein they must nevertheless be considered to have an important bearing upon the scope of the involved claims. In Figure 5 of the Dick patent there is illustrated a generator driven with variable speed from the axle of the car, a shunt field winding, battery, and lamps, together with wires and circuits arranged to vary the field and the dynamo by a regulating lever operating to vary the resistance coil located in series with the field winding *a*.'

[3] Defendant insists that such arrangement corresponds to regulation of the generator and to the movement in such regulator of the rheostat arm to vary the resistance in series with the field of the dynamo, and further that the Dick regulation was to maintain constancy of generator current throughout speed changes, while the battery was protected from overcharge by a solenoid with voltage and current

coils thereon. In the Creveling patent, as heretofore pointed out, such coils oppose each other; but in Dick these windings are arranged to permit a somewhat different effect, the current coil functioning for a high standard of current, and on charging the battery a resistance coil located in series with the voltage coil is operated to reduce the charging current. It is undeniable that such arrangement strikes one as being in all essentials not unlike Creveling's, although the specific means for readjusting the current to be maintained constant by the regulator is not disclosed. To Mr. Waterman's analysis of the Dick disclosure complainant relies solely upon the failure of this court to find anticipation in the original litigation to which reference has been made. It is, I conceive, the duty of the court, regardless of any prior decisions on the facts that may have been rendered in another case between different parties, to give force and effect to the evidence in the subsequent case, and resort to the testimony of other expert witnesses in another action, embodied in another record, is not warranted. Walker on Patents (5th Ed.) § 634, p. 710; Beach v. Hobbs (C. C.) 82 Fed. 916.

It is true that the evidence relating to the Dick patent consists of the opinion and views of an expert, based upon his examination of the prior disclosures, and is not binding upon the court, even though undisputed; still, as it relates to an admittedly abstruse subject, such views and opinions cannot be wholly disregarded. But in view of what has been stated herein with reference to different modes of operation of defendant's and complainant's apparatuses, the defense of anticipation need not be passed upon.

Infringement not being established, the bill is dismissed, with costs.

ALVEY-FERGUSON CO. v. PETER SCHOENHOFEN BREWING CO.

(District Court, N. D. Illinois, E. D. November 6, 1917.)

No. 28988.

1. PATENTS ⟸314—PATENTABILITY—SEPARATE DETERMINATION.
   In a suit for the infringement of two patents which work together in a system in a beneficial way, the validity of each must be determined separately on its own merits, claims, and description compared with what went before in the same field.
2. PATENTS ⟸34, 45—PATENTABILITY—EVIDENCE OF INVENTION.
   In doubtful cases, the success of a device or process, either alone or as a part of a system, or the fact that a separate related art has been stimulated by the use of the invention, may be considered in determining novelty or patentability.
3. PATENTS ⟸328—PATENTABILITY—INVENTION.
   The Alvey patent, No. 790,766, for a conveyer or device for lowering goods, does not accomplish a new or improved result or an old result from an improved operation, and contains no invention, notwithstanding its use as part of a successful system.
4. PATENTS ⟸328—PATENTABILITY—INFRINGEMENT.
   The Alvey patent, No. 790,811, for an elevator device for raising goods, *held* valid and infringed as to the five claims in suit.

In Equity. Suit for infringement by the Alvey-Ferguson Company against the Peter Schoenhofen Brewing Company. Decree dismissing the bill as to patent No. 790,766 and for an injunction and accounting as to patent No. 790,811.

John W. Hill, of Chicago, Ill., and C. J. Stockman, of Washington, D. C., for plaintiff.

Brown, Nissen & Sprinkle, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on patents 790,776 and 790,811, issued May 23, 1905, to Benjamin H. Alvey, and assigned to plaintiff, covering conveying mechanism for carrying merchandise between different floors or parts of a building or manufactory.

Plaintiff claims that:

The patentee "was the first to conceive of a complete system adapted to handle goods of fragile and delicate nature, as well as otherwise, throughout a complete cycle of their movement; that is, to take the goods at a given point, or at the elevator, as the case may be, elevate those goods to the desired point, handle and transfer them from one point to another in a large factory, involving many stories in one of the giant factories of the time, move them from floor to floor, and from one point to another, and finally deliver them at any point desired with absolute reliability and safety, and this without the necessity of an operator interfering throughout their course."

The first or conveyer patent relates to a device for lowering goods and the other for raising them, known as the elevator device. The claims of both patents which are in the suit follow:

No. 790,776. "7. The herein-described means for conveying articles from one room to the lower portion of the room below the same, comprising a spiral way which has its upper terminal in the lower room and a supplemental conveyer or slide for discharging articles upon the upper portion of said spiral way, said supplemental conveyer or slide extending off from the upper portion of said spiral way at an inclination upward therefrom, through an opening which is located at one side of said way and in the floor of the room above that containing said way, whereby the necessity of an opening in the floor for said spiral way is avoided.

"8. The herein-described means for conveying articles from one room to the lower portion of the room below the same, comprising a spiral way which has its upper terminal in the lower room and a detachable supplemental conveyer or slide for discharging articles upon the upper portion of said spiral way, said supplemental conveyer or slide extending off from the upper portion of said spiral way at an inclination upward therefrom, through an opening which is located at one side of the said way and in the floor of the room above that containing said way, whereby the necessity of an opening in the floor for said spiral way is avoided."

No. 790,811. "1. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portions and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, and traveling means for conducting the articles upward along said track or way.

"2. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portion and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, means for conducting the articles upward along said track or way, and conveying means for conducting said articles to and from said elevator.

"3. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an angle with its said end portions and gradually merging into the same, a frame arranged at the junction of an end portion and said intermediate part and forming part of the track or way, rollers arranged to form a part of said track or way, a pair of connected endless belts for conducting the articles along said track or way, and means for holding said belts down adjacent to the junction of said end intermediate portions."

"10. An elevator comprising a frame having a track or way provided with rollers, upon which rollers travel the articles being conveyed, and a traveling conveying means having roller-flights which are arranged above the first-mentioned rollers and engage the sides of said articles and push the same along said track or way.

"11. An elevator comprising a frame, composed of side members and a track or way between said side members, said track or way having rollers upon which travel the articles being conveyed, and a traveling conveying means, comprising endless belts guided by said side members and independently-rotable flights or carriers connecting said belts with each other and traveling above said rollers and engaging the sides of the articles conveyed."

[1, 2] Though much was said at the argument about the Alvey system, in which the structures of the two patents work together in a highly beneficial way, it is evident that the question of the validity of each must be separately judged. Of course each patent must stand or fall on its own merits, on its own claims and description compared with what went before in the same field. It is true that in doubtful cases the success of the device or process, either alone or as a part of a system, or the fact that a separate related art has been stimulated by the use of the invention, may properly be considered in reaching a conclusion on the subject of novelty, or patentability, and will sometimes turn the scale in its favor. Thus, in considering the first patent on the spiral chute and supplemental conveyer, the fact that it is used as part of a successful system of carrying raw material to the upper floors of a manufactory, changing it into the finished product and then returning it in the new form to the ground floor safely and cheaply, should properly be considered in deciding on patent validity, if that question is a doubtful one.

[3] The most that can be said for the first patent is that the joint use of the spiral chute and conveyer does away with the necessity of a hole in the floor over the chute, thus saving floor space and lessening the danger from possible fire. But since both spiral and conveyer were old, the question is whether there is a new or improved result, or an old result from an improved operation. Like the baseburning stove in Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241, do not the separate elements of the combination work just as they did before? It is true they co-operate, but apparently not in a new way, and with only such better result as is due to proper slope, adjustment, and the use of rollers in the spiral way. The baseburner was tremendously popular, and still is. It secured a vastly improved result, but that was due to aggregation only, as the court decided. Like observation may be made on the rubber-tip pencil, very useful, but a clear aggregation.

I am satisfied that the first patent contained no invention, notwithstanding its use as part of a successful system.

[4] The elevator patent, on the other hand, should be sustained and

held infringed, as to the five claims in suit. The patent structure has proved very successful, and is practically copied by defendant. Apart from these facts I think the combination of elements shown is patentable. A greatly improved result is secured, and there is a better mode of operation than in any of the numerous patents of the prior art. Pieper v. S. S. White Dental Co., 228 Fed. 30, 142 C. C. A. 486; American Caramel Co. v. White, 234 Fed. 328, 148 C. C. A. 230, both in this circuit.

There should be a decree dismissing the bill as to patent 790,776, and for injunction and accounting as to 790,811, without costs for or against either party.

In re BAUTISTA.

(District Court, N. D. California, S. D. November 5, 1917.)

1. ALIENS ⟸61—NATURALIZATION—PERSONS ENTITLED TO BE NATURALIZED —COLOR OR RACE.

Under Naturalization Act June 29, 1906, c. 3592, § 30, 34 Stat. 606 (Comp. St. 1916, § 4366), providing that all the applicable provisions of the naturalization laws shall apply to and authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States and who may become residents of any state or organized territory with certain modifications, when read in the light of the debates in Congress showing that it was for the declared benefit of the inhabitants of Porto Rico and the Philippine Islands, a native Filipino of the Malay race is entitled to naturalization notwithstanding Rev. St. § 2169 (Comp. St. 1916, § 4358), providing that the provisions of that title respecting naturalization shall apply to free white persons and aliens of African nativity or descent, as section 2169 is to that extent amended by the Act of 1906.

2. ALIENS ⟸61—NATURALIZATION—PERSONS ENTITLED TO BE NATURALIZED— "PERSONS WHO OWE PERMANENT ALLEGIANCE TO THE UNITED STATES."

Aliens born outside the Philippine Islands, but residing therein at the date of the treaty of December 10, 1898 (30 Stat. 1754) between the United States and Spain, and who had never been naturalized under the Spanish laws, are not persons owing a permanent allegiance to the United States and entitled to be naturalized under Naturalization Act June 29, 1906, § 30.

3. ALIENS ⟸68—NATURALIZATION—DECLARATION OF INTENTION—"ALIEN."

A native Filipino born in the Philippine Islands while under Spanish rule is an "alien," within Act June 30, 1914, c. 130, 38 Stat. 392, authorizing the naturalization without a previous declaration of intention of aliens who have served an enlistment of not less than four years in the navy and been honorably discharged.

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

In the matter of the petition of Engracio Bautista for naturalization. Petition granted.

John W. Preston, U. S. Atty., and George A. Crutchfield, Chief Naturalization Examiner, both of San Francisco, Cal.

MORROW, Circuit Judge. The petitioner is a Mestizo. He was born in the Province of Bulacan on the Island of Luzon in the Philip-

pine Islands, on the 14th of March, 1888. The Islands at that time were under Spanish rule, and the petitioner, with respect to the United States, was born an alien.

The islands were ceded to the United States by the treaty between the United States and Spain signed at Paris on December 10, 1898 (30 Stat. 1754). By article 19 of the treaty it was provided that:

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the act of Congress of July 1, 1902, temporarily providing "for the administration of the affairs of civil government in the Philippine Islands, and for other purposes" (chapter 1369, 32 Stat. 691, 692), it was declared in section 4 that:

"All inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in said islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain signed at Paris December tenth, eighteen hundred and ninety-eight."

No provision has been made by Congress for conferring the rights of American citizenship upon the inhabitants of the Philippine Islands except such as is contained in section 30 of the Naturalization Act of June 29, 1906 (34 Stat. 596, 606). It is there provided that:

"All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens *who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States,* with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five-year residence clause of the existing law."

The petitioner has not made his declaration of intention to become a citizen of the United States, as required by this statute, but he claims the right to make his application for citizenship without such declaration, under the Act of June 30, 1914, "making appropriations for the naval service for the fiscal year ending June 15, 1915, and for other purposes" (chapter 130, 38 Stat. 392, 395 [Comp. St. 1916, § 4356]), which provides as follows:

*"Any alien of the age of twenty-one years and upward who may, under existing law, become a citizen of the United States, who has served or may hereafter serve for one enlistment of not less than four years in the United States Navy, * * * and who has received therefrom an honorable discharge * * * with recommendation for re-enlistment, * * ** shall be admitted to become a citizen of the United States upon his petition without any previous declaration of his intention to become such, and without proof of residence on shore, and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof from naval * * * sources of such service: Provided, that an honorable discharge from the Navy, * * * with recommendation for re-enlistment, shall be accepted

as proof of good moral character: Provided further, that any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions."

The petitioner enlisted in the United States Navy on December 24, 1908. At the end of his enlistment, on December 23, 1912, he received an honorable discharge, and on March 17, 1913, he re-enlisted. At the end of this second enlistment he received a second honorable discharge, and on the next day he again re-enlisted. His discharges have always been accompanied by recommendations for re-enlistment. He is now serving his third term of enlistment of four years each, and comes to court with proof of good moral character from his superior officers. He came to the United States fom Manila in 1909, on the United States steamship Logan. He has resided continuously in the United States for more than eight years immediately preceding the date of this petition, and upon examination we find him intelligent, familiar with our form of government, and attached to the principles of the Constitution of the United States.

The petitioner claims the right as a Filipino owing permanent allegiance to the United States to be admitted as a citizen under section 30 of the Act of June 29, 1906, and upon his service in the Navy, and the other qualifications possessed by him he asserts the present right to be naturalized without a previous declaration of an intention to become a citizen.

[1] The first objection urged by the government is that under section 2169 of the Revised Statutes he cannot be admitted to citizenship in the United States. That section provides:

"The provisions of this title [Naturalization] shall apply to aliens [being free white persons, and to aliens] of African nativity, and to persons of African descent."

The Revised Statutes were approved June 22, 1874, and section 2169 was amended by the Act of February 18, 1875 (chapter 80, 18 Stat. 318), by inserting the words last above printed in brackets. The petitioner belongs to the brown or Malay race. He is therefore not an alien of the white race, nor is he an alien of African nativity or of African descent. It is therefore contended that he cannot be admitted to citizenship.

But for what purpose did Congress provide, in section 30 of the Naturalization Act of June 29, 1906, that all the applicable provisions of the naturalization laws of the United States should "apply to and be held to authorize the admission to citizenship of all persons not citizens *who owe permanent allegiance to the United States and who may become residents of any state or organized territory of the United States*"?

Mr. Justice Gray, speaking for a majority of the court, in United States v. Wong Kim Ark, 169 U. S. 649, 653, 18 Sup. Ct. 456, 458 (42 L. Ed. 890), began that remarkably able decision upon the subject of citizenship with the statement of the fundamental rule of construction applicable to such an inquiry, as follows:

"In construing any act of legislation, whether a statute enacted by the Legislature, or a Constitution established by the people as the supreme law of

the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted."

In the late Tap Line Cases, 234 U. S. 1, 27, 34 Sup. Ct. 741, 58 L. Ed. 1185, the court declared that the debates in Congress may be resorted to for the purpose of ascertaining the situation which prompted the legislation.

Following that rule, we find that section 30 of the Act of June 29, 1906, was framed pursuant to the provision of article 9 of the Treaty of Paris, and for the declared benefit of the inhabitants of Porto Rico and the Philippine Islands, and that such was clearly the understanding of Congress when it enacted the section into law. The act in which this section is found originated in the House of Representatives in February, 1906. In the Senate an amendment was offered by Sen. Foraker on June 27, 1906, which he explained to the Senate in the following language:

"I offer an amendment to the bill, to be attached to it as an additional section, which has special reference to Porto Rico and the Philippine Islands. It is a provision that passed the Senate by a unanimous vote—that is, it passed without any opposition, it is perhaps more proper to state—in the Fifty-Eighth Congress. I send it to the desk and ask that it may be read."

It was read, and after some discussion was adopted. It was disagreed to in the House, but was afterwards adopted by both houses upon a conference report, and is the section now under consideration. Cong. Record, vol. 40, pt. 10, 59th Cong., 1st Sess. pp. 9359, 9407, 9505, 9576, 9691.

It appears that in the Fifty-Eighth Congress referred to by Sen. Foraker the amendment offered by him and adopted in the Fifty-Ninth Congress was the first section of a Senate bill introduced by the Senator in the Fifty-Eighth Congress, making "applicable the provisions of the naturalization laws of the United States to Porto Rico, and for other purposes." In the report of the committee and in the course of the debate it was stated that the bill was also applicable to the Philippine Islands. Sen. Foraker said:

"I do not know why it should not apply to a citizen of the Philippines living there, an inhabitant there, and owing allegiance to us, *owing permanent allegiance to us as a people. That expression was furnished us by the State Department. This measure was referred to the State Department and very carefully considered there. If my memory does not serve me incorrectly, it originated with the State Department.* They communicated to us in regard to it, saying that this trouble constantly arises. The citizens of Porto Rico and the citizens of the Philippines also, for I think it would have equal application to them, owe us permanent allegiance; and yet if they see fit to come here and reside in good faith and for all time they never can become naturalized. Their condition is worst than the condition of their fellow citizens who, under the terms of the treaty of peace, elected to retain their allegiance to Spain." Cong. Record, vol. 38, pt. 2, 58th Cong., 2d Sess., pp. 1254, 1255.

We are thus informed that "owing permanent allegiance" to the United States was a term used by the Department of State to desig-

nate a certain class of people residing in Porto Rico and the Philippine Islands, and it was the situation of these people that prompted the legislation providing that, by coming into the United States and possessing certain qualifications, they might become citizens of the United States.

In an opinion by Atty. Gen. Bonaparte addressed to the Secretary of the Interior, dated July 10, 1908, replying to the question whether under the Act of June 29, 1906 (34 Stat. 596, 606), a native Filipino, owing permanent allegiance to the United States, who was a resident of one of the states, could become by naturalization a citizen of the United States, he stated that he could. In the course of the opinion the Attorney General said:

"This," referring to section 30 of the Act of June 29, 1906, "describes exactly the status of the inhabitants of the Philippine Islands. They are not aliens, for they are not subjects of and do not owe allegiance to any foreign sovereignty. They are not citizens, yet they owe permanent allegiance to the United States, since they owe and can owe it to no other sovereignty. The applicant is not to be required to renounce allegiance to any foreign sovereignty, because he owes none."

The Attorney General here uses the word "alien" as describing those who are subjects of a foreign sovereignty, and not those who are aliens by birth but whose allegiance to a foreign sovereignty has been dissolved by treaty. We shall return to this question later.

In the case of In re Alverto, 198 Fed. 688, the District Court for the Eastern District of Pennsylvania held that section 2169 of the Revised Statutes had not been repealed by the Naturalization Act of June 29, 1906, and that Congress did not intend to extend the privilege of citizenship to those who became citizens of the Philippine Islands under the Act of July 1, 1902, unless they were free white persons or of African nativity or descent. The court accordingly refused to admit a Filipino to citizenship.

In the case of In re Rallos, 241 Fed. 686, the District Court for the Eastern District of New York followed the decision in the above case and denied the application of a Filipino to be naturalized.

While we are of opinion that section 2169 of the Revised Statutes was not repealed by the Act of June 29, 1906, we think we have clearly shown by the proceedings in Congress that it was expressly amended by that act so as to admit to citizenship all persons not citizens who, owing "permanent allegiance to the United States," and possessing the other qualifications provided by the statute, became residents of any state or organized territory of the United States. This was done by Congress with full knowledge that the Filipino belonged to the Malay or brown race. It must therefore have been the purpose of Congress to so modify section 2169, R. S., as to admit to citizenship the Filipino otherwise qualified for citizenship, notwithstanding he is not an alien of the white race nor an alien of African nativity or descent. In the naturalization case of Monico Lopez, Naval Digest 1916, p. 207, the Supreme Court of the District of Columbia held that a native Filipino was eligible to citizenship in the United States. And in the case of In re Mallari, 239 Fed. 416, the District Court of Massachusetts held that a Filipino was eligible to citizenship notwithstanding the restric-

tion contained in section 2169, R. S., but denied the application for naturalization on the ground that the applicant had not shown compliance with the provisions of section 30 of the Act of June 29, 1906, with respect to the declaration of intention and residence.

Upon the decision of the Supreme Court of the District of Columbia in the case of Monico Lopez, supra, the Secretary of Labor requested the present Attorney General to take the necessary steps to have the decision reviewed in the appellate court. In reply to this request, Solicitor General Davis, in a letter dated January 4, 1916, stated that the opinion of the court in the Lopez Case was but a reaffirmation of the opinion of Attorney General Bonaparte given to the Secretary of the Interior under date of July 10, 1908, and that the Department of Justice saw no reason for reversing that opinion.

[2] It will be noticed that it is not "all the inhabitants" nor "all the citizens of the Philippine Islands" mentioned in the act of 1902 that are authorized to apply for citizenship in the United States, but only those who, with certain other qualifications, "owe permanent allegiance to the United States"; that is to say, the natural-born inhabitants of the Philippine Islands, who, after becoming residents in the United States and having the other necessary qualifications, were authorized to apply for citizenship in the United States. We say "natural-born" citizens, because we do not find that the government of the Islands ever had any authority to naturalize aliens. Under Spanish rule the application of a foreigner for a certificate of naturalization had to be made to the Spanish Cortez at Madrid through the Governor General of the Philippine Islands, and an indispensable requisite in such an application was that the applicant should show that he professed the Catholic faith. The naturalized inhabitants of the Islands, if any there were at the date of the treaty, must therefore have been a very small part of the population, so that those who on the passage of the Act of June 29, 1906, owed permanent allegiance to the United States were practically only two classes: First, Peninsula Spaniards, that is to say, natives of Spain, who within one year from the date of the treaty had not elected to preserve their allegiance to the Crown of Spain; and, second, natural-born Filipinos. The first were eligible to citizenship in the United States under section 2169, R. S., but the second were not, and it was to make them eligible that section 30 of the Act of June 29, 1906, was passed.

But there was another class of inhabitants whose status it is thought may be somehow involved in this legislation. This class may be described in a general way as aliens not eligible to citizenship in the United States under section 2169, R. S. But these aliens never owed permanent allegiance to the United States, and do not owe such allegiance now. The aliens who resided in the Islands at the date of the treaty continued to owe their permanent allegiance to the countries of which they were subjects, and only owed a temporary allegiance to the United States. The allegiance they owed to their sovereigns was not dissolved by the treaty. This temporary allegiance was transferred to the United States, but their permanent allegiance was continued to the sovereignty of which they were subjects. But with the

Filipino it was different. His allegiance to the Crown of Spain was dissolved by the treaty and his permanent allegiance was transferred to the United States. This limitation of the right of naturalization in the United States under section 30 to those only who owe permanent allegiance to the United States excludes aliens born elsewhere than in Porto Rico and in the Philippine Islands, unless eligible under section 2169 of the Revised Statutes. A Chinese person born in China was a subject of China, and, if residing in the Philippine Islands at the time of the treaty or at the time of the passage of the act of 1902, he owed only a temporary allegiance to the United States. The same rule would apply to all the other aliens residing in the Islands at that time. This answers the objection that the Act of June 30, 1906, construed as here indicated, would admit to citizenship a large number of persons which the policy of the United States has heretofore excluded. The act would clearly have no such effect.

We conclude, therefore, that the distinction of color contained in section 2169 of the Revised Statutes must yield to the clearly expressed purpose of Congress to modify that section by the Act of June 29, 1906, in favor of the natural-born Filipino coming into the United States and acquiring the other qualifications provided by law. The power to establish rules of naturalization is vested exclusively in Congress, and a rule so established must be observed by the courts. Chirac v. Chirac, 2 Wheat. 259, 268, 4 L. Ed. 234; United States v. Wong Kim Ark, 169 U. S. 649, 701, 18 Sup. Ct. 456, 42 L. Ed. 890.

[3] But there is the further objection that the petitioner has not heretofore declared his intention to become a citizen of the United States and that the Act of June 30, 1914, providing that certain persons who have served one enlistment of not less than four years in the United States Navy or Marine Corps and been honorably discharged may be naturalized without such a previous declaration, applies only to aliens, and the petitioner is not an alien. He was born an alien, and until now he has taken no step to change his status. It is true his status was changed by the Treaty of Paris when his allegiance to the Spanish Crown was dissolved, and again when the Act of July 1, 1902, providing temporarily for the administration of the affairs of the civil government of the Philippine Islands, made him a citizen of the Philippine Islands. But now, if otherwise qualified, he may himself take the further step and become a citizen of the United States under section 30 of the Act of June 29, 1906; and this is made possible by the provision enacted expressly for the benefit of those inhabitants of Porto Rico and the Philippine Islands whose allegiance to the Crown of Spain has been dissolved by the Treaty of Paris and their permanent allegiance transferred to the United States, and because of that status are not now required to renounce allegiance to any foreign sovereignty.

Who are aliens under the naturalization laws of the United States has not been definitely defined by the Supreme Court of the United States. But in Low Wah Suey v. Backus, 25 U. S. 460, 473, 32 Sup. Ct. 734, 737 (56 L. Ed. 1165), that court, in construing the alien immigration act of February 20, 1907 (chapter 1134, 34 Stat. 898), adopted

the definition given in 2 Kent, 50; 1 Bouvier's Law Dic. 129. "An alien has been defined," says the court, "to be 'one born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws.'" This definition is also found in Webster's Dictionary; Century Dictionary; Black's Law Dictionary; 2 Cyc. 85; 2 Corpus Juris, 1043; 2 Am. & Eng. Ency. (2d Ed.) 64; 1 Ruling Case Law, 794; Milne v. Huber, 17 Fed. Cas. (No. 9617) p. 406; 3 McLean, 212, 219; Buffington v. Grosvenor, 46 Kan. 730, 732, 27 Pac. 137, 138, 13 L. R. A. 282; McGregor v. McGregor, 33 How. Prac. (N. Y.) 456, 458; Lyons v. State of California, 67 Cal. 380, 382, 7 Pac. 763; United States v. Williams (C. C.) 132 Fed. 894, 895; and in the case of In re Gonzales (C. C.) 118 Fed. 941.

In this last case Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant of that island on April 11, 1899, the date of the proclamation of the Treaty of Paris. She arrived at the port of New York from Porto Rico in 1902, where she was prevented from landing as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge. Circuit Judge Lacombe held that as she was an alien by birth she was still an alien, unless in some appropriate way she had since become naturalized. This case was taken to the Supreme Court, and appears under the title of Gonzales v. Williams, 192 U. S. 12, 24 Sup. Ct. 177, 48 L. Ed. 317. The court, in determining the question involved, limited its decision to holding that Gonzales was not an alien immigrant within the meaning of the term as used in the Act of March 3, 1891, c. 551, 26 Stat. 1084, without passing upon the broader question decided by Judge Lacombe.

In United States v. Wong Kim Ark, 169 U. S. 649, 702, 18 Sup. Ct. 456, 477 (42 L. Ed. 890), Mr. Justice Gray, in defining citizenship, had this to say concerning naturalization:

> "A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts."

We think the petitioner, who was alien born and has not been naturalized in the United States, is an alien as that term is used in the Act of June 30, 1914. Any other definition that would exclude the petitioner would defeat the purpose of the act to encourage enlistment in the services therein mentioned. All statutes must be given a reasonable construction with a view to effecting the object and purposes thereof. Low Wah Suey v. Backus, 225 U. S. 460, 475, 32 Sup. Ct. 734, 56 L. Ed. 1165. The petitioner has all the essential and determining qualifications required by the act. He is 21 years of age and upwards, and we have determined that under existing laws he may become a citizen of the United States. He has rendered the necessary naval service, has been honorably discharged from such service, and has twice been recommended for re-enlistment,

and has the intelligence to understand and appreciate our form of government and the constitutional principles under which it is administered. He has all the qualifications for citizenship required by the statute of any alien, and, if the laws of naturalization are to be construed in accordance with the uniform rule required by the Constitution of the United States, we must hold that Congress intended the Act of June 30, 1914, to apply to aliens by birth who, possessing the other necessary qualifications of age, character, and service, may under existing law become citizens of the United States. Under the statute so construed the petitioner is entitled to be admitted as a citizen. This was the conclusion reached by Judge Rose of the District Court of Maryland with respect to an application for citizenship from a native of Porto Rico. In re Giralde, 226 Fed. 826. We concur in that opinion, and deem it applicable to the present case.

The applicant will be admitted to citizenship.

DAVIDSON et al. v. AMERICAN BLOWER CO. et al.

(District Court, N. D. New York. October 23, 1917.)

ATTORNEY AND CLIENT ⇐155—ATTORNEY'S FEES—ALLOWANCE.

On suit of the minority shareholders against the corporation and majority shareholders to enjoin the latter from carrying into effect a conspiracy to waste the corporate assets, the court, merely enjoining the majority shareholders from carrying out the conspiracy, but taking control of none of the corporate property, cannot, under its equity powers, fix the compensation of attorneys for the corporation and direct its payment from the general funds of the corporation, as they have no lien or right to a lien on funds or property in the possession or under the control of the court, but the attorneys would be left to assert their rights against the corporation by an action at law.

In Equity. Suit by Samuel Cleland Davidson and others against the American Blower Company and others. Application by William S. Haskell for an order directing the named defendant to pay him reasonable counsel fees, opposed by plaintiffs. Application denied.

This is an application by William S. Haskell for an order of this court directing the defendant American Blower Company, to pay him, as its attorney and counsel in this action, "his reasonable counsel fees for services rendered by him in this action, and for such other relief as may be proper." The motion is opposed by the plaintiffs, who are minority stockholders of said American Blower Company, principally on the grounds (1) that this court has no power to make such an order; (2) that Mr. Haskell already has been amply compensated by the company for such services by the payment of $2,000; and (3) that Mr. Haskell acted in this suit, not only for the American Blower Company, but for the defendant Charles H. Gifford individually, and that the balance of compensation asked, $13,000, would be, if allowed and directed paid, a payment to Haskell for services rendered to Gifford as an individual defendant.

Winthrop & Stimson, of New York City, for plaintiffs.

Wm. S. Haskell, of New York City (Wm. K. Payne, of Auburn, N. Y., of counsel), for defendant American Blower Co.

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

RAY, District Judge (after stating the facts as above). This suit was brought by certain minority stockholders of the American Blower Company, a New York corporation, on behalf of the corporation, to enjoin the defendants Eugene N. Foss and Charles H. Gifford, majority stockholders, from carrying into effect an alleged conspiracy to waste the assets of the American Blower Company, in the interest of a rival company or corporation, the B. F. Sturtevant Company, in which they are interested, and to enjoin Foss and Gifford from voting their stock in aid and execution of such alleged conspiracy or agreement, and also to enjoin them from so voting their stock and operating the Blower Company in connection with the Sturtevant Company, that a restraint of trade in violation of law would result. In substance and effect this court, in which the trial was had, held that such conspiracy had been formed and threats made to carry it into execution, and not only enjoined any and all acts by Foss and Gifford, or either of them, which would carry such conspiracy into execution and effect, but, to that end, enjoined Foss and Gifford from voting their stock in the election of a new board of directors, etc.

On Appeal to the Circuit Court of Appeals, that court, without disturbing the findings of fact, modified the decree, so as to permit the voting of their stock by Foss and Gifford, and so elect a new board of directors, and consequently new officers, but in all other respects the decree of the District Court was affirmed. The American Blower Company was and is a necessary party to the litigation, but *its* acts as a corporation were not impugned or attacked. A new board of directors has not been elected, nor has there been any change in the officers of the company. The court, pending or during the litigation, did not take possession of or exercise any control over the assets or property of said corporation, or assume so to do. It has not done so at any time. It did enjoin the doing of acts which would waste such assets and property of the corporation.

William S. Haskell, the petitioner here, was duly employed by the Blower Company to take care of its interests in this suit, and he appeared for it, and, so far as appears, or so far as claimed, fully and properly performed his duty. He was also employed herein by the defendant Gifford, one of such majority stockholders, who was engaged, it was alleged and found, in such conspiracy, and fully performed his duties as attorney for that client. As I view this case, presented on this motion, it is not necessary to question the propriety of the appearance of Mr. Haskell for both the defendant American Blower Company and the defendant Charles H. Gifford. If that is a defense to any proper action or proceeding by Mr. Haskell to recover compensation for his services rendered in this action to the American Blower Company, it can be presented by the proper party or parties in any action brought to recover for such services in case there is a dispute or question. When there is a fund in court subject to the control of the court, and there is litigation regarding same, or where there is a successful suit brought to recover or reclaim, or even protect, a fund or specific property, especially a trust fund, and circumstances are such as in equity to give the attorneys engaged in such litigation a lien or claim on

such specific fund or property for their compensation, it cannot be doubted that the court may fix the compensation of such attorneys, and thus ascertain the amount of the lien and direct payment thereof from such fund or property. Trustees v. Greenough, 105 U. S. 527, 532, 26 L. Ed. 1157. If this court had appointed a receiver of the assets of this corporation, the American Blower Company, and thereby taken them, or any part thereof, into its possession, or assumed control over the *property* for its protection and preservation, a different question would be presented. But all this court did was to determine that there had been a conspiracy and threats to do acts which, if done, would waste the corporate assets, and thereupon enjoin the doing by defendants of any act which would bring about that result. No property was taken into its possession by the court, or sued for or recovered by the plaintiffs. The suit, as stated, was to enjoin the doing of acts which might result in the loss of property, not to recover any property or its value. In Re King, 168 N. Y. 53, 60 N. E. 1054, property sued for had been recovered through the efforts of the attorneys. In Re Baxter & Co., 154 Fed. 22, 83 C. C. A. 106, there was a special fund of $50,000, deposited in court.

In the instant case the majority stockholders were charged by the minority stockholders with a purpose *to do acts* which would result in a waste of the property of the corporation, not with any actual taking or disposition of, or interference with, such property, which always remained in the possession of such corporation undisturbed. The title of the corporation to the property was not questioned, nor was its right to the possession. In Grant v. Lookout Mountain Co., 93 Tenn. 691, 28 S. W. 90, 27 L. R. A. 98, *a fund had been sued for and recovered by minority stockholders, and the recovery inured to the benefit of the corporation,* and hence the corporation itself was held liable for the reasonable counsel fees of *such minority stockholders* incurred in prosecuting such suit and recovering the fund. That, as seen, was an action by counsel for the minority stockholders, who conducted a suit which resulted in benefit to the corporation in the recovery of a fund sued for. It was not a question between attorney and client, to recover the value of services rendered the client, but a suit to have compensation paid out of the fund recovered for the benefit of another.

In Meighan et al. v. American Grass Twine Co., 154 Fed. 346, 83 C. C. A. 124, a suit was brought in behalf of all the stockholders against certain directors of a corporation to compel them to account for and pay over to the corporation the amount of certain illegal dividends declared and paid by them from the capital of the corporation. As a result of such suit the defendants (said directors) paid over a large sum to the corporation, and it was held that the attorneys for the plaintiffs in the suit were entitled to a lien for their services in the suit on such fund so recovered, and could enforce same in a suit in equity. This decision was based on section 66, Code Civ. Proc. N. Y., expressly giving a lien in such cases on the fund or proceeds of the cause of action into whosoever hands such proceeds come. It was not a question between attorney and client.

In this case Mr. Haskell was employed by the corporation through its officers in the regular way, and should be paid a reasonable compensation by the corporation as matter of course. If the corporation by its officers declines or refuses to pay, suit may be brought, the value of the services determined, judgment rendered, and payment of any sum awarded thereby enforced in the usual way. It seems to me it would be an unwarranted assumption of power for this court, as between attorney and client, to fix the compensation of such attorney for his services and direct it paid out of the general assets of such client in a case where no specific fund or property is the subject of the litigation. An attorney is always looking out for and caring for the interests of his client and protecting his property; but does this fact justify the court, except in the cases mentioned, in fixing the compensation of the attorney when a dispute arises and directing its payment from the general property of such client? Is the rule different when the client is a corporation from what it is when the client is an individual? In Matter of King, 168 N. Y. 53, 60 N. E. 1054, the action was by a trustee to recover securities wrongfully hypothecated and this action was successful. Under section 66 of the New York Code of Civil Procedure the attorneys for such trustee were held entitled to maintain an action to establish and enforce their lien on such securities for services in such suit to recover such securities. The section of the Code referred to (Ed. 5) reads as follows:

"The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien."

This and similar cases afford no warrant whatever for holding that the compensation of the attorney for a defendant in an equity suit may have his compensation fixed by the court and directed paid from the general assets of the client, in case of dispute as to the amount of such compensation, where there was no counterclaim and no recovery by the defendant and no effort or purpose in the suit to interfere with the property of such defendant. If there is a dispute between Mr. Haskell as attorney and the client, American Blower Company, as to the amount of compensation to which Mr. Haskell is entitled, that controversy can and should be settled in an action at law. If there is anything in the injunction order or decree now in force which will in any wise interfere with such an action the order may provide for a modification thereof, so as to permit Mr. Haskell to prosecute his action to recovery if he has a valid unpaid claim for services. I do not think Mr. Haskell has any lien for his services on the assets of the American Blower Company, or that this court in this suit can establish and enforce one.

In Re Gillaspie (D. C.) 190 Fed. 88, the court held that, since the relation of attorney and client is purely personal, depending on personal contract, courts of equity will never attempt to fix the compensation due the attorney in any ordinary litigation, but will leave the parties to an action at law. In this Gillaspie Case the court also held (page 91):

"The only proper cases that can arise where courts of equity and bankruptcy as well can award compensation to an attorney out of funds due others than his client is where, as I have heretofore indicated, such an attorney for one of a class has 'created' or secured a fund and brought it into the custody of the court, which fund is to inure, not alone to the benefit of his client, but to that of all those belonging to this class. In such cases the courts award compensation to the attorney out of the fund due to all, not on the theory of his having an attorney's lien, but on the broader theory that all interested in the fund should contribute ratably to the cost of 'creating' or securing it. These principles are very clearly set forth in Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central R. R. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; Jefferson Hotel Co. v. Brumbaugh (4th Circuit) 94 C. C. A. 279, 168 Fed. 867."

It seems clear to me that Mr. Haskell has ample protection and ample remedy in the usual way by suit against his client to recover reasonable compensation for his services. I discover no ground for the interposition and exercise of the equitable powers of this court in the matter of his compensation. He is entitled to be paid in the usual way from the general funds or assets of the corporation, on establishing in the usual way (in case of controversy) the extent and value of his services. As already stated, his compensation is not to be charged against, or made a lien upon, or paid from, any particular or special fund, and there is not and never has been any special or particular fund in court, or subject to the order of the court, from which such compensation is to be paid, or ought to be paid, to the exclusion of the general funds of the American Blower Company.

The application is denied, on the ground this court should not exercise its equitable jurisdiction, or power, if it possesses it, to fix the compensation of the petitioner, William S. Haskell, as attorney for the defendant American Blower Company in this suit, and direct the payment thereof by the said corporation from its general funds or property, but should leave the petitioner to his remedy at law, which is ample, adequate, and open; secondly, on the ground that this court in this suit has no power or jurisdiction to make the order prayed for.

Ex parte MERRILL.

(District Court, E. D. Michigan, N. D. October 27, 1917.)

1. COURTS ⟸366(10)—STATE DECISIONS—FORCE IN FEDERAL COURTS.
Where a person, imprisoned by the judge of probate for refusing or neglecting to perform an order, under Comp. Laws Mich. 1915, § 13765, authorizing imprisonment in such case, applied to the state circuit court for a writ of habeas corpus, which was dismissed, and the Supreme Court denied a writ of certiorari, applied for on the ground that the statute violated the constitutional provision against imprisonment for debt and was unconstitutional on other grounds, a federal court, to which application was subsequently made for a writ of habeas corpus, cannot consider contentions that the statute is contrary to the state Constitution, as a federal court will not interfere with a decision of the highest state court, determining the validity of a statute under the state Constitution.

2. CONSTITUTIONAL LAW ⟸315—COURTS ⟸202(4)—PROBATE COURTS—DUE PROCESS OF LAW.
Under Comp. Laws Mich. 1915, § 13765, authorizing the judge of probate to issue warrants for the arrest and imprisonment of any person refusing or neglecting to perform any order, sentence, or decree of such court, until he shall perform such order, sentence, or decree, the issuance of such warrant is a method of enforcing the order of the court, in the nature of a body execution, and not in the nature of a proceeding to punish for contempt, especially in view of the further provision of that section, authorizing the probate court to punish contempts; and hence the warrant may be issued, without a previous order therefor and without notice, without denying due process of law.

3. HABEAS CORPUS ⟸45(5)—GRANT BY FEDERAL COURTS—DETENTION BY STATE AUTHORITIES.
Where a person, imprisoned by a probate court for refusal or neglect to perform an order of that court, applied to the state circuit court for a writ of habeas corpus, which was dismissed, and a writ of certiorari was refused by the Supreme Court, a federal court would not issue a writ of habeas corpus on the ground that the statute under which he was imprisoned denied due process of law, as there was nothing to take the case out of the general rule that, in the absence of unusual and urgent reasons, federal courts will not interfere by habeas corpus with judgments of state courts from which an appeal can be taken by writ of error to the United States Supreme Court.

Petition by Herbert W. Merrill for a writ of habeas corpus. Writ dismissed.

G. W. Davis and Frank A. Rockwith, both of Saginaw, Mich., for petitioner.

Weadock & Weadock, of Saginaw, Mich., for respondent.

TUTTLE, District Judge. This is a petition for writ of habeas corpus, sought by the petitioner to secure his release from imprisonment in the county jail of Saginaw county, Mich., where he is detained under a warrant issued by the probate judge of such county during the course of certain proceedings pending in said court.

On February 5, 1915, an order was made by said probate court in the matter of the estate of William Merrill, deceased, directing petitioner, as one of the executors of the will of said deceased, to forthwith pay to one Eric W. Wessborg, executor of the will of Alice E.

Merrill Wessborg, deceased (daughter of the aforementioned William Merrill), all dividends collected by petitioner on certain shares of corporate stock bequeathed by said William Merrill to his said daughter, amounting on January 1, 1915, to $3,652, together with all dividends on said stock accruing between the last-mentioned date and the date of said order. From such order petitioner appealed to the circuit court for Saginaw county, which court affirmed the order of the probate court. An appeal was thereupon taken from such circuit court to the Supreme Court, the court of last resort in Michigan, which affirmed the decision and judgment of the circuit court. Upon the filing of the remittitur in the probate court, said Wessborg, on June 12, 1917, made a written demand upon petitioner for the payment of the dividends already mentioned, with notice that unless such money were paid on or before June 14, 1917, at noon, such order of the probate court would be enforced according to the statute in such case made and provided. The statute referred to is section 13765 of the Michigan Compiled Laws of 1915 which provides that such judge of probate shall have power, among other things:

"To issue warrants directed to any sheriff, constable, or other proper officer in this state, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of the probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law."

No attention having been paid to this demand, on June 15, 1917, upon the filing in said probate court of a verified petition of said Wessborg, showing the service of such demand and the failure to comply therewith, a warrant was issued by the judge of said probate court, addressed to the sheriff or any constable of the county, reciting the facts already mentioned, and directing him forthwith to arrest and imprison petitioner in the common jail of the county until he should perform the said order of said court or be delivered by due course of law. Thereupon the sheriff of such county arrested petitoner and imprisoned him as directed.

On the same day, petitioner obtained a writ of habeas corpus from the circuit court of said county and was released on bail, pending a determination by such court of the validity of his imprisonment. Petitioner alleged that the issuance of the warrant was illegal for a number of reasons, most of which are unnecessary to mention here. Among such reasons, however, it was alleged that the statute under which such warrant was issued was contrary to the Michigan Constitution, in that it provided for imprisonment for debt, in violation of the provision of such Constitution prohibiting the imprisonment of any person for debt arising out of, or founded on, a contract, express or implied. The constitutionality of such statute was attacked, also, on other grounds.

After full argument and reargument, and careful deliberation, the circuit court overruled the contentions of petitioner and dismissed the writ of habeas corpus, remanding the prisoner to the custody of the sheriff. Thereupon petitioner applied to the Supreme Court

of the state for a writ of certiorari to review the order dismissing said writ of habeas corpus, setting out in his petition for such certiorari fully all of the facts and circumstances and the legal grounds upon which he relied, including the constitutional objections already referred to. This writ the Supreme Court refused to grant, filing no opinion and assigning no reasons for its decision. Thereafter petitioner applied to said circuit court for a writ of injunction restraining the sheriff from further detaining him under the warrant in question. An order to show cause why an injunction should not be granted was issued, but on the hearing of such order the petition was denied and the injunction refused.

Thereupon petitioner filed his application in this court, reciting briefly the facts already referred to, and alleging that, because the warrant under which he is imprisoned was issued without a previous order and without notice to him, such warrant does not constitute due process of law; that the statute authorizing such warrant is contrary to the Michigan Constitution for the reasons previously presented to, and overruled by, the state court, and that such warrant and statute, depriving petitioner of his liberty without due process of law, are in conflict with the United States Constitution.

The facts as already stated are not in dispute, and the sole question presented is whether on such facts petitioner is entitled to his discharge by habeas corpus from this court.

[1] It is, of course, well settled that a federal court will not interfere with a decision of the highest court in a state, determining the validity under the state Constitution of a statute of such state. Merchants' & Manufacturers' National Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; Rasmussen v. Idaho, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820. I cannot, therefore, consider the questions raised by the contentions that this statute is contrary to the Michigan Constitution.

[2] The arguments of petitioner, based on the contention that his imprisonment is without due process of law and contrary to the United States Constitution, are necessarily founded upon the idea that the issuance of such warrant is in the nature of a proceeding to punish for contempt of court, rather than in the nature of process to enforce an order of the court. With this contention, however, I am unable to agree. It seems to me that the purpose of the statute authorizing such warrant was to provide an effective, if somewhat summary, method of enforcing the orders of the probate court, and that the warrant so authorized is in the nature of a body execution. This construction of the statute is, I think, fortified by the fact that in another subdivision of the same section of the statute, and following the provision already considered, the probate judge is empowered "to punish any contempt of his authority, in like manner as such contempt may be punished in the circuit court." It seems clear that the specific granting of the power to punish for contempt of court, following the granting of the power to issue the warrant in question, indicates an intention to confer two separate and distinct powers; the one being the power to enforce the orders of the court, and the other the power to punish for contempt of court.

This being so, the warrant could, of course, be issued by the judge, without a previous order therefor, and without notice to petitioner. Ex parte Murray (D. C.) 35 Fed. 496; Ex parte Audet, 38 R. I. 43, 94 Atl. 678; High v. Bank of Commerce, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121. In the case of Ex parte Audet, supra, substantially the same state of facts was presented, and in overruling the contentions of petitioner for a writ of habeas corpus the court said:

"With full knowledge of the judgment that was maturing against him under the statute and the decree of the court, and that execution would become issuable thereon, the petitioner * * * remained quiescent until he was committed to jail, and then asks for a writ of habeas corpus upon the ground that an execution was issued upon the judgment against him without a hearing. His position is no different from that of any other judgment debtor who might contend that an execution was issued against him without being accorded a hearing as to whether he had already paid the judgment. We see nothing unconstitutional in the act of the General Assembly, * * * nor that petitioner has been in any way deprived of his liberty or property without due process of law."

In Ex parte Murray, supra, involving similar facts and questions, the principles applicable were well expressed by the court as follows:

"'Due process of law' means 'in the due course of legal proceedings, according to the rules and forms which have been established for the protection of private rights.' 'Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of his life, liberty, or property, and to have the right of controverting every material fact which bears on the question of right in the matter involved.' One mode of enforcing the decree of the court under which the writ of attachment here complained of issued is by process of attachment against the petitioner, the party against whom the decree was rendered. Another mode is by process of sequestration against his property. This was the law when the proceedings in which the decree was rendered were had, and the petitioner knew it. The petitioner was a party to such proceedings, was present in court, had his day, and controverted the right of the complainant in said proceedings to have the decree which was obtained. The court pronounced judgment against petitioner, the effect of which was to involve his property and his liberty; for the statute of Alabama provided that such decree might be enforced by process of * * * sequestration against his property, as well as by execution. If, then, his property is taken or his liberty restrained under this decree, is it not in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights? It seems so to me. No person shall be deprived of his property, any more than of his liberty, without due process of law. Now, suppose an execution should be issued on the decree, and should be levied by the sheriff on the property of the petitioner, and it is so sold by the sheriff. The petitioner would certainly be deprived of his property. Could he justly complain that he had been deprived of his property without due process of law? Where is the difference? * * * I am unable to perceive how the petitioner is deprived of his constitutional rights any more by the one process than by the other. And it will hardly be contended that the decree could not be enforced by the levy of an execution on or by the sequestration of his property."

[3] It is, however, unnecessary to determine the questions herein raised, for the reason that I have reached the conclusion that there is nothing in this case, not present in every habeas corpus case, to take it out of the general rule that, in the absence of unusual and urgent reasons, the federal courts will not interfere by habeas corpus with

the judgments of state courts from which an appeal can be taken by writ of error to the United States Supreme Court. Ex parte Frederich, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; Bergemann v. Backer, 157 U. S. 655, 15 Sup. Ct. 727, 39 L. Ed. 845; Baker v. Grice, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748; Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91; Reid v. Jones, 187 U. S. 153, 23 Sup. Ct. 89, 47 L. Ed. 116; United States v. Lewis, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. Ed. 343; Urquhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760. As was said in Ex parte Frederich, supra:

"While the writ of habeas corpus is one of the remedies for the enforcement of the right to personal freedom, it will not issue as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. * * * The general rule and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the Constitution or laws of the United States to seek a review thereof by writ of error instead of resorting to the writ of habeas corpus."

The rule and the reasons therefor are thus stated in Urquhart v. Brown, supra:

"It is the settled doctrine of this court that, although the Circuit Courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon habeas corpus, one held in custody by state authority in violation of the Constitution or of any treaty or law of the United States, the court, justice, or judge has a discretion as to the time and mode in which the power so conferred shall be exerted, and that, in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several states, a federal court or a federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under state authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies afforded by the state for determining whether he is illegally restrained of his liberty. After the highest court of the state, competent under the state law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination. The exceptional cases in which a federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the state are those of great urgency that require to be promptly disposed of, such, for instance, as cases 'involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations.' The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision, upon habeas corpus, in the Supreme Court of the state, was in violation of his rights under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court."

Nor does it appear that the situation is affected by the fact that the decision of the Michigan Supreme Court was a refusal to grant the writ of certiorari to the circuit court. The facts and questions involved were fully stated in the affidavit for the writ, and it must be assumed that these facts and questions were duly considered by the Supreme Court before rendering its decision. No reason appears why petitioner could not have taken an appeal to the United States Supreme Court. The writ of habeas corpus is not a writ of error, and should not be used as a substitute for that writ, in the absence of special circumstances which do not appear to be present here. As was

pointed out by the United States Supreme Court in Bergemann v. Backer, supra, where a similar situation was involved:

"It is equally clear that the refusal of the courts of New Jersey to grant the accused a writ of error or to stay the execution of the sentence passed upon him constituted no reason for interference in his behalf by a writ of habeas corpus issued by a court of the United States. If the proceedings in the court of oyer and terminer could not, under the laws of New Jersey, be reviewed in a higher court of that state, except upon the allowance of a writ of error by such court or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the acts of Congress, the judgment of the highest court of the state in which a determination of the case could be had, and such judgment could have been, upon writ of error, re-examined here, if it had denied any right, privilege, or immunity specially set up and claimed under the Constitution of the United States. Gregory v. McVeigh, 90 U. S. 294 [23 L. Ed. 156]; Fisher v. Carrico, 122 U. S. 522, 526 [7 Sup. Ct. 1227, 30 L. Ed. 1192]."

For the reasons stated, I am of the opinion that petitioner is not entitled to be discharged on this writ of habeas corpus, and such writ is therefore dismissed.

AUDIFFREN REFRIGERATING MACH. CO. v. GENERAL ELECTRIC CO.

(District Court, D. New Jersey. October 20, 1917.)

1. DEPOSITIONS ⟸56(6)—NOTICE OF TAKING—POWER TO VACATE.
   Under Rev. St. § 863 (Comp. St. 1916, § 1472), authorizing the taking of testimony by deposition de bene esse in certain cases on reasonable notice to the opposite party or his attorney, the court has power to vacate notices of the taking of depositions in advance of the taking, if the procedure is irregular, instead of leaving the adverse party to his remedy by motion to suppress.

2. COURTS ⟸96(1)—PREVIOUS DECISIONS AS PRECEDENTS—CONSTRUCTION OF STATUTE.
   The holding of the Supreme Court that the same witness might be examined de bene esse more than once, under Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88, is applicable to the taking of depositions under Rev. St. § 863; the former statute, except in some unimportant details, being the same as the latter.

3. DEPOSITIONS ⟸84—EXAMINATION OF WITNESS MORE THAN ONCE.
   The testimony of the same witness may be taken by deposition de bene esse, under Rev. St. § 863, more than once, in equity as well as at law.

4. COURTS ⟸332—FEDERAL COURTS—RULES—VALIDITY.
   Equity rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi), requiring all depositions taken under a statute, unless otherwise ordered by the court or judge for good cause shown, to be taken and filed by plaintiff within 60 days from the time the cause is at issue, and by defendant within 30 days from the expiration of the time for the filing of plaintiff's depositions, does not vary Rev. St. § 863, authorizing the taking of depositions de bene esse in any civil cause depending in a District or Circuit Court, but is a mere regulation of the method of procedure, with which power Congress undoubtedly vested the Supreme Court.

5. COURTS ⟸332—FEDERAL COURTS—RULES—FORCE.
   It is not within the province of an inferior court to question the validity of a rule of the Supreme Court; its function being only to construe the rule.

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6. COURTS ⟸332—FEDERAL COURTS—RULES—CONSTRUCTION.
Such a construction of the rules of the Supreme Court as will apparently make them valid should be adopted.

7. COURTS ⟸350—FEDERAL COURTS—PRACTICE—DEPOSITIONS.
Under Rev. St. § 863, and equity rule 47, depositions de bene esse cannot be taken by plaintiff in a suit in equity without the court's permission more than 60 days after the joinder of issue.

Two actions, one at law and the other in equity, by the Audiffren Refrigerating Machine Company against the General Electric Company. On motion by defendant to vacate notices of the taking of depositions de bene esse under section 863 of the Revised Statutes. Motion in the action at law denied, and motion in the equity suit granted.

Frederic J. Faulks, of Newark, N, J., for the motion.
Harold H. Bowman, of New York City, opposed.

HAIGHT, District Judge. The plaintiff has instituted two actions against the defendant, one at law and the other in equity. Both are at issue. Its attorneys have given notices to the defendant that they propose, at a time and place in the notices set forth, to take, for use in each action, the testimony of certain witnesses by deposition de bene esse, under section 863 of the Revised Statutes (U. S. Comp. Stat. 1916, § 1472). The defendant moves to vacate the notices.

[1] 1. It is urged, primarily, in opposition to the motions, that the court is without power to vacate the notices in advance of the taking of the testimony; the only remedy of the defendant being, if the depositions are not taken in conformity with the law, to move to strike out or suppress them at final hearing, or after they have been taken. To support this contention the defendant relies upon the decision of Judge Ward in the Circuit Court for the Southern District of New York in Kline Bros. & Co. v. Liverpool, London & Globe Insurance Co. (C. C.) 184 Fed. 969. Counsel has failed to direct my attention to, and I have been unable to find, any other reported case in which the question has been directly passed upon. It is true that Judge Lacombe, speaking for the same court, in Henning v. Boyle, 112 Fed. 397, said:

"No order or other direction of the court is required antecedent to such examination. The right to take it upon notice merely, in the manner prescribed, is given absolutely to the party by act of Congress. If question is to be raised as to the reasonableness of the notice, or as to the regularity of the proceedings, it *may* be raised by motion to suppress."

The point in question was not, however, in any way before him for decision. He was merely making some observations on the effect of the statute. It will be noticed that he did not say that the questions regarding the regularity of the proceedings *"must"* be raised by motion to suppress, but merely that they *"may"* be so raised. He dealt more particularly with the point that no permission or other authorization of the court was necessary as a condition precedent to the examination. But that is quite different from holding that the court may not, when called upon in advance of the examination, decide whether the procedure which the party has followed is proper. While Judge Ward

did deal with the point in question, I do not understand that he flatly decided that there was *no power* to determine, in advance of the taking of the depositions, whether or not the method by or manner in which they were proposed to be taken would conform to the statute, and in other respects comply with the law. In a very brief opinion he expressed merely a "doubt" as to the power of the court in that respect. While it is true that he declined to vacate the notice of the taking of the depositions, still it would seem that his action in doing so was but the exercise of discretion, because he considered that the plaintiff (who moved to vacate) would be amply protected by a motion to suppress the depositions after they had been taken; the party giving the notice taking the risk that they might be suppressed.

If the practice adopted by Judge Ward were to be followed in all cases, it is apparent that the party to whom the notice is given would be compelled to take a chance that the deposition might not be eventually suppressed. He would be placed, without any fault of his, in the unenviable position of deciding whether he should incur the expense of being represented at the examination, which, if the deposition were later suppressed, would be useless and unnecessary, or whether he should not do so, which, in the event of the regularity of the depositions being sustained, might prove very disastrous to him. It is conceivable, also, that such a practice might readily be used for the purpose of oppression and harassment. While I hesitate to express a different opinion than Judge Ward, I am unable to concur in his reasoning that to hold that the court may, in advance of the taking of the depositions, decide whether the proceedings by which it is proposed to take them are regular or not, "would greatly impair the efficiency of the statute." It seems to me that the power of the courts to so intervene would have just the opposite result. It would be surely preferable, and more likely to avoid hardship on both parties, if the court, when objection to the regularity of the proceedings is made, were to determine in advance whether any depositions so proposed to be taken could be used upon final hearing or trial, because, in that way, the party giving the notice would avoid the expense incident to the taking of the depositions, if they could not later be used, and escape the possibility that he would be deprived of the testimony on final hearing or trial, and the party to whom the notice is given would, on the one hand, be saved the expense of having counsel attend the examination, in case he did not dare to take the chance that the court would later suppress them, and, on the other hand, would avoid the necessity of his taking any such risk.

Nor do I think that it can be assumed that the courts would permit, by recourse to them, the emergency purposes of the statute to be impaired, as Judge Ward seems to have feared. If the courts have power to suppress depositions which have not been taken in conformity with the law, as it has never been questioned that they have, I fail to see why they have not power, in advance of taking them, to determine whether the procedure or method by which it is proposed to take them complies with the law. The power exercised in each case is identically the same; the difference is only as to the time when the power is exer-

cised. I cannot conceive that Congress intended to impose on litigants the hardship which, as I have endeavored to above point out, would follow a construction of the statute denying the power of the courts to determine in advance the question as to the regularity or legality of the proceedings by which the depositions are proposed to be taken. Although the question now under consideration was not directly raised, it is important to note that Judge Davis recently in this court restrained, in advance, the taking of depositions under section 863, in an equity suit, because it was proposed to take them without the permission of the court, after the expiration of the time limited in equity rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi). Block v. Arrowsmith Mfg. Co. (D. C.) 243 Fed. 775. I am constrained to hold, therefore, that this court has the power, when appealed to, to vacate the notices in question in advance of the taking of the proposed depositions, if the procedure is irregular.

[2, 3] 2. The defendant contends that, as certain of the witnesses, whose testimony it is now proposed to take, have been previously examined in these cases de bene esse under the statute in question, they cannot be again examined without permission of the court. The rule which he invokes, and which was stated and applied in Phettiplace v. Sayles, Fed. Cas. No. 11,083, 4 Mason, 312 (C. C. R. I.), and Thurber v. Cecil Nat. Bank, 52 Fed. 513 (C. C. Md.), is, however, applicable only to the general equity practice which prevailed when all tesimony was taken by deposition out of court before a master, examiner, or on commission. It has no reference to depositions taken de bene esse, pursuant to a statute. Both of those cases were in equity and dealt with depositions taken on commission pursuant to the general practice then prevailing. While the decision in In re Thomas, 35 Fed. 822 (D. C. S. C.), was rendered in a bankruptcy proceeding, the leave there given to re-examine, by deposition, certain witnesses whose depositions were suppressed, was granted after the matter had come on for final hearing, at which time the court suppressed the depositions because they had not been taken in conformity with the statute. As the case had been closed and submitted, there was no right in either party, by virtue of statute or otherwise, to take any further depositions or testimony except by permission of the court. The beforementioned permission was granted because, as the deposition had been suppressed on technical grounds, it did not seem to the court that justice would be done if the case were decided without the testimony of those particular witnesses.

The power which the court exercised in that case was no different, therefore, from that which a court might exercise in any case, when it deemed it in the interests of justice to do so. In actions at law, it seems to have been definitely settled by the Supreme Court that the same witness may be examined de bene esse, under section 863, more than once, without the previous sanction of the court. Cornett v. Williams, 20 Wall. 226, 244, 22 L. Ed. 254. While the court in that case was dealing with the thirtieth section of the act of 1789 (1 Stat. 88), the decision is quite as applicable to section 863 of the Revised Statutes, because the former statute, except in some unimportant details, is the same as the latter. As section 863 applies to equity cases, as

well as actions at law (Stegner v. Blake [C. C.] 36 Fed. 183), I can conceive of no reason why a different rule should prevail in the two classes of cases, in respect to the right to take the deposition of the same witness more than once. It follows, therefore, that there is no merit in defendant's contention that the plaintiff may not again take the depositions, under section 863, of those witnesses who have previously been examined. I do not mean by this to be understood as holding that the court may not restrain the taking of the depositions of witnesses who have been previously examined, when the purpose of examining them again is to harass or oppress.

[4-7] 3. It is further urged by the defendant that, so far as the equity suit is concerned, no depositions can be taken without permission of the court, because more than 60 days elapsed between the joinder of issue and the giving of the notice. This contention is based upon rules 47 and 56 of the general equity rules of 1912. Defendant's contention is directly supported by the decision of this court in Block v. Arrowsmith, supra, and by that of Judge Mayer in the Southern district of New York, in Victor Talking Machine Co. v. Sonora Phonograph Corp. (D. C.) 221 Fed. 676, 678. It is urged, however, on behalf of the plaintiff, that the decision of Judge Mayer in Iowa Washing Machine Co. v. Montgomery Ward & Co. (D. C.) 227 Fed. 1004, 1007 (concurred in on that point by the other judges of that district), is, in effect, a reversal of the former decision and correctly construes the equity rules in question. With this contention I am unable to agree. Not only does Judge Mayer's later decision make no reference to the former, but it simply holds that to take depositions under section 863 within the time provided by equity rule 47, it is not necessary that previous authorization be obtained from the court; in other words, that equity rule 47 was not intended to vary section 863, by imposing as a prerequisite to the taking of testimony under that section, the previous order or authorization of the court.

The decision in the Victor Talking Machine Co. Case was, on the other hand, to the effect that, if the depositions were not taken within the time limited by rule 47, they would be suppressed, unless previous permission from the court to take them had been obtained. There is manifestly a broad distinction between the two cases, and, by reason thereof, the two decisions are entirely consistent and harmonious. To have provided by rule that no deposition in equity cases could be taken under section 863, without the previous order of the court could undoubtedly have been to vary the statute. That, of course, could only be done by legislative enactment. But to simply provide by rule for the purpose of expediting the disposition of cases, that depositions could not be taken under that statute after a certain time, without permission from the court, does not vary the statute in the sense before mentioned; it is a mere regulation of the method of procedure, with which power Congress undoubtedly invested the Supreme Court. The language of rule 47 is that "all depositions taken under a statute * * * shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown." The rule makes no distinction as to statutes. Hence, irrespective of

Judge Davis' decision in Block v. Arrowsmith, supra, by which I would, of course, feel bound, in view of the comprehensive language used in the rule, and the fact that it was undoubtedly within the power of the Supreme Court to place such a limitation upon the time within which depositions could be taken, I have no difficulty in reaching the same conclusion as Judge Davis and Judge Mayer did (the latter in the Victor Talking Machine Co. Case) regarding the proper construction to be given to rule 47. It, of course, does not lie within the province of an inferior court to question the validity of a rule of the Supreme Court. Its function is only to construe it, but of course it would always adopt a construction which would apparently make the rule valid.

There is no limitation in section 863 as to the time when the deposition must be taken, except that the cause must be "depending" at that time. Yet it was held, without dissent so far as I know, that former equity rule 68 (now rule 54 [198 Fed. xxxiii, 115 C. C. A. xxxiii]), which provided that testimony might be taken by deposition "according to the act of Congress," after a cause is at issue, prevented the taking of such testimony before a case was at issue. Stevens v. Railroad Co. (C. C.) 104 Fed. 934 (C. C. E. D. Mo.); Flower v. MacGinniss, 112 Fed. 377, 50 C. C. A. 291 (C. C. A. 2d Cir.). I can see no difference whatever in principle between these two rules on the point in question. One provided that depositions could not be taken before a cause was at issue, although it might be "depending"; and the other provides that a deposition shall not be taken after a cause has been at issue a certain number of days, without the court's permission. Both rules were the exercise of the same power and have the same effect on section 863. I think, therefore, that in the equity cause depositions taken under section 863 more than 60 days after the joinder of issue, without previous authorization from the court, could not be used upon final hearing. The notice on which it is proposed to take them should therefore be vacated.

It follows that the motion in the action at law must be denied, and the one in the equity action granted.

BEDELL v. BALTIMORE & O. R. CO. FLICK v. SAME. ROBERTSON v. SAME.

(District Court, N. D. Ohio, E. D. October 27, 1917.)

Nos. 9596, 9598, 9599.

1. PLEADING ⊂⊃252(2)—AMENDMENT—OPERATION AND EFFECT.
The filing by plaintiffs of amended petitions before defendant answered the original petitions was an abandonment of the original petitions, so that defendant was not required to answer such original petitions.

2. PLEADING ⊂⊃253—AMENDMENT—TIME TO ANSWER.
Under Gen. Code Ohio, § 11360, providing that plaintiff may amend his petition without leave at any time before the answer is filed, and that notice of such amendment shall be served upon defendant or his attorney, and defendant shall have the same time to answer or demur thereto

as to the original petition, the amendment cannot be regarded as made, and defendant's obligation to answer cannot be regarded as fixed, until notice of the amendment is served upon defendant or his attorney.

3. REMOVAL OF CAUSES ⊂=79(7)—TIME FOR REMOVAL—EFFECT OF AMENDMENT.
Where, before defendant had answered, plaintiff applied for leave to file an amended petition, instead of amending as of right, under Gen. Code Ohio, § 11360, and instead of procuring an order fixing the time to demur or answer, or serving notice of the amendment on defendants or its attorney, thereby limiting the time to demur or answer, sued out a new summons on the amended petition, fixing a new answer day, defendant was entitled to remove the action to a federal court at any time before such new answer day.

4. REMOVAL OF CAUSES ⊂=58—RIGHT TO REMOVE—ALTERNATIVE CAUSES OF ACTION.
Where plaintiff stated his right to recover in the alternative, in one count, alleging that defendant was engaged in interstate commerce, and that plaintiff was employed in such commerce at the time the injuries sued for were inflicted, and in the other count alleging the same facts, but omitting the allegations respecting interstate commerce, the cause was removable to a federal court, since, when plaintiff sets up two separate causes of action, even in the alternative, seeking only one recovery, one of which causes of action is removable and the other not, the defendant may remove the entire case.

At Law. Separate actions by Edward S. Bedell, by Jennie Flick, and by George Robertson against the Baltimore & Ohio Railroad Company. On motions to remand. Motions overruled.

John Ruffalo, of Youngstown, Ohio, for plaintiffs.

Harrington, De Ford, Heim & Osborne, of Youngstown, Ohio, for defendant.

WESTENHAVER, District Judge. These three cases are before me on plaintiffs' motion to remand and involve the same question. All the original petitions stated causes of action properly removable to this court. The injuries for which each plaintiff sought to recover were not alleged to have been sustained while the respective plaintiffs and defendants were engaged in an act of interstate commerce, but, on the contrary, such facts as are alleged show that they were not so engaged.

In the Bedell case the summons was served July 17th. It was returnable July 23, 1917. The answer day was August 11, 1917. On August 9, 1917, plaintiff obtained leave of court to file an amended petition instanter, which was accordingly done. A summons against the defendant was issued thereon and served August 14, 1917. The return day of this summons was August 20, 1917, and the answer day September 8, 1917. Thereafter, on September 1, 1917, defendant filed its notice and petition for removal with bond, all in proper form, and on September 6, 1917, an order was made removing the cause to this court.

In the Flick and Robertson cases exactly similar proceedings were had and taken; the return day and answer day to the original and amended petitions being as given above. The amended petition filed in each case purports to set up two different causes of action; both, however, being for the same injury. In the first cause of action it is

alleged that the defendant was engaged in interstate commerce, and the plaintiff was employed in such commerce at the time the injuries complained of were inflicted. The facts stated independently of these allegations are in no wise different from the statements of the original petition, and except for these allegations would not state a cause of action arising under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]). The second cause of action omits the allegations respecting interstate commerce, and is the same in substance as the original petition.

In support of the motions to remand, plaintiffs urge, first, that the petition to remove was filed too late, in that it was filed after the time at which by the state law and practice the defendant was required to plead or answer; and, second, that inasmuch as the first cause of action is one under the federal Employers' Liability Act, and not removable, the case cannot be removed here, even if the second cause of action is not under that act and is removable.

[1, 2] I am of opinion that, on the facts above noted, the petition to remove was filed in time. The filing by plaintiffs of amended petitions is an abandonment of the original petitions, and the defendant was not thereafter required to answer the original petitions. City v. Wiehle, 78 Ohio St. 41, 84 N. E. 425. The question then is: When was the defendant required to plead or answer to the amended petition? An amended petition may be filed as a matter of right at any time before the defendant has answered. G. C. § 11360. The defendant has the same time after such an amendment is made to answer as he would have to answer or demur to the original petition. An amendment cannot be regarded as having been made under favor of this section, and the defendant's obligation to answer cannot be regarded as fixed until notice of such amendment shall be served upon the defendant or his attorney. Moorman v. Schmidt, 69 Ohio St. 328, 69 N. E. 617. The original petition in these cases cannot, therefore, be regarded as having been amended until notice was served upon the defendant or his attorney. I am inclined to the opinion, but do not deem it necessary to decide the question now finally, that the answer day to an amended petition filed under this section is the third Saturday after the date when this notice is served. See Neininger v. State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

[3] The plaintiffs do not seem to have proceeded under this section. They applied to the court for leave to file an amended petition. The court might then, in its discretion, have fixed a time within which the defendant should demur or answer, but did not do so. The plaintiffs, instead of procuring an order fixing the time to demur or answer, or serving notice of the amendment on the defendant or its attorney, which would also have limited the defendant's time to demur or answer, elected to sue out a new summons on the amended petition, which fixed in each case August 20, 1917, as the return day, and September 8, 1917, as the answer day. The plaintiffs are bound, in my opinion, by this election and method of procedure. Manifestly plaintiffs could not have taken judgment as for a default at any time earlier than the 8th of September. The notice and removal petitions were filed September 1st. In my opinion, therefore, the defendant proceed-

ed in due time, and before the time at which it was required to demur or answer by the state law and practice.

[4] I am of opinion, also, that the second ground upon which the motion to remand is based is not well taken. The original petitions of the several plaintiffs stated a removable cause of action. I pass the question whether a plaintiff can by amendment deprive defendant of its right to remove. As respects the amended petitions, the right to remove depends on the case which the plaintiff has stated therein. The several plaintiffs had elected to state alternative causes of action, one based upon an injury said to be covered by the federal Employers' Liability Act, and therefore not removable, and another not based thereon, and which is therefore removable. In the recent case of Dick v. Hyer, 94 Ohio St. 351, 114 N. E. 251, the Supreme Court of Ohio has approved the practice of stating causes of action in the alternative, even though but one recovery is sought. I do not decide that the several plaintiffs have stated alternative causes of action within the holding of that case; but they have in good faith elected to state their right to recovery in the alternative, and are bound thereby on this motion to remand.

I am of opinion that, when a plaintiff sets up two separate causes of action, even in the alternative, and seeking only one recovery, one of which causes of action is removable and the other is not removable, the defendant may remove the entire case to this court. It was so held in the following cases: Patterson v. Bucknall S. S. Lines (D. C.) 203 Fed. 1021; Strother v. Union Pacific Ry. Co. (D. C.) 220 Fed. 731; Flas v. Illinois Central Ry. Co. (D. C.) 229 Fed. 319. In my opinion, the holding of these cases is based on sound reasoning. They merely apply the doctrine of the right to remove when a separable cause of action is stated, or when a case in some of its aspects involves a question arising under the Constitution and laws of the United States. In such situations it is well settled that when a separable controversy is stated, of which the federal courts have jurisdiction, or when one cause of action is stated which involves a controversy arising under the Constitution and laws of the United States, the right to remove exists, and the entire case is thereby transferred to the federal courts. If this were not true, the federal courts would be obliged to yield the right to take jurisdiction whenever a part of the cause was not removable, and thereby the jurisdiction of the federal courts might oftentimes be ousted. See Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514.

Plaintiff relies on Ullrich v. New York, etc., R. R. Co. (D. C.) 193 Fed. 768; Rice v. Boston, etc., R. R. Co. (D. C.) 203 Fed. 580; Jones v. Southern Ry. Co. (D. C.) 236 Fed. 584. These cases are clearly distinguishable and not in point. In each of them the plaintiff had elected to state his case in one cause of action. On the allegations and facts stated a cause of action was stated under the federal Employers' Liability Act, and therefore not removable. It was held, and rightly, that these allegations were controlling and prevented removal, even though, eliminating these allegations, a cause of action would be stated under the common law or state statute.

These holdings only apply the well-recognized rule that the federal act is exclusive and controlling, and whenever the facts stated or the

evidence shows the plaintiff and defendant were engaged in an act of interstate commerce, all rights and liabilities are controlled by the federal Employers' Liability Act. Missouri, etc., Ry. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Wabash R. R. Co. v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226.

An order will be entered overruling the motion to remand in each case. An exception may be noted on behalf of the several plaintiffs.

GRAND RAPIDS & I. RY. CO. v. DOYLE, Collector.

(District Court, W. D. Michigan, S. D. March 16, 1915.)

1. INTERNAL REVENUE ⊂⊃9—CORPORATE EXCISE TAX—DEDUCTIONS FROM INCOME—"BETTERMENTS AMOUNTING TO AN IMPROVEMENT."

   Under Tariff Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 11, imposing a tax on the net income of corporations and authorizing the deduction from the gross income of all ordinary and necessary expenses actually paid out of income in the maintenance and operation of the corporation's business and properties the cost of additions and betterments amounting to an improvement of a railroad company's property and adding to its value, such as expenditures for new sidings and spur tracks, or extensions thereto, new stations at places where there had been no stations, etc., and the cost of replacing rails, bridges, culverts and stations with better and more expensive ones in excess of the cost of renewal with like kind and quality could not be deducted.

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

2. INTERNAL REVENUE ⊂⊃4—EXECUTIVE INTERPRETATION.

   A rule promulgated by the Treasury Department for the guidance of revenue collectors, though entitled to consideration, has not great weight in determining the proper construction of a revenue law.

3. INTERNAL REVENUE ⊂⊃9—CORPORATE EXCISE TAX—DEDUCTIONS FROM INCOME—"OPERATING EXPENSES."

   The "operating expenses" of a railroad, which may be deducted from the gross income in ascertaining the net income subject to the corporate excise tax, means the expense for labor and materials which go into the actual operating of the road and property.

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

4. INTERNAL REVENUE ⊂⊃9—CORPORATE EXCISE TAX—DEDUCTIONS FROM INCOME—"MAINTENANCE."

   The "maintenance" of the property and business of a railway company, the cost of which is to be deducted from the gross income in ascertaining the net income subject to the excise tax, means the upkeep or preserving of the condition of the property to be operated, and does not mean additions to the equipment or property, or improvements of the former condition of the railroad.

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

At Law. Action by the Grand Rapids & Indiana Railway Company against Emanuel J. Doyle, Collector. On motions for a directed verdict. Verdict directed for defendant.

James H. Campbell, of Grand Rapids, Mich., for plaintiff.

Myron H. Walker, U. S. Dist. Atty., of Grand Rapids, Mich., for defendant.

SESSIONS, District Judge. Counsel upon both sides have requested the court to direct a verdict; counsel for the plaintiff asking for a directed verdict in the sum of the taxes paid under protest, with interest thereon, and counsel for the defendant asking for a directed verdict of no cause of action. The facts are undisputed and present no controversy. Therefore the issue which is presented is purely one of law and for the determination of the court and not of the jury.

[1] By section 38 of the Tariff Act of 1909 Congress provided for the imposing of special excise taxes upon all corporations doing business for profit and having capital stock represented by shares, whose net income exceeds the sum of $5,000 in any one year. The amount of the excise tax so to be laid is 1 per cent. of the net income of each corporation during one year in excess of the sum of $5,000.

The statute provides that the taxable net income of every such corporation shall be ascertained and determined by making certain deductions from the gross income of the corporation. Among other sums to be deducted from the gross income, in ascertaining the amount of the taxable net income is all the ordinary and necessary expenses actually paid within the year out of the net income in the maintenance and operation of the corporation's business and properties. This controversy arises out of that provision of the statute. The plaintiff contends that the deduction authorized by that provision of the statute includes such items as it has deducted from its gross income for expenditures made in so-called additions and betterments to its property. The defendant contends that deductions for expenditures for additions and betterments are not authorized.

During the years 1910, 1911, and 1912 the Grand Rapids & Indiana Railway Company, the plaintiff, was one of the corporations in this district subject to the excise tax imposed by this statute. The statute further provides that each year every corporation subject to the tax shall make a return to the Commissioner of Internal Revenue, and that such return shall state the gross income of the corporation from all sources and shall state the amounts of the various deductions made from the gross income as authorized by the statute.

The plaintiff in each of the years, and within the proper time, made such a return to the Commissioner of Internal Revenue. The return, in form at least, satisfied the requirements of the statute. Upon that return in each year, the Commissioner of Internal Revenue made an assessment and laid a tax as required by the statute. The taxes so laid and assessed were paid by the plaintiff. Thereafter, and after an investigation and an examination of the books and records of the plaintiff by government agents, the Commissioner of Internal Revenue decided and determined that certain deductions had been made from the gross income of the plaintiff which were not authorized by the statute, and thereupon the commissioner made a new return as authorized by the statute, and a new assessment, and levied a tax of 1 per cent. upon the new assessment. The plaintiff paid the extra taxes

so levied, and has brought suit to recover back the amount so paid, the payment having been made under protest.

The items of the deductions originally made by the plaintiff from its gross income and determined to have been improper by the Commissioner of Internal Revenue cover various expenditures, but all, in reality, of like or similar character. Those expenditures are for additions and betterments to the property of the railway corporation and include expenditures for sidings and spur tracks. In each instance the siding or spur track which was constructed was either a new siding or spur track or a new extension of an old siding or spur track. In other words, it was an addition in each instance. Those sidings or spur tracks in most instances were what are termed "industrial sidings" or spur tracks. In other words, they were sidings put in to reach industrial establishments located along the line of the railway and for the purpose of serving patrons of the road. Other items include sidings which were placed upon the main line of the road, and by the main line I do not mean the main line of the road as distinguished from its branches, but I mean the line of the railway, main line and branches included, as distinguished from sidings and spur tracks. Those sidings were in some instances passing sidings, and put in for the purpose of expediting the traffic of the road and improving the traffic facilities. In other instances they were Y-tracks, put in for the purpose of turning the engines and cars and trains of the road.

Another item of expenditure involved in this controversy was the improvement of the roadbed, including the rails. During each of these years, 1910, 1911, and 1912, the rails upon certain portions of the road were taken up and the old rails replaced with new and heavier rails. Bridges and culverts were replaced with new ones of better material. Wooden bridges and culverts were replaced with concrete and steel bridges and culverts, more expensive and more valuable. Another item of expenditure in the improvement of the right of way was the replacing of the gravel ballast with slag upon portions of the road. Another item was the improvement of frogs and switches which were put in either at sidings or at crossings.

There were also built along the line of the railway new stations. Sometimes the new station was built at a place where there had been no station. At other times an old station building was replaced with a new and better and more costly building. Improvements were made also by the addition of a system of block signals on the southern division of the road. In one instance, at least, a warehouse was purchased and used which constituted in fact a freight house. New shops were built at Grand Rapids and new machinery was installed for certain purposes. Overhead crossings were built to separate the grades of crossing railroads. The telegraph and telephone lines were, upon parts of the right of way, replaced, and, while the testimony is not very clear on that subject, the inference is that in each instance the old line was replaced with a better and more expensive new line. Additions were also made to the equipment of the road. In one year 150 new freight cars were purchased. In another year 138 new cars were purchased. Payments were made upon contracts which had been entered into in years previous for the purchase of cars, the title to

which had been retained by the seller; in other words, it was a conditional sale of cars, and the purchase price of the cars was to be paid in yearly installments and in each of two of the years an installment came due and was paid, and a certain part, one-half, of the principal, so paid, was put in this item of additions and betterments and deducted from the gross income of the railway. Certain lands were purchased for the purpose of increasing the facilities at the stations. That, in a general way, covers the expenditures which were made.

In ascertaining the amount which should be charged to the ordinary expense account of the railway and the amount which should be placed in this account of additions and betterments, this practice was pursued: For example, in replacing old rails with new there was charged to the expense account the estimated value and cost of replacing the old rails with rails of the same weight, and there was charged to additions and betterments account the excess over and above the sum charged to the expense account represented by the excess weight of the rails. In other words, when rails were improved by putting in heavier rails than the old ones, the estimated cost of replacing the old rails with new rails of like weight was charged to expense, and the excess cost was charged to additions and betterments. The same was true of the stations which were built. If an old station was replaced with a new one, say an old wooden station replaced with a brick and stone or concrete building, the estimated expense of replacing the old building with a new one of the same material was charged to expense, while the excess cost of the brick and stone building over the wooden one was charged to additions and betterments. The same method was pursued in making all of the charges that are contained in this account of additions and betterments.

The precise question to be determined is this: Under the statute, in accordance with which the excise tax was levied, are these so-called additions and betterments a part of the ordinary and necessary expenses of the maintenance and operation of the railway company's business and property? That question is really one of first impression. Few authorities have been cited by counsel upon either side. In fact, there are few decisions of the courts which are applicable to this comparatively new statute.

Some decisions have been cited by counsel for the plaintiff, but they have little or no bearing upon the question here presented. One case has been cited, decided by the Supreme Court in considering the statute authorizing the construction of the Union Pacific Railroad. It is evident that the statute there under consideration by the court was for an entirely different purpose than the statute here under consideration. In the occurrence out of which that case arose, the government of the United States was seeking to aid and promote the building of a railroad to accommodate the growing western portion of this country. In effect, if not in fact, the government entered into a partnership in the building and construction and early operation of that road. This section of the Tariff Act, whatever may be said of the other sections, does not involve the protection or promotion of railways or other industrial corporations. It is purely a revenue statute, and must be considered from the standpoint of revenue to be derived by the

government. Other cases have been cited which relate to early excise statutes. In each of the cases which have been cited, the court specifically confined its decision to the statute then under consideration, which was, in terms, different from the present one. Therefore we can derive very little aid from those decisions.

One case has been cited by counsel for the plaintiff which involves a construction of the statute here under consideration. That decision, as I read it, is in effect against the contention of the plaintiff. In that case an insurance association claimed the right to deduct from its gross income amounts which it had expended in replacing old office furniture with new. The stipulation of facts in that case specifically states that it was a mere renewal of the old furniture, and it is a fair inference that the furniture was renewed with furniture of like kind and quality as the old. In this case, the cost of renewal with like kind and quality has been charged to expenses, and has been allowed, and it is only the excess cost which has been charged to the account of additions and betterments and been disallowed by the Commissioner of Internal Revenue.

[2] On the part of the defendant, there has been cited a Treasury decision. While that decision, which in fact is a rule promulgated for the guidance of revenue collectors of the government, is entitled to some consideration, it is not entitled to great weight, because to make it controlling would be permitting a party to a lawsuit to formulate and determine the rule of law by which his case should be decided. The party promulgating the rule contained in that Treasury decision is the real party defendant in this action, and, of course, courts cannot permit a party to a lawsuit to say what the rule of law for the decision shall be.

There has also been cited the requirements of the Interstate Commerce Commission relative to a uniform system of accounting, or accounts to be kept by railway companies. That rule or requirement is important in one respect and in only one. That rule was promulgated by the Interstate Commerce Commission in 1907. The act of Congress here under consideration was enacted in 1909, and it is to be presumed that Congress knew and took into consideration the system of bookkeeping or accounting which had been required by one of the government agencies, the Interstate Commerce Commission, and enacted this statute in view of that requirement. By the terms of that rule railroad companies were required to carry an account of additions and betterments like the account which has been carried by this plaintiff, and in which these expenditures have been placed.

So, as I say, the case is really one of first impression, and has to be decided from the statute itself, and not from the decisions of the courts or government agencies. Are these expenditures included in the "necessary expenses of the maintenance and operation of the plaintiff's railway property and business"? In my judgment, they are not. In each instance it is an addition to the property, and an addition to the value of the property of the railway company. It is an improvement of its property; it is an extension of its property; it is an addition, not only to its inventory value, but to its real and actual value.

It is a well-known fact that corporations in general, both railway

and manufacturing companies, often use a part of their net earnings and income in the extension and improvement of their plants and property and business. Nearly every corporation of an industrial character does that, and in many cases industrial corporations do not declare dividends for a number of years after their organization, for the very reason that they are extending and improving and adding to their property. But amounts so expended in additions are no less income than they would be if paid to the stockholder as dividends, and no less income or additions to the value than if the amount had been carried into a surplus account and placed in bank.

Banking corporations buy office furniture and build bank buildings out of the surplus account which has been derived from income; but it is none the less an addition to the value and the capital and the property of the bank. Manufacturing institutions make additions to their factories, install new machinery, increase their equipment, and do all this out of their income; but it is none the less income, and it none the less adds to the value and the capital and the money invested in the plant. Other industrial institutions take the money that is income and invest it in additions to the plants and declare stock dividends. If the contention of the plaintiff in this case be correct, a prosperous manufacturing or railway company could increase its plant equipment and property tenfold, and still not be required to pay the excise tax imposed by this statute. I do not think that was the intention of Congress. I do not think that such an intention can fairly be inferred from the language of the statute itself.

[3, 4] Every one knows what is usually meant by the operating expenses of a railroad—the payment for labor and materials which go into the actual operating of the road and the property. "Maintenance," as used in this statute, fairly means the upkeep or preserving of the condition of the property to be operated, and does not mean additions to the equipment or property, or improvements of former condition of the railroad.

It follows that the deductions originally made by this plaintiff in its return of its gross income were improperly made, and that the excess tax assessed by the Commissioner of Internal Revenue upon the amount represented by these additions and betterments was properly assessed, and the plaintiff is not entitled to recover back the taxes which it has paid.

Your verdict will be in favor of the defendant.

Ex parte HUTFLIS.

(District Court, W. D. New York. October 19, 1907.)

1. ARMY AND NAVY ⟸20—COMPULSORY SERVICE AND DRAFTS—REVIEW OF PROCEEDINGS BY COURTS.

Selective Draft Act May 18, 1917, § 4, providing for the creation and establishment of boards to determine all questions of exemption, and all questions of, or all claims for, excluding or discharging individuals or classes of individuals from the draft, creates independent tribunals for carrying out the provisions of the act, without giving any right to the civil courts to exercise supervisory power over their decisions, or to correct any errors that they may commit.

2. ARMY AND NAVY ⟸20—COMPULSORY SERVICE AND DRAFTS—EXEMPTIONS.

Under Selective Draft Act, § 2, providing that the draft shall be based upon liability to military service of all male citizens or male persons, not alien enemies, who have declared their intention to become citizens, between certain ages; section 4, providing for the exclusion or discharge of certain specified classes of persons, and creating boards to determine all questions of exemption; and section 5, providing for the registration of all male persons between the ages of 21 and 30, and declaring that all persons registered shall be subject to draft, unless exempted or excused as provided in that act—though aliens who have not applied for citizenship are not liable to military duty, yet they are not automatically exempted, but must claim exemption in order to be excused.

3. ARMY AND NAVY ⟸20—COMPULSORY SERVICE AND DRAFTS—RIGHT TO HEARING.

Proceedings on an alien's claim for exemption under the Selective Draft Act are analogous to proceedings before a board of immigration, and the applicants have an unquestionable right to a fair hearing.

4. HABEAS CORPUS ⟸16—DETENTION BY MILITARY AUTHORITIES—COMPULSORY SERVICE AND DRAFTS.

While the action of a local or district board in passing on a claim for exemption under the Selective Draft Act cannot be reviewed as of right by a writ of habeas corpus, such remedy will not be denied, where the board has abused its power or exercised it arbitrarily.

Petition by Mathias Hutflis for a writ of habeas corpus. Jurisdiction retained, pending an application to the Adjutant General.

Irving M. Weiss, of Buffalo, N. Y., for petitioner.
Stephen T. Lockwood, of Buffalo, N. Y., for respondent.

HAZEL, District Judge. Section 2 of the Selective Draft Act, so called, in so far as material to a determination of the question herein involved, reads as follows:

"Such draft as herein provided shall be based upon liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act."

Section 4 provides for the exclusion or discharge from the selective draft of certain specified classes of persons from among those liable to the draft, and for the creation and establishment by the President

of local and district boards, the local boards being empowered to hear and determine (subject to review by district boards)—

"all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President."

Section 5 providing for registration declares that all persons registered—

"shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in the act provided.

[1] These provisions are not in conflict with one another. When read together, they clearly and definitely indicate that Congress, though not contemplating that nondeclarant aliens, not alien enemies, between the ages of 21 and 31, should be liable for military service, did intend to make them subject to the draft, and exemption dependent upon compliance with the adopted rules and regulations, which have the force of law. It was clearly the intention of Congress to create independent tribunals for carrying out the provisions of the act—tribunals, the powers and duties of which relate specifically to commandeering the military forces of the United States—without giving any right to the civil courts to exercise supervisory power over their decisions or to correct any errors that they may commit.

[2] I cannot agree with the contention that the act automatically exempts nondeclarant aliens because of the information required of them at the time of registration. Force must be given to the phrase in section 5, "unless exempted or excused therefrom, as in this act provided." A man may be subject to jury duty, and yet not liable to serve as a juror because of his exemption or immunity from serving; but he is nevertheless required to claim exemption. Applying that rule to this situation, the relator, though clearly not liable or exposed to military duty on account of his alienage and failure to apply for citizenship, is nevertheless required to claim exemption, if he wishes to be excused from serving in the army.

The relator claims, inter alia, that the writ should be allowed on the ground that through ignorance his claim to exemption was not filed; that he has had no hearing; that he was misled by a member of the board, though unintentionally, as to the method of filing his claim for exemption; that he was unfamiliar with the provisions of the act, was unable to read or write English, and was uninformed as to the rules and regulations printed on the notice requiring claims for exemption to be filed or submitted on or before the seventh day following its mailing; that he did not know of the provision requiring affidavits in support of a claim for exemption to be furnished within 10 days after filing the claim; and that on learning that he had been accepted he applied to the local board for a form upon which to file his claim for exemption, and was given by mistake an appeal blank, upon which he specified that he was a nondeclarant alien, but which the district board disregarded.

[3, 4] In this situation the questions are whether the relator has waived the privilege of asserting his claim for exemption, and whether the certificate of the local board accepting him for military service, resulting in his subsequent arrest as a deserter for disobeying an order of entrainment for the army mobilization camp, is final and conclusive. It seems to me, under the circumstances, that waiver is of doubtful application, for at no time did the relator intend to relinquish any rights. His ignorance and illiteracy are matters that the local board may properly consider in reopening his case. Proceedings under this act are analogous to proceedings before the board of immigration, wherein aliens have the unquestionable right to a fair hearing to determine their status and right to remain in the United States; but in this case the relator has had no hearing whatever, his evidence is not in, and his right to exemption has not been passed upon. The relator, claiming to be a subject of Austria and a nondeclarant alien, if his claim were true, would be in the exemption class. While the action of the local or district board cannot be reviewed as of right by a writ of habeas corpus, such remedy would not be denied, where a board had abused its power or exercised it arbitrarily.

The contention that the relator is deprived of his treaty rights under the most favored nation clause in the treaty existing between the United States and Austria-Hungary is untenable. Assuming, but not deciding, that such clause applies to subjects of Austria, our treaty with Switzerland (1850), providing substantially that citizens of either country domiciled in the other shall be free from personal military service (11 Stat. 589), is believed not inconsistent with the Selective Draft Act; for, as heretofore pointed out, section 2 by implication excepts aliens who are merely denizens of the United States, only requiring them to file a claim to exemption in accordance with the rules and regulations prescribed by the President. Moreover, exemption because of treaty rights is not mentioned in the act under discussion, section 14 of which suspends all laws in conflict therewith.

It is questioned whether this court should interfere in behalf of the relator in view of his induction into the military service; but as it has come to my attention that Provost Marshal General Crowder has recently promulgated a rule (see Official Bulletin, October 16, 1917, p. 12) for reopening cases where registrants, through their nonculpable ignorance, have been reported for military duty and sent to mobilization camps, for the purpose of determining whether they should be exempted or excused from military service, it will probably be sufficient for the court to suggest such procedure herein. Hence, without making the writ absolute at this time, but retaining jurisdiction, I will allow 10 days for application to the Adjutant General for permission to reopen the case before the local board under the above rule, and for the relator to file his claim for exemption and affidavits in support thereof.

So ordered.

Ex parte BLACKINGTON.

(District Court, D. Massachusetts. October 17, 1917.)

No. 1576.

ARMY AND NAVY ⊂⊃18—ENLISTMENT—VALIDITY—MEDICAL OFFICERS.

A person enlisting in the National Guard, and subsequently drafted into the federal service, is not entitled to be discharged, because he was below the height prescribed by the army regulations and was not physically fit for military service, but was passed by the medical examiner, acting as recruiting officer, because of personal bias and hostility toward the applicant, as voluntary enlistment rests on a contract, in making which the parties deal at arm's length, and neither occupies a fiduciary position towards the other, and recruiting officers and medical examiners act solely for the state or the United States, and owe no duty to the applicant to decide fairly. There was no evidence that the federal medical officers who examined the petitioner after the National Guard was drafted into the federal service acted improperly. Discharge refused.

Petition by Carl A. Blackington, for a writ of habeas corpus. Petition dismissed, and writ discharged.

Harvey D. Eaton, of Waterville, Me., and Ropes, Gray, Boyden & Perkins, of Boston, Mass., for petitioner.

The United States Attorney, for respondent.

MORTON, District Judge. Habeas corpus to secure discharge from the United States Army. The writ issued, and there was a hearing in open court upon the right to discharge. Such evidence as the petitioner desired to offer was heard. At the conclusion of it, the respondent orally suggested that no cause had been shown justifying the petitioner's release from military service, and moved that the writ be discharged and the petitioner remanded. The motion was heard without requiring the respondent to rest; and the question now is whether, upon the petitioner's own evidence, he is entitled to the relief sought.

The facts, as claimed by the petitioner, are as follows: The petitioner is a member of the bar, residing in Waterville, Me., and before his enlistment was actively engaged in the practice of his profession. When he was about three years old his head was kicked or stepped on by a horse, and the calk in the shoe punctured both the outer and inner plates of his skull. Trephining was done, and a piece of the skull about half an inch in diameter was removed. No plate was inserted, and the wound so made is at present closed only by skin and flesh, and to some extent by new bone, which has grown in around the edges. It is in the front part of the left temple, near the outer corner of the eye, and represents an obvious indentation, which is at once apparent to anybody looking at that side of the petitioner's face. Through the opening in the skull the pulsation of the blood vessels in the brain can be felt. The petitioner's height is 5 feet 3 inches.

On June 29, 1917, the petitioner enlisted as a private in Battery E, First Maine Heavy Field Artillery, which at that time was part of the National Guard. It was then known that the National Guard would shortly be called into the federal service, and the petitioner enlisted with that expectation. The medical officer who examined and accepted him for service was Dr. J. G. Towne, who was then an officer of the Maine National Guard. About a year previous Mr. Blackington had had occasion in the course of his business to collect a debt from Dr. Towne's sister. Mr. Blackington does not appear to have done anything improper, or even out of the ordinary, in connection with the matter. Dr. Towne, however, conceived a violent animosity toward him, and said that he would get even with Blackington for annoying his sister; that he understood that Blackington was going to enlist in the Heavy Artillery, and, if Blackington did, he (Towne) would pass him if Blackington could not see beyond the end of his nose; and that he (Towne) would see to it that Blackington was passed by the federal medical examiner, etc.

The army regulations require that recruits for the arm of the service into which Mr. Blackington was enlisted should be not less than 5 feet 4 inches in height, and the statute itself requires them to be "effective and able-bodied men." R. S. § 1116 (Comp. St. 1916, § 1884). These requirements were known to Dr. Towne. He reported the petitioner's height as 5 feet 4¼ inches. The regulations also provide that "depressed fractures of the skull, particularly those of the motor region, usually cause rejection." This, too, was known to Dr. Towne; but he made no mention of the petitioner's head injury and paid no attention to it, except to press on it with his finger and inquire if the pressure caused pain. The petitioner was accepted for enlistment by Dr. Towne as "Recruiting Officer."

Within a day or two after the enlistment became complete, the petitioner consulted two other doctors upon the question whether he could safely perform military duty, especially near cannon in action, and was informed that he could not. From that time, he consistently endeavored to obtain his discharge from the service, but without success. The Maine regiment in which he originally enlisted was drafted into the United States Army on August 5th. Thereafter he was examined by the federal medical officers, and was accepted by them. Nothing whatever appears which casts any suspicion on the fairness of their examination, unless the remark by Dr. Towne, above quoted, be so regarded. No direct evidence was offered by the petitioner that his present physical condition is such that military service will cause more injury or hardship to him than to the average man. The single physician who testified, Dr. Hardy, expressed no opinion as to the petitioner's ability to do military work.

I saw no reason to reject as manifestly untruthful the testimony of the petitioner's witnesses as to Dr. Towne's statements; and he certainly reported the petitioner as being of the required height, when in fact the petitioner is an inch below it. Upon the petitioner's testimony a prima facie case is made that Dr. Towne was actuated by bias and hostility against him. If Dr. Towne was under any ob-

ligation to the petitioner to decide fairly the question whether the petitioner's height and physical ability to perform military service in heavy artillery were those called for by statute and army regulations, such obligation, upon the petitioner's evidence, was not met.

My attention has been called to nothing in the statutes or regulations imposing any such duty or obligation on the recruiting officer, and in my opinion none is created by implication of law. Voluntary enlistment rests on a contract between the recruit and the government. The contract is based on his offer of service and the acceptance of it by the military authorities. In making it, the parties deal at arm's length; neither occupies a fiduciary position towards the other; each looks out for his (or its) own interest. Whether the contract is binding is determined by the principles of law applicable to contracts generally. Duress, fraud, misrepresentation, avoid a contract of enlistment, as they would any other contract. In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

The recruiting officer, or the medical examiner, acts solely for the state or for the United States. The purpose of the examination is not to give to the applicant assurance that he is physically fit for military service, but only to prevent undesirable men from getting into the army, where their presence would cause difficulty and expense. United States v. Cottingham, 1 Rob. (40 Va.) 615, 40 Am. Dec. 710. So, too, the army regulations governing recruiting are established for the good of the service, and may be waived by the military authorities. Such action is not a good ground of complaint by an applicant, not of the prescribed height, whose offer of service was nevertheless accepted. As to the effectiveness and bodily soundness, the army has the right to fix its own standards—if not absolutely, at least within much wider limits than are approached in this case. If Dr. Towne, in violation of his duty as an officer, accepted an unfit man, that was a matter for which he might be called to account by his military superiors; but it was nothing that a recruit passed by him could take advantage of, whether such action was inspired by personal hostility, or was the result of mere negligence.

In his application for enlistment Mr. Blackington stated that he was "physically qualified to perform the duties of an able-bodied soldier." It does not appear that he then believed this statement to be untrue, or had any suspicion that his old injury was likely to interfere with military service. The possibility that it might do so seems not to have been suggested to him until after his enlistment. Cases in which enlistment was procured by intentional misrepresentation on the part of the applicant—see Ex parte Dunakin (D. C.) 202 Fed. 290; United States v. Gibbon (C. C.) 24 Fed. 135—seem to me not applicable. But for the reasons stated I am of opinion that on his own evidence the petitioner is not entitled to be discharged.

An order may be entered, dismissing the petition, discharging the writ, and remanding the petitioner.

In re MAAGET.

(District Court, S. D. New York. June 20, 1911.)

1. BANKRUPTCY ⟸407(5)—DISCHARGE—GROUNDS FOR DENIAL—FALSE FINANCIAL STATEMENT.
   A bankrupt's written statement of his financial condition, from which liabilities are omitted, cannot be defended on the ground that assets were also omitted, and that the balance was therefore substantially correct, as a merchant is concerned, not only with the net surplus, but with its proportion to the liabilities.
2. BANKRUPTCY ⟸407(5)—DISCHARGE—GROUNDS FOR DENIAL—FALSE FINANCIAL STATEMENT.
   A bankrupt's omission of obligations from a statement of his financial condition was not excusable, though he thought it would do no harm to omit them.
3. BANKRUPTCY ⟸414(1)—PROCEEDINGS FOR DISCHARGE—MATTERS TO BE PROVED.
   To defeat a discharge on the ground that a bankrupt omitted obligations from a financial statement made by him, it is necessary to show either expressly or impliedly, that he knew the obligations existed and could be enforced against him.
4. BANKRUPTCY ⟸414(3)—PROCEEDINGS FOR DISCHARGE—SUFFICIENCY OF EVIDENCE.
   Where a bankrupt, charged with omitting liabilities from a statement of his financial condition, claimed that it was agreed with the sellers of goods that they should not be counted against his line of credit while they remained in a warehouse, but it appeared that, after a balance of the bankrupt's books had been struck, the invoices therefor were entered on the books, without regard to the dates of delivery from the warehouse, the facts indicated a desire to keep them off of the books until the balance was taken, and that this scheme was devised by the bankrupt, who alone had any possible purpose to accomplish thereby, though he claimed that he was personally ignorant of what the bookkeeper did.

In Bankruptcy. In the matter of I. H. Maaget, bankrupt. On application for a discharge. Discharge denied.

See, also, 173 Fed. 232; 179 Fed. 1019, 102 C. C. A. 664.

Marks & Marks, of New York City, for bankrupt.

Robert P. Levis, of New York City, for objecting creditors.

Ralph Wolf, of New York City, for objecting creditor American Woolen Co. of New York.

Myers & Goldsmith, of New York City, for objecting creditors Boessneck, Broesel & Co. and Fred Butterfield & Co.

LEARNED HAND, District Judge. [1] I certainly cannot agree with the proposition that a bankrupt or any one else may defend a written statement of his financial condition, merely by showing that the balance is substantially correct, nor does it appear that the learned master so thought. It needs no argument to show that a financial statement, showing assets of $107,000 and liabilities of $63,000, is not a correct statement of a business in which the assets are $157,000, and the liabilities $113,000, any more than, to put extreme cases, it would be a correct statement of a business in which the assets were $57,000

and the liabilities $13,000, or the assets $1,157,000 and the liabilities $1,113,000. Still in each case the surplus is the same. A merchant is concerned, not only with the net surplus, but with its proportion to the liabilities, and everybody knows that who knows anything about financial statements, personal or corporate.

[2, 3] Therefore the question comes down to this: Did the bankrupt know that these omitted obligations were actual obligations on April 27, 1907. If he did, it is not commercially tolerable that he should omit them, even though he thought that it would do no harm. Nothing will more quickly destroy confidence in commercial dealings than to justify the statement of a merchant materially false, which professes fully to disclose the facts, because the merchant thought the omissions made no difference. By offering any statement at all, he assumes the rôle of candor, in which he must be throughout consistent; nor can he, by casuistical reservations, suppress a part out of what is given for the whole truth. All that it is necessary to show is that he knew that the obligations existed and that they could be enforced against him. That much, however, it is necessary to show, either expressly or implicitly; otherwise, the proof of fraudulent intent would fail, scienter being a part of the case.

[4] While the bankrupt probably had no accurate knowledge of the exact extent of his liabilities, it is, of course, wholly incredible that he should have been ignorant of liabilities nearly equal in amount to all those which he put in his statements. A number of the invoices were receipted for in his own hand, and for the rest it is impossible to believe that his acquaintance with his own affairs would have permitted ignorance of any such amount of receipts as are here involved. It is, moreover, only just to the bankrupt to say that he professes nothing of the kind, but takes the position that while the goods were held at the spongers, or at the warehouse, the understanding was that he should be under no liability. It was, of course, possible that he should have so understood his commercial relations, and that there should have been in fact an agreement of that kind, although it was of somewhat unusual character; but his testimony hardly goes far enough to meet the case. What he says is that it was agreed that while the goods remained in warehouse the indebtedness for purchase price should not be counted upon the credit which should be allowed to him; that is, against his "line of credit" with the various houses with whom he dealt. Assuming such an agreement to have been made, the result would not be to change his liability for the goods in law, of which there was the usual commercial evidence, but only to extend the amount of the credit allowed him. That the sellers might have agreed to this is also quite obvious, if they, by a control over the merchandise, had security for the indebtedness incurred through the sales. The most reasonable interpretation to be put upon his testimony is that he claims such an agreement to have been made with the sellers.

While such an agreement did not in fact change his liabilities in law, or the necessity of a statement of the facts, it is perhaps possible that he might have honestly supposed that they were no obligations at all, and that he might have omitted them for that reason. That belief is,

however, hardly consistent with the entry of them, in his books of account, as liabilities, without any comment, and especially with the precise time of entry of these particular bills. His position is that he did not regard the bills as liabilities until the "redelivery," as he calls it, from the warehouse, at the time when he wanted to begin work on them, or at least to put them in his own factory. That position would certainly have much support, had the entries been made of these liabilities only upon the dates when the "redeliveries" occurred; but they have no relation whatever to those dates. The books, indeed, show a great deal of the attitude of mind of the bookkeeper who kept them. The invoices were not entered at all until after the balance was struck of April 27th, although they had been received for a number of months before. Clearly the excuse of the bankrupt that they were not entered because of the haste of stock taking is ad captandum. As soon, or substantially as soon, as the balance was struck, these invoices were entered, $57,966.08 during the month of May alone, of which at least $50,000 were for receipts prior to April 27th. The bookkeeper did not think that these constituted an indebtedness only on "redelivery"; that much is beyond dispute. Moreover, he did think that in May they constituted an indebtedness, else he would not have entered them as such, for men do not put into their ledgers unperformed contracts. Had anything happened between the date of the invoices' receipt and the entry? Nothing but the striking of a balance from the books; certainly nothing which any sane man could suppose had the faintest relation to the existence of any indebtedness. Whoever controlled the books, therefore, certainly regarded the receipts as constituting an immediate liability, but wished for some reason to keep them off the books until the balance could be taken off without them. Consequently the bookkeeper, at least, had the requisite knowledge of the character of these transactions.

How of the bankrupt? He answers by saying that, whatever his bookkeeper may have done, at least he was personally ignorant of it, which is manifestly incredible, if my inferences from the books hitherto have been correct. Even assuming the unlikelihood of such unfamiliarity with his own books as this presupposes, no bookkeeper without instructions would have had the least conceivable incentive for any such conduct as these books show. There being no reasonable explanation but a desire by somebody to keep out of the books what were recognized as obligations, we must suppose him to have devised it who alone had any possible purpose to accomplish. Certainly Fink could have gained nothing. Unless we are to take the bankrupt's story quite naively, we must suppose that he directed that the obligations should be suppressed, because he did not wish the full extent of his commitments to become known.

I cannot accept the report upon this specification, and I find that it is proved. It will not, therefore, be necessary to consider the others.

Discharge denied.

In re KERNER.

Ex parte GREFF & CO.

(District Court, S. D. New York. October 9, 1917.)

BANKRUPTCY ⊂⊃384—COMPOSITION—FALSE FINANCIAL STATEMENT BY BANKRUPT.

Where a bankrupt, who issued a financial statement in January, omitted from his list of assets goods purchased for the spring trade, and omitted from the list of his liabilities debts incurred by the purchase of such goods, his offer of composition must be denied, despite his claim that it was customary in the trade to omit from the financial statement such assets and liabilities.

In Bankruptcy. In the matter of the bankruptcy of William Kerner. The bankrupt offered composition. On objections by Greff & Co., the master reported against the composition offered. On motion to confirm the report. Report confirmed.

Motion to confirm a master's report against a composition in bankruptcy. The master found, and it is not denied, that the bankrupt made a written statement of his financial condition upon which he obtained goods. This statement was true, except that it omitted merchandise debts of $6,000 from the liabilities, and from the assets the merchandise for which those debts were incurred, all of which he still retained. The bankrupt's excuse is that all the merchandise was purchased for the next spring's trade, and that he did not therefore suppose he need put the debts into a statement of his existing financial condition at the time (January 8th), when he issued the statement. He also attempted to show that such a practice obtained under the custom of that trade, but the master excluded the proof.

Charles H. Broas, of New York City, for objecting creditor.
Lester M. Friedman, of New York City, for bankrupt.

LEARNED HAND, District Judge (after stating the facts as above). This case falls directly under my ruling in Re Maaget, 245 Fed. 804, and I shall follow it, unless it appears that it has been overruled in Re Rosenthal, 231 Fed. 449, 145 C. C. A. 443. The opinion in that case does not pass upon the point, and I have no means of determining whether it was raised on the appeal. In any event the opinion below does not diverge from In re Maaget, but quotes it with approval, and the case has the distinguishing point that the bankrupt, who could not read or write, may well have supposed the statement to have been true. I cannot find that any court has decided that, where a bankrupt deliberately chooses to omit a liability for the purchase price of goods still on hand, he has made a true financial statement. Scienter is, of course, a necessary element in the charge, and it would be a defense to show that the bankrupt, however erroneously, supposed that the liability did not in fact exist.

Nothing of the sort is suggested here; the most that by implication can be said to be shown is that he supposed that he need not put the liability into the statement, because a custom exists in the trade to exclude any such. But, while the bankrupt's error touching the ex-

istence of the liability would make the statement honest and excuse a mere mistake, his error as to his obligation to make a true statement is irrelevant. His duty is to speak the truth, so far as he knows it, and no mistake as to the scope of that duty affects the legal consequences of his omission. Like any other duty, the law imposes it upon him at his risk. The test is honesty in the statement, not in the belief that an honest statement is necessary. It would be as intolerable as it is anomalous to allow men to make financial statements which they know to be false, on the plea that they supposed the recipient was not entitled to honest ones.

Report confirmed; confirmation of composition denied. It would be satisfactory if a ruling upon the point could be obtained from the Circuit Court of Appeals.

In re BASH et al.

(District Court, E. D. Pennsylvania. November 1, 1917.)

No. 5694.

BANKRUPTCY ⊂⊃323—CLAIMS—AMOUNT—"SECURED CREDITOR."

Under Bankruptcy Act July 1, 1898, c. 541, § 57e, 30 Stat. 560 (Comp. St. 1916, § 9641), providing that claims of secured creditors may be allowed to enable them to participate in creditors' meetings, but for such sums only as seem to be owing over and above the value of the securities, section 57h, providing that the value of securities held by secured creditors shall be determined, and the amount credited upon such claims, and a dividend paid only on the unpaid balance, and section 1, subsec. 23 (Comp. St. 1916, § 9585), defining "secured creditor" as including a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable thereunder, or owning such a debt for which some person secondarily liable has such security, a creditor, holding collateral security upon which it has realized, is only entitled to a dividend on the balance of its claim, though it had no notice that the collateral was the property of the bankrupt.

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

In Bankruptcy. In the matter of Louis Bash and others, individually and trading as M. H. Bash Sons, bankrupts. On petition by the Colonial Trust Company for review of an order of a special referee. Order affirmed, and petition dismissed.

James B. Lichtenberger, of Philadelphia, Pa., for petitioner.

Edwin Fischer and Alfred Aarons, both of Philadelphia, Pa., for alleged bankrupts.

THOMPSON, District Judge. The Colonial Trust Company, on May 17, 1916, filed its proof of debt in the sum of $4,967.42, based upon two notes of M. H. Bash Sons to order of Louis Bash and indorsed by him, one dated October 20, 1915, for $1,200, and one dated January 17, 1916, for $1,500, and two collateral notes of the Alaska

Fur Company, signed by Louis Bash, as president, to the order of the Colonial Trust Company, one dated December 2, 1915, for $750, indorsed by M. H. Bash Sons, with 5 shares of Bank of Commerce stock as collateral, and one dated January 19, 1916, for $1,600, indorsed by Louis Bash, with $2,000 United States Steel Corporation 5's as collateral.

The notes not being paid at maturity, the Bank of Commerce stock was sold by the Colonial Trust Company for $572.55, and the United States Steel Corporation bonds for $2,103.18. The Colonial Trust Company claimed that it was entitled to participate in dividends to creditors upon the full amount of its claim, without deduction of the proceeds of the collateral. The special referee allowed the claim only for the balance due after deducting the amount of the proceeds as the value of the security. The ruling was based upon section 57, subsections "e" and "h," of the Bankruptcy Act (Comp. St. 1916, § 9641), providing as follows:

"e. Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities."

"h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The special referee found as a fact that the 5 shares of Bank of Commerce stock and the $2,000 United States Steel Corporation 5's were both the personal property of Louis Bash, and that, inasmuch as the collateral was owned by the bankrupt, the provisions of section 57, subsections "e" and "h," applied. The circumstances under which the Colonial Trust Company made the loans upon the notes were as follows:

Louis Bash was president of the Alaska Fur Company. He called upon the officers of the Colonial Trust Company and requested a loan to the Alaska Fur Company of $750. It was agreed that the loan be made, provided Bash deposited sufficient collateral. He offered as collateral 5 shares of the Bank of Commerce. The stock stood in the name of M. H. Bash Sons, and the certificate was delivered to the trust company, transferred in blank over the firm's signature. The loan of $1,600 was made under substantially the same circumstances, except that the 2,000 United States Steel Corporation 5's were unregistered bonds, without anything upon them to indicate to whom they belonged.

The petition for review of the order of the referee, requiring the proceeds of the petitioner's collateral to be deducted from the amount of its claim before allowance, is based upon the alleged fact that the petitioner, in acquiring the collateral, acquired it as the property of the Alaska Fur Company, and not as that of Louis Bash, or M. H.

Bash Sons, the bankrupts. The special referee has based his conclusion upon the finding that the circumstances in connection with the delivery of the collateral were such as to put the petitioner upon inquiry as to the real ownership of the collateral. While I am of the opinion that the referee erred in so finding (Wood v. Smith, 92 Pa. 379, 37 Am. Rep. 694; Burton's Appeal, 93 Pa. 214), he was clearly right in his conclusion that the Colonial Trust Company could only prove for the amount of its debt after deduction of the amount received upon the collateral. The question whether the petitioner is a secured creditor is determined by the definition of that term in section 1, subsection 23, of the Bankruptcy Act (Comp. St. 1916, § 9585), as follows:

"'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

If the fact that the petitioner held the collateral for valuable consideration without notice of the bankrupts' title was set up in support of its right to hold or sell the collateral, it would be material. But it has realized upon its collateral, and has presented its claim in a court of bankruptcy. Its rights to recover are therefore governed exclusively by the bankruptcy law, which is intended to prevent a creditor whose claim is secured by the property of the bankrupt from recovering out of the estate in bankruptcy, except as a general creditor for the unsecured balance of its claim. The language of the act is plain, and makes no exception in favor of a secured creditor without notice that the security is the property of the bankrupt.

The order of the special referee is affirmed, and the petition for review dismissed.

COLLINS v. ERIE R. CO.

(District Court, W. D. New York. July 18, 1917.)

No. 1237.

1. MASTER AND SERVANT ⟸256(1)—ACTIONS FOR INJURIES—SUFFICIENCY OF COMPLAINT.

In an employé's action for injuries, where the complaint alleged that he was a towerman, and was required to pump water by means of a gasoline engine into a water tank for use of locomotive engines engaged in interstate commerce, it might be inferred, as against a demurrer, that the water was being pumped into the tank for the immediate use of locomotives engaged in such commerce, and that such use was not dependent upon any remote possibilities.

2. COMMERCE ⟸27(5)—"INTERSTATE COMMERCE"—SERVICES OF EMPLOYÉS.

A railway employé, pumping water into a tank for the use of locomotive engines engaged in interstate commerce, is engaged in such commerce, or in work so closely connected therewith as to be a part thereof, where the water is being so pumped for the immediate use of locomotives engaged in such commerce, and such use is not dependent upon remote possibilities.

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

At Law. Action by William M. Collins against the Erie Railroad Company. On demurrer to the complaint. Demurrer overruled.

Hamilton Ward, of Buffalo, N. Y., for plaintiff.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (John W. Ryan, of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District Judge. [1] As the demurrer admits facts well pleaded, i. e., that plaintiff was a towerman, and as part of his duties was required to pump water by means of a gasoline engine into a water tank for use on locomotive engines engaged in interstate commerce, the fair presumption from the material allegation of jurisdiction is that the water to be pumped into the tank was for immediate use on locomotives operated in interstate commerce. It is, of course, not unlikely that different inferences may be drawn at the trial from what may be testified in relation to the use of the water which may be shown to have been intended for locomotives operating within the state.

In Hudson & Manhattan Ry. Co. v. Iorio, 239 Fed. 855, 152 C. C. A. 641, upon which reliance is placed by defendant, the act of putting rails in storage for future use at the time the plaintiff received injury was held not to be so closely related to interstate commerce as to be a part of it; but in this case the facts are claimed to be distinguishable, in that greater imminence existed between the water and its use in interstate commerce, as obviously the locomotive could not be operated unless supplied with sufficient water for making steam.

The facts in D., L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, and C., B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, are also asserted to be different from those of this case. In the Harrington Case it was held that

the coal mined by the plaintiff, who was injured, was not so closely related to interstate commerce as to be a part thereof, because of the uncertainty of its being used for fuel by locomotives engaged in interstate transportation, while in the Yurkonis Case, though the plaintiff was engaged in mining coal, which was then taken in the coal cars from the switch tracks to a coal trestle, which would ultimately be used in interstate commerce, the Supreme Court held that the mere fact that the coal was to be used in interstate commerce after being mined and transported did not make the injury sustained by the miner an injury sustained while engaged in interstate commerce.

Quite recently, in Southern Railway Co. v. H. E. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, the Supreme Court decided that a car inspector, who went to the assistance of another employé, injured in a wreck while he was engaged in inspecting cars, and was himself injured by stumbling over some large clinkers in his path, while carrying a jack for raising a derailed car, was nevertheless engaged in interstate commerce, as his act in raising the car was instrumental in opening the way for interstate transportation, even though his primary object was to render aid to a fellow workman.

[2] It must be admitted that, in view of the decisions herein mentioned and the analysis of such decisions by Judge Scott in Giovio v. N. Y. C. R. R. Co., 176 App. Div. 230, 162 N. Y. Supp. 1026, the question is exceedingly close, and I am almost persuaded that this case falls within the principle of those cases, especially the Harrington, Yurkonis, and Iorio Cases, and that at the time of receiving the injury the plaintiff was not engaged in interstate commerce, so as to give him the right to invoke the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]).

I am, however, reluctant to hold, in view of the allegations of the complaint, that no cause of action is alleged of which this court may take cognizance, as the inference may be drawn from such allegations that the water was being pumped into the tank for the immediate use of locomotives engaged in interstate commerce, and that such use was not dependent upon any remote possibilities. As said by Mr. Justice Holmes in Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, in speaking of an engine which appears to have been used interchangeably in interstate and intrastate commerce:

> "Its next work, so far as appears, might be interstate, or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events."

At this time, therefore, on this motion, I hold that the complaint fairly states a cause of action under the federal Employers' Liability Act, and that plaintiff was engaged in interstate commerce, or that his work was so closely connected therewith as to be a part of it. Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153.

The demurrer is overruled.

In re DUUS.

(District Court, W. D. Washington, N. D. April 14, 1917.)

No. 3725.

1. STATUTES ⊂=225—CONSTRUCTION WITH REFERENCE TO OTHER STATUTES.
Rev. St. § 2171 (Comp. St. 1916, § 4362), providing that no alien, who is a native citizen, subject, or denizen of any country with which the United States are at war at the time of his application, shall be admitted to become a citizen, and Act June 29, 1906, c. 3592, 34 Stat. 596, providing that, before the examination and administration of the oath of allegiance upon admission, notice shall be given by the applicant for 90 days, must be construed together.

2. ALIENS ⊂=61—NATURALIZATION—ALIEN ENEMIES—"APPLICATION."
Under Act June 29, 1906, as to naturalization, and Rev. St. § 2171 (Comp. St. 1916, § 4362), prohibiting the naturalization of citizens or subjects of any country with which the United States is at war at the time of the application, the filing of the petition and the examination in court must be considered as one act and comprehended within the term "application," so that a German subject who filed his petition in January, 1917, was not entitled to admission to citizenship after the passage of the resolution declaring a condition of war, especially in view of Act July 30, 1813, c. 36, 3 Stat. 53, by which a proviso was added to section 2171 as originally enacted, authorizing the naturalization of aliens of enemy nativity who had, prior to June 18, 1812, made declaration of their intention, to which the rule "expressio unius" applies.

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

Application by Antone Duus for admission to citizenship. Hearing deferred until the termination of the war, or until further order.

John Speed Smith, Chief Naturalization Examiner, for the United States.

NETERER, District Judge. The applicant is a subject of the Emperor of Germany, and filed his petition for naturalization on the 11th day of January, 1917. In due course the application came on to be heard on this 14th day of April. The congressional resolution declaring a condition of war between the United States and Germany was passed on April 6, 1917. Section 2171, Revised Statutes (section 4362, vol. 5, U. S. Compiled Statutes 1916), provides that:

"No alien who is a native citizen, * * * subject or a denizen of any country, state, or sovereignty, with which the United States are at war at the time of his application, shall be then admitted to become a citizen of the United States."

This act was passed on the 14th day of April, 1802. There are but few decisions interpreting the act, all arising out of the War of 1812. In Ex parte Newman (C. C. 1813) Fed. Cas. No. 10,174, it was held that an alien enemy could not even make the preparatory declaration of intention, since he "has no legal standing in court to acquire even inchoate rights." In the Case of In re Little, 2 Browne, 218 (Pa. 1812), it was held that, while an alien enemy could not be naturalized,

he might make the preliminary declaration, "when he gains no personal privileges in consequence thereof."

By the provisions of section 2171, supra, the applicant merely appeared before the court, was examined, and took the oath of allegiance. The transaction was of one act. This section has never been changed. When the act under which we are operating was passed, June 29, 1906, provision was made that, before the examination and administration of the oath of allegiance upon admission, notice was required to be given by the applicant for 90 days.

[1, 2] I think that these two acts must be construed together. This conclusion is strengthened by the fact that on July 30, 1813 (3 Stat. 53, c. 36), a proviso was added to section 2171, supra, authorizing the naturalization of aliens of enemy nativity who had, prior to June 18, 1912, made declaration of intention, and by the rule "expressio unius" the limitation was explicitly fixed. No exception was made by the act of 1906, supra, and under this act, in view of the law, the filing of the "petition" and the examination in court must be considered one act and comprehended within the term "application"; and if any doubt did exist under the circumstances, that doubt should be resolved against the applicant, since no right can be jeopardized. The policy of the government during the war has been declared, and an alien will not be disturbed, either in his liberty or his possessions, so long as he lives as a citizen and obeys the law.

Hearing on the application will be deferred until the termination of the war, or until further order of the court.

THE EROS.

(District Court, E. D. New York. December 23, 1916.)

ADMIRALTY ⊂=124—UNITED STATES MARSHALS ⊂=11—FEES—COSTS.

Under Rev. St. § 829, subd. 15 (Comp. St. 1916, § 1386), providing that, when the debt or claim in admiralty is settled by the parties without a sale, the marshal shall be entitled to certain commissions, the marshal is, where the claimant of a vessel libeled pays the amount of a decree, having secured its release from custody by the giving of bond, entitled to the commission provided, and the amount of such commission should be included in the decree as part of the costs.

In Admiralty. Libel by Eugene Higgins against the yacht Eros, claimed by Julien H. Evrard. From the refusal of the clerk to tax the marshal's poundage on entry of decree, libelant appeals. Item taxed as costs.

Duer, Strong & Whitehead and Selden Bacon, all of New York City, for libelant.

Kirlin, Woolsey & Hickox, of New York City, for claimant.

Henry Ward Beer, Asst. U. S. Atty, of Brooklyn, N. Y., for marshal.

VEEDER, District Judge. The libelant appeals from the refusal of the clerk to tax the marshal's poundage upon the entry of decree. The yacht was taken into custody by the marshal pursuant to writ, but was afterwards released upon the giving of a bond by the claimant to the marshal, pursuant to Rev. St. U. S. § 947 (Comp. St. 1916, § 1573). The case has been tried, and a final decree is being entered for the libelant for $37,356.46 and costs. In taxing his costs the libelant has asked that the sum of $189.02 be taxed as the poundage required to be paid to the marshal in case of settlement without a sale, as provided by Rev. St. U. S. § 829, subd. 15 (Comp. St. 1916, § 1386):

"When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first $500 of the claim or decree, and one-half of one per centum on the excess of any sum thereof over $500."

It is well settled that if decree be entered, and the amount awarded be paid voluntarily by the defendant without issue of execution, such payment constitutes a settlement between the parties without a sale within the meaning of this statute. The Russia, 5 Ben. 84, Fed. Cas. No. 12,170; The City of Washington, 13 Blatchf. 410, Fed. Cas. No. 2,772; In re Johnston, 8 Ben. 201, Fed. Cas. No. 7,421; The Clintonia (D. C.) 11 Fed. 740; The Captain John (D. C.) 41 Fed. 150. This doctrine is supported by the state practice on attachments, and by all the cases with respect to what constitutes voluntary payment. It follows that, if the decree be entered, the claimant has the right to pay immediately, and on paying to the libelant the face of the decree, with any accrued interest, the judgment must be satisfied.

Apparently the libelant can assert no further claim for this poundage, unless it is included in the taxation; and if he receives payment, the marshal can demand this commission. As stated by Judge Simonton in Smith v. The Morgan City (D. C.) 39 Fed. 572:

"The commission on moneys paid between the parties without a sale of the property is given to the marshal by way of compensation for the loss of the opportunity to earn the fees by sale and by custody of the money. The cause being in the hands of the court, and the court having rendered a decree, the regular mode of enforcing the decree is by execution. The enforcement of the execution was as well the right, as the duty, of the marshal. The parties, however, prefer to settle the matter without further intervention of the court. If they take this course, they cannot deprive the marshal of all that he might have earned. They pay him a reduced commission—1 per cent. instead of 2½, and one-half of 1 per cent. instead of 1¼. The same practice, from time immemorial, has existed in this state. When parties settle a case in judgment outside of the sheriff's office, he gets a reduced commission. Gen. St. S. C. § 2437. The marshal is entitled to the commission charged."

If the marshal be entitled to receive this poundage on payment, the libelant may reasonably ask to be put in a position where he is entitled to insist on receiving the amount from the claimant or his sureties on payment of the decree. The obvious way is to incorporate it in the costs taxed and included in the decree. This procedure is expressly approved in Smith v. The Morgan City (D. C.) 39 Fed. 572,

supra. In the case of The Acadia, 10 Ben. 482, Fed. Cas. No. 23, the marshal sought to have his poundage taxed before decree or settlement. It was held that, while it could not be taxed at that time, the marshal might thereafter become entitled to it if a settlement were had or a decree rendered, and Judge Choate cited as authority Judge Benedict's ruling in The City of Washington, supra. The same view was taken by Judge Blatchford in the case of In re Johnston, 8 Ben. 201, Fed. Cas. No. 7,421, and reasserted by Judge Benedict in the case of the Captain John (D. C.) 41 Fed. 147. In the case of The Isabel (D. C.) 79 Fed. 103, the marshal had apparently never seized the vessel, since the court states that no monition was served; and the foregoing cases were distinguished on the ground that in those cases the vessel had been seized by the marshal. In Benedict's Admiralty (4th Ed.) 661, the form for a bill of costs includes the marshal's fees and poundage. And this seems in accordance with the provisions of section 983 of the Revised Statutes (Comp. St. 1916, § 1624).

The claimant is not harmed by such procedure. If the decree were reversed, it would carry with it the reversal of the taxation, and, if the amount had been collected, the right to reimbursement. If the decree is not appealed from, or on appeal is affirmed, and the claimant and his sureties should fail to pay, the libelant would issue execution to the marshal, who would collect. In that case the marshal would, of course, be entitled to his commission upon the execution, presumably at a larger rate. Of course, he could not have both commissions; but in collecting the execution he would be required to credit the reduced poundage taxed, so far as collected, against the poundage allowed on the execution. A somewhat similar situation is presented in the state practice, where the sheriff's fees on execution are always included in taxing costs on entry of judgment; but if the defeated party pay the judgment without issue of execution he is allowed credit for the taxed sheriff's fee.

I am constrained by the foregoing authorities to include this item in the costs decreed.

OCCIDENTAL CONST. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2954.

1. UNITED STATES ⊂=68—ACTION—RECOVERY.
   Plaintiff, which hired mules to an agent of the United States under an agreement providing that extra care should be given the mules, cannot, where the contract was not binding on the United States, recover against the latter for injuries resulting to the mules from a failure to carry out the agreement.
2. UNITED STATES ⊂=47—CONTRACTS—LIABILITY.
   Under Rev. St. § 3744 (Comp. St. 1916, §§ 6895), designed to prevent fraud on the part of officers intrusted with making contracts, the United States is not responsible for injuries to property in its possession, resulting from negligence on the part of its agents.
3. UNITED STATES ⊂=96—CLAIMS—NEGLIGENCE.
   An action for damages for injuries to mules hired to an agent of the United States, claimed to have resulted from negligence, is one sounding in tort, and cannot be maintained under Tucker Act March 3, 1887, c. 359, 24 Stat. 505, as one for damages not sounding in tort.
4. TAXATION ⊂=5—PROPERTY SUBJECT—MULES IN POSSESSION OF AGENT OF GOVERNMENT.
   Mules and equipment having been hired to an Indian agent, under an agreement that they should be returned to plaintiff, the hirer, a resident of California, are, where used on an Indian reservation in Arizona, subject to taxation under Civ. Code Ariz. 1913, § 4846, declaring that all property within the state shall be subject to taxation, and the United States government is not liable to plaintiff because the property was distrained for taxes in Arizona before it could be returned; neither plaintiff's residence nor the use of the property by the government freeing it from liability for taxes.

Dietrich, District Judge, dissenting in part.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by the Occidental Construction Company against the United States of America. There was a judgment for part only of the relief sought, and plaintiff brings error. Affirmed.

The plaintiff in error brought an action against the United States under the provisions of the act of March 3, 1887, known as the Tucker Act (24 Stat. 505). The facts as found by the court below are in substance the following: On January 10, 1913, the Department of the Interior, through its Indian Service, was engaged in certain construction work on the Mojave Indian reservation, Ariz., of which F. R. Schanck was the superintendent in charge, and H. P. Coultis was the special disbursing agent. On January 10, 1913, the plaintiff delivered to Schanck, as the agent of defendant, 100 mules and certain grading equipment and harness for the use of the defendant in its said work, and Schanck agreed on behalf of the United States to take said property from the corral of the plaintiff at Los Angeles to said Indian reservation, and after the completion of the work to return the same to the plaintiff's corral in Los Angeles. The price agreed upon for the use of the mules was $10 per month for each mule, and for the use of the other property $273.50 per month. Schanck caused the property to be transported to the Indian reservation. The work was completed on April 10, 1913. Before the property was delivered the plaintiff directed the attention of said Schanck to certain blank forms of

contract for the letting of said property, and informed him that the property could only be let on said terms. Schanck replied that he had no legal authority to sign such a contract, but that he was constantly hiring mules for the government, and these mules and equipment were needed at once. The contracts were prepared by the plaintiff and forwarded to Schanck by mail, and were returned to him, bearing the signature, "United States Indian Service, Hugh P. Coultis, Clk. and Spl. Disbursing Agent." Coultis signed the same under Schanck's direction. On January 30, 1913, the plaintiff and Schanck executed the formal offer and acceptance memorandum authorized by the Secretary of the Interior for the hiring of animals and other personal property by said Indian Service. The price to be paid was the same as had been agreed upon, and said formal offer and acceptance was used as the basis of the disbursement of all funds of the United States applied to payment for the use of said property by the said disbursing agent. The work on the Indian reservation had been authorized by an act of Congress, and Congress had made an appropriation therefor. On or about March 7, 1913, the county assessor of Mojave county, Ariz., assessed taxes in the sum of $415.14 on said property, valuing the mules at $100 per head, which was their actual value. Said property was then on the reservation, and was in the custody of the United States, and in use on the work. On the completion of the work on April 10, 1913, the mules were driven from the reservation to the railroad station at Topock in said Mojave county, for the purpose of being shipped to Los Angeles. They were in charge of a person in the employment of the United States, directed by Schanck to take them to the station. One mule was drowned without negligence on the part of any one. When the remaining 99 mules reached Topock the county tax assessor of Mojave county stated to the person in charge that he would take possession of the mules. No objection was made on behalf of the defendant or the man in charge to the possession so taken by the assessor. The assessor took possession under a claim of lien under section 4872 of the Civil Code of Arizona, which provides that, in the event the owner of personal property shall fail to pay the taxes assessed thereon, the assessor shall seize sufficient of said personal property to satisfy the taxes and costs. The plaintiff was notified of the seizure, and communicated with Schanck, and was informed by the latter that he had taken the matter up with the United States district attorney at Phœnix, and that he expected to secure the release of the property without the payment of said taxes. On April 15th the plaintiff informed the defendant that, if it was necessary to pay the tax to prevent a sale, it would advance the money. Schanck replied, requesting that the money be sent, but saying that he would not pay it over, unless necessary. On April 16th the plaintiff sent the money, with the request that, if he must pay the tax, he do so under protest. The amount so paid under protest was $825.94. Whereupon the defendant regained possession of the property and loaded the same into cars and caused the same to be transported to Los Angeles and delivered to the plaintiff. While the mules were in the possession of the United States on the reservation, they were properly fed; but they were so negligently used that the shoulders of some of them were bruised, and the necks were made sore, and while they were in the possession of the county assessor they did not receive sufficient food, and in fact were nearly starved. The condition of the mules when delivered to the plaintiff at Los Angeles was due to their bruised necks and sore shoulders and the improper feeding while in the charge of the county tax assessor. The plaintiff had no knowledge that they were not properly fed while in the custody of the assessor. Twenty-one of said mules had sore shoulders and sore necks, and on account thereof the plaintiff was not able to use them until June 1, 1913. Certain harness of the value of $48.42 was not returned to the plaintiff, and certain grading equipment of the value of $42.78 was not returned. Other grading equipment was damaged through negligence, to the extent of $70.06. The defendant paid the agreed rental value of the mules and equipment while the same were on the reservation. Neither Schanck nor Coultis had authority to execute the contracts sent to Schanck by the plaintiff, and there was no ratification of said written contracts on the part of the United States, and no estoppel against

the United States to deny the validity thereof. The plaintiff paid $3 for the services of a man to unload the mules and deliver them to plaintiff"s corral in Los Angeles on April 26th, and paid $12.50 for the services of the men to unload the other property and deliver it to the plaintiff. The men were employed by the plaintiff to do this work at the request of the defendant. By reason of breakage in the equipment, which was the result of lack of ordinary care on the part of the persons using the same while on the reservation, the equipment was damaged in the sum of $70.06, and the property so received, but not returned to the plaintiff, was of the value of $91.20. As a conclusion of law the court found that the plaintiff was entitled to a judgment against the defendant for the sum of $176.70, and no more, and judgment was entered for that amount.

The plaintiff in its complaint sought to recover, in addition to the sums allowed by the court below, the reasonable value of the use of 99 mules from April 10th to April 23d; for the loss of the use of the 99 mules from April 26th to June 1st, during which time they were alleged to be unfit for work, because not properly fed while in the possession of the tax assessor; for the feed and care of the mules from April 26th to June 1st; for the permanent deterioration in value of the mules; for the sums paid to the assessor for feed and transportation of feed for the mules, and for their care while in his custody; and for the amount of the tax, costs, and expenses paid to the assessor.

M. M. Meyers and Charles E. Dow, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The plaintiff attached to its complaint copies of the contracts, one relating to the mules, and one relating to the grading equipment. It brings to this court none of the evidence in the case, but relies upon the findings of fact of the court below as ground for the recovery of the sums for which it sues.

The plaintiff contends that, notwithstanding the finding of the court that neither Schanck nor Coultis was authorized to enter into the written contracts which were pleaded, and that there was no ratification or estoppel in relation thereto, the plaintiff was entitled to judgment for the injuries to the mules while they were in the actual possession of the defendant, for the reason that the contract was fully performed, citing Clark v. United States, 95 U. S. 539, 24 L. Ed. 518, a case in which the government was held liable on an implied contract, the court ruling that, when a contract has been wholly or partially executed on one side, the party performing will be entitled to recover the fair value of his property or services as upon an implied contract for a quantum meruit. If the plaintiff were here suing for the value of the use of the mules by the defendant, the case so cited would be directly in point, as would also be St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 24 Sup. Ct. 47, 48 L. Ed. 130, and United States v. Andrews, 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185.

But the plaintiff contends that it is seeking to recover damages for the negligence of the employés of the government in their treatment of the mules. In answer to that contention it is to be said, first, that

the complaint does not allege negligence. So far as it relates to the injury to the mules, the complaint contains no more than the following. Referring to the alleged contract the pleader said:

"That the said contract provided that defendant should, and the defendant therein agreed to, take extra care of the said mules and equipment, and return the said mules to the plaintiff herein at its yard in the city of Los Angeles, in the county and state aforesaid, at the termination of the lease and hiring, in as good condition as when taken; that the defendant did not take extra care of the said mules and equipment, as provided in the said agreement, and did not return the said mules and equipment to the plaintiff in as good order as when received; that said mules, upon their return to the plaintiff as above set forth, were all of them in very poor condition, were emaciated and weak, and the plaintiff could not use nor let the said mules to be used, nor any of them, on account of such poor, weak, and emaciated condition, resulting from such lack of care as aforesaid, until the 1st day of June, 1913."

[2] The claim for damages for injury to the mules is therefore based upon an express agreement to exercise extra care. But there was no legal contract between the parties. And even if the allegations of the complaint were sufficient to charge negligence, the plaintiff could not recover damages therefor, for, in the absence of an express contract, the government is not liable for the negligence of its employés. In Robertson v. Sichel, 127 U. S. 507, 515, 8 Sup. Ct. 1286, 1290 (32 L. Ed. 203), the court said:

"The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."

So in Bigby v. United States, 188 U. S. 400, 407, 23 Sup. Ct. 468, 471 (47 L. Ed. 517), the court said:

"The government is not liable to be sued for the torts, misconducts, misfeasances, or laches of its officers or employés."

And, referring to the act of 1887, it further said:

"There is no reason to suppose that Congress intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887."

The plaintiff cites United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65, in which it was held that the United States, as lessee of real property, was under an implied obligation not to permit waste, nor, by its failure to exercise reasonable care, to permit it to be committed. But in that case there was an express contract of lease, and no question was raised as to the authority of the government officer to make it, and the relation between the lessor and the United States was that of landlord and tenant. The plaintiff relies, also, on certain expressions of the court in Clark v. United States, in which it was said:

"In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such bailment."

And the court went on to say that a bailee for hire—

"is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed."

The question here, however, is whether the government became a bailee for hire with the ordinary incidents of bailment, including responsibility for the negligence of its employés. What was said in Clark v. United States on the subject of negligence was unnecessary to the decision of the case which was before the court. The only question was whether the government was liable to pay for the benefit which it had received. The question of negligence was not involved, for, as the court said:

"Negligence is not attributed to the employés of the government."

Section 3744 was intended, as was said in Clark v. United States, to protect the government against pillage and fraud, and it is mandatory. It originally appeared in the act of June 2, 1862, c. 93, 12 Stat. 411, entitled:

"An act to prevent and punish fraud on the part of officers intrusted with making of contracts for the government."

It being well settled that the government is not responsible for torts of its employés, it cannot, we think, be made to answer for damages to property unlawfully taken into the possession of its employés. There is good reason why the government should pay for that which it actually receives and of which it retains the benefit through the unauthorized act of its employés. But if it is to be held that the government is bound to all the incidents of an implied contract in every case where the oral agreement of its employés has been actually performed, what becomes of the protection intended to be afforded by section 3744?

[3] The plaintiff asserts that, even if it is not in a position to recover as upon a contract, express or implied, it is still entitled to recover unliquidated damages, since the statute gives a right of suit "for damages, liquidated or unliquidated, in cases not sounding in tort," and that since the original taking of the property was with plaintiff's consent, and not a tortious act, the damages claimed do not sound in tort, citing United States v. Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987, where it was held that a claim for salvage might properly be said to be one for unliquidated damages in a case "not sounding in tort," under the provisions of the Tucker Act. The difficulty, however, is that the plaintiff's claim for damages as it is presented to this court does sound in tort. It is a claim for damages for the wrongful acts and negligence of the defendant's employés. "Causing harm by negligence is a tort." Bigby v. United States, supra; Peabody v. United States, 231 U. S. 530, 34 Sup. Ct. 159, 58 L. Ed. 351.

[4] The plaintiff contends that the defendant is liable for the damages caused by the taking and detention of the mules by the tax assessor, and asserts that at the expiration of the term for which the property was let, the defendant was bound to return the same to the plaintiff at Los Angeles, that the mules were not taxable in Arizona, and that the defendant wrongfully surrendered possession thereof to

the tax assessor. The mules were in Arizona at the time of the levying of the annual taxes. The law of that state provides in plain terms that:

"All property of every kind and nature whatsoever within this state shall be subject to taxation." Civil Code, § 4846.

The fact that the owner of the taxed property resided in California was immaterial. The property was taxable where found. 37 Cyc. 799. Nor was the property exempt from taxation by reason of the fact that at the time when the tax was assessed, the property was on an Indian reservation or in the possession of government officials. Thompson v. Pacific Railroad, 9 Wall. 579, 19 L. Ed. 792; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242; Gromer v. Standard Dredge Co., 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801. A case very similar to the case at bar is United States v. Moses, 185 Fed. 90, 107 C. C. A. 310, in which it was held that the horses and harness of a contractor with the United States government, which, on the default of the contractor an officer of the government has taken for use in completing the contract, were not, in the absence of an act of Congress to that effect, exempt from taxation, the government having no ownership in the property. The court said:

"It is true that property in the lawful possession of the United States, and in which the United States has a property interest, may not be seized by any process issued under the authority of the state. In this case, however, the United States had no property interest in the property in question. It had a right to the possession of said property under the terms of the contract before quoted until the work required to be done by the Widell-Finley Company was completed and no longer. That work was completed, as stated, August 31, 1907. Its possession thereafter by Walter was for and on behalf of the Widell-Finley Company, and the mere fact that Walter was an officer of the United States, and claimed that his possession was for and on behalf of the United States, did not prevent its seizure by the sheriff as aforesaid. To render such seizure unlawful, it must appear that the officer had a legal right to hold and retain the possession of said property for and on behalf of the United States. A mere claim of right in the government is not sufficient."

We find no error. The judgment is affirmed.

DIETRICH, District Judge (dissenting). Upon one feature of the case I am unable to concur. It was expressly found by the court below that:

"They [the mules] were so negligently used, however, that the shoulders of some of them were bruised and their necks were made sore to an extent beyond what would have resulted, if proper care had been taken of them while they were being used in said work."

I am inclined to think that the appellant is entitled to recover as upon an implied contract for the loss it thus sustained through the government's failure to exercise reasonable care. United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65; Clark v. United States, 95 U. S. 539, 24 L. Ed. 518; St. Louis, etc., v. United States, 191 U. S. 159, 24 Sup. Ct. 47, 48 L. Ed. 130; United States v. Andrews & Co., 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185. The written instrument of agreement being invalid, the government, upon accepting the ap-

pellant's mules for use, impliedly agreed to take reasonable care of them and to pay the reasonable value of their use. In the absence of an express agreement to the contrary, such obligations are imposed upon all bailees for hire. Had the parties duly executed a written instrument fully complying with section 3744 of the Revised Statutes, in which, however, there was no express provision touching the care to be exercised by the government, it would still have been under the implied obligation to exercise a reasonable degree of care. The duty to pay the reasonable value of the use of the mules and the duty to take reasonable care of them are obligations of such a fundamental character that they do not fall within the scope of the evil sought to be remedied by section 3744. Both spring from the same source, and are of equal dignity, and I see no reason why one should be recognized and the other repudiated.

Nor am I able to take the view that the plaintiff's claim sounds in tort. If A. hires from B. a team of horses, and expressly agrees to take good care of them, the abuse thereof, either by him or his servants, constitutes a breach of the contract, upon which B. may bring his action for damages. Such a suit would be upon the contract. So here the plaintiff is suing the government for its failure to keep its implied contract to take reasonable care of the mules, of which it had possession with plaintiff's consent. Robertson v. Sichel and Bigby v. United States, cited in the majority opinion, are typical cases of wrongdoing by government officers or agents to third parties having no contractual relations either express or implied with the government. In such cases I very readily agree that the government cannot be held liable. In United States v. Bostwick, supra, there was no expressed agreement to take reasonable care of the leased premises, and yet the court held the government liable for the wrongful destruction of trees and fences and the digging and carrying away of gravel and stone, saying:

"But the implied obligation as to the manner of use is as much obligatory upon the United States as it would be if it had been expressed."

I am unable to see how the obligation there was any more clearly implied than it is here. So in Clark v. United States, supra, the inference is unavoidable that the government would have been held liable if the plaintiff's vessel had been lost through the negligence of government employés.

HELMET CO. v. WM. WRIGLEY, Jr., CO.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

No. 2960.

1. TRADE-MARKS AND TRADE-NAMES ⟸92—SUIT FOR UNFAIR COMPETITION—SUFFICIENCY OF BILL.
   The allegations of a bill considered, and *held* sufficient to sustain a decree granting an injunction against unfair competition in trade.
2. EQUITY ⟸153—PLEADING—SUFFICIENCY OF BILL.
   Allegations in a bill, although made on information and belief, may rightfully be considered in determining the sufficiency of the bill, where the existence of such facts is also distinctly alleged, and especially where they are peculiarly within the knowledge of defendant, and the allegations have been voluntarily answered.
3. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—UNFAIR COMPETITION—IMITATION OF PACKAGES.
   Evidence *held* sufficient to sustain a decree granting an injunction against unfair competition by a manufacturer of chewing gum, especially on a comparison of the packages of the respective parties which show a marked similarity in the collocation of colors calculated to deceive ordinary purchasers.
4. TRADE-MARKS AND TRADE-NAMES ⟸69—UNFAIR COMPETITION—FRAUDULENT INTENT.
   A manufacturer is chargeable with knowledge of the inevitable consequences of imitating the dress of an older and competing product and is open to the inferences that it intends its product to be confused with that of its competitor.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by the Wm. Wrigley, Jr., Company against the Helmet Company. Decree for complainant, and defendant appeals. Affirmed.

Gilbert Bettman, of Cincinnati, Ohio, for appellant.

James R. Offield, of Chicago, Ill., for appellee.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The parties to this appeal are each engaged in the manufacture and sale of chewing gum. In a suit for unfair competition, and on final hearing, the Wrigley Company was granted a decree enjoining the Helmet Company from selling or marketing chewing gum "in cartons, packages or wrappers in size, form, color, or in arrangement of printing or device, in color, language or symbols, simulating" complainant's product, as identified in its bill, and particularly from selling chewing gum "in wrappers or packages containing or employing printed matter or devices in color, language, and form similar to" three certain brands of the Helmet Company, to wit, "I.X.L. Spearmint," "Helmet Spearmint Product," and "Red, White and Green Label Spearmint Product." The Helmet Company appeals.

The decree ought to be affirmed unless some technical rather than meritorious objections urged against the form of the bill must be sustained.

[1] 1. Objection is made that the bill is lacking in positive and specific averment of facts sufficient to constitute unfair competition. The portions of the bill so complained of are found in the seventh and eighth paragraphs. In the closing part of the seventh paragraph the bill states:

"* * * Your orator further averring upon information and belief that a certain number of dealers in chewing gum, both the wholesale jobber, the retail dealer and the street fakir, can be found who have purchased the said packages of chewing gum from the defendant for the purpose of palming off the defendant's goods upon the public as the goods of your orator, and that this defendant has found, as a matter of fact, that the purchasing public makes no distinguishment between the packages of your orator and the Spearmint packages of this defendant, and that the Spearmint product of this defendant can be palmed off on the public and trade generally as the goods and product of your orator."

The eighth paragraph is as follows:

"That your orator avers, upon information and belief, that the said defendant is preparing to rush and flood the trade with vast quantities of chewing gum having the exact trade-dress of your orator, and that unless the honorable court shall grant an immediate injunction or restraining order preventing the sale or delivery of said packages that said defendant will at once utilize such delay and put upon the market his fraudulent imitation of your orator's trade-dress, as above set forth, to the great and irreparable damage of your orator, your orator averring that said chewing gum product known as 'Helmet Spearmint' and as made by the defendant, is of an inferior grade or quality to the product of your orator, is not of the same flavor as your orator's product, and is calculated and intended to and does, as a matter of fact, greatly injure the high reputation, character, and quality of your orator's goods."

It is necessary to read the whole of the seventh paragraph in order rightly to understand the portion above quoted. It is there in substance alleged that after complainant began an extensive advertising campaign for its Spearmint chewing gum product in 1906 the defendant began its chewing gum business and continued by progressive steps to dress its goods in such a way as ultimately to place upon the market the goods complained of in the suit and covered by the decree in question. All this is set out by positive averment. Thus the portion immediately preceding the part of the seventh paragraph above quoted reads:

"And your orator avers that this defendant has simulated style of lettering, shape of package, peculiar markings, form of wrapper and general color scheme, thereby producing and giving to its style of package, carton, and wrappers, the peculiar visual appearance that was adopted by your orator and your orator's predecessors in the year 1894 and through long years of usage has become the predominating means for distinguishing your orator's well-known Spearmint product from other gum products upon the market. * * *"

What is contained in the last three lines of the same paragraph (above quoted) is in effect stating the inevitable consequence of what is previously and positively alleged in the paragraph; that is to say, that

defendant's Spearmint product "can be palmed off on the public and trade generally as the goods and product of your orator"; and it is not at all certain that the pleader did not through the use of the words "as a matter of fact" intend to make the last averment positively. If this were not so, when the seventh and eighth paragraphs are read together, and indeed the whole bill should be considered in a unitary way, it is obvious that the latter portion of the eighth paragraph is positively averred; thus, after alleging that defendant's product is of an inferior grade, it is stated, "and is calculated and intended to and does, as a matter of fact, greatly injure the high reputation, character and quality of your orator's goods." And these averments alone, as matter of pleading, furnish sufficient foundation for the decree.

[2] It is a mistake, moreover, to suppose that the allegations founded on information and belief cannot rightfully be considered on final hearing. The criticism made of the first part of the eighth paragraph is that an immediate restraining order was alleged to be necessary. It is enough to say of this that no steps were taken to obtain such an order, and that no such order was issued. It is to be observed of the form of such allegations as complainant made upon information and belief that they distinctly allege existence of the facts set out, though upon information and belief. This does not differ from the commonly recognized form that plaintiff "has been informed and believes, and therefore avers." Murray Co. v. Continental Gin Co. (C. C.) 126 Fed. 533, 534, and citations, by Judge Bradford; Wyckoff v. Wagner Typewriter Co. (C. C.) 88 Fed. 515, 517, by Circuit Judge Lacombe; Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co. (C. C.) 109 Fed. 330, 331; Boyd v. Thayer, 143 U. S. 135, 146, 181, 12 Sup. Ct. 375, 36 L. Ed. 103; Story, Eq. Pl. (10th Ed.) § 241, p. 236, note; Rush, Eq. Pl. Pr. (2d Ed.) § 63; 1 Whitehouse, Eq. Pr. § 105. And in Leavenworth v. Pepper (C. C.) 32 Fed. 718, 719, when passing upon a question whether defendants should be called on to answer a bill involving allegations of fraud based only on information and belief, Judge Thayer said:

"I think that position is untenable. If the court was asked to grant any interlocutory orders, such as to issue an injunction against making sales of any of the property pending suit, or if it was asked to appoint a receiver of the property pending the litigation, the court would look at the character of the averments, and finding that they were only made upon information and belief, it would probably refuse any such interlocutory orders; but the fact that these averments are made upon information and belief is no reason, in my judgment, why the defendants should not answer the bill."

We do not overlook decisions like Gaines & Co. v. Sroufe (C. C.) 117 Fed. 965, where objection was seasonably taken to allegations made on information and belief in respect of matters obviously within the knowledge of the pleader; but decisions of that character are hardly applicable to allegations concerning the effect of an alleged infringer's own acts and their tendency to deceive the public. Further, in view of the knowledge to be imputed to the claimed infringer, his voluntary answer to the pleading ought to operate as a waiver of such questions of definiteness in averment. Here the defendant filed an elaborate

answer, seemingly meeting every averment of the bill, without questioning its sufficiency. It was not until the case was brought to final trial that the bill was challenged either as to form or certainty of averment. Counsel then presented objections similar to those urged here, but they do not appear to have been distinctly passed upon. We have assumed that counsel were entitled to present the same objections in this court; but while complainant might seasonably have been required to make positive and specific averments as to some facts which would seem to have been within its knowledge, still no present advantage can be taken of this, since we think the bill as an entirety in substance states a case of unfair competition.

[3] 2. It is objected that there is no evidence to support the bill. The issue of fact seems to have been, whether defendant's trade-dress is a substantial imitation of plaintiff's. After the suit was brought and before answer was filed, on motion of complainant, an order was made in pursuance of equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) requiring defendant by its president to answer certain interrogatories. Defendant was then asked to state, among other things, when it first placed on the market and how long it continued on the market Spearmint products. The president of defendant answered the interrogatories by stating that it commenced to market its "I.X.L." Spearmint brand February 5, 1909, and continued to market the same "intermittently since" that date; that it commenced to market its "Helmet Spearmint Product" August 30, 1913, and had "continued intermittently to market" the same since that date; that it commenced to market its brand "Red, White and Green Label Spearmint Product" January 5, 1910, and had "continued intermittently to market" the same since that date. Further, defendant was asked whether it had "manufactured and sold Spearmint products in labels and cartons as identified by the four (three) exhibits in the preceding interrogatories, within the Southern district of Ohio, Western Division, prior to June 1, 1914"; and it was further asked whether it had "sold its various Spearmint products in labels and cartons, as identified in the preceding interrogatories, in the states of the United States other than the state of Ohio." The answer to these last two interrogatories was in each instance in the affirmative. These answers were all duly verified, and, together with the interrogatories, were received in evidence at the trial. The trial for the most part was conducted in an informal way, and yet so as to bring out the essential facts. This was done in a measure through undisputed statements of counsel and through exhibits showing the brands of chewing gum of the respective parties so far as necessary to a solution of the case, and showing particularly the cartons, packages, wrappers, and their distinctive forms, colors, and dress, respectively; these were presented to the court below and have been brought here. By stipulation, a pamphlet called "Catalogue of Helmet Brands of Gum" and a folder called "Helmet Company's Agents Sheet" were introduced.

After the court held that a prima facie case had been made, counsel for defendant stated:

"Well, we will put in evidence in regard to this word 'intermittently.' Of course, with regard to the question of the trade-dress, there is no dispute in the case, and whether or not the trade-dress is an imitation, in the opinion of this court, of the complainant's is something that you cannot introduce proof in regard to."

The president of the defendant was called to explain the word "intermittently" as it was used in his answers to the interrogatories before mentioned. He said:

"By 'intermittently' I mean that some days we would get orders and other days we would not; probably a lapse of a day or two."

The record shows that the trial judge examined a number of packages of chewing gum, presumably the packages appearing here as exhibits, one of which is marked "Complainant's Exhibit, Complainant's package," and the other four including the three brands of defendant above specifically mentioned and another brand of defendant marked as "Complainant's Exhibit, Defendant's Mountain Spearmint Product"; and it may be said in passing that as to this latter package no relief was granted. The court asked complainant's counsel how long the Wrigley package had been on the market, to which answer was made without objection:

"Twenty-two years, and the counterbands have been substantially the same as they are from the beginning, but that is the one they are advertising."

We do not discover that this was contradicted, and, on the contrary, it seems to have been an accepted fact below, if indeed it is not in effect conceded in the answer, that the business of the Wrigley Company and its predecessors began long before defendant commenced the manufacture and sale of chewing gum. The trial judge rendered no formal opinion, yet near the close of the hearing he stated, "I think it is a case of bad faith," and directed a decree except as to the Mountain brand.

The most convincing evidence to be found in the record in support of the charge of unfair competition appears in the trade-dress employed by the respective parties, excluding of course the Mountain brand. The packages of both parties, consisting of counterbands and individual pieces of chewing gum, are all substantially of the same size. The groundwork of these counterbands is white, and all have a green bar, appearing on both sides, with the name Spearmint displayed thereon in white letters, but the bar of complainant's counterband has a rude spearhead at one end. At one end of complainant's counterband is a sprig of spearmint in green, at the other end are the words, "The Flavor Lasts," in green letters disposed above and below the point of the spear, and the same figure and words are displayed in the same way on the opposite side. At each end of two of the defendant's counterbands is a green shield, one bearing the letters "I.X.L." in white, and the other "Lasting Flavor" in white, and the same design and letters appear at the ends of the opposite sides. The remaining counterband of defendant has at one end a shield outlined by double green lines with white center and bearing the letters "I.X.L." with some flourishes in green, the other end showing a helmet

in green, with the words "Helmet Gum" in green letters immediately above the helmet, and the same designs appear at the ends of the opposite side. The names "Wrigley" and "Pepsin Gum" appear in red letters, the one above and the other below the green bar, on both sides of complainant's counterband; while the names "Pepsin" and "Chewing Gum" appear in green letters, the one above and the other below the green bar, on both sides of one of defendant's counterbands. The names "Pepsin" and "Chewing Gum" in red letters are similarly arranged on another of defendant's counterbands, and the names "Helmet" and "Chewing Gum" in red letters appear in the same positions on the remaining counterband of defendant. One edge of complainant's counterband shows the following: A green bar with a spearhead bearing the words "The Flavor Lasts" in white letters, and immediately under the bar the name "Wm. Wrigley, Jr., Co.," with the names of the cities Chicago and New York at one end of the name of the company, and Toronto and London, England, at the other end, and the opposite edge is the same except that the words borne on the green bar are "Perfumes The Breath" in white letters. On one edge of defendant's counterbands these words appear in green letters and figures, "Guaranteed" and beneath this word, "Under the Pure Food and Drugs Act, June 30, 1906, Serial No. 18035;" on the opposite edge, "A Pleasant Chewing Gum containing Pepsin and other pure food ingredients;" underneath these words are "Lasting Flavor Good For Digestion." On another of defendant's counterbands the same words appear on one edge except that "Guaranteed" is in red letters, and on the opposite edge the same words appear except that the first sentence is in red letters, and the others in green. On one edge of defendant's remaining counterband are the words in green letters, "Guaranteed by The Helmet Co., Cincinnati, Under the Food and Drugs Act, June 30, 1906," and on the opposite edge the word "Spearmint" appears in green letters. Above the letters on each of the edges last mentioned are two heavy dotted parallel lines in red. Complainant's and defendant's packages alike contain five pieces or bars of chewing gum, and are completely inclosed in pink paper, except that the pieces of chewing gum are not so inclosed at the ends of one of defendant's packages.

While there are different features of these packages, both in words and colors, yet there is a most striking similarity in their general appearance. Complainant's product, it is true, can be distinguished from defendant's products when the packages are examined together for purposes of comparison; this can be done too when they are examined separately by one who is familiar with the two sets of packages, since he can do so through the presence or absence alone of Wrigley's name; but the identity is so marked that the average user desiring the product of either producer would in all likelihood be misled into buying the product of the other. The likelihood of confounding defendant's brands with complainant's brand would naturally occur in respect of an inexpensive article such as chewing gum. Any tendency to confuse users ought to suggest to manufacturers and dealers avoidance of similarity, rather than its cultivation. The degree

of resemblance found here can receive but one interpretation; it required ingenuity and study to bring it about; it is calculated to confuse and deceive. One of the controlling reasons for this is to be found in the skilful association of colors employed by defendant on its counterbands and on the wrappers of the individual pieces of chewing gum, and particularly (except as to one) the use made of the pink. The only answer that the president of defendant company could give to the question why it was necessary to "adopt a pink wrapper for each individual stick" was:

"Because pink poster paper is the cheapest paper for printing. Some of the high-price goods have white and some pink, but pink is the cheapest paper."

In an opinion rendered in Wm. Wrigley, Jr., Co. v. Colker, 245 Fed. 907, as appears by an exhibit here, Judge Cochran said:

"The defendant has the right to use spearmint to flavor his gum, and to sell it. But why not wrap it up in a blue package? I have an idea that if you would put it up in a blue package, the complainant would not complain. Why does he select pink, when he has got all the other colors of the rainbow to make a selection from—blue and violet and yellow and green? But he takes the complainant's color. And so as to these other markings. Wrigley has his lettered in red, and so is Colker's lettered in red. Other markings are in green on Wrigley's product, and so is Colker's in green; and it is that way all around, it is in the same colors exactly. There is no other conclusion that one can come to, than that he adopted that dress in order to get Wrigley's business."

As Judge Lacombe said in Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co. (C. C.) 109 Fed. 317, 318:

"It is no doubt true that no one can have a trademark monopoly in color of paper, or in shape of label, or in color of ink, or in one or another detail; but a general collocation of such details will be protected."

Defendant admits extensive marketing of its product under the brands in question. No necessity is shown for dressing its product so as to confuse it with that of complainant. True, it is said that the predominating color, pink, is cheaper; but this is simply illustrative of defendant's apparent indifference to the rights of the using public, not to speak of the rights of complainant. It is well settled that dealers are not so much to be considered as are the ordinary users; the former will of course know the manufacturers from whom their purchases are made, but the latter are open to deception whether practiced by the manufacturer or the dealer; and hence the effect of producing and dressing goods that are calculated to deceive is at once a temptation to unscrupulous dealers and an imposition upon unwary users. Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 610, 128 C. C. A. 203, L. R. A. 1915F, 1107 (C. C. A. 6); Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 722, 723, 119 C. C. A. 164, and citations (C. C. A. 6); L. E. Waterman Co. v. Standard Drug Co., 202 Fed. 167, 171, 120 C. C. A. 455, and citations (C. C. A. 6); N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed. 869, 875, 23 C. C. A. 554 (C. C. A. 2); Wotherspoon v. Currie, Law Rep. 5 E. & I. 508, 517; Lever v. Goodwin, 36 Ch. D. 1, 2, 3, 7; National

Biscuit Co. v. Baker (C. C.) 95 Fed. 135; R. Heinisch's Son's Co. v. Boker (C. C.) 86 Fed. 765, 768; Cauffman v. Schuler (C. C.) 123 Fed. 205, 206.

[4] It is idle to suppose that defendant's officers cannot discern the injurious effect of the manner in which they suffer the company's brands to be dressed and put upon the market. The defendant is therefore chargeable with knowledge of the inevitable consequences of such conduct, and so is open to the inference that it intends its products to be confused with and mistaken for complainant's product. Elgin Nat. Watch Co. v. Ill. Watch Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; Samson Cordage Works v. Puritan Cordage Mills, supra, 211 Fed. 608 (C. C. A. 6); Fuller v. Huff, 104 Fed. 141, 145, 43 C. C. A. 453, 51 L. R. A. 332 (C. C. A. 2); Collinsplatt v. Finlayson (C. C.) 88 Fed. 693; Meccano v. Wagner (D. C.) 234 Fed. 912, 918; Wm. Wrigley, Jr., Co. v. L. P. Larson, Jr., Co. (C. C.) 195 Fed. 568, 570; Von Mumm v. Frash (C. C.) 56 Fed. 830, 837; Braham v. Beachim, 7 Ch. D. 848, 856; Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, 168, 24 Atl. 658; Northwestern Knitting Co. v. Garon, 112 Minn. 321, 326, 128 N. W. 288.

The decree must be affirmed.

MARYLAND CASUALTY CO. v. PACIFIC COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2947.

1. DEPOSITARIES ⟸14—BONDS—ACTIONS.
   In an action on a bond executed by defendant to secure a deposit of county funds, evidence *held* to show that the bond was not approved by county officials until after the bank in which it was contemplated funds should be deposited had failed.
2. DEPOSITARIES ⟸7—BONDS—"OFFICIAL BOND."
   A bond given by a bank to secure funds of a county of the state of Washington deposited therein is an "official bond," and falls within the principle of Rem. & Bal. Code Wash. § 8327, declaring that errors of form in an official bond shall be disregarded; and where it has in fact been acted upon to that extent, the fact that it has not been properly approved or filed as required by law constitutes no defense.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Official Bond.]
3. DEPOSITARIES ⟸7—BONDS—APPROVAL.
   The treasurer of a county of the state of Washington cannot alone accept for the benefit of the county a bond tendered by a bank designated as a depositary of the county funds, but can at most mark the bond approved; concurrence of other officers being necessary to acceptance.
4. DEPOSITARIES ⟸7—BONDS—ACCEPTANCE.
   A bank designated as county depositary tendered a bond, conditioned that the bank should keep all sums deposited and keep the county treasurer harmless and indemnified for and by reason of the deposits. The bond was delivered to the treasurer on July 12th by the bank, in which funds to a considerable extent had already been deposited. The prosecuting attorney declined to approve the bond on account of a pro rata clause, and

the county treasurer so notified the surety. The bank closed its doors on Saturday, July 17th, and on the following Monday the bond indorsed by the treasurer and the prosecuting attorney was tendered for filing. The treasurer, in the interim between July 12th and July 17th, increased the amount of the deposits in the bank, though all the bonds, including the one involved, given by the bank, did not then equal the amount of the deposits. *Held* that, as the treasurer did not alone have authority to approve the bond, and as the amount of deposits in the bank at the time the bond was tendered exceeded the aggregate amount of the several bonds, the surety is not liable, on the theory that the bond must be treated as having been acted upon by the treasurer, because of the presumption that a public officer acts lawfully, and that without the bond the treasurer was not authorized to make such deposits.

5. DEPOSITARIES ⊂=7—BONDS—CONSTRUCTION.

In such case, the bond, though its terminology was ambiguous, extended the obligation of the surety to moneys presently on deposit, as well as moneys to be deposited.

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 by Pacific County, a municipal corporation, and another, against the Maryland Casualty Company, a corporation of the state of Maryland. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

John W. Roberts, of Seattle, Wash. (Roberts, Wilson & Skeel, of Seattle, Wash., of counsel), for plaintiff in error.

Charles O. Bates and Charles T. Peterson, both of Tacoma, Wash., and John I. O'Phelan, of Raymond, Wash., for defendants in error.

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

DIETRICH, District Judge. Pacific county, in the state of Washington, and J. L. Glazebrook, its treasurer, brought suit upon the bond of the Maryland Casualty Company, and after a trial without a jury recovered judgment in the sum of $9,281.32, together with costs. The Casualty Company, hereinafter referred to as the defendant, brings the case here for review. Omitting immaterial parts, the bond is as follows:

"Know all men by these presents, that First International Bank of South Bend, Washington, as principal, and Maryland Casualty Company, a corporation of the state of Maryland, as surety, are firmly held and bound unto J. L. Glazebrook, treasurer of the county of Pacific, state of Washington, in the sum of ten thousand dollars ($10,000). * * *

"Dated this 9th day of July, A. D. 1915.

"Whereas, the said principal, First International Bank, has been designated by J. L. Glazebrook, treasurer of Pacific county, as a depositary of the current funds in the hands or possession of the said treasurer, J. L. Glazebrook, to be deposited in the said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer, as the requirements of said county shall demand, and which amount may be increased or decreased as the said treasurer may determine; and

"Whereas, the said bank, in consideration of such deposit and of the privilege of keeping same, has agreed to pay the county of Pacific, state of Washington, interest," etc. * * *

"Now, therefore, if the said First International Bank shall * * * well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, * * * and shall in all respect save and keep the said county, and the county treasurer of the said county, harmless and indemnified for and by reason of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90, * * * then this obligation shall be void and of no effect; otherwise to be and remain in full force and effect.

"Provided:

"1. That the Maryland Casualty Company surety on said bond, shall have the right to terminate its liability under this obligation by serving notice," etc. * * *

"2. The surety shall only be liable for such proportion of the total loss or damage sustained by said obligee, by reason of any default of the principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to; and in no event shall the surety hereunder be liable for any sum in excess of the penalty of this bond."

It was delivered by the defendant's agent to the First International Bank, and by the cashier of the bank handed to the county treasurer, on July 12, 1915. Under the state law, referred to in the bond as House Bill No. 90, before the designation of a bank as a depositary becomes effective, and before the treasurer is authorized to deposit in such bank any public funds, the bank must file with the county clerk a surety bond in favor of the treasurer, "in the maximum amount of deposits designated by such treasurer to be carried in such bank"; and the bond must be approved by the treasurer, prosecuting attorney, and chairman of the board of county commissioners, or at least two of such officers, "before being filed with the county clerk, and unless so approved the same shall not be received or filed by the county clerk." The bond in question was not filed with the county clerk until July 19, 1915. The bank had been designated as a depositary in the preceding January, and upon July 12th there was on deposit of the public funds of the county a balance of $48,429.24, to secure which the bank had furnished surety bonds, on file with the county clerk, aggregating $36,000 (exclusive of the bond in question and the bond of the Illinois Surety Company for $10,000, which by its terms had expired on July 1st), besides collateral in the form of municipal warrants and bonds aggregating approximately $10,500, which it had placed in the hands of the county treasurer. Our attention has not been directed to any provision of law authorizing the treasurer to make deposits upon collateral security of any character; but, if these bonds and warrants be considered at their face value, which was in excess of their market value, the security to cover deposits in this bank aggregated $46,500, as against an actual deposit balance of nearly $3,000 in excess of that amount. On July 13th the treasurer made an additional deposit of $4,000, and on the following day he made another deposit of $4,000, and at the same time checked out $4,000. The bank remained open Saturday, July 17th, as usual, but failed to open Monday, or subsequently, and its affairs are now in the course of liquidation. The treasurer had no other transactions with it between July 12th and July 19th, and, as already indicated, there was due him when the bank failed a balance of $52,429.24. The lower court excluded the bond of the

Illinois Surety Company, included the collateral at its face value, and held that the defendant's bond was in force and covered all deposits, both those made before and those made after it was put into the hands of the treasurer.

The defendant urges two general contentions: First, that the bond was not delivered to or accepted by the county until after the bank failed; and, second, that it was not intended to cover existing deposits, but was given to secure only deposits to be thereafter made.

[1] Upon the first point, some of the material facts are undisputed, while others are in controversy. It is admitted that the bond was not tendered to the county clerk until July 19th. It is further conceded that of date July 14th the treasurer wrote to the defendant the following letter:

"In re Bond of First International Bank.

"We have your depository bond for $10,000, dated July 9th, 1915, in favor of J. L. Glazebrook, county treasurer. The prosecuting attorney refuses to approve any bond carrying the pro rata clause, and we ask you to kindly give us a bond in which this item is eliminated, or followed by the following: 'Provided, however, that if such other bonds or securities are insufficient for any reason to fully make, together with the aforesaid proposition under this bond, the full amount of interest and principal demanded and refused and interest thereafter accruing to time of actual payment to said treasurer, then and in that event the surety hereunder shall be liable to said treasurer to the full amount of loss sustained by reason of such insufficiency.' If you will deliver to your agent here a bond as stated above, we will deliver the bond we now have to him, and take the new bond in lieu thereof. If you prefer, we promise to return to you immediately the old bond above mentioned as of July 9th upon receipt of new bond corrected to read as stated above. Thanking you for your kindness in the above matter, we are," etc.

There is no positive evidence as to when the letter was mailed, but the testimony strongly tends to show that it was actually received by the defendant at Seattle on July 19th. When the bond was tendered for filing upon the 19th of July, it bore the signatures of the treasurer and the prosecuting attorney, but without date. Notwithstanding the statements in this letter, the treasurer testified that the signatures were indorsed on July 12th; but the prosecuting attorney declined to say when he made the indorsement, although it would seem quite incredible that he should have forgotten. However, he admitted that, when the bond was presented for his approval, he declined to approve it, for the reasons stated in the treasurer's letter. When we consider the statement in the letter, the corroboration thereof by the prosecuting attorney under oath, his evasion of the question when he indorsed his name, the fact that the indorsement is without date, and the further fact that the bond was not tendered for filing until after the bank failed, the conclusion is irresistible that the prosecuting attorney did not give his approval or attach his name until after the bank failed, notwithstanding the bare, uncorroborated testimony of the treasurer to the contrary. It must be borne in mind that as a witness the treasurer had the strongest inducement to color the truth. Admittedly, as between him and the county, he and his official bonds must stand responsible for the $8,000 deposited on the 13th and 14th. If he can succeed in this action, he will escape the consequences of offi-

cial malfeasance of the most flagrant character. For reasons which may readily be surmised, the county is joined with him in this suit; but, in a suit by the county upon his official bond, the right to recover would be so clear as apparently to leave no possible ground for defense.

[2-4] But if we take the view that the considerations referred to are all outweighed by the uncorroborated testimony of this deeply interested witness, what legal aspect does the case present? Plaintiffs place great, if not exclusive, reliance upon the assumption that the bond was accepted and acted upon by the treasurer. Of course, it was not accepted by the county, for the only officer authorized to accept it for the county knew nothing about it until July 19th. But was it acted upon by the treasurer? We are in entire accord with the principle enunciated in section 8327 of the statutes of the state of Washington (Rem. & Bal. Code), and recognized in such cases as Board v. Duluth, 75 Minn. 174, 77 N. W. 815, State v. Pederson, 135 Wis. 31, 114 N. W. 828, Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20, People v. Edwards, 9 Cal. 286, Deer Lodge Co. v. U. S. F. & G. Co., 42 Mont. 315, 112 Pac. 1060, Ann. Cas. 1912A, 1010, Buhrer v. Baldwin, 137 Mich. 263, 100 N. W. 469, Hennepin County v. State Bank, 64 Minn. 180, 66 N. W. 143, and Ihrig v. Scott, 5 Wash. 584, 32 Pac. 466. Accordingly we hold that such a bond as this is in effect an official bond, and falls within the rule that defects of form should be disregarded; and where the bond has in fact been acted upon, to that extent it will constitute no defense that it has not been properly approved or filed as required by law. But there must be an acceptance of the bond, and the acceptance can be accomplished only by a substantial compliance with the forms prescribed by law, or by official acts done in reliance upon the existence of such bond. Here, before the bank was entitled to receive deposits, it was its duty—not the duty of the treasurer—to file with the county clerk a surety bond approved by at least two out of the three designated county officers. The statute undoubtedly contemplates delivery to and acceptance by the clerk on behalf of the county. The bank presents the bond to the treasurer and one of the other officers, or to the two other officers, for their approval; but the treasurer cannot accept the bond for the county any more than could the prosecuting attorney or the chairman of the board of county commissioners. The limit of the treasurer's power, whether he acts alone or in conjunction with one of the other officers, is to "approve" the bond—its form, its execution, and the sufficiency of the surety. But such approval does not ipso facto consummate a delivery to or constitute an acceptance by the county. In the ordinary course the bank might with perfect propriety alter its purpose, after securing the requisite approval, and decline to deliver the bond to the clerk; no one would contend that in such a case the bond would be effective. So here it would have been competent for the bank or the defendant to withdraw the bond at any time prior to its delivery to the clerk on July 19th, provided the county or the treasurer had not in the meantime acted in reliance upon it. Defendant received no premium, and was not in a position to

make a demand therefor until its proffered obligation was accepted. It being admitted that the bond was not delivered to or accepted by the county substantially in the manner prescribed by law, and that no officer of the county acted in reliance upon it, unless it be the treasurer, the only question is: Did the treasurer so act? There is no suggestion from any source that, relying on the bond, he left in the bank any part of the balance of approximately $45,000 on deposit on July 12th, and for which the defendant was held responsible in the court below. Nor is there any substantial evidence that he relied upon it in making the deposits on July 13th and 14th. Upon being asked the direct question by defendant, he objected to answering, and his objection was sustained. In the face of this declination to say whether he would or would not have made the deposits without this bond, he attempts to support the contention that he relied upon it by invoking the presumption that a public officer acts lawfully, and that therefore he would not have made these deposits without the bond. But, even if we put on one side the consideration that it is positively shown that, contrary to such presumption, he was in this very matter violating the law by making deposits upon collateral of doubtful value, when the law requires surety bonds, and further by carrying a balance substantially in excess of securities of all descriptions, does not the presumption operate directly against, rather than in support of, his position? For him to have deposited a single dollar in reliance upon this bond before it was delivered to and accepted and filed by the clerk would, as he well knew, have been to fly in the face of an express statutory prohibition, of which he admits he was cognizant.

It is suggested in the defendant's brief, and not discussed by the plaintiffs, that under the state law he might, upon his own responsibility, have deposited public funds in the bank without requiring the statutory security; if that be a correct view, of course the presumption would be that he made the deposits upon his own responsibility and without security. But if the law be otherwise, surely to sustain the position that he did not violate one branch of a law we cannot indulge the presumption that he violated another of its express provisions. If he had had no previous transactions with the bank, or if such transactions as he was having had been in compliance with the law, and if he could have lawfully made deposits upon this bond without first filing it with the clerk, there would be room for the presumption; but it would be a strange use of the principle, if it could be invoked in favor of the plaintiff under the circumstances here shown to have existed. There is a suggestion that the letter does not express a present rejection of the bond, but implies a conditional or temporary acceptance. It may be conceded that the language is equivocal on several points. But it is to be repeated that it was not within the power of the treasurer to accept, temporarily or otherwise. He could give or withhold his approval, and that is all; and neither would his approval in itself be effective for any purpose, nor would his disapproval be final or conclusive. Besides, it is plain from his own testimony that he did not regard the bond as having been delivered to or accepted by the county. He says:

"I did not file the bond with the clerk, because the company had not sent me bond carrying the clause outlined. If I had filed it, and the company sent me the bond carrying the clause outlined, it took an order of court to take this one (indicating the bond sued on). It required a cancellation notice of 90 days, and in that event I would have held two bonds against the company for $10,000 each."

We must hold that the record fails to disclose an acceptance, either in the manner prescribed by statute or by conduct showing that any officer of the county assumed that the bond was in force and acted in reliance thereon.

[5] It is unnecessary to discuss the other point at length. While the language of the bond is ambiguous, we construe it as extending the obligation of defendant to moneys presently on deposit as well as to moneys to be deposited. Whether it created any liability touching an existing claim upon which the bank was already in default, or for past deposits in case it should appear that the bank was insolvent when the bond was given, we need not now decide. Nor do we express any opinion upon the question whether or not the bond of the Illinois Surety Company should be considered in determining the aggregate amount of securities, especially as to such previous deposits, if any, as the bank was unable to account for and pay to the county on July 1st.

The judgment is reversed, with directions to grant a new trial, and to take further proceedings not out of harmony with the views herein expressed. Costs to appellant.

BULLARD v. UNITED STATES.

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

No. 1513.

1. INTOXICATING LIQUORS ⟸223(3)—ILLICIT DISTILLING—ISSUES, PROOF, AND VARIANCE.
   In a prosecution for illicit distilling, the gravamen of the offense being the unauthorized distillation of alcoholic spirits, an instruction authorizing conviction if accused distilled rum, brandy, or whisky was not erroneous, though the indictment charged only distillation of whisky, for the specification might be disregarded as surplusage.
2. CRIMINAL LAW ⟸1172(6)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.
   Where the evidence showed only illicit distillation of whisky, an instruction authorizing conviction on proof of distillation of rum, brandy, or whisky, was harmless though the indictment specified only whisky.
3. INTOXICATING LIQUORS ⟸167—ILLICIT DISTILLING—PERSONS LIABLE—OWNER OF LAND.
   In a prosecution for illicit distilling, an instruction that, if defendant allowed the use of his land for the still under agreement giving him control thereof or an interest therein, he was equally responsible with the party in control and operation, was not open to objection, as the charge warranted proof that defendant was engaged with others in illicit distilling.
4. CRIMINAL LAW ⟸1169(2)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.
   Where the sheriff testified to finding the still on defendant's land, the admission of testimony by the deputy collector that the sheriff telegraphed

him to come, that he had got defendant's still, while erroneous, was harmless.

5. WITNESSES ⊂=405(2)—IMPEACHMENT—COLLATERAL QUESTIONS.
Where, for impeachment, the prosecution questioned defendant as to a wholly collateral charge against him, the prosecution is bound by his answer that prosecution of such charge had been quashed, and the judgment roll is not admissible despite altercations between counsel.

6. CRIMINAL LAW ⊂=1169(11)—APPEAL—HARMLESS ERROR.
In a prosecution for illicit distilling, where defendant took the stand, and in response to cross-examination by the prosecution admitted he had been indicted for adultery, but stated the prosecution had been quashed, the court admitted the judgment roll in the adultery case on account of a sharp altercation between counsel and by instructions authorized the jury to consider it. It was claimed that the judgment contradicted defendant's statement that prosecution had been quashed and showed a discreditable state of affairs in his household. *Held*, that the erroneous admission of the judgment roll was prejudicial error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

George W. Bullard was convicted of illicit distilling, and he brings error. Reversed.

W. F. Stevenson, of Cheraw, S. C., for plaintiff in error.

Francis H. Weston, U. S. Atty., of Columbia, S. C., and J. Waties Waring, of Charleston, S. C., Asst. U. S. Atty.

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

KNAPP, Circuit Judge. Plaintiff in error, defendant below, was convicted of illicit distilling, and brings his case here on writ of error. The indictment contains seven counts, charging him, in substance: (a) With having in his possession or under his control a distilling apparatus which was not registered; (b) with being a distiller of spirits, "to wit, corn whisky," without having given the bond required by law; (c) with carrying on the business of such distiller with intent to defraud the government of its tax; and (d) with working in a distillery for the production of spirits, "to wit, corn whisky," which distillery did not display the required sign. In the remaining counts the same charges as (b), (c), and (d) are repeated with reference to the distillation of rum, but as these counts were withdrawn from the jury they need not be considered. The defendant was found guilty on the first four counts.

[1] Taking up the assignments of error, or such of them as appear to merit discussion, we come to a contention based upon the following instruction to the jury:

"It does not matter whether it was rum or whisky or brandy or any liquor which conforms to the statutory definition of distilled alcohol spirits. If he is proved to have been in possession of such a still and to have been in possession unlawfully and to have operated it unlawfully, then he is guilty, although the indictment might have charged him with producing distilled spirits called brandy and he was proved to have produced corn whisky, be-

cause the offense is the intended production or production of distilled alcohol spirits, and not of any particular class or name of such spirits."

[2] This instruction is claimed to be erroneous for the reason that the indictment, excluding the counts withdrawn, charges the unlawful production of a particular kind of spirits, namely, corn whisky, and it is argued that defendant could only be convicted for producing the specific article named in the indictment. We are unable to sustain the contention. The gravamen of the statutory offense is the unauthorized distillation of alcoholic spirits, and an indictment therefor need not specify the particular kind of spirits which the defendant is accused of producing. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Coffey v. United States, 116 U. S. 427, 434, 6 Sup. Ct. 432, 29 L. Ed. 681. The specification in this case, therefore, might well be regarded as surplusage, the inclusion of which did not modify or restrict the applicable rule of law, since its omission would not affect the sufficiency of the indictment. But whatever might be said if the proofs had disclosed the production of rum or brandy, the objection is demonstrably without force in view of the fact that the only testimony upon the subject was the asserted finding, near the "furnace" on defendant's premises, of "several barrels of mash, made of fermented meal, such as is used from which to distill corn whisky." Inasmuch, then, as the evidence supported the specific charge in the indictment, it seems clear to us that defendant was in no wise prejudiced by the instruction quoted, even if it be assumed that such an instruction addressed to a different state of facts would be erroneous. The case of Terry v. United States, 120 Fed. 483, 56 C. C. A. 633, holds nothing to the contrary and has no pertinent application. To this it may be added that the objection here considered would appear unavailing for the further reason that it does not apply to the first count of the indictment, and conviction upon that count alone would be sufficient to sustain the judgment. Claassen v. United States, 142 U. S. 146, 12 Sup. Ct. 169, 35 L. Ed. 966.

[3] Complaint is also made because the jury were told that if defendant "allowed the use of his land for the still under any agreement whatsoever of sharing in its results, or under any agreement whatsoever that gave him the right to take charge and control of it, he would be equally responsible with the party in control and operation." We fail to see wherein this statement is incorrect or upon what ground it can be held erroneous. The defendant was charged with having an unregistered distilling apparatus in his possession and under his control, and with being a distiller of spirits. This was enough to permit proof, if the facts warranted, that he was engaged with others in the illicit business of which he was accused; but plainly in that case his guilt would not be condoned by their participation. And, if it be claimed by him that the still in question was actually operated by some one else, the instruction was entirely proper and should be upheld. In short, with the single exception hereinafter noted, the charge as a whole appears to be full and fair in its review of the testimony and not otherwise subject to valid objection.

[4] Two questions of evidence seem to require examination. The first is this: One Jenkins, a witness for the government, testified that

he was deputy collector at the time and that he received a telegram from Patterson, sheriff of Marlboro county, saying, "Come on, I have got Bullard's still." The contents of this telegram were clearly inadmissible, and the motion to strike out should have been granted. But the error was not appreciably harmful and may be disregarded. Patterson had testified fully as to what he saw and found in defendant's pasture lot, and his message to Jenkins was at most a mere inference from facts which he had already stated to the jury. In the circumstances, therefore, the refusal to strike out must be held quite insufficient for a reversal of the judgment.

[5] The other question is much more serious. Bullard, as a witness in his own behalf, denied vigorously that he had any connection with or knowledge of the unlawful acts alleged to have been committed on his premises. On cross-examination he admitted that he had been indicted for assault and battery and that he had pleaded guilty and paid a fine. He was then asked if he had not been indicted for other offenses, including adultery. This also he admitted, but said that the case had been "squashed." Immediately following this answer the record says:

"In reply, the district attorney offered the judgment roll in the adultery case to contradict the defendant, and showed that the case had not been quashed. To this the defendant objected; the objection was overruled and the judgment roll introduced in evidence, containing an order of the court providing for an adjustment of all the charges. Before its introduction a difference of opinion between counsel for the government and the defense as to the contents of this roll and order was openly expressed before the jury. Counsel for the government stated that the consent order showed an admission by defendant. Counsel for the defense arose and stated there was nothing in the order that could be construed as an intimation to that effect—all this before either could be restrained by the court. Under these circumstances, the court to relieve the jury from any misapprehension held the roll competent and the order (was) read as follows."

We are not aware of any theory upon which this ruling can be defended. The subject-matter of the question addressed to Bullard was obviously collateral to the issue on trial and the government was bound by his answer. Indeed, it is elementary that contradiction in such case is not ordinarily permissible. The district attorney, in pursuing an inquiry wholly unrelated to the charge under investigation, took the risk of replies which would defeat the effort to show that the witness was a man of bad character or otherwise unworthy of belief. Whether his statements about the adultery charge were true or false, he could not be contradicted in that regard except out of his own mouth. And clearly, as it seems to us, the "roll and order" in the adultery case was not made competent evidence against him by the circumstance that sharp dispute broke out between counsel, "before either could be restrained by the court," as to whether or not the order in that case, "providing for an adjustment of all the charges," showed an admission of guilt by the defendant. In short, nothing appears in this record which brings the case within any recognized exception to the settled and familiar rule that the testimony of a witness upon a purely collateral matter is not subject to contradiction.

[6] The prejudicial effect of this evidence can scarcely be doubted.

Not only was it claimed to refute Bullard's assertion that the adultery indictment had been quashed, but the recitals in the "adjustment" order, in terms and by inference, disclosed a condition of affairs in defendant's household which the jury could not fail to regard as highly discreditable. That their verdict was influenced by the damaging impression which this order would naturally produce seems to us by no means improbable. Moreover, as bearing upon Bullard's credibility, the evidence in question was given a degree of prominence by the following instruction:

"In view of the contention which has taken place between counsel in the courthouse, and that the jury might not be under any mistaken or erroneous conclusion as to what it was, I think it proper that the order should be read. You have heard it, and it is for you to say whether that order agreed to by him shows on his part any admission of guilt, or whether, on the other hand, it was simply done by him in a laudable effort to improve his relations with his wife, and do away with differences."

But the contention between counsel grew out of Bullard's reply to a question concerning a matter entirely foreign to the pending charge of illicit distilling. For that reason the government was bound by his answer, whatever it was, and had no right to contradict him by the record in the case to which the inquiry related. And the difficulty is that the mistaken ruling, however commendable its purpose, permitted the jury to find that Bullard was untruthful in saying that the adultery case had been quashed, and to further find that he had in effect confessed an immorality which is a criminal offense under the laws of South Carolina. The obvious tendency of the evidence, if the jury found against him on this collateral issue, was to place the defendant in a most unfavorable light and thereby give unfair support to the charge for which he was on trial. That the admission of this evidence was reversible error seems to us an unavoidable conclusion.

The judgment of conviction must be set aside and a new trial granted.

Reversed.

THOMPSON v. BALKE.

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

No. 3058.

1. APPEAL AND ERROR ⇐954(1)—REVIEW—QUESTIONS PRESENTED.
An appeal, after defendant's application to rehear motion for preliminary injunction was denied, presents for review only the propriety of the preliminary injunction complained of.

2. CONTRACTS ⇐147(3)—CONSTRUCTION—RULES.
In ascertaining the intention of the parties, the contract as a whole should be considered.

3. INJUNCTION ⇐136(2)—SUBJECTS OF PROTECTION.
Defendant, a distiller with a large quantity of whisky in bond, entered into a contract whereby plaintiff, after buying certain whisky, was given the option of buying whisky made in subsequent years. One clause of the contract provided that defendant should bottle whiskies for plaintiff at

fixed prices, and another clause provided that the contract should become void on plaintiff's failure to exercise in due season any annual option provided for, and that if, at termination, there should remain in bond any whiskies previously purchased, defendant should bottle the same according to agreement. A supplemental contract allowed plaintiff to do his own bottling, and a later agreement provided that, on its termination, defendant should bottle whiskies still in bond and sold by plaintiff to his customers. *Held* that, on termination of the contract by plaintiff's failure to exercise the option provided, plaintiff was, in view of the whole contract, and the fact that bonded whisky could only be bottled in defendant's bottling house appurtenant to the distillery where the whisky was bonded, entitled under the evidence now produced to a preliminary injunction, preventing defendant from excluding plaintiff from use of the bottling house.

4. APPEAL AND ERROR ⟸954(1)—PRELIMINARY INJUNCTION—DISCRETION.
An order granting a preliminary injunction should be affirmed, where the granting of the injunction was not an abuse of discretion, and there was a fair case for its exercise.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by Rudolph F. Balke against John B. Thompson. From a decree granting a preliminary injunction, defendant appeals. Affirmed.

Hazelrigg & Hazelrigg, of Frankfort, Ky., and John B. Thompson, of Harrodsburg, Ky., for appellant.

Lawrence Maxwell and Joseph Wilby, both of Cincinnati, Ohio, and Thos. D. Slattery, of Covington, Ky., for appellee.

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

KNAPPEN, Circuit Judge. Appeal from an order granting a preliminary injunction. The case is this:

On December 21, 1908, appellant was the owner of the "Old Jordan" distillery, at Harrodsburg, Ky., where he then had on hand in bonded warehouse about 19,000 barrels of "Old Jordan" whisky of the crops of 1901, 1902, 1903, 1905, 1906, and 1907. On that date he made a contract with the corporation of which appellee was president (and to whose rights he has succeeded), whereby appellee (as we shall call the interest represented by him) agreed to procure for appellant a loan of $90,000 on the latter's note, collateraled by warehouse receipts for whisky, and indorsed by appellee; also absolutely to buy a certain amount of appellant's 1901, 1902, and 1903 crops at given prices. He was given the option of buying, also at given prices, whiskies of the crops of 1903, 1905, 1906, and 1907, on written notice prior to December 1 (later changed to November 1) of the years 1909, 1910, and 1911, respectively. He was given a further option generally of buying all of appellant's future manufacture (at a certain minimum and maximum production) "during the life of the contract," at certain prices based on the prices of grain from year to year, and, specifically, of buying the crops of 1909 and 1910 (there was no 1908 crop) on notice prior to November 1, 1912; the crops of 1911 and 1912 on notice prior to November 1, 1913; the crops of 1913 and 1914 on notice

prior to November 1, 1914 (as those option dates were later changed); and thereafter a series of separate annual options extending to January 1, 1935. He was given the exclusive right to use appellant's business name, as well as the trade-name "Old Jordan," during the life of the agreement.

The twenty-first clause of the contract provided that appellant was to bottle the whiskies for appellee on certain terms and prices named. By the thirteenth clause the contract was to "become null and void" in the event of appellee's failure to exercise in due season any annual option provided for, with provision that if at the time of such termination there should remain in bond any whiskies previously purchased by appellee under the contract, appellant should remain under the obligation of clause 21, before referred to, to bottle the whisky under its terms and conditions; by the seventeenth clause, appellee was entitled to free storage for six months from the date of the entry in bond.

By a supplemental contract of April 14, 1909, appellant was relieved from the obligation of free storage, and in consideration thereof the provision for bottling by appellant was abrogated, and appellee was to do his own bottling at the "Old Jordan" distillery; appellant agreeing to deliver the bulk whisky to appellee at the bottling house as required. The original contract was otherwise undisturbed. By a still later contract of December 2, 1910, appellant agreed that in the event of the termination of the original contract, as provided for in its thirteenth clause, he would bottle in bond, at certain stated charges, all Old Jordan whiskies still in bond theretofore acquired by appellee and by him sold to his customers (or by his customers bought "off the market"), with appellee's agreement to bottle. The contract was concededly carried out by appellee until November 1, 1914 (he meanwhile doing the bottling at his own expense under the agreement of April 14, 1909), and the options given him were exercised for all crops to and including those of 1909 and 1910. Appellee expressly disclaimed the right to take the crops of 1912, 1913, and 1914 (there was no crop of 1911); the crop of 1912 being treated, for the purposes of notice, as part of the 1913 crop.

On November 1, 1914, when appellee's right to further purchases ended, appellee had a large amount of bulk whisky of the crops of 1909 and 1910, fully paid for, which he claimed the right to bottle in bond at appellant's bottling house. Appellant, while denying the existence of this right after November 1, 1914 (and accordingly soon thereafter demanding possession of the works, and offering and claiming the right to do appellee's bottling on payment of charges therefor), suffered appellee to use the bottling house (appellant meanwhile bottling therein some of his own whisky) until about December 6, 1916, when appellant caused the revenue officer to wholly exclude appellee. As under the revenue laws appellee's remaining whisky (claimed to be about 7,000 barrels) could be bottled only at appellant's distillery, appellee filed his bill for injunction against interference with his asserted right to bottle. A temporary injunction was ordered (on appellee's giving bond for $25,000) restraining such interference

and directing the reinstatement of appellee in the bottling house for the purpose of such bottling, and the delivery to him of so much of his whisky as he should demand for the purpose. On motion for rehearing appellant represented that a considerable part of appellee's whisky in bulk had been sold by him since November 1, 1914, under agreement for bottling it in bond, and that by the contract of December 2, 1910, appellant was entitled to bottle it; that joint possession of the premises by appellant and appellee was impossible; and that appellant had of his own whisky about 12,000 barrels of the 1912 and 1913 crops ready and eligible for bottling. The answer to the bill had asserted the sale of appellant's whiskies (crops of 1912 to 1914), with privilege of bottling at the distillery on appellee's delivery of possession. The application to rehear was denied.

[1-3] This appeal brings up nothing but the propriety of granting the preliminary injunction. Louisville & Nashville R. R. Co. v. Western Union Telegraph Co. (C. C. A. 6) 207 Fed. 1, 4, 124 C. C. A. 573. The crucial question on the merits is whether the appellee's right to bottle his bulk whiskies then on hand ended November 1, 1914, with the termination of his right to make further purchases. Appellant insists that this result is compelled by the express language of clause 13 of the original agreement, which makes the contract "null and void" on appellee's refusal to exercise in due season any annual option.

We are unable to agree with this conclusion, for the provision just referred to is immediately followed by one equally express retaining appellant's obligation under a later clause (21) to bottle "under the terms and conditions" of that clause all of appellee's whiskies previously purchased and still remaining in bond. True, clause 21 obligates appellant to bottle "during the entire life" of the agreement, and this expression, as used exactly or in substance, in other places in the contract, means the period during which the right to exercise options existed. But to ascertain the intention of the parties the contract must be considered as a whole; and appellant's construction cannot be accepted without nullifying the express agreement of clause 13, obviously designed to meet the very contingency which this case presents. This should not be done. We think, moreover, that the effect of the second contract, so far as concerns the bottling privilege remaining after the right to further options ended, was merely to substitute a right in appellee for an obligation upon appellant; for, while the provision in the second contract relieving appellant from his bottling obligation refers to clause 21 of the original contract (not mentioning clause 13), yet not only does it seem unreasonable to suppose that appellee deliberately intended to give up the important right conferred by clause 13, but by the very last clause of the second contract "all and singular the terms" of the original contract are declared to "be and remain binding upon both parties," "except so far as modified by this supplemental contract," and the provision of clause 13 which we are considering was not in terms modified.

Appellee's asserted right to bottle his bulk whisky in bond thus remained after November 1, 1914, unless taken away by the sixth clause

of the contract of December 2, 1910, the "purpose and intent" of which was declared to be that in the event of the termination of the contract under its thirteenth clause appellant should assume and carry out appellee's obligation and agreement to bottle whiskies theretofore acquired by appellee under the contract and sold by him to his customers, or by the latter bought "off the market," but not yet bottled in bond—such bottling to be done by appellant at the same "terms and rates" agreed to by appellee.

The pleadings do not disclose the circumstances out of which the 1910 bottling agreement arose, or its purpose, and no testimony was introduced. Its intent was thus left to be ascertained solely from the language of the writing (which does not, as in the case of the second or supplemental agreement, state how it came about), in connection with the preceding written agreements. The absence of such information has not rendered difficult an interpretation of the preceding contracts, which speak for themselves.

Judged alone from the face of the writings, we agree with the District Judge that the 1910 provision relates only to whiskies sold subject to a bottling right not yet exercised, and does not affect appellee's right given by previous contracts to bottle whiskies not so sold. We have not the benefit of Judge Cochran's views of its application to whiskies actually so sold, except as may be involved in the denial without opinion of the application for rehearing. We therefore shall not now pass upon the construction of the agreement as it relates to whiskies so sold, nor definitely and conclusively decide its application to goods not so sold. It may be that on final hearing (which no doubt may speedily be had) evidence of the custom of the trade (knowledge of which the District Judge may have had), or of the circumstances out of which the 1910 agreement arose, will make it entirely clear whether the 1910 provision was intended wholly to take the place of the arrangement evidenced by the first and second contracts taken together, or whether, as appellee contends, it was intended only to meet possible cases of purchases from appellee, or on the market, of bulk whisky to be held in bond with bottling right for an indefinite period, which might continue after appellee had ceased to operate the bottling house. Such arrangement would seem naturally to accommodate both parties—the appellee, by not requiring him to operate the works for sporadic and belated bottling; the appellant, by giving him prompt and uninterrupted possession of the works as soon as appellee should cease active bottling, so far as immediately required, of his own bulk goods.

[4] The order awarding preliminary injunction should be affirmed; for this appeal raises only the question whether in awarding it discretion was properly exercised (Interurban Co. v. Westinghouse Co. [C. C. A. 6] 186 Fed. 166, 170, 108 C. C. A. 298); and although, if we could say, as matter of law, that appellee had no right to the relief asked, it would be our duty at least to reverse the order for injunction for lack of room for the exercise of discretion (Bissell Co. v. Goshen Co. [C. C. A. 6] 72 Fed. 545, 550, 19 C. C. A. 25; Shelbyville v. Glover [C. C. A. 6] 184 Fed. 234, 238, 106 C. C. A. 376), such is not

the case here. To say the least, appellee presents a fair question as to the extent of his asserted right, requiring opportunity for its full presentation and final decision. It may well be that as between appellant and appellee the latter's need of protection is more immediate, as the last of his whisky must, under the revenue laws, be removed from bond by July, 1918, if not earlier, while under the law none of appellant's whisky is required to be so removed before 1920, although some of it is already eligible to bottling. It thus cannot be said that the trial court, on the balancing of conveniences and inconveniences to the respective parties, especially in view of the requirement of security, has acted improvidently. Pere Marquette R. R. Co. v. Bradford (C. C.) 149 Fed. 492; Bigelow v. Calumet & Hecla Mining Co. (C. C.) 155 Fed. 869, 881.

In affirming the order below, we recognize the possibility that appellee's possession of the bottling department, whether before or after final hearing, may interfere with appellant's convenience; and it scarcely need be said that appellee's possession should not in any event go farther than necessary for his protection, nor cause unnecessary interference with appellant's needs. The order for injunction does not in terms exact exclusive possession. The District Court not only has the right, on final hearing, in case appellee shall there succeed, to consider the questions how far his possession should go, and the extent to which it should be made exclusive (on which questions we find it unnecessary to say more than already said), but will be left at liberty to exercise its discretion respecting any application, even before final hearing, for the protection of appellant against improper and unnecessary interference and delay.

PACIFIC COAST PIPE CO. v. CONRAD CITY WATER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2937.

1. COURTS ⟸497—CONFLICTING JURISDICTION—PROPERTY IN CUSTODY OF THE LAW.

In a suit in personam in a federal court, where plaintiff attached land as an auxiliary remedy only to provide security for the payment of the judgment, by posting and filing notices as provided by state statute, without taking actual possession, the attachment did not bring the land into the custody of the law, so as to prevent an actual seizure of the land by the state courts.

2. CORPORATIONS ⟸559(2)—APPOINTMENT OF RECEIVER—COLLATERAL ATTACK.

Rev. Codes Mont. § 6698, authorizes the appointment of a receiver in an action to foreclose a mortgage under certain circumstances, in cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, or in other cases under the usages of courts of equity. A bill of complaint against a water company set up a small mechanic's lien on the property, and alleged that the company was charged with the duty of supplying water to a town and its inhabitants; that its property was subject to a trust deed, and it was otherwise indebted in a sum exceeding its assets; that it was insolvent, and conceded its inability to operate its water system, and was without money

to continue such operation; that it was essential to the well-being of the town and its inhabitants that the system be operated; that to shut down the plant would seriously injure it, and impair plaintiff's security and the value of the assets applicable to the payment of creditors generally, and subject the company to numerous suits; that the immediate expenditure of money was imperative; and that the company was without credit, and its affairs in a chaotic condition. *Held*, that the court had jurisdiction to appoint a receiver, and its appointment of a receiver was not open to collateral attack, though plaintiff's lien was trivial, or even fictitious, and though the other conditions exhibited by the bill were fanciful or grossly exaggerated.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit by the Pacific Coast Pipe Company against the Conrad City Water Company and others. From a judgment dismissing the bill (237 Fed. 673), plaintiff appeals. Affirmed.

E. C. Day and Thomas A. Mapes, both of Helena, Mont. (Kerr & McCord, of Seattle, Wash., of counsel), for appellant.

O. W. McConnell, of Helena, Mont., and J. A. McDonough, of Great Falls, Mont., for appellees.

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

DIETRICH, District Judge. On November 3, 1913. the plaintiff and appellant herein sued out a writ of attachment in an action which it had brought in the United States District Court in Montana against the defendant Conrad City Water Company, and caused the same to be levied upon certain real property belonging to the defendant, by posting and filing notices in the manner provided by the state statutes. In due course, namely, upon July 2, 1914, judgment was entered in favor of the plaintiff for approximately $10,000. Thereafter, in March, 1915, and before the plaintiff took out a writ of execution, one of the defendants here, the Conrad Mercantile Company, brought suit in the state district court to foreclose a mechanic's lien for $54.70, and upon a showing that the Water Company was insolvent, and its affairs in a chaotic condition, a receiver was appointed to take charge of all of its property. The receiver so appointed is still acting, and still has possession of all the Water Company's property, including that levied upon by the plaintiff in the attachment suit.

The plaintiff, claiming that the mechanic's lien, if valid at all, is subject to its attachment lien, and that a trust deed executed and recorded in 1910, covering the property in question, is void, brought this suit in May, 1915, for the purpose of having the superiority of its lien adjudicated. With the Water Company there are joined as defendants the plaintiff in the foreclosure suit, the receiver, the trustee named in the trust deed, and the holder of the bonds secured thereby. Subsequently the trustee named in the trust deed appeared in the foreclosure case pending in the state court, and by cross-bill prayed for a foreclosure of the security, and upon his application the receivership was extended to the case made by the cross-bill. So that suit stood when this cause was tried. The court below, though holding that

the trust deed was void and the mechanic's lien was apparently a fiction, concluded that by reason of the pendency of the foreclosure suit it was without jurisdiction, and accordingly dismissed the bill.

[1] Plaintiff's attachment proceedings did not operate to bring the attached land into custodia legis. Wiswall v. Sampson, 14 How. (55 U. S.) 52, 65, 14 L. Ed. 322; State of Georgia v. Jesup, 106 U. S. 458, 1 Sup. Ct. 363, 27 L. Ed. 216; In re Hall & Stilson Co. (C. C.) 73 Fed. 527. Beardslee v. Ingraham, 183 N. Y. 411, 76 N. E. 476, 3 L. R. A. (N. S.) 1073, is cited contra, but in so far as it is in point it is thought to be in conflict with the Wiswall-Sampson Case. The court did not take actual possession. The lien was effected by the filing of notices, and is analogous to—certainly not of greater dignity than—a judgment lien. Actual seizure by other courts was not thereby barred. The suit was essentially in personam, the attachment being an auxiliary remedy only, to provide security for the payment of such personal judgment as might be recovered.

[2] The property being subject to seizure by the state court under due process, it remains only to consider whether or not the receivership proceedings were void for want of jurisdiction, for of course it is conceded that, if the receiver is lawfully in possession, he cannot be sued or his possession disturbed without the consent of the state court. Wabash Ry. Co. v. College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379, on rehearing 208 U. S. 609, 28 Sup. Ct. 425, 52 L. Ed. 642. Section 6698 of the Revised Codes of Montana provides that a receiver may be appointed by the court in which an action is pending in the following, among other, cases:

"In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt. * * * In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

The bill of complaint in the cause in which the receiver was appointed exhibited a claim, apparently made in good faith, that the plaintiff held a small mechanic's lien upon the property of the Conrad City Water Company. It was further shown that the debtor was a public service corporation, charged with the duty of supplying water to the town of Conrad and its inhabitants; that for this purpose it had constructed and owned a system of water mains and service pipes, and a pumping plant, by which the water was supplied; that its property was subject to a trust deed securing an issue of bonds in the amount of $80,000, and that it was indebted to various persons in the aggregate sum of $96,000, while the value of all of its assets was less than $60,000; that it was absolutely insolvent, and conceded its inability to care for or to continue to operate its water system, and was without money to continue such operations; that not only was it essential to the well-being of the town of Conrad and its inhabitants that the system be continuously operated, but that if the plant should be shut down it would be seriously injured, with the result that the plain-

tiff's security, and the value of the assets applicable to the payment of creditors generally, would be seriously impaired; and, further, that unless the plant was kept in operation the Water Company would be subjected to numerous suits. It was specifically represented that the necessity for the immediate expenditure of at least $1,000 was imperative, and that still other expenditures must follow in the near future, and that the company was wholly without credit, and that generally its affairs were in a chaotic condition. To this complaint the Water Company appeared, admitted its insolvency, conceded the validity of plaintiff's claim, and in effect joined in the prayer for a receiver.

It is thought that by such a record the application for the appointment of a receiver was clearly brought within the court's jurisdiction. Indeed, even if no lien had been asserted, but only an unsecured contract debt, there would have been a prima facie case for the appointment of a receiver. Re Metropolitan Railway Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. Upon the showing made, the failure of the court to take possession of the property would have resulted in confusion among creditors, sacrifice of property, and the most distressing inconvenience to the people of Conrad, dependent, as they were, for water, upon the debtor's system. In that the plaintiff's claim was supported by a lien upon specific property, its position was not less, but more, favorable than that of a general creditor. It could with propriety ask the court to protect its security against the waste or impairment which would necessarily result from a failure to operate the plant. It is quite aside from the question to suggest that the lien claim was trivial, or even that it was fictitious, or that the other conditions exhibited by the bill were either fanciful or grossly exaggerated. We are discussing the power of the court to act, not the wisdom of its action. If the state court erred in its findings of fact or its conclusions of law, or improvidently exercised its discretion, those are considerations for an appellate court; with them we are not concerned. On the face of the record the court had jurisdiction, and in a collateral attack upon its judgment we are not at liberty to inquire further.

The judgment will be affirmed, with costs to appellees.

FORD MOTOR CO. v. FARRINGTON et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2963.

1. APPEAL AND ERROR ⊂=873(1)—WRIT OF ERROR—SCOPE OF REVIEW.
Where a writ of error is directed only to the judgment, an order, made after judgment, denying a new trial or application for modification of the judgment, is not reviewable.

2. APPEAL AND ERROR ⊂=977(1)—REVIEW—DISCRETION OF TRIAL COURT—NEW TRIAL.
An application to set aside a verdict and grant a new trial, being addressed to the discretion of the trial court, cannot ordinarily be reviewed on writ of error.

3. REPLEVIN ⊂=11(1)—ACTIONS—DEMAND.
Where, under a contract giving defendants the agency for motor cars, they were required to pay 85 per cent. of the price thereof, though plaintiff was given the right, on refunding the same, to retake the cars, plaintiff is not entitled to replevin the cars without previous demand and a tender to defendants of the amount paid, and the fact that the tender would probably have been refused is no excuse for failure to make it.

4. REPLEVIN ⊂=10½—ACTIONS—TENDER.
Where plaintiff was entitled to retake motor cars on returning defendants' payments, plaintiff's failure to tender the same cannot be excused because its agents believed defendants would refuse payment; tender not being excused, unless defendants' conduct was such as to induce a reasonable belief that it would be refused.

5. APPEAL AND ERROR ⊂=216(2)—PRESERVATION OF GROUNDS OF REVIEW—INSTRUCTIONS—REQUEST.
Where defendants counterclaimed, plaintiff cannot complain, on error, that more specific instructions should have been given touching the measure of defendants' damages and the maximum of the recovery; plaintiff having requested no instruction properly presenting those matters.

6. REPLEVIN ⊂=82—ACTIONS—NOMINAL DAMAGES.
Where plaintiff wrongfully deprived defendants of possession of motor cars, defendants are entitled to nominal damages at least.

7. APPEAL AND ERROR ⊂=171(1)—REVIEW—QUESTIONS PRESENTED.
Where an action was tried and submitted on the theory that the contract between plaintiff and defendants was legal, the question whether it was valid under the anti-trust laws will not be reviewed.

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

Action by the Ford Motor Company against E. A. Farrington and L. A. Houck, copartners doing business as the Pacific Transfer Company, and others, who counterclaimed. There was a judgment for defendants, and plaintiff brings error. Affirmed.

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 plaintiff in error.

Charles A. Hardy, of Eugene, Or., John F. Logan, of Portland, Or., and Isham M. Smith, of Wallace, Idaho, for defendants in error.

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

DIETRICH, District Judge. This is an action in replevin, brought by the plaintiff and appellant to recover 37 Ford automobiles from the defendants Winchell and Hathaway, doing business as the Ford Auto Company, at Eugene, Or. The automobiles having been seized by the marshal under a provisional writ, the defendants answered, praying that they have judgment for the value thereof, and also for $25,000 damages, which they claimed to have suffered as a consequence of the seizure. Upon a trial with a jury there was a verdict in favor of the defendants for $16,077.50, the admitted value of the cars, and $6,000 as damages; and judgment was entered accordingly. Plaintiff's application for a new trial and for a modification of the judgment having been denied, it sued out this writ of error.

The plaintiff is the manufacturer of the Ford automobile, and consigned the cars in question, together with many others, to the defendants, for sale under its general "agency contract." By its terms the contract would expire upon July 31, 1916, but it contained a provision authorizing either party, with or without cause, to cancel it at any time, upon written notice by registered mail, and accordingly, on May 25, 1916, the plaintiff gave such notice. Under the contract the plaintiff retained title to the consigned cars until they were sold to users, but the defendants were required to pay on account thereof at the time of the consignment 85 per cent. of their retail price, and were also required to pay the freight. In case of a cancellation of the contract, the plaintiff had the right to retake the unsold cars, at the same time repaying to the consignees the full amount of their advancements. When the notice of cancellation was given, the defendants had on hand 37 of the cars so consigned, on account of which they had advanced the aggregate sum of $16,077.50, including freight charges. A day or two following the notice one of the plaintiff's representatives visited the defendants at their place of business, and after discussing with them matters relating to the closing up of the contract and turning over the cars, he went to Portland to advise with his superior. Upon his return to Eugene, two days later, he again took the matter up with them, but with great arrogance he declined to confer with or in the presence of their attorney, or to give them any time at all to consider the proposition he had made. A few days later, on June 3d, the suit was commenced, without first making any formal demand for the cars, or tendering the $16,077.50 which the defendants were entitled to receive.

[1, 2] There are 12 assignments of error, 5 of which are on account of instructions given, and 5 on account of instructions refused. One of the other two, the seventh, relates merely to a preliminary explanation by the trial judge of the theory upon which he would instruct the jury, and may therefore be disregarded; and the twelfth concerns an order, made after entry of judgment, denying the plaintiff's application for a modification of the judgment. But this, too, may be summarily disposed of, with the suggestion that the writ of error is directed only to the judgment, and an order, made after judgment, denying a new trial or an application for a modification of the judgment, is not reviewable under the writ. Besides, it is plain that the modification asked for could not be granted without ignoring the verdict, and an ap-

plication to set aside a verdict and grant a new trial is addressed to the discretion of the trial court, whose action relative thereto is not ordinarily reviewable.

[3] From the transcript of the proceedings incorporated in the record it is to be inferred that in fact no exceptions at all were taken to the instructions given; but, assuming that the vague exceptions set forth in the bill were actually taken and that they are sufficient in form, we do not think they are well founded. By the instructions thus called into question the court in substance advised the jury that under the evidence the cars were wrongfully taken from the defendants, because there was no previous demand, and more especially because there was no payment or tender of the $16,077.50. There is no pretense that tender was in fact made; nor do we think it was waived. The most that can be said is that it probably would have been declined; but such a possibility or probability did not relieve plaintiff from its obligation to make an actual tender. Its agent seemed to think it a matter of little importance that plaintiff held possession of over $16,000 of the defendants' money, and neither offered to pay it back nor gave them time enough definitely to decide whether they would or would not accept it upon the conditions tentatively suggested.

[4] One of the requested instructions, which the court refused, raises a kindred question. It was to the effect that tender was unnecessary "if the defendants informed plaintiff, or led plaintiff to believe, they would not accept payment." But, even if the evidence were such as to make such an instruction pertinent, still it does not correctly state the law. What the plaintiff's agents may, in their reckless disregard of defendants' rights, have believed, is not necessarily what they had reason to believe; and the defendants could be bound only by conduct of such character as to induce the reasonable belief that they would not accept.

[5, 6] Clearly it would have been error to give any one of the other requested instructions. By the eleventh the court was in effect asked to advise the jury that, unless the defendants proved that they had been damaged to the full amount of $25,000, as alleged, and that the automobiles were of the full value alleged, they must fail entirely. It may be that more specific instructions should have been given touching the measure of the defendants' damages and the maximum limit of their recovery; but the plaintiff neglected to suggest to the trial court a proper instruction upon the point, and, if the verdict is excessive, they have not brought to us such a record as enables us to afford relief. There is a request that the jury be instructed to find for the plaintiff upon the question of damages; but manifestly, if the defendants were wrongfully deprived of the possession of the cars, they are entitled to at least nominal damages. Indeed, the cause was tried and submitted to the jury upon the theory that they were entitled to damages, provided the taking was found to be wrongful, and without objection or exception from plaintiff. The requests were properly denied.

[7] The major part of appellant's brief is devoted to the question whether or not its "agency contract" is obnoxious to the anti-trust laws, and therefore void; but, in view of the fact that the cause was tried

and submitted upon the theory that the contract was valid, and that the rights of the parties were defined and were to be measured thereby, the inquiry is thought to be immaterial.

The judgment is affirmed, with costs to defendants in error.

CAVORETTO v. ALASKA GASTINEAU MINING CO.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1917.)

No. 2965.

1. TRIAL ⟸251(8)—INSTRUCTIONS—APPLICABILITY TO ISSUES.
   In an action for injuries received by a servant when a splinter of steel flew from a hammer wielded by another, the court charged that, if the hammer was defective, the jury should determine whether defendant knew of the defect, and whether the injured servant might have repaired it, or whether he might have selected another hammer for the work. The injured servant was not required to use the hammer, and there was no showing that he was required to repair defects. *Held*, that the instruction was defective, submitting issues not raised, and cannot be justified on the theory that it might properly refer to the helper.
2. MASTER AND SERVANT ⟸286(4)—INJURIES—EVIDENCE.
   Evidence in an action by a servant injured by a splinter from a hammer wielded by another servant *held* sufficient to take question of defendant's negligence to the jury.

In Error to the District Court of the United States for the First Division of the District of Alaska.

Action by Dominico Cavoretto against the Alaska Gastineau Mining Company. There was judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions to grant new trial.

Action by Cavoretto against the Alaska Gastineau Mining Company for damages for loss of the sight of an eye. Trial to jury, and verdict for the mining company. Cavoretto brings writ of error. Cavoretto was a general blacksmith, of experience in cutting cold steel. His duty at the time he was hurt was to hold a chisel upon a bar of steel while a helper would strike the face of the chisel with a sledge hammer weighing about 14 pounds. His complaint charged that the hammer, used through the negligence of the company, became chipped, frayed, and unsafe; that the defendant knew of such condition, or ought by ordinary care to have known it; that when at work a piece of steel was broken off the hammer by the force of a blow, and plaintiff was hit in his eye by a piece of steel. The company denied all negligence and pleaded assumption of risk.

Plaintiff testified that his custom was to tell the helper to cut the steel; that the helper knew what kind of tools to use in the work; that about a month before the injury he observed that the hammer used was chipped, with small pieces hanging, and that the head was getting smaller, because crushed all around, and that pieces would be apt to hit some one when blows were struck; that when he first saw this condition he told the foreman, and asked him why he did not get a new hammer; and that the foreman replied that he had ordered a hammer, which was "liable to come any day," but that he did not look at the hammer on the day he was hurt. The helper testified that he was under the orders of the blacksmith, doing what the blacksmith told him to do, and that Cavoretto told him that they were to cut some steel. He noticed that the hammer was "a little soft," but says that he made no complaint of it, and that he never heard anybody else complain of it.

J. H. Cobb, of Juneau, Alaska, and Heywood & Wilson and Walter Shelton, all of San Francisco, Cal., for plaintiff in error.

L. P. Shackleford, H. L. Faulkner, and W. S. Bayless, all of Juneau, Alaska (Rufus Thayer, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] In charging the jury the court said:

"If you find that the hammer was a defective appliance, then the next question would be: Was the defendant required to use that particular hammer while in that particular condition in the performance of the work, or was he free to repair or reshape it, or get some other hammer that was suitable, and not dangerous? For, if he was so free, then defendant cannot be said to have required the work to be done with that hammer in that shape. If you find from the evidence that this particular hammer was furnished plaintiff to do the work with, and that it was defective, then you are to inquire further whether the defect in the hammer was due to the negligence of the defendant —that is to say, whether or not it knew, or by the exercise of reasonable care could have known, that the hammer was defective. If it was defective, and the defendant knew, or ought to have known, of that fact, and required the plaintiff to use it in the performance of his duties—that is, left him no free and voluntary choice but to use it in that shape—and if the injury, if any, was received by virtue of so using the implement so found to be defective and required to be used, then your verdict should be in favor of the plaintiff for such damages as you may find that he has suffered. But if you find that the implement was not defective under the circumstances, as I have defined 'defective' to you, or if you find that the plaintiff was not required to use it in the work, but might have taken a hammer which was not defective, and yet freely and voluntarily chose the defective hammer, knowing it to be defective, then he cannot recover, and your verdict must be for defendant."

Counsel excepted to this instruction, and contend that it was not warranted by the pleadings or the evidence in the case. Their argument is that it injects into the case an issue whether or not plaintiff was required to use the defective hammer, and that such issue was erroneously submitted, because it was never contended that the plaintiff himself was required to use the hammer, but that it was admitted his coemployé, the helper, was the man to whom the tool was furnished, and by whom it was used. It is also said that by such injected issue a burden was erroneously put upon plaintiff to show that he was required to make selection of a hammer, and that, inasmuch as the proof did not show any such requirement, the jury was practically constrained to find against him.

We are of the opinion that the trial court was in error in giving the instruction complained of. It was not in accord with the theory or evidence of the plaintiff that he was required by defendant to use the hammer, said to be frayed and battered, or that it was the duty of plaintiff to repair or reshape the hammer used, or to see to it that the helper got another hammer for use. The effect of the charge was to state, as among the essential issues, matters which were not material points pleaded or in controversy. By submitting them there arose such a confusion of statement as doubtless led the minds of the jurors to deliberate upon and solve questions not involved, and which, if answered in a certain way, seemed to call for a verdict against plaintiff.

[2] Defendant says, however, that as there was testimony by the foreman to the effect that there were other hammers available, it was not harmful error to omit any reference to the helper, because if the jury had been told that the hammer was in the hands of the helper, unless coupled with evidence that the helper was careless in the use of the hammer, such instruction would not have availed plaintiff, and that if, by giving such an instruction, the jury might have believed that the accident was due to the carelessness of the helper, and had found for plaintiff, it would have been ground for reversal, because neither pleadings nor proofs would have justified the finding. We need not follow this argument to its possible results, because it is fundamental that the plaintiff had a right to have his case submitted upon the issues pleaded and presented, and to have such issues stated free from commingling with injected issues not pleaded or presented, and which may have been the foundation of the adverse verdict reached. We cannot hold that there could be no recovery, and, without intending to express any opinion upon the facts, we believe the evidence was properly for the jury. New York, N. H. & H. R. Co. v. Vizvari, 210 Fed. 118, 126 C. C. A. 632, L. R. A. 1915C, 9; Gekas v. Oregon-Washington R. & N. Co., 75 Or. 243, 146 Pac. 970; Pushcart v. N. Y. Shipbuilding Co., 81 N. J. Law, 261, 81 Atl. 113.

The judgment is reversed, and the cause is remanded, with directions to grant a new trial.

THE QUERNMORE.

(Circuit Court of Appeals, Fifth Circuit. June 13, 1917.)

No. 3049.

1. SALVAGE ⊂=30—STRANDED VESSEL—LIABILITY—AMOUNT.
   Where, at the instance or request of the master, libelants rendered services and incurred expense in floating the vessel after it had grounded, the vessel is liable for all claims, regardless of the rule of the general average; the case being governed by contract, and not by rules applicable to voluntary salvage.
2. SALVAGE ⊂=30—STRANDED VESSEL—ELEMENTS OF COMPENSATION.
   The owner of tugs used in floating a stranded vessel is entitled to compensation for hawsers broken or ruined, and such items are not included in per diem compensation for the services of the tugs.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Libel by the Henry Nanninga Company and others against the Quernmore, claimed by the Steamship Queensmore, Limited, and another. From the decree, the claimant and its surety appeal and the libelants also assign cross-errors. Modified and affirmed.

Charles R. Hickox, of New York City, George Denegre and Victor Leevy, both of New Orleans, La. (Kirlin, Woolsey & Hickox and Mark W. Maclay, Jr., all of New York City, on the brief), for appellants.

William Garrard and A. Minis, both of Savannah, Ga., for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This case is brought before this court by an appeal of the claimant of the British steamship Quernmore and the surety on the claimant's release bond from a decree rendered against them in favor of libelants, who, at the instance or request of the master of the ship, rendered services and incurred expenses incident to getting the vessel afloat after it had run aground near the mouth of the Savannah river while on its way to sea from the port of Savannah.

[1] Complaint is made of the action of the court in assessing against the owner of the ship the entire amounts awarded. It is contended that whatever amounts were properly allowable in favor of the libelants should have been prorated between the ship and its freight and cargo according to their respective values. We are not of opinion that there is any merit in this contention. The ship itself was chargeable for services and expenses required and contracted for by its master, or at his instance or request, to effect its rescue from the strand. The liability so incurred was contractual, though what was done to save the ship from the danger to which it was exposed by the stranding constituted a salvage service of the kind which imposes a liability not contingent or dependent upon the success of the enterprise. The claims of the libelants were not for services voluntarily rendered to a ship in distress under circumstances making their compensation dependent upon success and chargeable against whatever they helped to save. The question of general average, or of the liability of freight and cargo to contribute to expenses incurred by or at the instance of a ship's master for the rescue of it from a peril of the sea, is one which does not concern those who, under contracts or employments binding upon the ship, rendered services or incurred expenses which contributed to the saving of the ship. The libelants were entitled to have the compensation due to them charged against the ship in behalf of which they were engaged to render services or incur expenses for its rescue. The enforcement against the ship alone of its contract liability did not prevent the assertion in its behalf of a liability of the cargo and the freight to make suitable contribution for the partial protection or reimbursement of the ship for outlays the benefits of which were shared in by the cargo and the freight.

Our examination of the record in the light of the arguments of counsel has led us to the conclusion that the several items of service and expense for which awards against the owner of the ship were made were such as warranted the charging of the ship with liability therefor, and that as to none of those items has it been made to appear that the amounts awarded on account thereof were so insufficiently supported by the evidence adduced or so excessive as to call for a reversal or modification of the part of the decree which dealt with and disposed of those items.

What was said by the District Judge in the opinion he rendered we think sufficiently justifies the awards which were made against the ship or its owner.

[2] The libelants make complaint of some features of the decree. In so far as the decree is complained of because of the alleged insufficiency of amounts awarded as compensation to which the libelants

were found to be entitled, it does not seem to us that the complaints are well founded. One of the libelants, the Propeller Towboat Company, which furnished the services of several tugs which took part in the pulling of the Quernmore, claimed $640 as compensation for three hawsers alleged to have been broken and ruined in the pulling operations. Evidence which was practically uncontroverted showed that three of this libelant's hawsers were broken and ruined as alleged, and that the loss so sustained amounted to as much as $640. The libelant was entitled to be compensated for the loss or damage so incurred. The award made by the decree of per diem compensation for the services rendered by the tugs did not cover the property loss involved in the breaking and ruining of the three hawsers. We have reached the conclusion that the decree should be modified, by adding to it an award in favor of the Propeller Towboat Company of $640, with interest from the date of the filing of its libel, as compensation for three hawsers broken and ruined; and it is ordered that the decree be here modified as just indicated. As so modified, the decree is affirmed, with interest to date of payment at the rate of 6 per cent. per annum, with costs against the appellants.

SOUTHERN RY. CO. v. COOPER.*

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

No. 3005.

1. RAILROADS ⟸376(3)—INJURIES ON TRACKS—LIABILITY.
   Under the Tennessee Precautions Act (Shannon's Code 1896, § 1574, subsec. 4), a railroad company is liable for the death of one run down on its tracks, where the engineer did not look ahead or blow the whistle, though, had he looked, the engineer could have seen deceased 150 feet away, and could have blown the whistle, so deceased could have stepped out of danger.
2. COSTS ⟸260(4)—FRIVOLOUS APPEAL—PENALTY.
   Where the only excuse offered to defeat an action for the death of one run down by defendant's train was obviously insufficient, a penalty of 5 per cent. is properly imposed under rule 26, clause 2 (202 Fed. xvii, 118 C. C. A. xvii), upon affirmance of the judgment on error.

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

Action by George A. Cooper, administrator of the estate of W. H. Cooper, deceased, against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed, with penalty.

J. H. Anderson and L. D. Smith, both of Knoxville, Tenn., for plaintiff in error.

W. T. Kennerly, of Knoxville, Tenn., R. M. Harrell, of Jacksboro, Tenn., and Pickle, Turner, Kennerly & Cate, of Knoxville, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

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

PER CURIAM. [1] While plaintiff's decedent was walking on the railroad track, he was struck and killed by a train approaching from behind. His administrator recovered, in the court below, judgment for the money value of his life. Upon motion for a new trial, the District Judge thought that all questions of error in the charge regarding the precise rules of liability were made immaterial by the conceded fact that the engineer, if he had been looking ahead, could and would have seen the deceased 150 feet away; that, in that event, the engineer could have blown the whistle, and the decedent could have stepped out of danger; but that the engineer did not look and did not sound the whistle. The District Judge thought that these facts demonstrated a clear liability, under the Tennessee Precautions Act (subsection 4, § 1574, Shannon's Code). With this conclusion, we agree.

[2] The only excuse alleged is that the fireman had seen the danger and had called to the engineer, and that the latter's attention was engaged in an unsuccessful effort to find out what the fireman's call had been, or in putting on the brakes without trying to sound the whistle. This excuse appears to us so obviously insufficient to justify nonaction, where the statute requires action, that we think it proper to impose a penalty of $200, 5 per cent. of the judgment below, and in addition to interest, under the terms of rule 26, clause 2 (202 Fed. xvii, 118 C. C. A. xvii). Southern Ry. v. Gadd, 233 U. S. 572, 581, 34 Sup. Ct. 696, 58 L. Ed. 1099.

The judgment is affirmed, with costs, and with this penalty.

SPANN et al. v. SMITH, District Judge.

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

No. 1560.

MANDAMUS ⊂=58—JUDICIAL PROCEEDINGS—ENFORCEMENT OF MANDATE OF APPELLATE COURT.

A petition *held* to state no ground for a writ of mandamus to compel a District Judge to comply with the mandate of the Circuit Court of Appeals.

Petition by H. F. Spann, P. N. Spann, and M. S. Spann, copartners as Spann Bros., for a writ of mandamus, directed to Henry A. M. Smith, Judge of the District Court of the United States for the Eastern District of South Carolina. Dismissed.

See, also, 238 Fed. 338, 151 C. C. A. 354.

S. G. Mayfield, of Denmark, S. C., and Alexander Akerman, of Macon, Ga., for petitioners.

J. N. Nathans, of Charleston, S. C., for the respondent.

Before PRITCHARD, Circuit Judge, and WADDILL and ROSE, District Judges.

PRITCHARD, Circuit Judge. This is an application for a writ of mandamus, in which it is alleged that the court below has refused to

enforce the mandate of this court. It appears from the record that the court below, in its order disposing of the motion pending in the lower court, made the following entry:

"* * * That any application the complainant may make for a rehearing in the cause or a review of the original decree must be instituted before the first day of the term of this court to be held in the city of Columbia on the first Tuesday of November, 1917, or the court will proceed to a final decree herein under the mandate and opinion of the Circuit Court of Appeals and the testimony in the cause."

We find nothing in this order to justify us in assuming that the learned judge who tried the cause is at all inclined to disregard the mandate of this court. Therefore, under the circumstances, we think that the petition should be dismissed.

POPULAR MECHANICS CO. v. BROWN.

(Circuit Court of Appeals, Seventh Circuit. August 10, 1917.)

No. 2433.

PATENTS ⊜259—"CONTRIBUTORY INFRINGEMENT."

The publication in a magazine of a cut of a garage, with a general description from which a skilled mechanic might build a structure which would infringe a patent, did not constitute contributory infringement, in the absence of proof that any one had made or intended to make such use of the article, since, for one to be chargeable with contributory infringement, there must be a direct infringement, existing or threatened.

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

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

Suit in equity by Stewart Brown against the Popular Mechanics Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

T. Hart Anderson, of New York City, and Benjamin T. Roodhouse, of Chicago, Ill., for appellant.

Jacob C. Le Bosky, of Chicago, Ill., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. This is an appeal from a preliminary injunction restraining appellant, publisher of the Popular Mechanics magazine, from contributory infringement of appellee's patent No. 1,175,506, March 14, 1916, for a garage.

Appellant's offense consisted of publishing in the reading section of its August, 1916, number a picture in perspective of a garage and a 20-line general description (without plans and specifications) from which a sufficiently skilled reader might erect a structure embodying the idea of the patent; and the decree enjoined the circulation of that issue. But appellee had no monopoly of the news that he had obtained such a patent. Appellant's real offense therefore was in publishing the

description without stating at the same time that the structure was patented.

No proof is in the record that appellant either had built or was threatening to build a garage of the patented type. Consequently there was no basis for a finding of direct infringement, actual or impending. For one to be guilty of contributory infringement, there must be a direct infringement, existing or threatened—something to which to contribute. No proof was made that any reader had erected or was about to erect such a garage; or that any reader was accustomed to avail himself of the instructive matter in Popular Mechanics beyond his fireside and easy chair; or that the bare possibility that there was somewhere a reader who some time might act upon the information was in truth a greater possibility than if the article had also stated that appellee had obtained a patent on the structure. But at all events a possibility is not a threat. In our judgment, therefore, no basis existed for a finding of contributory infringement. Compare Luten v. Town of Lee (D. C.) 206 Fed. 904; Walker on Patents, § 407; Toppan v. Tiffany Car Co. (C. C.) 39 Fed. 420.

The decree is reversed, and the cause remanded, for further proceedings not inconsistent with the opinion.

METALLIC RUBBER TIRE CO. v. HARTFORD RUBBER WORKS CO.

(District Court, D. Connecticut. February 19, 1917. Memorandum in Modification of Opinion, June 29, 1917.)

No. 1261.

1. PATENTS ⟸322—SUIT FOR INFRINGEMENT—REFERENCE FOR ACCOUNTING.
On a reference for an accounting for damages and profits in an infringement suit, the master cannot go into the general question of infringement, nor consider and decide the general scope of the patent, such questions having been foreclosed by the decree, but his duty is limited to a determination of the extent of the infringement and the particular infringing devices made or used by defendant.

2. PATENTS ⟸318(3)—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.
On an accounting for infringement of a patent for a nonskidding rubber tire made so by stitching wire into the tread, complainant is entitled to recover all the profits made by defendant from the manufacture and sale of tires so made, since without the patented feature they would have had no market value for the new and specific purpose contemplated by the patentee.

3. PATENTS ⟸318(4)—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.
Where an infringer has so commingled patented and unpatented elements in his structure as to make it impossible to apportion the profits between them, the patentee is entitled to the entire profits.

4. PATENTS ⟸318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.
Taxes and insurance paid by an infringer may only be deducted on an accounting for profits where the plant in question is devoted solely to the infringing business.

5. PATENTS ⟸318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.
The cost of buildings and machinery, repairs, and plant depreciation, if allowable at all in an accounting for profits by an infringer where the

plant is not used exclusively for infringing purposes, can only be considered where defendant furnishes evidence from which an apportionment may be made.

6. PATENTS ⟸318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.
On an accounting for profits by an infringer losses cannot be set up as an offset to sales made at a profit.

7. PATENTS ⟸318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.
Royalties paid by an infringer to patentees of other parts entering into the infringing article *held* erroneously allowed by the master under the facts of the particular case on an accounting for profits.

8. PATENTS ⟸318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.
Expenses incurred by an infringer in advertising all of its manufactures, and not limited to the infringing articles, cannot be allowed in an accounting for profits.

9. PATENTS ⟸318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.
Various items *held* improperly allowed to an infringer on an accounting for profits either as not properly allowable or as not sufficiently established by the evidence.

10. PATENTS ⟸318(2)—SUIT FOR INFRINGEMENT—DAMAGES RECOVERABLE.
Damages for infringement in addition to defendant's profits are allowed in equity only where the injury to complainant is plainly greater than the aggregate of such profits, and in case no profits are shown complainant is entitled to judgment for his damages, with interest, where an established royalty is shown.

In Equity. Suit by the Metallic Rubber Tire Company against the Hartford Rubber Works Company. On exceptions to master's report on accounting. Exceptions sustained, and case recommitted.

Alfred Wilkinson, of New York City, and George D. Watrous, of New Haven, Conn., for plaintiff.

Ernest Hopkinson, of New York City, for defendant.

THOMAS, District Judge. This case arises on exceptions to the report of the master, to whom the case was referred to state an account of damages and profits arising from the infringement of the patent in suit. The invention of the patent relates "to means for preventing the yielding tires of bicycles and other wheeled vehicles from slipping on the roadway, as they are particularly apt to do when the roadway is smooth," by embodying a wire in the tread of the tire. When the case came up for final hearing on pleadings and proofs, Judge Platt gave the patent a very narrow and restricted construction, and held the patent not infringed. This decision was reversed by the Circuit Court of Appeals upon appeal for the reason that the prevention of slipping was nowhere to be found in the prior art, either as an object of the prior patents relied on or as a result of the use of the structures therein specified, and that the substantial invention of the patent was of a high grade and of a functional and characteristic novelty, and consisted in the fact that exposed wire stitching makes hard bearings to prevent skidding or slipping. So construed, the patent was held to be valid and infringed, and the Circuit Court of Appeals was confirmed in this view because the infringement was not an accidental one, the defendant having originally been licensed under the patent, and having, after the expiration of the license, put out a

product which so closely simulated the patent structure that it was held to be an infringement.

[1] The decision of the Circuit Court of Appeals is binding, and the defendant's interests must be presumed to have been promoted by its use of the structure. The law is thoroughly settled that where a patent has been sustained by a court, the master, in a reference to determine the amount of damages and profits, cannot go into the general question of infringement, nor can he consider and decide the general scope and extent of the patent. All of these questions have been foreclosed by the decree sending the case to the master, and the master must simply examine and decide as to the extent of the infringement and as to the particular infringing device made or used or sold by the defendant. Turrill v. Illinois Cent. R. R., 5 Biss. 344, 24 Fed. Cas. 387; Whitney v. Mowry, 4 Fish. Pat. Cas. 207, 29 Fed. Cas. 1105. In view of the decision of the Circuit Court of Appeals, I am bound to hold that it was the patentee, and not the defendant, who did whatever has been done towards embodying wire in tires so as to produce hard bearings that will prevent skidding, and if the master in reaching his conclusion was governed or controlled, as he apparently was, by the view that it was not the patentee, but the defendant, who did this, he was, in my opinion, manifestly in error.

It is also clear that the "metallic wire interwoven with itself," and "parts of which lie substantially flush with the outer surfaces of the tread," must be held to be novel, essential and functional elements of the patented invention, and are embodied in the infringing articles made and sold by the defendant.

[2] The patent must be taken to be evidence of its utility, and the defendant, under the decision of the Circuit Court of Appeals, is estopped to deny that it is of value. Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., 225 U. S. 604, 616, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939. Indeed, any evidence on the accounting tending to show the nonutility of the patented invention would be incompetent. Authorities supra; Peerless Brick Machine Co. v. Miracle Pressed Stone Co. (C. C.) 181 Fed. 526. Furthermore, the patented improvement must be held not to involve mere detail improvements. As construed by the Circuit Court of Appeals, it made a new tire out of an old one, and changed and improved the function of the old tire. A comparison between the tire of the patent and the old tire of the prior art cannot be taken, for the reason that the new tire has, for its characteristic function, nonskidding, something that the old tire did not have. Compared to the entire vehicle, the tire is a separate part, just as are the vehicle's lamps. Considered by itself, the tire, like the lamp, is a complete entity, a unit in itself, and a single and complete article of commerce, and for the new and specific purpose contemplated by the patentee in his invention the tire is useless without the improvement just as the improvement is useless without the tire. It therefore seems imperative to hold that the patented improvement has given the entire value to the combination, in which case plaintiff is entitled to recover all the profits unless the defendant can show, and the burden is on it, that a portion of them is the result of some noninfringing and valuable

improvement made by him. This rule is clearly stated in Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., supra. It is also stated by the Supreme Court in Manufacturing Co. v. Cowing, 105 U. S. 253, 255, 26 L. Ed. 987, as follows:

"If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market."

The rule is also tersely stated by the Circuit Court of Appeals for the Third Circuit in Carborundum Co. v. Electric Smelting & Aluminum Co., 203 Fed. 976, 982, 122 C. C. A. 276, 282, as follows:

"It is well settled that, in the case of mechanical inventions, where the infringed patent covers a mere improvement upon mechanism before known and open to the defendant to use, the complainant can recover only the excess of such profits as have been realized through the use of the improvement over what the defendant might have made by the use of such mechanism without such improvement. But it is equally well settled, that where the entire commercial value of the mechanism arises from the patented improvement the owner of the patent will be entitled to recover from the infringer the total profits derived from the manufacture, use or sale, of such mechanism. Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809; Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222 [41 L. R. A. (N. S.) 653]; Manufacturing Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987; Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011; Maimin v. Union Special Mach. Co., 187 Fed. 123, 109 C. C. A. 41; Wales v. Waterbury Mfg. Co., 101 Fed. 126, 41 C. C. A. 250."

And, as is pointed out in the Carborundum Case, supra, a patentee may be entitled to the entire profits the infringer has made in the market even though the mechanism without the patented improvement might not be wholly useless.

[3] Neither is the fact, to which the master seems to attach importance, that the plaintiff has not used the patented improvement material. Carborundum Co. v. Electric Smelting & Aluminum Co., supra. Moreover, there is evidence that the conduct of the defendant, by commingling the elements of the combination, has been such as to preclude the belief that it has derived no advantage from the use of the plaintiff's invention, and may have made it impossible for the plaintiff to meet the requirements of an apportionment. If such is the case, the law requires the entire inseparable profit to be given to the patentee. Westinghouse Co. v. Wagner Mfg. Co., supra, 225 U. S. 618, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 261, 36 Sup. Ct. 269, 60 L. Ed. 629.

There are separate items of profits which the master has disallowed which seem to require specific attention.

[4] I. *Taxes and Insurance.*—The manufacture by the defendant of the infringing tires was a single infringement outside of and detached from its regular business. Taxes and insurance, both for fire and labor, were therefore improperly allowed by the master. Such charges are only allowed where the plant in question is devoted solely to the infringing business. Winchester Repeating Arms Co. v. American Buckle & Cartridge Co. (C. C.) 62 Fed. 278; Piaget Novelty Co.

v. Headley (C. C.) 123 Fed. 897; National Folding Box & Paper Co. v. Dayton Paper Novelty Co. (C. C.) 95 Fed. 991; Sayre v. Scott, 55 Fed. 971, 975, 5 C. C. A. 366.

[5] II. *Total Repairs, Building, and Machinery and Plant Depreciation.*—This item, like taxes and insurance, relate to the plant and its use. These items stand upon the same footing as taxes and insurance, and can only be allowed when the building and plant are specially built for and used only for infringing purposes. This was distinctly held in this district by Judge Nathaniel Shipman in Winchester Repeating Arms Co. v. American Buckle & Cartridge Co., supra. Moreover, it is impossible to estimate with accuracy, for there is no help to be found in defendant's testimony, how much of these expenses can be charged to the defendant's business of manufacturing the infringing devices. I do not feel warranted in sustaining any allowance on this item, certainly without some attempt on the part of the defendant to make an apportionment, and so have concluded that this question ought to be referred again to the master.

[6] III. *Defective and Guaranteed Tires.*—The master has allowed to the infringer a lump item for sales and replacements of defective tires made at a loss or supposed to be made at a loss. This ruling cannot be sustained. Losses cannot be set up as an offset to sales made at a profit; every infringement must be treated by itself, if it resulted in profit. That profit belongs to the patentee, and if it resulted in loss, that loss must be borne by the infringer. Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 455, 12 Sup. Ct. 49, 35 L. Ed. 809; Graham v. Mason, 1 Holmes, 88, 10 Fed. Cas. 930; Steam Stone Cutter Co. v. Windsor Mfg. Co., 17 Blatchf. 24, Fed. Cas. No. 13,335.

[7] IV. *Royalties.*—The master deducted royalty payments for other patents used in the infringing structures than that of the patent in suit. If these payments were made for royalties covering the addition of substantially different and noninfringing elements to the structure of a limited patent, they should be allowed; but under the construction put upon the patent by the Circuit Court of Appeals I do not see how they can be so regarded; hence I feel bound to hold that the master erred in his allowance for royalties.

The payment of Midgely royalties was not on account of any existing patent. These payments were made by Midgely for the purpose of obtaining a patent on the infringing structure, and his original broad claim was disallowed by the Patent Office as being anticipated by the patent in suit, and it was only granted for a slight change in form, and the Circuit Court of Appeals said of this change that:

"We fail to see that it is material whether the result be obtained by crinkled or coiled wires."

The "Dunlop royalties" were for patents which the defendant still owns. The defendant has failed to show that any advantage resulted to it from the use of the Dunlop patents, and the burden was on it to so show; moreover, the decision of the Circuit Court of Appeals proceeds upon the theory that the entire value of the infringing tires made, used and sold by the defendant was due to the invention covered by the patent in suit. This item should therefore be disallowed up-

on the authority of Sayre v. Scott, supra, 55 Fed. 976, 5 C. C. A. 366; Crosby Valve Co. v. Safety Valve Co., supra; and Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000.

V. *G. & J. Clincher Royalties.*—These were for licenses for 24 patents, two of which expired prior to the commencement of the defendant's infringement and one, one year after there had been about a year of good infringing sales. The fourth expired June 4, 1908. The defendant has offered no proof as to whether the invention of any of these 24 patents was embodied in the infringing tires. The burden was clearly upon the defendant to make such proof, and in the absence of such proof, especially in view of the decision of the Circuit Court of Appeals, I must hold that the master improperly allowed these items.

VI. *Rubber Depreciation.*—This item taken into the income account is for a lumping sum, and the explanation given by the defendant is, to say the least, meager and unsatisfactory, and consists solely of hearsay testimony as to the condition of the rubber market. I fail to see in the record that any evidence has been introduced testing the accuracy of this item as the law requires. Sayre v. Scott, supra. And as was stated in Byerly v. Sun Co. (D. C.) 226 Fed. 759, at page 765, "the vagaries of the market" at the precise time of its use cannot be followed in an accounting.

[8] VII. *Advertising Expenses.*—The documents before the master seem to show that the defendant has charged all of its advertising expenditures of every sort, including those which advertised the infringing tires and those which advertised the defendant's other products to one account. There should be some apportionment, as it is not fair to load on to the business of the infringing tires anything except that which assisted the selling of those tires.

[9] VIII. There are several other items which seem to me at least questionable:

Patent and Legal Expenses.—For this no allowance can be made. National Folding Box & Paper Co. v. Dayton Paper Novelty Co. (C. C.) 95 Fed. 991, 994; Piaget Novelty Co. v. Headley, supra.

General Expenses.—This is a lumping sum, and its items are not satisfactorily explained.

Travel—General.—About this there is no definite proof to show whether it was connected with the defendant's manufacture and sale of the infringing tires or whether it related to its other business.

Bad Debts.—These relate to certain specific tires which were sold and not collected for. This item is not allowable for the reasons already indicated. Crosby Valve Co. v. Safety Valve Co., supra; Peerless Brick Machine Co. v. Miracle Pressed Stone Co., supra. There is no explanation as to what is meant by "Bad Debts."

In Peerless Brick Machine Co. v. Miracle Pressed Stone Co., supra, it was held that the testimony of an officer of a defendant corporation on an accounting for profits made from the sale of an infringing machine that some of the accounts for machines sold were not collectible was not sufficient in itself to require the profits on account of such sales; there being no testimony of attempts to collect or offer to

assign any part of the accounts to the plaintiff. I feel bound to follow this ruling.

The item of "Philadelphia fire loss" is a mere book entry unexplained, and does not carry its own proof. There should be further testimony showing the amount of insurance and whether the fire was an actual loss, and also whether the burning of a building in Philadelphia could have any bearing on the cost of tires made in Hartford.

A more serious question arises as to whether the master erred in deducting the profits on tires identical with the infringing structures, but which did not have the interwoven or embedded wire of the patent in suit. I think this ruling should be sustained for the reason that the plain-tread tire was and is satisfactorily used without the wire of the patent in suit, and such tires would not have infringed. Such a view is in no way inconsistent with the conclusions as to the other items. To what extent this may affect the final result can best be determined on the recasting of the report, which should be done in accordance with the views herein expressed.

The master has disallowed any claim for substantial damages. The claim for damages, in addition to profits, is only allowed in equity in those cases where the injury to the plaintiff sustained from the infringement is plainly greater than the aggregate profits made by the infringer. Coupe v. Royer, 155 U. S. 565, 582, 15 Sup. Ct. 199, 39 L. Ed. 263. This practice requires that the master in making his report should state the evidence and findings and conclusions upon each line of evidence separately and distinct from each other, but this he has not done. The measure of damage, outside of profits, would in the case of an established royalty be the license fee. Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Birdsall v. Coolidge, 93 U. S. 64, 23 L. Ed. 802. In this case there is a license agreement between the parties, but it includes other patents than the one in suit; and it would clearly seem that it is incumbent upon the plaintiff to show how much of the license fee provided for in the license agreement was paid for the use of the monopoly of the patent in suit and how much for the use of the other patents. Clearly, a royalty which is reserved for several patents is not a proper one to measure the damage for the unlawful use of one of them after the license has expired, but if it is shown how much of the established license fee was paid for the use of the patent in suit, there is no reason why it should not be received as a proper measure of damages.

[10] If the account shows no profits, but does show damages, the plaintiff will be entitled to a judgment for damages (Marsh v. Seymour, 97 U. S. 348, 24 L. Ed. 963), and interest from the time of the infringement, for the reason that an established royalty makes the damages liquidated (Consolidated Rubber Tire Co. v. Diamond Rubber Co. [D. C.] 226 Fed. 455, 463; Locomotive Safety Truck Co. v. Pennsylvania Railroad Co. [C. C.] 2 Fed. 677, 683; Creamer v. Bowers [C. C.] 35 Fed. 206, 210). If the profits are found to exceed the damages, the plaintiff will be entitled to a judgment for the profits, but not for damages. Emigh v. B. & O. R. Co. (C. C.) 6 Fed. 283. If the accounting shows both profits and damages and also shows the latter

to equal or exceed the former, the plaintiff will be entitled to a judgment for the amount of the damages (Birdsall v. Coolidge, supra; Star Salt Caster Co. v. Crossman, 4 Ban. & A. 566, 22 Fed. Cas. 1,132; Child v. Boston & Fairhaven Iron Works [C. C.] 19 Fed. 258; Simpson v. Davis [C. C.] 22 Fed. 444), or for any sum not in excess of treble that amount in the discretion of the court (U. S. R. S. § 4921 [Comp. St. 1916, § 9467]). No case can properly be made upon which the court can exercise such discretion on the report as made.

In view of all the circumstances of the case, the exceptions are sustained, and the case recommitted to the master to state an account in accordance with the views herein expressed.

So ordered.

Memorandum in Modification of Opinion.

After the opinion was filed the plaintiff orally directed the court's attention to the following paragraph:

"A serious question arises as to whether the master erred in deducting the profits on the tires identical with the infringing construction, but which did not have the interwoven or embedded wire of the patent in suit. I think this ruling should be sustained for the reason that the plain tread tire was and is satisfactorily used without the wire of the patent in suit, and such tires would not have infringed"

—and claimed that said paragraph was inconsistent with the general conclusion reached in the earlier part of the opinion. No formal motion was made, nor was a motion for rehearing filed, but after correspondence with counsel on both sides a date was set and hearing had as to whether the paragraph above quoted should be stricken from the original opinion or whether the paragraph should stand.

The plaintiff contends that the quoted paragraph takes away the force of the ruling contained in the opinion, which may be briefly stated to be as follows:

"A comparison between the tire of the patent and the old tire of the prior art cannot be taken, for the reason that the new tire has for its characteristic function—nonskidding—something that the old tire did not have. The tire is a complete entity—a unit in itself—and a single and complete article, and for the new and specific purpose contemplated by the patentee the tire is useless without the improvement. It therefore seems imperative to hold that the patented improvement has given the entire value to the combination in which case the plaintiff is entitled to recover all the profits, unless the defendant can show that a portion of them is the result of some noninfringing and valuable improvement made by it."

The defendant contends that the paragraph now under consideration is a correct statement of the law and that it should not be stricken from the original opinion as filed, and has filed an extended brief in support of its contention. While it is true "that the plain tread tire was and is satisfactorily used without the wire of the patent in suit," yet it is, as I view it and have held, equally true that "*for the new and specific purpose contemplated by the patentee* the tire is useless without the improvement."

It was my intention to hold that the plaintiff is entitled to recover of the defendant all the profits which have been shown to have been

received by the defendant on the manufacture and sale of all tires made by the defendant with the patent in suit incorporated into or built into them, because those tires containing the Adams device, which was for a *"new and specific purpose,"* were useless without the improvement for the *particular purpose* for which they were manufactured, to wit, nonskidding, and that while a plain tread tire without the wire was salable for its purpose, yet it could not be fairly said to this plaintiff that it could not recover all the profits received by the defendant on all tires made by the patented improvement which is a permanently incorporated improvement and impossible of removal or detachment.

Whether right or wrong in my conclusion, I feel bound to hold and do hold that the instant case falls within the second rule stated by the Supreme Court in Westinghouse v. Wagner, 225 U. S. on page 614, 32 Sup. Ct. 694, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, which is found in the following language:

"Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits."

This is the rule to apply here. The master held that:

"This accounting therefore falls under division 'd' given in Westinghouse Co. v. Wagner, in which as the court said: 'The plaintiff's patent is only a part of the machine, and created only a part of the profits—if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.'"

But the Supreme Court said on page 615 of 225 U. S., on page 694 of 32 Sup. Ct. (56 L. Ed. 1222, 41 L. R. A. [N. S.] 653):

"The real controversy arises in applying this principle to those cases where it is impossible to separate the single profit into its component parts."

Here I have felt strongly that the wire of the patent made the tire salable "for the new and specific purpose contemplated," viz. a nonskid tire. There were different kinds of nonskid tires on the market, and the nonskid property of a tire was being featured by the different tire manufacturers, and it was that feature which attracted a purchaser who was bent on having a nonskid tire. To say to a purchaser who wanted a nonskid tire, in the words of the special master, as stated in his report:

"In size and component parts it [is] was exactly similar to the plain-tread tire, excepting for imbedding of the wires in the tread portions. The added wire coil could be left out of the tread, and there would be left a serviceable, efficient, and salable plain-tread tire"

—is entirely beside the question, and, if carried to its logical conclusion and adopted by every purchaser as conclusive, would result in no manufacturing or sale at all of nonskid tires with the patented feature embodied in it. It requires no argument to prove that there would be, if the wire of the patent were left out of the tire, a "serviceable, efficient, and salable plain-tread tire"; for, if the patent were eliminated in the construction of a nonskid automobile tire, we would have as the result of such elimination a plain-tread tire. But the wire of the patent in suit made the tire answer the purpose for which it was manufactured, sold to the jobbers, and purchased by the consuming pub-

lic. In my opinion it gave each particular tire its full value "for the new and specific purpose," and without it the tire would have no value "for the new and specific purpose" for which it was manufactured and sold.

Such was the conclusion of Judge Sanborn in Van Brunt v. La Crosse Plow Co. (D. C.) 208 Fed. 281, in applying the doctrine of the Westinghouse Case, for on page 285 he said:

"The case then goes on to hold that, while this burden is on the plaintiff, he meets and overcomes it, and casts it upon the defendant, by showing confusion of profits by the act of defendant. When the plaintiff, by data furnished by defendant, taken from its books, or by other proof, shows that no attempt has been made, or perhaps would be possible, to keep separate the profits due to defendant's improvements from those due to the patented feature taken and infringed by defendant, the latter, even though acting in perfect good faith * * * (which was not the case here), must stand the loss. The profits due to plaintiff's patent and defendant's patents cannot be separated, never could have been separated, by the very nature of the case, because no one can tell just what feature of the seeder influenced a purchaser to buy. But since it turns out that defendant was a wrongdoer, even though an innocent one (which was not the case here), the loss must fall upon it, rather than the plaintiff, whose property was wrongfully appropriated. This is the meaning of the Westinghouse Case, as applied to the case at bar. And the same rule applies to the whole machine, unless a fair apportionment can be made from the evidence between the furrow opener and the balance of the seeder."

And on page 287 the court quoted from Manufacturing Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987, as follows:

"If the improvement is required to adapt the machine to a *particular use*, and there is no other way open to the public of supplying the demand for *that use*, then it is clear that the infringer has by his infringement secured the advantages of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market."

And then said:

"It is entirely settled by these cases that where plaintiff's patent is only part of a machine, but 'the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature,' then the profits are to be calculated on the whole machine. No standard of comparison under these conditions can exist."

So, also, Judge Ray in Decker v. Smith (D. C.) 225 Fed. 776, for on page 783 he said:

"In getting at damages and profits in patent cases the ordinary rules of evidence should be applied so far as applicable, and no arbitrary rules should be allowed to prevail over the clear equities of the case. But an infringer, so adjudged, is held to be a trustee for the owner of the patent infringed, and, if he has so intermixed and confused the profits received with other matters that either he or the one whose rights have been invaded, and disregarded must bear a loss, that loss must be on the infringer. This has been decided many times."

Other passages from the Westinghouse Case are illuminating, and may, I think, with some force be particularly apposite to the case at bar. For instance, on page 615 of 225 U. S., on page 694 of 32 Sup. Ct. (56 L. Ed. 1222, 41 L. R. A. [N. S.] 653), the Supreme Court said:

"In considering the question presented by the record here, it is to be borne in mind that Congress has legislated (Rev. Stat. § 4921) with a view of affording the patentee ample redress against the infringer. It not only makes the latter liable for damages—sometimes threefold damages—but for all profits derived from the use or sale of plaintiff's intervention. The rule as to the burden of proof has, however, been so applied that this statutory right has been often nullified by those infringers who had ingenuity enough to smother the patent with improvements belonging to themselves or to third persons. In such cases, the greater the wrong the greater the immunity; the greater the number of improvements the greater the difficulty of separating the profits. And if that difficulty could only be converted into an impossibility the defendant retained all of the gains, because the injured patentee could not separate what the guilty infringer had made impossible of separation. Manifestly such consequences demonstrate that either the rule or its application is wrong. The rule is sound, for it but announces the general proposition that the plaintiff must prove its case and carry the burden imposed by law upon every person seeking to recover money or property from another. But the principle must not be pressed so far as to override others equally important in the administration of justice. It may serve to illustrate the rule and its limitations, if, at the risk of stating the obvious, we apply it to the various steps of this case."

And again the passage from the opinion found on page 620 of 225 U. S., on page 696 of 32 Sup. Ct. (56 L. Ed. 1222, 41 L. R. A. [N. S.] 653), is, in my opinion, particularly fitting to the position in which the defendant is in, especially in view of the facts established by the testimony. The court there said:

"6. But when a case of confusion does appear, when it is impossible to make a mathematical or approximate apportionment, then from the very necessity of the case one party or the other must secure the entire fund. It must be kept by the infringer, or it must be awarded by law to the patentee. On established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take the advantage of his own wrong. The fact that he may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability. He cannot appeal to a court of conscience to cast the loss upon an innocent patentee and by judicial decree repeal the provision of Rev. Stat. § 4921, which declares that in case of infringement the complainant shall be entitled to recover the 'profits to *be accounted* for by the defendant.'"

Upon further consideration of the nature of this case, and holding that rule "b" applies, and not rule "d," and that there may be no misunderstanding before the master when the case is remanded and further proceedings had before him, the paragraph under discussion as contained in the original opinion may be stricken out.

The exceptions are sustained, and the case remanded to the master, to state an account in accordance with the views expressed in the original opinion as amended by this memorandum. At oral argument upon this modification an interlocutory decree was submitted to the court for signature; but the better practice, it seems to me, is to await the further report of the master, and upon the filing of that report, and the proceedings taken subsequent thereto, counsel may then take such steps respecting the decree, and what shall be embodied in it, as may then seem proper.

Ordered accordingly.

UNITED STATES ex rel. KOOPOWITZ v. FINLEY, Colonel, etc.

(District Court, S. D. New York. November 3, 1917.)

1. ARMY AND NAVY ⊂⊃20—SELECTIVE DRAFT ACT—PROVISIONS OF STATUTE.
Members of a local draft board have no authority to waive any of the provisions of the Selective Draft Act, or regulations made thereunder.

2. HABEAS CORPUS ⊂⊃16—SELECTIVE DRAFT ACT—LOCAL BOARD—HEARING.
Selective Draft Act May 18, 1917, § 2, declares that such draft shall be based on liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of 21 and 30. Section 4 authorized the establishment of district boards, having authority to review the determination of local boards. Section 5 declared that all male persons between the ages of 21 and 30 shall be subject to registration. Rules and regulations promulgated by the President pursuant to section 4 declared that resident aliens who had not taken out their first papers should be exempt, upon the filing of a claim of exemption supported by an affidavit. Section 20 declared that the claim should be filed with the local board on or before the seventh day after the mailing by the local board of the notice required to be given the registrant of his having been called for service. Relator, a nondeclarant alien, registered and submitted to a physical examination, but made no claim for exemption on or before the seventh day after mailing by the local board of the notice of call to appear for physical examination. Thereafter relator claimed exemption, which was denied by the local board, which certified him for military service, and an appeal to the district board was dismissed. *Held* that, while civil courts can afford relief from orders of the administrative boards having charge of registration only for a manifest abuse of the discretion of such boards, relator was not denied a fair hearing by the local and district boards, and was properly certified for military service.

3. ARMY AND NAVY ⊂⊃20—SELECTIVE DRAFT ACT—LOCAL BOARD—HEARING.
Under such act and regulations, as nondeclarant aliens are required to register and might be subjected to draft, save for treaty obligations, the local board had jurisdiction over relator, and his failure to duly claim exemption rendered him liable for military service; it being obvious that Congress would not have required such aliens to register, had they been absolutely excluded.

4. ARMY AND NAVY ⊂⊃20—DRAFT—POWER OF CONGRESS.
Regardless of treaties, Congress has power to subject all residents of the United States to draft for army purposes, without respect to citizenship or alienage.

5. STATUTES ⊂⊃184—CONSTRUCTION.
In construing statutes, effect should, whenever possible, be given to the provisions thereof, and that construction should be placed upon the statute which will enable its general plan to be carried out.

Habeas Corpus. Application by the United States, on the relation of Joseph Koopowitz, alias Jacob Koopowitz, for a writ against John P. Finley, Colonel Infantry, D. O. L., in Charge Militia Affairs, Headquarters Eastern Department, United States Army. Writ dismissed.

Meyer Greenberg, of New York City, for relator.

Francis G. Caffey, of New York City, U. S. Atty., and Harold A. Content, of New York City, Asst. U. S. Atty., for respondent.

MAYER, District Judge. The relator is brought before the court on a writ of habeas corpus. A full statement of the facts is desirable:

The petition of relator, who describes himself as "Joseph" Koopowitz, sets forth that he is a Russian citizen, born in Kovna, Russia, on February 10, 1888, and arrived in the United States in August, 1915; that he is a nondeclarant alien, having never filed his intention to become a citizen of the United States; that he was drafted for service in the army of the United States, and received an order on September 24, 1917, directing him to report for military service on September 29, 1917, at Camp Upton, at Yaphank in the state of New York; that he claimed exemption before the local board, and appealed to the district board for the city of New York from the decision of the local board; that his claim of exemption was based upon the fact that he was and still is a nondeclarant alien; that on October 3, 1917, he was arrested by the military authorities for not reporting for duty under the order of September 24, 1917, and is now in custody. The relator annexes a copy of his passport, purporting to show that he was a resident in South Africa for over six years prior to July 19, 1915, and that he was possessed at said time of his Russian passport. He also annexes a sheet containing his finger prints for comparison with the finger prints on the passport.

The return on behalf of the respondent alleges that relator duly registered on June 5, 1917, under the name of "Jacob" Koopowitz, pursuant to the so-called Selective Draft Act of May 18, 1917; that by reason of the residence from which relator registered he is under the jurisdiction of local board for division No. 57 of the city of New York, state of New York; that relator's red ink number is 721, and his order number is 209. It is further set forth that on August 1, 1917, the said local board duly mailed and caused to be mailed, pursuant to the regulations prescribed by the President, in accordance with the provisions of the act of May 18, 1917, to said relator, Jacob Koopowitz, a notice of call and to appear for physical examination before the said local board on August 7, 1917, and that the said notice set forth, "Any claim for exemption or discharge must be made on forms which may be procured at the office of this local board, and must be filed at the office of this local board on or before the seventh day after the date of mailing this notice," and the said notice bore on the bottom thereof the date of mailing aforesaid; that on August 7, 1917, relator appeared before the said local board and duly submitted to a physical examination, and was examined by C. H. Hall, M. D., examining physician, and was found by the board to be physically qualified for military service; that no claim for exemption or discharge was made or filed by the relator, or by any other person in respect of the relator, on or before the seventh day after the mailing by the local board of the notice of call and to appear for physical examination; that, no claim for exemption or discharge having been filed by or on behalf of the relator within the time limited by the regulations prescribed by the President, the said local board duly certified relator for military service to the district board; that on August 12, 1917, the local board caused to be mailed to relator a notification that he had thus been certified for military service to the district board; that on August 18, 1917, an appeal from the decision of the local board was filed with the district board, and on August 24, 1917, the district board

disallowed the appeal, and affirmed the decision of the local board, and held relator for military service; that on August 30, 1917, the district board certified back relator for military service to the local board; that on August 31, 1917, the local board caused to be mailed a notice, familiarly known as the "green card," notifying relator that he had been selected for military service and requesting him to hold himself in readiness to report to the local board for military service at a date subsequently to be announced; that on September 24, 1917, the local board caused to be mailed to relator a notice, familiarly known as the "red card," ordering relator to report at the local board on September 29, 1917, at 7 in the forenoon, for military service at Camp Upton; that relator failed and neglected to respond to said notice, and that on or about October 3, 1917, relator was duly arrested and turned over to the military authorities because of his failure to report for military service.

In order to have all the facts before the court, permission was given to relator to file further affidavits in support of his petition. In accordance with such permission, relator filed an affidavit, verified October 26, 1917, wherein he set forth that, when he appeared for physical examination on August 7, 1917, he stated to the members of the local board, whose names he does not know, that he was an alien, a Russian subject, and that he did not think that he was to be drafted; that he asked them whether he had anything to do in the matter, and was informed by some one sitting at the desk writing that, as long as he was an alien, he had nothing to do and that he would not be called. It will be noted that this statement, if made, came from some unidentified person. He further swears that on August 8, 1917, he spoke to a friend of his, one Stambul, and informed him that he had been told by the members of the board that he need not do anything, whereupon Stambul informed him that it was necessary for him to file a regular exemption blank, and he then went that evening to the board and asked for a blank, stating that he wished to file his claim for exemption and again was informed by a man sitting at the desk writing, who was a member of the board, "as relator is informed and verily believes," that as long as he was an alien he need not worry; that he would not be called. He further states that the next day Mr. Stambul went with him to the office of an attorney, and the attorney advised relator immediately to cause his exemption blank to be filed, and on the following day, which was August 8, 1917, he brought his exemption blank to the board, but they refused to take it from him, claiming that it was too late. He further states that he gave his name as Joseph Koopowitz, but that his name was erroneously recorded as Jacob Koopowitz. Relator submits the affidavit of Stambul in corroboration of those matters and things as to which reference is made to Stambul in relator's affidavit.

[1] In answer to the foregoing each of the three members of the local board definitely and specifically denies the statements in relator's affidavit in respect of conversation with relator. Obviously the members of the local board had no power to waive any of the provisions of the statute or of the regulations made thereunder; for, if relator as matter of law was called upon to file his claim of exemption, he was

obligated to do so in the manner prescribed by the statute and the regulations.

[2-5] Briefly stated, the question is this: Is a person who failed to claim exemption on the ground that he was a nondeclarant alien, and who now asserts (without contradiction) that he is such an alien, properly in the custody of the military authorities? Section 2 of the act of May 18, 1917, provides, among other things:

"Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act."

Section 5 of the act provides in part as follows:

"Sec. 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; * * * and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

Under section 4 of the act, Congress outlined the administrative machinery which the President was authorized "to create and establish" in order to work out the elaborate detail which this difficult problem of raising a draft army presented. By that section the President, in his discretion, was authorized to establish local boards, and the powers of such local boards, so far as here relevant, were described as follows:

"Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President."

Section 4 also provides:

"Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. * * *

"The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision. * * *

"The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft."

The practical construction of the statute by the Executive is illustrated by section 18 of the Rules and Regulations prescribed by the President for local and district boards, the title of said section being:

"Persons or Classes of Persons to be Exempted by a Local Board."

The section begins as follows:

"The following persons or classes of persons, if called for service by a local board and not discharged as physically deficient, shall be exempted by such local board upon a claim for exemption being made and filed by or in respect of any such person, and substantiated in the opinion of the local board, and a certificate of absolute, conditional, or temporary exemption, as the case may require, shall be issued to any such person."

Later in the section, under various subdivisions, are enumerated the persons or classes of persons to be exempted by the local boards, and in subdivision (f) it is provided:

"(f) *All Other Resident Aliens Who have Not Taken Out Their First Papers.* —Any person who is a resident alien—that is, a citizen or subject of any foreign state or nation other than Germany—who shall not have declared his intention to become a citizen of the United States, upon presentation to such local board, at any time within 10 days after the filing of a claim of exemption by or in respect of such person, of an affidavit signed by such person setting forth the following information:

"1. Date and place of birth.

"2. Date of immigration into the United States.

"3. Whether he has taken out his first papers—that is, declared his intention to become a citizen of the United States.

"4. Present address: and upon presentation by affidavits of such other evidence as may be required in the opinion of the board to substantiate the claim."

It is also provided in this same section that:

"The statement on the registration card of any such person that exemption is claimed shall not be construed or considered as the presentation of a claim for exemption."

In brief, it thus appears that a nondeclarant alien could obtain his exemption upon filing a proper claim therefor. Section 20 of the Regulations provides that such claim must be made by the claimant or by some other person in respect of the claimant on a form prepared by the Provost Marshal General and furnished by the local boards for that purpose. This section further provides:

"Such claim must be filed with the local board on or before the 7th day after the mailing by the local board of the notice required to be given such person of his having been called for service."

From the foregoing it will be seen that all the forms of law and procedure were duly and properly complied with by both the local and the district boards. Relator not having filed his claim for exemption within the prescribed period, there was nothing before the board to show that he was entitled to exemption, and as a result he was properly certified to the district board, which in turn properly disallowed relator's appeal. In the recent case of Angelus v. Sullivan, 246 Fed. 54, the court said:

"While disagreeing therefore with the opinion expressed by the district judge that the courts cannot interfere with the action of the boards and hold-

ing as we do that the civil courts can afford relief from orders made by such boards in any case where it is shown that their proceedings have been without or in excess of their jurisdiction or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act, we nevertheless approve the conclusion he reached that the bill should be dismissed."

In the case at bar a fair hearing was not denied to relator, and both the local and the district boards acted in strict accordance with the procedure laid down by the Regulations.

The remaining question is whether the local board wholly lacked jurisdiction. It is contended, because nondeclarant aliens are exempted from the draft, that no obligation was placed upon relator affirmatively to present his claim for exemption, and this is but another way of stating that by virtue of the act itself relator was automatically exempted. It must be conceded at the outset that Congress had the power to subject all persons to the draft, whether citizen or alien.[1]

The question, then, is whether, from the structure of the act, it was the intention of Congress that only those who claimed exemption should in proper cases be exempted or whether those entitled to exemption could disregard the procedure provided for by the act and the Regulations and show aliunde, as here, that they fell within one of the statutory exempt classes. Putting the matter another way, the question is whether the government was required under the act affirmatively to ascertain whether relator was exempt or whether the duty rested upon relator to show that he was exempt.

In answering these questions it must be remembered that the case calls for the construction of a statute, and, in construing this statute, it is important to understand the machinery erected by it and the methods and manner which it prescribes for bringing into the service of the United States those who are within the statutory draft age. It would, of course, have been easy for Congress to accept nondeclarant aliens from the registration provision of section 5. For instance, it did not include, and therefore excluded, women. It did, however, include all male persons within the draft age. The obvious purpose of this provision of section 5 was to construct a roster throughout the entire nation, which, as it were, would constitute prima facie the list from which the draft was to be made up. Section 5 made all registered persons subject to draft, "unless exempted or excused therefrom as in this act provided." There seems to be good reason, as matter of language, for using both words; that is, "exempted" and "excused." Certain persons were by the act made exempt. Thus, to illustrate: Under section 4 regularly or duly ordained ministers of religion are exempt. Under the same section, however, the President was authorized to exercise his discretion to exclude or discharge from the draft or to draft for partial military service only, certain other classes, such, for instance, as county and municipal officials. These latter classes were not entitled to exemption as matter of right, for Congress conferred upon the President the discretion of determining

[1] In stating this proposition I am not to be understood as referring in any manner to what the Legislative and Executive branches might deem to be the proper course to pursue in respect of treaty obligations, if any.

whether certain classes should be excluded, which is but another way of conferring upon the President the right to excuse these classes. By virtue of section 2 of the act above quoted, nondeclarant aliens are exempt because not included. But section 2 provides that the draft "shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act."

This, therefore, is a general declaration in the early part of the act that the draft is to take place under lawful presidential regulations and, later in the act, to wit, in section 4, Congress has provided for the general nature and character of the regulations. Certainly section 5, as to registration, so far as it included nondeclarant aliens, would have been a useless provision, if the act did not after that operate upon nondeclarant aliens, as well as upon all other classes made exempt by the statute. Whether a person is a nondeclarant alien or not is a question of fact, exactly the same as whether a person is a duly ordained minister of religion or a student for the ministry in a recognized theological or divinity school, and the clear purpose of the act was that the fact should be ascertained by the administrative boards which the President was authorized to create. Any other method would have made the act, in part at least, unworkable, and it is a familiar rule of construction of statutes that, whenever possible, effect shall be given to the provisions of a statute, and that that construction shall be placed upon it, if possible, which shall enable its general plan or scheme to be carried out. Further, it is quite plain that Congress had in mind that some of those exempted by the act might not claim exemption and might be willing to serve in accordance with the draft.

It must be further assumed that it was impossible for the local and district boards, or any other governmental agencies, independently to ascertain whether or not a relator was a nondeclarant alien; for such an inquiry would involve a search of the records of the naturalization courts, federal and state, throughout the entire country, to ascertain a negative, to wit, whether a person had not declared his intention—an obvious impossible and absurd inquiry. The whole plan of the act is undoubtedly to require that those who claim exemption shall affirmatively present their claim to the appropriate body, so that that body can determine as a fact whether the person falls within the exempted classes. When, therefore, no such claim is presented, and the proceedings of the local and the district boards are regular in every respect, the court cannot go outside of the proceedings of the boards to determine independently something which the act required should be determined by these boards. It is, of course, not strange that some who would have been entitled to exemption have failed to claim exemption; but the remedy, if any, in such case, does not lie with the courts.

For the foregoing reasons the writ is dismissed.

UNITED STATES v. PIERCE et al.

(District Court, N. D. New York. November 7, 1917.)

1. WAR ⊜4—ESPIONAGE ACT—OFFENSES—PUBLICATIONS.
The circulation and distribution of pamphlets falsely charging unworthy motives to Congress in declaring that a state of war existed between the United States and Germany, exaggerating the horrors of war, inveighing against conscription, and falsely stating that a high governmental official had done unlawful acts so he had no time to prosecute food speculators, is a violation of the so-called Espionage Act June 15, 1917, c. 30, § 3, declaring that whoever, when the United States is at war, shall willfully make or convey false reports 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, shall be guilty of an offense, for the mere intent to interfere with the success of the military or naval forces of the United States is sufficient, though the false reports do not have such effect, and the obvious effect of such pamphlets would be to encourage its enemies and hinder the operations of the United States.

2. CONSTITUTIONAL LAW ⊜90—WAR ⊜4—FREEDOM OF SPEECH AND PRESS —SCOPE.
Const. U. S. Amend. 1, declaring that Congress shall make no law abridging the freedom of speech or of the press, merely preserves the right to fairly criticize and comment, and does not justify lawlessness; therefore the so-called Espionage Act June 15, 1917, c. 30, § 3, denouncing the offense of willfully making or conveying false reports with intent to hinder the operation or success of the military or naval forces of the United States or to promote the success of its enemies is valid, and the circulation of pamphlets containing false and misleading statements calculated to have that effect cannot be justified as an exercise of freedom of speech or political argument.

3. WAR ⊜4—ESPIONAGE ACT—OFFENSES—JURY QUESTION.
In a prosecution under the so-called Espionage Act June 15, 1917, c. 30, § 3, for circulating of pamphlet containing false reports, it is a question for the jury whether the statements, if false, were willfully made with intent to hinder military operation of the United States or promote the success of its enemies.

4. WAR ⊜4—ESPIONAGE ACT—OFFENSES—INTENT.
In a prosecution under the so-called Espionage Act June 15, 1917, c. 30, § 3, intent to hinder military operations of the United States or promote the success of its enemies may be inferred from the character of the false statement and the circumstances of the circulation.

5. CRIMINAL LAW ⊜312—INTENT—PRESUMPTION.
Intent is a question of fact, every sane person being presumed to intend the natural and probable consequences of his words and acts.

6. CONSPIRACY ⊜43(6)—INDICTMENT—SUFFICIENCY.
An indictment charging that plaintiffs throughout the period of time from the 6th day of April, 1917, to the day of the finding and presentment of the indictment and during which period the United States had been at war, within the Northern district of New York and Albany, unlawfully and feloniously conspired, combined, confederated, and agreed together to interfere with, prevent, hinder, and delay the execution of certain laws of the United States, setting them forth, and that during the period of conspiracy it was agreed that each of the defendants should discourage, obstruct, and prevent the prosecution by the United States of war with Germany, and further alleged that the offenses were committed in the city of Albany, is sufficiently definite; it not being necessary to specify the exact place where the conspiracy was formed or the exact time, a continuing conspiracy being charged.

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7. WAR ⟸4—ESPIONAGE ACT—OFFENSES—"OBSTRUCT."
Under the so-called Espionage Act June 15, 1917, c. 30, § 3, which declares that 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 enemy, 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, shall be punished, three classes of offenses are denounced, the first consisting of the making of false reports or statements with the specified intent, the second for willfully attempting to cause disloyalty, and the third in willfully obstructing the recruiting or enlistment service of the United States to the injury of the service; and it is no defense to a prosecution for willfully obstructing the recruiting or enlistment service to the injury of the United States that there was no actual prevention of enlistment or compliance with draft legislation, for obstruction does not necessarily mean prevention, and the act was leveled at persons who should attempt to prevent enlistment, etc.

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

8. WAR ⟸4—ESPIONAGE ACT—OFFENSES—SCOPE—"INJURY TO SERVICE."
Under such section, the expression to "the injury of the service" of the United States refers to the prevention of enlistment, etc., and hence an indictment charging willful dissemination of false reports, and the willful attempting to cause insubordination, etc., need not allege that it was to the injury of the service of the United States.

9. CONSTITUTIONAL LAW ⟸90—FREEDOM OF SPEECH—POLITICAL PARTIES.
Citizens have a right to criticize existing laws and advocate their amendment or repeal, but they have no right to encourage and solicit resistance to the execution of laws, and such counsel and solicitation cannot be justified on the ground that it was a dissemination of arguments in favor of a political party.

At Law. Clinton H. Pierce and others were indicted for conspiracy under Criminal Code (Act March 4, 1909, c. 321), § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), and also violations of the so-called Espionage Act, §§ 3 and 4. On demurrer. Demurrer overruled.

See, also, 245 Fed. 888.

D. B. Lucey, U. S. Atty., of Ogdensburgh, N. Y.
Frederick A. Mohr, of Auburn, N. Y., for defendants.

RAY, District Judge. Since April 6, 1917, the United States has been at war with the Imperial German Government, on which day the Congress of the United States by joint resolution duly approved stated:

"That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared," etc.

May 18, 1917, Congress enacted what is commonly and popularly known as the Selective Draft Act (Act May 18, 1917, c. 15), approved that day. This act provides for the increase of the regular army, the enlistment of men in the military service of the United States, and the drafting of men for the purpose. This was done to enable the United

States to prosecute the war thus thrust upon us to a successful determination. June 15, 1917, Congress enacted what is commonly known as the Espionage Act (Act June 15, 1917, c. 30), approved that day, and which is entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage and better to enforce the criminal laws of the United States, and for other purposes." Section 3 of this act reads as follows:

"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."

[1] It is seen at a glance that whoever, when the United States is at war, willfully makes or conveys 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, commits a crime against the United States. It is not necessary that the operation or success of the military or naval forces be actually interfered with, or that the success of its enemies be actually promoted. The making or conveyance of false reports or false statements with the intent to interfere with the operation or success of either the military or naval forces of the United States or to promote the success of the enemies of the United States is all-sufficient.

The defendants have extensively circulated and spread broadcast a printed pamphlet or circular containing, with other things, the following:

"Conscription is upon us; the draft law is a fact!

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;

"Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

"Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

"Then they will be shipped through the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

"Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

"Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; and every pang will be multiplied in its passage to you.

"Black death will be a guest at every American fireside; mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

"And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

"And still the toll of death will grow.

"Let them come! Let death and desolation make barren every home! Let the agony of war crack every parent's heart! Let the horrors and the miseries of the world-downfall swamp the happiness of every hearthstone!"

To this is added:

"Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!"

Then, after referring to the war and its horrors, we find the following:

"You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay."

To this is added:

"It is the price you pay for your stupidity—you who have rejected Socialism!"

Then, after referring to food prices, we find the following:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers."

Then later:

"We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely, killing. * * *

"We have been telling you all for, lo, these many years that the whole nation could be mobilized and every man, woman and child induced to do his bit for the service of humanity; but you laughed at us.

"Now you call every person traitor, slacker, pro-enemy, who will not go crazy on the subject of killing; and you have turned the whole energy of all the nations of the world into the service of their kings for the purpose of killing, killing, killing.

"Why would you not believe us when we told you that it was possible to cooperate for the saving of life?

"Why were you not interested when we begged you to work all together to build, instead of to destroy? To preserve, instead of to murder?

"Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellow-workers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man?

"Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded, you are paying for them now.

"Lo, the price you pay! Lo, the price your children will pay! Lo, the agony, the death, the blood, the unforgettable sorrow—the price of your stupidity! * * *

"VII. For this war—as every one who thinks or knows anything will say, whenever truth telling becomes safe and possible again—this war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

"It is to determine whether interest, dividends and profits, shall be paid to investors speaking German or to those speaking English and French.

"Our entry into it was determined by the certainty that if the allies do not win J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

We have here, not only lurid and exaggerated pictures of the horrors of war, possible and impossible, but many false statements calculated to incite opposition to the war and opposition to the government and also calculated to interfere with the morale of our armies, discourage enlistments, registration, and willing service in our armies, and encourage desertion. These false statements are also calculated

to encourage our enemies and discourage and intimidate our own citizens and soldiers, and thereby promote the success of our enemies. It is not true that the recruiting officers will take our sons of military age and "impress them into the army." It is not true that, "You are being dragged, whipped, lashed, hurled into it" (the army or the war). It is not true that, "The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers." The Attorney General of the United States is not doing anything of the kind. It is not true that, "We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely, killing." It is not true that, "Now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of killing; and you have turned the whole energy of all the nations of the world into the service of their kings for the purpose of killing, killing, killing." It is not true that, "Our entry into it (this war) was determined by the certainty that if the allies do not win J. P. Morgan's loans to the allies will be repudiated and those American investors who bit on his promises would be hooked." Here is a plain assertion to every intelligent mind that the declaration of war to which reference has been made contains a falsehood, and that such declaration was made because of the fear that the allies might not win, and that in such case J. P. Morgan's loans to the allies would be repudiated, payment refused, and that American investors would lose their loans and suffer loss. In other words, that our entry into this war with Germany was determined upon by Congress to insure, if possible, the success of the allies, to the end that they would fulfill their contracts and pay the loans made them by individuals in the United States. The purposes and motives of our President and of Congress are impugned and grossly misrepresented and falsified. What reports or statements can be more or better calculated to interfere with the operation and success of our military and naval forces in this war, or more or better calculated to promote the success of the enemies of the United States?

[2-5] It is said, first, this pamphlet is an argument in favor of Socialism and of the Socialistic party; and, second, that such publications are proper and allowable under our Constitution, which prohibits curtailment of freedom of speech and of the press.

The first amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

If this means that every man and woman in the United States in times of war and national peril may falsely state or say in words, or by means of pamphlets and writings printed and spread broadcast, anything and everything he pleases, however injurious to the general welfare and however grossly false the statements and however detrimental to the success of our military and naval forces the falsehood may be, and that Congress is powerless to enact a law abridging this right, then

the law under consideration is unconstitutional except in so far as it merely prohibits the circulation and distribution of such pamphlets containing the false reports and false statements of the nature described. In Warren v. United States, 183 Fed. 718, 721, 106 C. C. A. 156, 159 (33 L. R. A. [N. S.] 800) the Circuit Court of Appeals, Eighth Circuit, said:

"Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances," etc.

In United States v. Toledo Newspaper Co. (D. C.) 220 Fed. 458, it is held that the constitutional guaranty of freedom of the press is not infringed by summary process and conviction of contempt for publication tending to obstruct the administration of justice. If this be correct, why may not Congress enact a law making it an offense to make and spread broadcast, when a state of war exists, pamphlets containing materially false statements which are intended to interfere with and obstruct the lawful raising and organization of armies and the military operations of the government and which pamphlets are calculated to have that effect? Suppose a man goes out and publicly advocates by means of false statements the overthrow of our national government, the disbandment of our lawfully created national armies, organized for national defense in time of war, and puts his false declarations and statements in pamphlet form and circulates them, can it be doubted that Congress may constitutionally prohibit such acts? In State v. Pape, 90 Conn. 98, 96 Atl. 313, it is held:

"Liberty of speech and of the press is not license, not lawlessness, but the right to fairly criticize and comment."

See, also, Ex parte Bird, 5 Porto Rico, 241.

In Turner v. Williams, 194 U. S. 279, 294, 24 Sup. Ct. 719, 724 (48 L. Ed. 979) Mr. Chief Justice Fuller said:

"The flaming brand which guards the realm where no human government is needed still guards the entrance; and as long as human governments endure they cannot be denied the power of self-preservation as that question is presented here."

The act of Congress in question here is one obviously enacted and necessary for the preservation of our government and the enforcement of its rights. In my judgment to deny its constitutionality is to deny to the government of the United States the power of self-preservation by suppressing the publication and distribution of false statements made with the intent to destroy the morale and efficiency of our armies when engaged in lawful warfare, and prevent or interfere with their lawful organization and the lawful recruiting thereof. Such publications give aid and comfort to the enemy.

If a jury on evidence should find that this pamphlet contains false statements calculated to discourage our armies and enlisted men, discourage compliance with our draft laws, and interfere with their enforcement, or impair the morale of our armies, and that it was the intent of the writer and distributor to bring about such results, can it be justified on the theory that our Constitution warrants and protects the making of such false statements disseminated for such a purpose?

I think not. Freedom of speech and of the press does not give liberty to the individual to prevent or interfere with the preservation of our government, or the organization and success of our armies, and this may not be done under the guise of advocating the principles of a political party or the principles of Socialism. In the instant case, the language employed and contained in this pamphlet is for the consideration of the jury, and it will be for the jury to say whether or not the statements made, if proven to be false, were willfully made with intent to interfere with the operation or success of our military or naval forces, or to promote the success of our enemies, or willfully attempt to cause insubordination, or refusal of duty in such forces of the United States.

This intent may be inferred from the nature and character of the false statements made and promulgated and the surrounding circumstances and conditions, and on a consideration of the conditions under which made and of the persons to whom made. The false statements must be willfully made, and their making and promulgation must be accompanied by the intent specified. Intent is a question of fact. Every sane person is presumed to intend the natural and known consequences of his acts voluntarily and knowingly done and of words used.

It is for the jury to say, or will be, probably, under all the evidence in the case, if proof is given tending to sustain the allegations of the indictment, whether the defendants in spreading and distributing these pamphlets were merely advocating the principles and doctrines of the Socialistic party, or were attempting to discourage the war, enlistments, and recruiting, and impair the morale of our army, and thereby interfere with the operation and success of the military and naval forces of the United States to the injury of the United States, and intended so to do.

Depicting the horrors of war, the devastation of country and destruction of life and property caused by war, may present an argument against engaging in war unnecessarily—a reason for not doing so —but when coupled with materially false statements and representations as to what the officers and representatives of the government are doing and as to why the war was engaged in or declared by the law-making body of the nation, the realm of legitimate argument and free speech is departed from, and a question of fact is presented for the decision of a jury whether the horrors of war were depicted and the false statements made to advance and promulgate the principles of a political party or to interfere with and destroy the efficiency of our armies and interfere with the operation and success of our military and naval forces and promote the success of the enemies of the United States. It must be that "free speech" and "freedom of the press" has its limitations and do not include and protect the making and promulgation of false statements knowingly made with intent to destroy our armies in time of war and interfere with and prevent the enforcement of our laws.

[6-8] It is urged that the conspiracy counts are insufficient, in that they do not charge what the conspiracy was, or what the conspirators were to do. The indictment charges that "throughout the period of time from the 6th day of April, 1917, to the day of the finding and

presentment of this indictment" (October 25, 1917), the United States has been at war, and that "during said period of time the defendants," naming them, within the Northern district of New York at Albany, N. Y., "unlawfully and feloniously have conspired, combined, confederated, and agreed together * * * to interfere with, prevent, hinder, and delay the execution of certain laws of the United States, to wit." These laws are then specifically named and pointed out. It is charged to have been a continuing conspiracy commencing on a day certain and continuing in force and operation down to the date of the indictment. The indictment then charges "that during said period of time"—that is, from the beginning to the end thereof—the conspiracy was that each of said defendants "should and would discourage, obstruct, and prevent the prosecution by the United States of said war between the United States and the Imperial German Government, and prevent, hinder, and delay the execution of said laws (the ones specified and pointed out) above enumerated, by personal solicitation, public speeches, and various pamphlets which they should and would distribute and circulate, intending and attempting to cause and influence various persons available for military duty to fail to register and to refuse to submit to registration and draft for service in said military and naval forces and to fail and refuse to enlist for service therein," etc. Then follows the charge of overt acts in execution of such conspiracy. Nothing is said to the effect that the conspiracy includes the use or distribution of pamphlets containing false or untrue statements, but it is charged that defendants conspired to willfully cause and attempt to cause insubordination and refusal of duty, etc. The pamphlet is attached to and made a part of the indictment. Certain parts are quoted in the body of the indictment, and the statements quoted and other parts are alleged to be false.

It is urged by defendants that the statements of fact contained in the pamphlet are but the expression of an opinion, as, for instance: "Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army." The word "impress," in connection with the creation of an army, implies the use of force, and the words of the pamphlet may be found to be calculated and intended to create the belief that recruiting officers are going and do go into our homes and by force, and without any preliminary selection for military service in accordance with law, seize and force into the army and navy the sons of our citizens. The statement is calculated, and may have been intended, to create a feeling against recruiting, the selective draft act, and the officials of the government. Such statements inspire resistance and strengthen the determination of those disposed to be at all recalcitrant. It may be that there is no direct statement that one is in duty bound to resist, but it is plainly taught and indicated that it will be to the interest of many, if not all, to resist. Is the quoted statement a mere expression of opinion as to what is being done or is to be done? Is it not a bald statement of what is being done and is to be done under a law of Congress which justifies no such act by a recruiting officer? Then take this statement, "The Attorney General of the United States is so busy sending to

prison men who do not stand up when the Star Spangled Banner is played that he has no time to protect the food supply from gamblers."

Is this an expression of opinion merely, or is it a bold, bald assertion that a fact exists, that a thing has been done and repeatedly done by the highest law officer of the national government without warrant of law? Is it not an assertion well calculated to excite hatred of this high official of the government, by asserting that he is doing unlawful acts and so busily engaged in the doing that he pays no attention to the enforcement of laws providing for food conservation? Such statements are likely to be given credence in certain localities by certain classes, and so incite opposition to the government and opposition to law and its enforcement. It seems clear to me that these and other statements above quoted and found in the pamphlet are to be considered by the jury, which is to determine their truth or falsity, the willfulness of the act, and the intent and purpose of the ones who made and promulgated them.

Section 3 of the so-called Espionage Act, hereinbefore quoted, clearly points out three classes of acts constituting offenses thereunder. The first consists in the willful making or conveying false reports or statements with the intent specified. The second consists in willfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The third consists in willfully obstructing the recruiting or enlistment service of the United States to the injury of the service of the United States. It may be a question whether the making and conveyance of false reports and 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, must be accompanied by an intent and purpose to injure the service of the United States, and whether such false reports and statements must be of a nature or character which would injure the service of the United States. So it may be a question whether one who willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, must intend and purpose to injure the service of the United States. In short, do the words "to the injury of the service of the United States" relate back to and qualify each of the clauses of the section? Must the indictment allege, and must the government prove, not only that the United States is at war, and that the false reports and statements were made and conveyed with intent to interfere with the operation or success of the military or naval forces, but that such acts actually resulted either in injury to the service of the United States or were intended so to do?

This is true as to obstructing the recruiting and enlistment service as the section so says in plain terms. But the obstruction need not be physical and all obstruction of such service is injurious to the service of the United States. Obstruction does not necessarily imply prevention. The flowing stream of water may be obstructed, and often is, while its continuous onward flow is not wholly prevented, and its ultimate onward flow may not be prevented at all. Any and all acts and words or writings that interfere with the operation or success of

the military or naval forces of the United States, and all attempts, successful or unsuccessful, by acts, words, or writings, to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States in time of war, work to the injury of the service of the United States. When Congress wrote into section 3, above quoted, the words "or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States," it may have had in mind the hundreds and thousands of cases where fathers and mothers and brothers and sisters will obstruct in a way and to an extent the recruiting and enlistment service by urging and soliciting their sons and brothers not to enlist. No one will contend, I think, that such an act will be held a willful obstruction of the enlistment service to the injury of the service of the United States within the intent and meaning of section 3 of the act under consideration. But should some third person go about soliciting and urging young men not to enlist, extravagantly and untruly depicting the horrors and dangers and consequences of war, impugning the motives and purpose of the President and Congress in declaring war, and misrepresenting the objects sought to be attained by our government in declaring the existence of a state of war, we have a case where a jury well may find a willful obstruction of the recruiting or enlistment service of the United States to the injury of the service of the United States, even if the government is unable to prove that a single person was induced by such acts not to enlist when otherwise he would have enlisted.

Counts 1 and 2 of the indictment charge conspiracy. The other counts charge the offenses specified in section 3 of the so-called Espionage Act, and charge the making and conveyance of false reports, etc., and the willful attempting to cause insubordination, etc., in two ways—"to the injury of the service of the United States" and also in another count without this clause. I think either count sufficient in law. The count which charges the willful obstruction of the recruiting and enlistment service also charges that it was done to the injury of the United States, and is clearly sufficient.

The indictment seems to have been drawn with care and with abundant caution and is sufficiently definite as to time and place. The places where these offenses are alleged to have been committed is the city of Albany in the Northern district of New York. The time is specified. It was not necessary to specify the street and number of the house or business place where the conspiracy was formed, or to charge that it was formed on a particular day specified to the exclusion of other days, inasmuch as it is charged as a continuing conspiracy commencing on a day specified and continuing in effect and operation each day down to the time of the finding of the indictment. It was not necessary to set out what each alleged conspirator said. A conspiracy may be established by proving the acts of the alleged conspirators done within and during a specified time, all the defendants working in concert to bring about a certain unlawful result. It may not be possible, and it is unnecessary, to prove the words spoken by the alleged conspirators in forming the alleged conspiracy, provided the acts done by them and proved show concert of action by the partici-

pants necessarily tending to the joint consummation of the specified crime.

[9] Citizens have the right to criticize the existing laws, point out their defects, injustice, and unwisdom, and advocate their amendment or repeal; but they have no constitutional right to counsel, advise, encourage, and solicit resistance to the execution of or refusal to obey them. A political party and its individual members may advocate the repeal of existing laws, their amendment and improvement, and point out defects, and a political party may be formed for this very purpose. However, a so-called political party may not be formed to resist the execution of existing laws claimed to be unwise, unpatriotic, and oppressive, and its members permitted to encourage and advocate resistance to their due execution because of their membership therein. The willful resistance to the execution of a valid law may be made a crime, as may the willful obstruction of its enforcement. Any and all resistance and any and all obstruction to the operation or enforcement of a law may be declared an offense. It is the duty of all persons to obey the law and in lawful ways when called upon by due authority to aid in its enforcement. If this is not true, no government can survive.

I find no ground for sustaining the demurrer to the indictment or to any count thereof, and same is overruled.

UNITED STATES v. PIERCE et al.

(District Court, N. D. New York. November 9, 1917.)

1. INDICTMENT AND INFORMATION ⟸121(2)—INDICTMENT—SUFFICIENCY.
   An indictment charging conspiracy by defendants, which designated the place as the city of Albany, N. Y., and the time each and every day from April 6th to the date of the indictment is sufficiently definite, and a motion for a bill of particulars will be denied.

2. INDICTMENT AND INFORMATION ⟸121(2)—SUFFICIENCY—BILL OF PARTICULARS.
   An indictment charging conspiracy and a violation of the Espionage Act June 15, 1917, c. 30, § 3, whereby defendants circulated false reports and solicited persons with the intent of obstructing enlistment, is sufficient, though not giving the exact date of the solicitations and the language used, and defendants are not entitled to a bill of particulars compelling the United States to disclose the names of persons solicited, or the particular times when the solicitation took place, or the language used.

3. INDICTMENT AND INFORMATION ⟸121(2)—BILL OF PARTICULARS—RIGHT TO.
   When the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused, the court may direct that a bill of particulars may be furnished, so that he may properly prepare his defense.

4. INDICTMENT AND INFORMATION ⟸121(1)—BILL OF PARTICULARS—DISCRETION OF COURT.
   The granting or refusing of a bill of particulars rests in the sound discretion of the court.

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5. INDICTMENT AND INFORMATION ⟸121(5)—BILL OF PARTICULARS—REFUSAL.
When a bill of particulars is once made and served, it concludes the rights of all parties, who are to be affected by it, and he who has furnished a bill of particulars must be confined to the particulars he has specified as closely as if they were part of the indictment itself.

6. INDICTMENT AND INFORMATION ⟸121(2)—PARTICULARS—BILL OF.
An indictment charging conspiracy and a violation of Espionage Act June 15, 1917, c. 30, § 3, which alleged that pamphlets spreading false information relating to military operations of the United States were distributed by defendants, and that in various places such pamphlets and circulars were distributed, which gave only the names of some of those to whom the pamphlets were distributed, is sufficient in itself, and defendants are not entitled to a bill of particulars setting out the names of those to whom the pamphlets were distributed, for it would be prejudicial to the United States to restrict it by the requirements of such bill of particulars.

7. CRIMINAL LAW ⟸629—LIST OF WITNESSES.
As Rev. St. § 1033 (Comp. St. 1916, § 1699), applies only to treason and capital offenses, defendants who were not charged with treason and capital offenses are not entitled to a list of the names and addresses of all witnesses sworn by the government before the grand jury.

8. CRIMINAL LAW ⟸629—TRIAL—CONFRONTATION OF WITNESSES.
Const. Amend. 6, providing that a defendant is entitled to be confronted with the witnesses against him, does not entitle such defendant to a list of the witnesses who testified before the grand jury, but only entitles defendant to be present personally at trial and to be confronted with the witnesses against him.

At Law. Clinton H. Pierce and others were indicted for conspiracy and violation of the Espionage Act, § 3, and they move for a bill of particulars as to counts 1 and 2 of an indictment for conspiracy and violation of section 3 of the so-called Espionage Act. Motion denied.

See, also, 245 Fed. 878.

Frederick A. Mohr, of Auburn, N. Y., for the motion.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

RAY, District Judge. [1] 1. The counts of this indictment as to which a bill of particulars is demanded charge a continuing conspiracy to commit a crime or crimes against the United States and overt acts committed in pursuance and execution thereof. As to the times and places when and where the conspiracy was entered into, the indictment is sufficiently definite and specific—as definite and specific as safely to the rights of the United States it can be made, and, clearly, it is so definite, specific, and certain in these regards that the defendants are put on notice and cannot be harmed by reason of indefiniteness in the allegations. The place is the city of Albany, N. Y., and the time is each and every day from April 6, 1917, to the date of the indictment.

[2] 2. I do not think the United States attorney should be compelled to undertake to disclose the names of persons solicited by the defendants or the particular time or days when such solicitation took place, or to undertake to give the language used by defendants in making such solicitations further or more specifically than is set forth in the indictment. It is sufficient to put the defendants on notice as to

what they must meet on the trial. The general substance of what is alleged to have been stated by them is set forth.

[3-6] 3 and 4. The same remarks apply to claims 3 and 4 of the notice or demand for a bill of particulars.

Generally, the indictment gives the names of some of the persons to whom the pamphlets were given and distributed, and also states that the names of the persons solicited are to the grand jurors unknown. It is also stated that the various places in Albany—that is, the particular places where the circulars were circulated and distributed by defendants—are to the grand jurors unknown.

When the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused, the court may direct that a bill of particulars be furnished him so that he may properly prepare his defense. Kettenbach v. United States, 202 Fed. 377, 382, 120 C. C. A. 505. The granting or refusal of the bill of particulars rests in the sound discretion of the court. Rosen v. United States, 161 U. S. 29, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Breese v. United States, 106 Fed. 680, 682, 45 C. C. A. 535. When a bill of particulars is once made and served, "it concludes the rights of all parties who are to be affected by it; and he who has furnished a bill of particulars under it must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration." Commonwealth v. Giles, 1 Gray (Mass.) 466, cited and approved in Dunlop v. United States, 165 U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799. In United States v. Adams Express Co. (D. C.) 119 Fed. 240, it is said:

"The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts, more or less in detail, he will be required to meet, and the court will limit the government in its evidence to those facts set forth in the bill of particulars."

It is seen that this court ought not to direct a bill of particulars which if made and served may seriously limit and embarrass the government in its legal proof and result in shutting out evidence of certain pertinent facts not now fully known to the United States attorney. It is not to be presumed the United States will offer false or perjured testimony on the trial, and, in view of the nature of the case and of the charges made, it may be assumed the defendants know when and where they made speeches, if any, solicitations, if any, and the nature and character thereof, and also the names of the persons solicited, if any particular person was solicited. I do not think the government should be compelled to disclose the names of its witnesses. It is charged in the indictment that August 26, 1917, the defendants made personal solicitations (meaning in aid and execution of the conspiracy charged) from "various persons whose names are to the grand jurors unknown." If the names are unknown to the grand jurors, it is fair to presume such names are unknown to the United States attorney. The court should not require that officer to undertake to give information he does not possess or in default shut out competent proof on the trial. It is charged as an overt act that August 26, 1917, in and about the city of Albany, the defendants and each of them made public

speeches in aid and execution of the conspiracy. The indictment gives the names of some of the persons to whom pamphlets were distributed, and a copy of the pamphlet is attached to and made a part of the indictment. The indictment says that the names of others to whom such pamphlet was distributed are to the grand jury unknown. The defendants call for a bill of particulars not only giving times, places, and names of persons, but the language or substance thereof used by defendants in personal solicitation under the heading "Overt Acts."

As already stated, it would be impracticable to require the United States to set out the evidence which it expects to give on the trial. The nature and character and general substance of these solicitations is set forth by charging the nature and character of the conspiracy and what defendants conspired to do and bring about. The overt acts charged, giving time and place with reasonable certainty, state that pamphlets were distributed, copies of which are made a part of the indictment, speeches made in aid and execution and furtherance of such conspiracy, and personal solicitations indulged in. I think this sufficient to apprise the defendants that evidence will be offered that in such speeches and solicitations defendants spoke words and used language encouraging and advising others to do or cause to be done the very things they are charged with having conspired to do. The allegations of the indictment is notice to the defendants that they must be prepared to meet such proof. "Solicit" means to ask, request, urge, etc., and it being charged that defendants had agreed to do certain acts, and that defendants solicited persons to aid in doing such acts, the nature and character of the solicitations is so clearly and sufficiently indicated that defendants cannot be prejudiced on the trial. The witnesses called to prove the solicitations on a given occasion may disagree as to the words used by the defendants, while agreeing as to the substance and meaning of the words used and some of the language. It would be prejudicial to the United States to compel it to set out the language each witness is expected to testify to as having been used by a defendant on a given occasion. Each witness will be entitled to testify to what he recollects was said, and the question will be: Was the language actually used to promote or aid in the execution of the conspiracy, if one is found to have existed? The precise words used may not be material, and it would be wrong to put the government in a position where it would be precluded from proving what was actually said on a given occasion should the witness on the trial vary from the language of the statement he is now expected to testify to.

[7] The defendants demand that they be furnished "the names and addresses of all the witnesses sworn by the government before the grand jury in this proceeding or action." In some of the states, such a demand may be made and must be complied with. In other states, the names of such witnesses must be indorsed on the indictment; but this practice does not obtain in the United States courts. United States v. Butler, Fed. Cas. No. 14,700; United States v. Aviles (D. C.) 22 Fed. 474; Jones v. United States, 162 Fed. 417, 89 C. C. A. 303. Section 1033, R. S. U. S., provides that in cases of treason and

capital offenses a list of jurors and witnesses must be furnished the defendant. See 3 U. S. Comp. St. 1916, Annotated, § 1699, p. 3556. There is no federal statutory provision going beyond this.

"If a federal prisoner is not indicted for a capital offense, he is not entitled as of right to a list of witnesses." Jones v. United States, 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied 212 U. S. 576, 29 Sup. Ct. 685, 53 L. Ed. 657.

"In cases not capital the United States attorney is not bound to furnish defendant with the names of witnesses." United States v. Butler, Fed. Cas. No. 14,700.

"The court will not, in advance of the trial of a * * * case not capital, * * * require the United States attorney to give him [defendant] a list of witnesses examined by the grand jury." United States v. Aviles (D. C.) 222 Fed. 474, 477.

[8] The sixth amendment to the Constitution, providing that the defendant shall be confronted with the witnesses against him, only means that defendant is entitled to attend the trial and to hear the witnesses testify, and does not entitle such defendant to a list of the witnesses who testified before the grand jury. United States v. Aviles (D. C.) 222 Fed. 474. No facts appear calling upon the court to exercise any discretion it may possess in this regard in this case.

The application for a bill of particulars and a list of witnesses is denied.

IVINS v. JACOB et al.

(District Court, E. D. Pennsylvania. October 31, 1917.)

No. 4554.

1. NEGLIGENCE ⟸121(2)—PRESUMPTIONS—"RES IPSA LOQUITUR."

The phrase "res ipsa loquitur" is used to express the rule of law that the mere fact of damage justifies the conclusion of legal injury through an allowed presumption of negligence on the part of defendants, and also to express the thought that, the fact of damage having been inflicted as it was inflicted, the attending circumstances justify the inference of fact that it was the result of negligence.

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

2. MUNICIPAL CORPORATIONS ⟸706(8)—USE OF STREET AS HIGHWAY—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries sustained by a person struck by an automobile while on a sidewalk, where plaintiff did not confine her evidence to the fact that she was so struck while on the sidewalk, but called the driver of the automobile, who testified that the movement of the car was beyond his control because the steering gear would not work, but who further gave testimony showing his knowledge of the condition of the car, it was not error to charge that the jury might view the case as one justifying the inference of negligence, in the absence of exculpating facts, but that the exculpation would exonerate defendants from liability, unless negligence was disclosed in presenting such exculpating facts.

3. TRIAL ⟸252(8)—USE OF STREET AS HIGHWAY—ACTION FOR INJURIES—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action for injuries to a person struck by an automobile, where the evidence showed that the driver of the car had discovered that it was

not in normal operating condition, a requested instruction that a purchaser of a car had a right, under specified limitations, to accept the assurance of a dealer that the car was in operating condition, was properly refused, as the issue was whether the driver exercised proper care in operating the car in the condition in which he knew or had reasonable grounds to believe it was, and the requested instruction would have had a diverting effect upon the minds of the jurors.

4. MUNICIPAL CORPORATIONS ⊜706(3)—STREETS—USE AS HIGHWAY—PRESUMPTIONS.
Where the circumstances of an injury to a person struck by an automobile while on a sidewalk justified the inference of negligence of some one, it justified the inference of negligence of defendant, who was driving the car, in the absence of proof that the car was beyond his control, as proof of such fact was within his power to produce.

5. MUNICIPAL CORPORATIONS ⊜706(3)—STREETS—USE AS HIGHWAY—PRESUMPTIONS.
The inference of negligence, arising from an automobile striking a person while on a sidewalk, was only prima facie, and might be rebutted.

At Law. Action by Mary J. Ivins against Joseph P. Jacob and another, trading as Jacob Bros. On motion of defendants for a new trial. Rule discharged, and leave to enter judgment granted.

Daniel R. Rothermel, of Philadelphia, Pa., for plaintiff.
William W. Smithers, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The questions remaining in this case relate to the correctness of the instructions given to the jury and to the result of the jury's admeasurement of the damages. Excluding the latter, there are eight reasons assigned to support the motion. The first three and the eighth may be characterized as formal.

[1, 2] The fourth bears upon the application of the "res ipsa loquitur" rule to the general facts of this case. The quoted phrase has two meanings. It is used to voice the rule of law that the mere fact of damage justifies the conclusion of legal injury through and by an allowed presumption of negligence on the part of the defendants. The same phrase is used, however, to express the thought that, the fact of damage having been inflicted as it was inflicted, the attending circumstances justify the inference of fact that it was the result of negligence. The phrase was employed in this case in this latter sense. As automobiles ordinarily travel on the part of the street within the curbs assigned to vehicular traffic, the mere fact that one was being run upon the sidewalk, to the hurt of a pedestrian lawfully there, would justify the fact inference, in the first instance, that the injury had been negligently inflicted.

If, therefore, the plaintiff in this case had confined her testimony and other evidence to the fact that she had been struck while upon the sidewalk by the defendants' automobile, this would have been evidence from which the jury could have found negligence, and the defendants would have been called upon to supply the exculpating facts, which would rebut or deny the inference otherwise to be drawn. The plaintiff, however, did not content herself with such proofs, but made

part of her case in chief the testimony of the driver of the automobile to the effect that the presence of the car on the sidewalk was due to the fact that the movement of the car was beyond his control, because the steering gear would not work. The testimony of this witness, however, disclosed the fact of his knowledge of the condition of the car, and thus fairly raised the question of his exercise of due care in his operation of the car, which he knew was or might become beyond his control, to the hurt of some traveler upon the highway.

The jury were in consequence instructed that they might view the case as one justifying the inference of negligence, in the absence of the exculpating facts, but that the exculpation would exonerate the defendants from legal responsibility for the damages, unless negligence of the defendants, which brought about the damage, was disclosed in presenting the exculpating facts. The real issue, as presented to the jury, was in consequence the question of whether the defendants had been guilty of negligence in the operation of the defendants' car, as its operation was disclosed by the driver. We are unconvinced of any error in making this feature of the case to turn upon the issue as above defined.

[3] The remaining reasons for a new trial may be treated as voicing two complaints. One is the failure, and in effect the refusal, of the trial judge to affirm the defendants' first point. This point requested instruction to the jury that the purchaser of a car had the right, under the limitations defined in the point, to accept the assurance of the dealer that a car which had been sold to him as in operative condition was in such condition. This point was in truth not negatived, but ignored, and it was ignored because its injection into the case would have had a wholly diverting effect upon the minds of the jurors. Inasmuch as the driver of the car had discovered for himself that the car was not in normal operative condition, the issue was changed from that of the condition in which he received the car to one of the exercise of due and proper care on his part in operating it in the condition in which he knew or had reasonable grounds to believe it was. If the jurors had been instructed that the defendants were justified in their reliance upon the assurances of the dealer who sold them the car that it was in operative condition, they must also have been instructed that such assurance became unimportant, after knowledge had come home to the defendants of what the actual condition of the car was. We are, for this reason, unconvinced of any error in the failure to specifically affirm defendants' first point.

The other complaint is based upon the sound proposition that negligence which visits responsibility for damages upon the defendants must be not merely negligence which exists, but also negligence which has contributed to the injury. The complaint is that the charge gave free rein to the jury to find negligence, and upon this finding to reach a verdict against the defendants, without instructing them that negligence would not found a verdict unless that negligence was the proximate cause of the damage done. The thought in the mind of the trial judge was to express the proposition of law in accordance with defendants' view, and a careful reading of the transcript of the charge satisfies us that the jury were so instructed.

The physical injuries sustained by the plaintiff were of a character the money loss from which is difficult to estimate. She sustained serious and painful injuries. The trial court would have accepted a finding of a less sum than that awarded by the jury as reasonably adequate damages. It is perhaps true that, if the verdict had been for a larger sum than that given, it would have impressed the court as excessive. A very careful consideration of all the elements which enter into the question have left us in the state of mind in which we are unable to find the verdict to be excessive in amount. It is full. Indeed, it may be characterized as approaching the limit of fullness. In a case, however, which presents, as do cases of this class, a more or less wide latitude for the exercise of judgment as to what a proper award would be, we do not think the verdict should be disturbed. The complaint of the excessiveness of the verdict is not included among the reasons assigned, but defendants were granted leave to add it. It has because of this been considered.

The above-stated conclusions are, we think, supported by the decided cases to which we have been referred. We are in entire accord with the general propositions of law which the learned counsel for defendant has advanced with gratifying clarity of statement. The use of the res ipsa loquitur phrase as the technical designation of a legal doctrine was avoided in the charge, because the phrase, as voicing a legal doctrine or the law of the case as the law governing it, was deemed not to be applicable. The thought expressed to the jury was merely the statement of the obvious truth that there are happenings attended by such circumstances as that the story of what happened cannot be told without disclosing the responsibility for what happened. There is no more legal doctrine in the expression of such a thought than there is in the equivalent statement, from all the facts and circumstances surrounding this occurrence, any one would be justified in concluding the negligence of the defendant was the cause of it.

[4] The argument of counsel, which concedes that the circumstances of the occurrence justify the inference of the negligence of some one, but not the negligence of the defendant, is a concession of everything, because one of the circumstances was that the defendant was driving the car. If this automobile had been without warning driven upon the sidewalk, there striking a pedestrian, no one could doubt that it would not only justify, but compel, a finding of negligence. This inference of fact is not stayed by the possibility that it might not have been intentionally driven upon the sidewalk. If such possibility were suggested, the answer would be: Show me that, and I am prepared to believe it; but, unless you do, I must hold you to be in fault. This attitude is sensible and just, and in accord with the accepted principle of the law of evidence that he who has control of the proofs shall produce them. If the car was beyond control, the driver knows it, and can offer evidence of the fact. All the pedestrian could do would be to know the fact that the car was where it should not be driven, and that the circumstances indicated negligence. This constitutes prima facie proof. There is nothing in any of the cited cases to combat this view. Oil Co. v. Torpedo Co.,

190 Pa. 350, 42 Atl. 707; Lucid v. Powder Co., 199 Fed. 377; Allen v. Coal Co., 212 Pa. 54, 61 Atl. 572; Joyce v. Black, 226 Pa. 408, 75 Atl. 602, 27 L. R. A. (N. S.) 863; Wolf v. Tract Society, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241.

[5] The inference of negligence is, of course, only prima facie, and may be rebutted. We are again in entire accord with counsel for defendants that the exculpating facts, so far as testified to by one of the defendants, were before the jury, and that they could not be disregarded. There is an old saying, however, to the effect that one hole may be filled by the digging of another. The hole which was filled was accounting for the automobile being run upon the sidewalk by explaining that the steering gear would not work. The hole which was dug subjected the driver to the inference of negligence in attempting to operate a vehicle without the exercise of that degree of care which was called for by its defective condition. The latter became the real and only issue of negligence in the case. To present this feature of the case in its purely legal aspect, the testimony of the defendants is to be viewed as if it had been in chief, excusing defendants of negligence by showing a broken steering gear, and the witness on cross-examination had admitted negligence in the operation of a defective car.

The remaining questions of whether, negligence being conceded, it was the proximate cause, or a contributing cause, of the injury, and whether the defendants were responsible for the consequences of their negligence, or whether the injuries suffered by the plaintiff were so remote as not to be within the limits of what might have been anticipated, are questions which do not seem to require further discussion.

The rule for a new trial is discharged, and the plaintiff has leave to enter judgment on the verdict.

UNITED STATES SMELTING CO. v. HOFKIN et al.

(District Court, E. D. Pennsylvania. October 25, 1917.)

No. 1703.

1. CORPORATIONS ⟸326—DIRECTORS' LIABILITY—STATUTORY PROVISIONS—LIBERAL OR STRICT CONSTRUCTION.

   Act Pa. April 29, 1874 (P. L. 73), making corporate directors individually liable for debts where they have declared a dividend while the company was insolvent, is both penal and remedial, and is to be so construed as to make it effective where it applies, but not to extend its application beyond the cases set forth.

2. CORPORATIONS ⟸334—LIABILITY OF DIRECTORS—WRONGFUL PAYMENT OF DIVIDEND—"INSOLVENT."

   Under Act Pa. April 29, 1874, directors of a corporation, who vote a dividend to themselves, knowing that the moneys thus paid out are needed to meet the demands of those with whom the company has contractual relations, are individually responsible to creditors, especially if the dividend is declared by the directors for the purpose of benefiting themselves,

to the loss of creditors; a corporation whose finances are in this condition being insolvent within the meaning of the statute.

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

3. CORPORATIONS ⊜340(2)—LIABILITY OF DIRECTORS—DEBTS INCLUDED.
Act Pa. April 29, 1874, imposing liability on corporate directors, declaring a dividend when the company is insolvent, for all debts of the company then existing and for all thereafter contracted, includes an executory contractual obligation of the corporation on which there is no existing debt when the dividend is declared.

4. CORPORATIONS ⊜360(1)—LIABILITY OF DIRECTORS—ACTIONS TO ENFORCE—PLEADING.
In a suit by a creditor of a corporation against its directors, a bill of complaint, alleging that defendants, knowing that a large sum of money would soon become payable to plaintiff under its contracts with the corporation and that the corporation was in consequence insolvent, diverted a large part of the assets to themselves and other stockholders by declaring a dividend of 500 per cent. and then applying for a receivership, as a result of which the creditors got nothing, sufficiently showed that the corporation was insolvent.

5. CORPORATIONS ⊜334—LIABILITY OF DIRECTORS—WRONGFUL PAYMENT OF DIVIDEND.
Under Act Pa. April 29, 1874, the existence of an outstanding executory contract will not of itself halt the payment of dividends by the corporation, though insolvency results from executory contracts existing when the dividend is declared.

6. COURTS ⊜343—FEDERAL COURTS—EQUITY RULES—PARTIES.
Under the equity rules, a corporate creditor, suing directors to enforce their statutory liability under Act Pa. April 29, 1874, may sue on behalf of all other creditors having the same cause of complaint, and by the bill tender them an opportunity to become parties.

In Equity. Suit by the United States Smelting Company against Mendal Hopkins and others. On motion to dismiss the bill of complaint. Motion denied.

R. Stuart Smith, of Philadelphia, Pa., for plaintiff.

Alfred Aarons and Alex. Simpson, Jr., both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The substantial evidentiary and ultimate fact averments of this bill are that the defendants, knowing that a large sum of money would soon become payable to the plaintiff under its contracts with the corporation, of which the defendants were directors, and that the corporation was in consequence insolvent, diverted a large part of the assets of the corporation to themselves and other stockholders through and by the fraudulent device of declaring a dividend of 500 per cent. on the capital stock of the company, and following this with a successful application to have the affairs of the company placed in the hands of a receiver. The practical result is that the creditors get nothing, and the stockholders receive in the one dividend five times the total of the capital stock.

One of the prayers of the bill is that the directors be decreed individually liable for the debts as provided in the Pennsylvania act of assembly approved April 29, 1874 (P. L. 73), upon the finding that

the company was insolvent when the dividend was declared and paid by the directors to themselves and others. There is also a prayer for general relief.

The law has its policies, as well as its principles of justice. The development of our system of laws through and by the formulation of legal principles by the courts and by legislative enactments shows a continued effort to get these principles of justice in accord with a sound policy of the law. The former calls upon all debtors to pay their debts. The adoption of the latter recognizes that capital is timid, and hence the wisdom of permitting persons who have money to put into business ventures to combine their capital without other risk than its loss. The swing from one extreme to the other may be traced from the principle of the liability of partners in solido, through limited partnerships and joint-stock companies, corporations in which some measure of personal liability is imposed upon their members, to the class of corporations in which no individual responsibility is incurred by stockholders or managers for the debts of the corporation as such.

[1] The necessity of safeguarding creditors has resulted in a variety of legislative acts, of which the act of assembly cited is one. Once given the conception of the legal entity of the corporation as distinct from that of its individual members, we start with the principle of the absence of this individual liability, except to the extent to which it is imposed by statute. As the imposition of liability is usually based upon some impropriety of conduct, some act of omission or commission on the part of the individual, we get the thought that these provisions partake of the penal, and import into them from the principles governing the construction of punitive statutes, the one calling for a strict construction. Inasmuch, however, as such provisions are written into our laws in order to protect the principle of exemption from individual liability against abuse they partake also to that extent of the nature of remedial statutes.

The rule of construction, in consequence, is to give them the meaning which will make them effective where they apply, but not to extend the application beyond the cases set forth. This act of assembly is expressive of two thoughts so far as affects the points now in controversy. One is that a dividend may be declared and paid at a time when the corporation is insolvent. The other is that the directors authorizing such payment shall be liable (up to the amount of such dividend) "for all the debts of the company then existing and for all thereafter contracted."

[2] There is no statutory definition of insolvency given in the act. We must, therefore, find in what sense the word is used. It was obviously used in the sense of expressing the evil which the act was intended to suppress. That evil was that assets which should be preserved to meet the demands of those who dealt with the corporation as its creditors might be diverted to the pockets of its stockholders. It is to be observed that the act does not in terms make the liability turn upon the fact of the directors having knowledge of the insolvency but upon the fact of the insolvency. None the less, directors who had in good faith declared and paid a dividend upon the reasonable assumption of there being surplus earnings to be distrib-

uted, and without thought or reasonable grounds to believe that the moneys thus paid out in dividends were at the time needed to meet the future demands of creditors whose claims were not then payable, such dividend would not be within the provisions of the statute. By the same token, however, if they voted a dividend to themselves, knowing that the moneys to be thus paid out were then needed to meet the demands of those with whom the company had contractual relations, such directors would be individually responsible to creditors, and emphatically so if the dividend was declared by the directors for the purpose of benefiting themselves to the loss of creditors. It is precisely this conduct with which these defendants are charged in this bill, and we think a corporation, the finances of which were in the condition indicated, is at the time insolvent within the meaning of this act of assembly. The liability (limited to the amount of the dividend so declared) is to any one who is then a creditor, or who may thereafter become a creditor during the term of service of the director charged with the payment of the debt.

[3] The words of the statute extend the liability so as to include all "debts of the company then existing and for all thereafter contracted." This phraseology is broad enough to include the claims asserted by the plaintiffs. In a strictly technical sense, one with whom a corporation has contracted, but whose contract is still in the purely executory stage, holds the contractual obligation of the corporation; but there can be said to be no existing debt. Such a construction would fairly be characterized, however, as narrow, and the language of the statute is broad and embracing. The purpose we think clearly was, and the language chosen has clearly expressed the meaning of that purpose to be, that if the directors thus unlawfully diverted a sum of money which was required to meet an obligation which had been then incurred, or if, after having depleted the assets of the corporation by the payment of a dividend, others were lured into becoming creditors of the company, the directors guilty of this depletion are required by the statute to restore creditors to the position in which they would have been had such unlawful dividend not been declared and paid. Whether it was unlawful or not depends, as already stated, upon the financial condition of the corporation at the time the dividend was declared. This is a fact, the existence of which is averred by the averment of insolvency, and, unless admitted, is a trial fact to be proven by the plaintiff. The legal consequences which follow such finding of fact are a trial conclusion and cannot be reached through a demurrer, the equivalent of which a motion to dismiss is.

[4] The suggested necessity of denying the present motion would be conceded by the learned counsel for defendants if the averments of the bill had been confined to the simple averment of insolvency. Inasmuch, however, as the plaintiff has set forth certain definite evidentiary facts, the position is taken that the averment of insolvency is an inference deduced from those facts, and, if the inference is unjustified, its correctness can be challenged through this motion. This view, however, ignores the averment of the guilty knowledge and purpose of the directors in paying the dividend. With this element in the case, we refuse to find that the company, under the averments of the bill

of complaint was at the time not insolvent, and, in consequence, deny the motion to dismiss the bill.

The foregoing comments, so far as they touch the merits of the case, of course, refer solely to the averments of the bill. The real facts will be disclosed at the trial. All which is now ruled is that the plaintiff may put its case to its proofs.

[5] The further comment is perhaps not out of place that there is no thought of holding directors to a standard of liability based upon a condition of insolvency at the time of the payment of the dividend which, however, was not disclosed until afterwards, although insolvency resulted from contracts then existing in the executory stage. In other words, the existence of an outstanding executory contract will not of itself halt the payment of dividends.

[6] The other grounds of the motion go to the formalities of the bill. The criticism of the form of the bill is based upon a view which ignores the special character of the cause of action which this bill asserts. Chancery practice, under the equity rules applicable, sanctions the bringing of a bill of complaint by one of a class on his own behalf and on behalf of all others having the same cause of complaint who may become parties and the bill may properly tender an opportunity to them to become parties. This is what the plaintiff has done. This, moreover, is an attempt to assert a special right of action conferred by statute, and the procedure prescribed by the statute or indicated by necessity may be followed. The right of action given by this statute is not the right to visit upon the defendants a liability to pay the debt due to the plaintiff, but to require them to meet by payment the claims of two classes of creditors with the total payment to be made, limited to and thus measured in its aggregate by the amount of the unlawful dividend. Of course, as a general proposition, no one can be made a litigant without his consent. Gravenstine's Appeal, 49 Pa. 310. And this plaintiff cannot use the names of others as complainants in this bill without their sanction. This, however, is an entirely different thing from the averments which this bill makes that the plaintiff belongs to a class of creditors made up of themselves and others to whom belongs the right to have from the defendants payment of all their claims up to the limit of the liability asserted. It may well be that a finding of who are the other creditors, with the sums of their respective claims and the aggregate of all of them, may be necessary to enter the decree commanded by the equities of the case as disclosed by the proofs.

The motion to dismiss is accordingly denied, with leave to the defendants to answer over.

GUARANTY TRUST CO. OF NEW YORK v. MEXICAN PETROLEUM CO., Limited.

(District Court, S. D. New York. November 5, 1917.)

1. CONTRACTS ⟸162—CONSTRUCTION.

In the construction of written contracts, the various clauses should be harmonized, if possible, and the court should seek to avoid a construction which would nullify or render inconsistent one clause or provision with another.

2. CORPORATIONS ⟸486—BONDS—SINKING FUNDS—CONTRACTS—CONSTRUCTION.

Defendant, for the purpose of borrowing money, issued sinking fund bonds under a deed of trust, section 2 of which provided that, whenever any underlying bonds deposited with the trustees should be purchased, redeemed, or paid by means of a sinking fund created in pursuance of a mortgage or other instrument, securing the same or providing for the issue thereof, the amount paid for the purchase, redemption, or payment should be paid to and received by the trustee and added to the sinking fund. A subsequent provision declared that the percentage stated in the bonds as being the minimum sinking fund payment should be calculated on the maximum amount of such first lien bonds, but that the defendant should be credited in reduction pro rata of the sinking fund payments with an amount equal to the aggregate of all payments made to the trustee pursuant to the sinking fund requirements of any instrument securing or providing for the issue of bonds or other obligations pledged with the trustee. Defendant pledged with the trustee bonds of a subsidiary company which bonds also provided for sinking fund arrangements, and the provisions for adding to the sinking fund amounts received in payment or redemption of such bonds applied only to the bonds of the subsidiary company. *Held*, in view of the fact that the provisions as to the sinking fund did not extend to bonds satisfied on foreclosure, and as defendant and the subsidiary company might be treated as one whole, the amounts paid on redemption of bonds of subsidiary companies out of the sinking fund should be credited on the amount which defendant was annually obligated to pay into the sinking fund.

At Law. Action by the Guaranty Trust Company of New York against the Mexican Petroleum Company, Limited. On motion by plaintiff for judgment on the pleadings. Motion denied.

Stetson, Jennings & Russell, of New York City (William C. Cannon, of New York City, of counsel), for plaintiff.

Kellogg, Emery & Cuthell, of New York City (Frederic R. Kellogg, of New York City, of counsel), for defendant.

MAYER, District Judge. This is an action brought to recover $320,000, claimed to be due from defendant to plaintiff, under the terms and provisions of the deed of trust given by defendant to the Standard Trust Company of New York (to whose rights by merger plaintiff has succeeded) to secure an issue of bonds for an aggregate principal amount of $12,000,000, executed on October 3, 1911. In October, 1911, for the purpose of borrowing money for its lawful corporate purposes, defendant, in pursuance of resolutions adopted by its board of directors and stockholders, duly authorized the issue of certain first lien and refunding sinking fund gold bonds, for an aggregate principal amount

of $12,000,000, and in pursuance of due authorization it made and executed to the Standard Trust Company of New York its mortgage and deed of trust, dated October 3, 1911. Under said deed of trust defendant deposited and pledged with the Standard Trust Company of New York certain stocks and bonds of various corporations. Bonds of defendant were issued under the deed of trust to the amount of $5,940,000; there being outstanding at the present time approximately $2,200,000 of the said bonds.

The bonds issued under the deed of trust contained certain sinking fund provisions, whereby defendant is required to make yearly payments to plaintiff to constitute a sinking fund, the amount of such payments to be computed upon the production of oil by defendant, but not to exceed 15 per cent. of the maximum amount of bonds then outstanding. Article 2, section 2, of said deed of trust provides as follows:

"Whenever any underlying bonds deposited with the trustees hereunder shall be purchased, redeemed, or paid by means of a sinking fund created in pursuance of a mortgage or other instrument securing the same or providing for the issue thereof, the amount paid for the purchase, redemption, or payment thereof shall be paid to and received by the trustee and added to the sinking fund hereinafter in this indenture provided for."

Article 5, section 1, of the said deed of trust, contains the following provisions:

"The percentage, if any, which shall have been stated in the bonds of any such series as being the minimum sinking fund payment shall be calculated on the maximum amount of such first lien bonds of such series theretofore issued. The percentage, if any, stated in the bonds of any such series to be payable as a maximum sinking fund shall be similarly calculated; the Limited Company, however, being credited, in reduction pro rata of the sinking fund payments to be made by the Limited Company to the trustee as aforesaid on each such 1st day of October, with an amount equal to the aggregate of all payments made to the trustee, during the calendar year ending on each such 1st day of September next preceding pursuant to the sinking fund requirements of any instruments securing or providing for the issue of bonds or other obligations pledged with the trustee hereunder."

Defendant deposited and pledged with plaintiff, under the deed of trust, certain bonds of the Mexican Petroleum Company of California, issued under a mortgage duly made by that company to the Southern Trust Company of Los Angeles as trustee. The mortgage to the Southern Trust Company contained certain sinking fund requirements under which the said trust company was directed to dispose of any moneys which might come into the sinking fund therein provided for, either by making certain investments thereof, or by purchasing bonds of the issue secured by the said mortgage. In July, 1916, the Southern Trust Company purchased $320,000 principal amount of the bonds of the said California Company from the plaintiff, which bonds had been deposited by the defendant under its deed of trust, and paid therefor the sum of $320,000 to plaintiff. The total amount of the sinking fund payments due from defendant to plaintiff on October 1, 1916, under the provisions of the deed of trust, and the bonds issued thereunder, was the sum of $891,000, being the maximum amount of

15 per cent. of the bonds issued. On October 1, 1916, defendant paid to plaintiff, under the said sinking fund provisions, $571,000.

This suit is brought to recover the difference between the maximum amount of the sinking fund payments, namely, $891,000, and the sum of $571,000 thus paid by defendant to plaintiff. Defendant contends that under article 5 of the deed of trust the payment to plaintiff of $320,000 for the purchase of bonds of the California Company which had been pledged under the deed of trust should be taken in reduction of the sinking fund payments required under defendant's deed of trust. Plaintiff contends that under article 2 this amount is to be "added to" the sinking fund payments otherwise provided for, and that there is a balance of $320,000 due from defendant to plaintiff.

[1] Defendant, for a separate defense, sets forth facts which it contends constitute an estoppel. It is, of course, an elementary principle of the construction of written instruments that their various clauses should be harmonized, if possible, and the courts seek to avoid a construction which will nullify or render inconsistent one clause or provision with or as against another. In view of the conclusion stated on the argument, it is necessary merely to state briefly the reasons therefor.

[2] The phrase "added to the sinking fund," means "becomes a part of the sinking fund." This clause was not intended to affect "the amounts payable" to the sinking fund, all of which was elsewhere fixed; but its sole object was to make it clear that the moneys thus received by the trustee should, instead of being held by it, or reinvested by it, be considered as a part of the sinking fund, but, of course, always subject to each and every specific provision regarding the amount and administration of that fund. Only two alternatives exist—either the proceeds of these bonds are a part of the sinking fund or they are not. If no such clause were found in the mortgage, it would not be a part of the sinking fund. But, since the clause is found in the mortgage, it follows that these proceeds do become a part of the sinking fund, and hence they become governed by all of the sinking fund provisions, just as though it had been paid into the sinking fund by defendant directly, and one of those specific provisions of the sinking fund article is the one upon which defendant relies.

Plaintiff's argument, to the effect that the words "add to" must be considered as equivalent to "increase the amount of," fails to take into consideration that the clause does not say that the thing to which these moneys is to be added is the full amount of the installments which defendant would otherwise be compelled to pay. On the contrary, the thing to which these moneys is to be "added" is the "sinking fund hereinafter in this indenture provided for," and the very provision thus referred to contains the credit clause relied upon, thus making it clear that, while this language fixes the first element of which the sinking fund in any given year will be composed—that is to say, the amount of the proceeds of bonds sold as aforesaid—yet that it makes no effort at all to determine the amount of the other portion of the sinking fund, to wit, the amount that should be paid

by the defendant directly to the plaintiff. This last element is fixed, first, by taking the amount payable according to the language of the bonds themselves; and, secondly, by deducting the credit to which defendant is entitled under the sinking fund clause itself.

The fairness of this provision is evidenced by the fact that both provisions of the trust deed are expressly limited to moneys which come from the sinking funds of the subsidiary companies. In case any bonds pledged under the deed of trust are paid by means of a foreclosure of the mortgage upon the property of the subsidiary company, or as a result of a sale otherwise of the property, or by reason of any dissolution or liquidation of any such company, the moneys thus received are not covered by the operation of these two clauses.

The reason for this distinction is plain, since the defendant company and the subsidiary companies are members of one group; practically all of the stock of all of the subsidiary companies being owned by the defendant company, the parent concern. Hence, in accordance with a well-understood practice which has been adopted in other similar cases, sinking fund moneys, coming either from the operations of the holding company or of the subsidiary companies, are treated as an entirety. The holding company is entitled to just the same credits in respect of sinking fund moneys which come into the hands of plaintiff through the operation of the sinking fund requirements of the subsidiary companies as would be the case regarding sinking fund moneys paid by defendant company itself directly to plaintiff.

In order to accomplish this desired result, two separate provisions were necessary. The first of these provisions is the one entitling defendant to a credit as against the sinking fund payments to an amount equal to the amount received through the purchase of bonds with sinking fund moneys of the subsidiary companies. But, if the trust deed had stopped there, the desired result might not have been reached; for, although the amount of defendant's sinking fund payments would have been decreased, yet no provision would have been made for the substitution of other moneys for the amounts thus deducted. Hence the second provision, which is that the moneys received from the sinking fund operations of the subsidiary companies shall become a part of or "be added to" the sinking fund in the hands of plaintiff, thus removing the possibility of any claim that, although defendant was entitled to a credit, yet that the proceeds of the subsidiary companies' bonds sold could not be used as a part of the sinking fund for the redemption of the bonds issued by defendant, but, on the contrary, that such proceeds must be still held in trust or reinvested by plaintiff.

In view of the foregoing, it is unnecessary to discuss the question of estoppel.

Motion denied.

In re M. & H. GORDON.

(District Court, S. D. New York. October 25, 1917.)

1. BANKRUPTCY ⟸376—COMPOSITION—TERMS.
The fundamental theory of a composition agreement is that all creditors shall be treated alike and none shall have any advantage, and therefore a proposed composition, whereby the bankrupt agreed to pay one creditor the amount of expenditures incurred in investigating the financial affairs of the bankrupt, in addition to his pro rata share, cannot be confirmed, for the creditor, in making the expenditure, acted on its own risk, and to confirm the composition would open the door to preferring one creditor above another.

2. BANKRUPTCY ⟸377—COMPOSITION—WITHDRAWAL OF CLAIM.
Under Bankr. Act July 1, 1898, c. 541, § 12b, 30 Stat. 549 (Comp. St. 1916. § 9596), declaring that an application for a 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, a creditor, for the purpose of enabling a bankrupt to secure confirmation of a proposed composition, may withdraw his claim, preferring that arrangement to an acceptance of the composition, and the creditor whose claim was withdrawn will not be counted as one in computing the number whose approval the bankrupt was bound to obtain.

3. BANKRUPTCY ⟸379—COMPOSITION—RENEWAL OF OFFER.
Where a proposed composition was for the best interest of creditors, the bankrupt, though confirmation was denied because, in compliance with the demand of one creditor, he agreed to make a payment to such creditor of certain expenses which would operate as a preference, after such creditor's claim is withdrawn, is entitled to renew his application for confirmation of composition.

In Bankruptcy. In the matter of the bankruptcy of M. & H. Gordon. On motion to confirm report of special master recommending that proposed composition be confirmed, to which Liberman & Co., a creditor, objected. Special master's report and proposed composition rejected, and matter returned to special master.

Isaac Marks, of New York City, for the motion.
Harry N. Wessel, of New York City, opposed.

MAYER, District Judge. This is a motion to confirm the report of the special master on specifications of objection to a proposed composition. The special master has recommended that the composition be confirmed, and one of the creditors has objected to confirmation on several grounds.

The bankrupt duly offered a composition to his creditors of 25 per cent. on the dollar in cash. One of the creditors, the Gera Mills, was represented by its attorney, Mr. Saul S. Myers, who took proceedings on behalf of his client as an intervening creditor, and, in the course of those proceedings, incurred a bill of $450 to $500 to certified public accountants employed by him in the investigation of the financial affairs of the bankrupt. Mr. Myers, on behalf of his client, also incurred another bill of a little over $100 to a detective for making certain investigations. When Mr. Marks, the attorney for the bankrupt,

interviewed Mr. Myers with a view of obtaining the acceptance of the proposed composition by the Gera Mills, Mr. Myers stated that the Gera Mills could not afford to accept the composition unless these disbursements on their part were paid by the bankrupt. The result of the interview between Mr. Marks and Mr. Myers on behalf of their respective clients was that Mr. Marks promised on behalf of the bankrupt that the bankrupt would reimburse the client of Mr. Myers for this outlay of approximately $650 to the accountants and the detective. The special master stated in his opinion:

"These being the facts, it does not seem to me that it can properly be said that the Gera Mills are to receive any greater amount than the 25 per cent. paid to all the creditors."

[1] The fundamental theory and purpose of a composition agreement is that all creditors shall be treated alike, and that none shall have any advantage, secret or otherwise, over the other. The bankrupt was not under any legal obligation to pay the bills incurred by one of the creditors in its investigations. The money thus expended by the creditor was at its own risk. If, as the result of such investigation, the estate had been benefited and assets had been discovered, then the creditor was at liberty to apply to the court for appropriate compensation; but as against the bankrupt the creditor had no claim in this regard, either of a legal or a moral nature.

When, therefore, the bankrupt, through his attorney, promised to make the creditor whole on the creditor's expenditures, after the creditor through its attorney had refused to sign unless made whole, the very thing was done which vitiates this composition agreement. It is specious to say, because as a net result of such a transaction the creditor will not receive more than 25 per cent. on his claim, that he shares equally with other creditors and gains no advantage. As the matter stood when the negotiation began, the creditor was out of pocket the amount of his claim against the bankrupt plus this expenditures, and the agreement to reimburse is an agreement to pay this same creditor more than 25 per cent. of any claim which it could prove or have allowed to it in bankruptcy.

It can readily be seen where such a practice will lead, if followed to its logical conclusion. For instance, an attorney could very well say that his client had incurred expenses for his advice and services as an attorney, and the client could refuse to sign a composition agreement unless the unliquidated fees of his attorney were paid. The possibilities of such practice and procedure could be further illustrated, but what has been pointed out is sufficient for the purpose of making clear that any arrangement which contemplates the payment to one creditor of one cent more than is to be paid to another creditor in the same class is the kind of an arrangement which the law will not permit, and which will result in the disapproval by the court of a composition agreement.

[2] Another specification is interposed because of the following facts: The Garfield National Bank filed a claim, which was allowed. When Mr. Marks, attorney for the bankrupt, saw the attorney of the bank, the latter stated that the bank was not opposed to the carrying

out of the composition, but that its disposition was not to sign an acceptance, but the bank's attorney stated that, instead of signing, he would withdraw the claim of the bank. If the claim stands as allowed, then the bankrupt would not have a majority in number and amount of the claims accepting the composition. If the claim may be withdrawn, then the bankrupt has the necessary majority. The contention of the objecting creditor is based on the language of section 12b, of the Bankruptcy Act:

"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. * * *" Comp. St. 1916, § 9596.

There is nothing in this section which prevents a creditor from withdrawing a claim at any time he pleases, provided, of course, such withdrawal is in good faith and without fraud or other wrongful agreement or means. There is nothing in the record which suggests that this arrangement with the bank was other than proper and fairly obtained as the result of the appeal of Mr. Marks on behalf of his client to the attorney for the bank.

[3] From the financial standpoint it seems to me that the offer is in the best interest of the creditors. It will be an undue hardship on this bankrupt if, because of the transaction with the Gera Mills, the composition agreement should fail. The bankrupt did not initially offer to pay this creditor the expenses incurred, but only did so after the creditor made such payment a condition of its consent. If, therefore (now that the view of the court is understood), this arrangement is nullified, I see no reason why an application to confirm the composition agreement should not be entertained.

In the circumstances I shall return the matter to the special master, with instructions to take further proof in respect of the arrangement, if any, to be made between the bankrupt and the Gera Mills. This is another way of stating that the bankrupt can ascertain whether the Gera Mills will sign on the absolute and unqualified condition that it is to receive, under the composition agreement, 25 per cent. and no more.

Settle order on one day's notice.

WM. WRIGLEY, JR., CO. v. COLKER.

(District Court, E. D. Kentucky, at Covington. April 13, 1914.)

No. 2892.

1. TRADE-MARKS AND TRADE-NAMES ⇐68—UNFAIR COMPETITION—SELLING GOODS AS THOSE OF ANOTHER.

A man has a right to sell his own product to anybody that wants to buy it, but he has no right to put forth his goods as those of another, so as to get the advantage of such other man's trade.

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

2. TRADE-MARKS AND TRADE-NAMES ⟸70(4)—UNFAIR COMPETITION—IMITATION OF WRAPPERS.

Where plaintiff was selling a spearmint flavored gum, which was extensively advertised, defendant's sale of a similar article in a wrapper of the same color as plaintiff's wrapper, and with letterings and markings of the same colors, resulting in giving it the same general appearance, so that the ordinary purchaser would not know the difference, unless he read closely, will be enjoined.

3. TRADE-MARKS AND TRADE-NAMES ⟸3(4), 70(1)—UNFAIR COMPETITION—IMITATION.

Though plaintiff was selling a spearmint flavored chewing gum under the name "Spearmint," defendant had a right to use spearmint to flavor his gum, and to use the word "Spearmint" on his gum, providing he did not sell his goods in a dress having a general resemblance to that of plaintiff.

In Equity. Suit by the William Wrigley, Jr., Company against A. Colker. Decree for complainant.

Gordon, Morrill & Ginter, of Cincinnati, Ohio, for complainant.
Howard M. Benton, of Newport, Ky., for defendant.

COCHRAN, District Judge. [1, 2] The question in this case is whether defendant has put on the market his goods for the complainant's. A man has a right to sell his own product to anybody that wants to buy it; but he has no right to put forth his goods as another's goods, so as to get the advantage of a man's trade. This (Figure 1) is the package of the complainant, the Wm. Wrigley, Jr., Company. On the hearing of the motion for temporary injunction, I held that this package (Figure 2) was an infringement of that represented in Figure 1, because the ordinary purchaser was likely to be deceived, when calling for Wrigley's goods, or "Spearmint" goods, into thinking, when he got the package represented in Figure 2, that he was getting a package of Wrigley's goods. And why is he deceived? Why is that calculated to deceive him? It is because the general appearance is the same. A man in the habit of buying Wrigley's goods, and paying a nickel a package for it, will go into some place where he is not in the habit of getting it and call for Wrigley's, and if the package represented in Figure 2 is handed him, he will think that is it, unless he actually reads the words on it; and he will not always, or is not likely, to read it closely, and he will not detect the difference until he has actually used it, and noticed that there is a difference in the taste of the two—if there is.

Since the temporary injunction was granted, the defendant has put another article on the market. What is the difference between the article as represented in Figure 2 and the new article in general appearance? The ordinary purchaser would not see any difference at all. The only difference is that here on the first product he has "Aids Digestion" on the left, whereas on the new product he has "Sweetens the Breath." While on the right of the original package he has "Flavor Everlasting," on the right of the new product he has "Assists Digestion." Unless a person would recall these things, he would not know they were not the same. And then there are other markings here; but the dress is substantially the same. The ordinary purchaser

Figure 1

Figure 2

would not know the difference between them; he would not know the difference between that and this (indicating the two products), unless he read closely.

[3] The defendant has the right to use spearmint to flavor his gum, and to sell it. But why not wrap it up in a blue package? I have an idea that, if you would put it up in a blue package, the complainant would not complain. Why does he select pink, when he has got all the other colors of the rainbow to make a selection from—blue, and violet and yellow, and green. But he takes the complainant's color. And so as to these other markings. Wrigley has his lettered in red, and so is Colker's lettered in red. Other markings are in green on Wrigley's product, and so is Colker's in green; and it is that way all around. It is in the same colors exactly. There is no other conclusion that one can come to than that he adopted that dress in order to get Wrigley's business. And, as Colker says, he gets it without advertising. He don't have to advertise; the advertising is already done. And so Wrigley, by spending a million dollars a year in advertising his product, has to sell it at 48 cents a box; while Colker, who does not have to do any advertising, because it is already done, is able to sell his product at 20 cents a box, and perhaps that entire difference may be the difference in advertising for all we know.

I have considered the matter carefully on the application for preliminary injunction, and I am clear that this later marking is calculated to fool the purchaser, in order to get Wrigley's business. There is no other motive under the sun for dressing the thing up like that, other than to get their business. I do not know about the wording of your temporary injunction. It is possible that putting that on the market is a violation of that. The complainant is entitled to his decree.

Now, do not dress your goods up so that they resemble his. You can use the word "Spearmint" on your goods; you can plaster them all over with the word "Spearmint," if you want to; but that dress has a general resemblance to Wrigley's in looking at it a way off. Do not have them the same, and then there will be no bother. I am perfectly clear this is an infringement of the complainant's rights. They are spending money hand over fist to sell their goods by advertising their goods, and nobody else is entitled to the benefit of that advertising in putting his goods on the market.

THE SARK.

(District Court, E. D. Louisiana. December 19, 1912.)

No. 14179.

1. SALES ⟸150(3)—DELIVERY—CONTRACT.
   Where cotton oil cake was sold for October and November shipment, delivery to a ship in December was not a compliance with the contract.
2. PRINCIPAL AND AGENT ⟸123(1)—CHARTERER—AUTHORITY OF AGENT.
   Evidence *held* to show that the agent of the charterer, who signed bills of lading for goods delivered to the vessel, was acting within the scope of the authority delegated by charterer.

3. JUDGMENT ⊂832—CONCLUSIVENESS—EFFECT.

The agent of the charterer of a vessel having signed bills of lading for deliveries to the vessel, and the consignees, on faith of the bills of lading which were antedated so as to show delivery to the vessel at the date fixed by contract, having paid drafts for the purchase price, a judgment recovered by the consignees against the vessel in a foreign court is conclusive as to vessel's liability in a subsequent proceeding against the charterer by the vessel's owners.

In Admiralty. Libel by the Steamship Company Sark against the South Atlantic Steamship Company. Decree for libelant.

Geo. Denegre, of New Orleans, La., J. P. Blair, of New York City, and Victor Leovy, of New Orleans, La., for libelant.

John D. Grace, of New Orleans, La., for respondent.

FOSTER, District Judge. [1] In this matter it appears that the South Atlantic Steamship Company chartered the steamship Sark by a general charter, to load from New Orleans to one or more ports in Denmark. As a part of her cargo, the Southern Cotton Oil Company shipped some 1,250 tons of cotton oil cake to Nyborg which they had sold to the firm of J. J. Larsens of Copenhagen for October and November shipment. A part of this cotton oil cake was delivered to the steamship during the month of November, but a considerable amount of it was delivered after the first of December and some as late as the 10th of December. The portion delivered in December, of course, was not a delivery under the contract of sale. The charter party contains the usual clause, requiring the captain to sign bills of lading as presented to him. Alfred H. Clement, in charge of the charterer's office in New Orleans, however, requested permission of the captain to sign the bills of lading for him. The captain did not consent, but neither did he seriously object, and Clement did sign and issue 13 bills of lading, covering the shipments of the aforesaid oil cake, and the captain impliedly ratified the signing. Clement had, however, antedated some of the bills of lading to show that the entire shipment had been received on board during the month of November, but this part of his action the captain had no knowledge of and could not be considered to have approved. On the faith of these, the consignees of the cotton oil cake accepted, and ultimately paid, drafts for the purchase price. However, when the ship arrived in Denmark, the consignees discovered that all of the cotton oil cake had not been actually received on board during November, and instituted an action against the ship for damages, on the theory that as the price had declined they would not have accepted the shipment, owing to the default in delivery, but for the falsely dated bills of lading. The ship appeared by counsel and defended the suit, but judgment went against her, and it is the amount of her damages, growing out of the award, that libelant, her owner, is now seeking to recover.

[2, 3] In the libel Clement is alleged to be the managing director of the South Atlantic Steamship Company. He was not such an official; but it is immaterial, as he was their agent in full charge at New Orleans, conducting the business almost entirely on his own responsi-

bility. Both Clement and Trosdale, who was the general manager of the company, contented themselves, when testifying, with denying that the former was the managing director of the company, and said nothing about the scope of his authority. Meyers, president of the company, testifies Clement's authority to sign bills of lading depended on the form of the charter party. The form of the bill of lading prepared by them indicates that it was their intention that Clement should sign bills of lading for the captain, and there is testimony by respondents' witness Pearce tending to show that it is customary for the ship agent to sign bills of lading for the captain at New Orleans in certain circumstances. I am convinced that Clement acted within the scope of the authority delegated to him by the charterers, and that his action in predating the bills of lading was deliberate and fraudulent.

It is contended by respondents that as the ship would not be liable for a bill of lading signed by the master, or some one for him, when the goods were not actually received, there was no liability in this case; but I consider that contention entirely beside the issue.

The verdict of the Danish court is conclusive on the parties, and the ship was made to suffer through the wrongful act of respondents' agent acting within the scope of his authority, and for which they are responsible.

There will be a decree in favor of the libelant as prayed for.

CASTLE et al. v. SWEDISH AMERICA MEXICO LINE, Limited.

(District Court, D. Maryland. September 28, 1917.)

SHIPPING ⊂=108—CONSIGNEES—LIABILITY.

Where the bill of lading provided that the goods should be taken from the ship by the consignee immediately it should be ready to discharge, or transhipped into lighter at the expense of the consignee, a consignee is liable for his just share of the expense of discharging the cargo into ocean-going barges; the consignee furnishing no wharfage facilities and not providing lighters until several days after notified.

In Admiralty. Libel by William A. Castle, Leon Gottheil, and Frank C. Overton, copartners doing business as Castle, Gottheil & Overton, against the Swedish America Mexico Line, Limited. Libel sustained in part; otherwise, dismissed.

Maloy & Brady and George M. Brady, all of Baltimore, Md., for libelants.

Harry N. Abercrombie, of Baltimore, Md., for respondent.

ROSE, District Judge. The libelants are consignees of certain bales of wood pulp. In the bill of lading is found the provision following:

"The goods to be taken from the ship by the consignee immediately the vessel is ready to discharge, and as fast as she can deliver, either night or day, or the same will be transhipped into lighter, or landed, or warehoused, at the expense and risk of the proprietors of such goods."

The vessel arrived in the port of Baltimore on the 22d of last February, and immediately gave notice to the agent of the consignees that it was ready to discharge its cargo. The agent of the consignees failed to provide any berth in which the ship could discharge, nor could she secure any herself. The ship thereupon arranged to have lighters brought alongside, and at 7:30 o'clock on the morning of February 24th began discharging into such lighters. The lighters obtained for this purpose were in fact ocean-going barges, it being impractical on the 24th to obtain any others.

On the afternoon of the 26th, the Baltimore & Ohio Railroad, as agent for the consignees, brought lighters to the ship. As the barges were still engaged in receiving cargo, the lighters were made fast outside of them, and the portion of consignees' goods not already placed on the barges, and there stowed, was carried across them to the lighters. Ultimately the entire consignment came into the possession of the Baltimore & Ohio Railroad.

The ship demanded payment of what it calculated to be the share of the consignees of the expense of delivering the goods upon the barges, and threatened to libel them for such amount. The Baltimore & Ohio Railroad demanded of the consignees payment of what it said was their proportion of the expenses connected with placing the goods on the lighters, and subsequently delivering them on board the cars. The consignees paid both sums under protest, and have brought this libel against the owners of this shipment to recover.

The libelants admit that they cannot maintain their claim in so far as concerns the sum exacted by the Baltimore & Ohio Railroad for its own reimbursement, nor in my view is it any more possible for them successfully to ask for repayment of their fair share of the expenses to which the ship was put in delivering the cargo upon the barges. The provision of the bill of lading seems very clear and express on the point. At this time, when ships are in so great demand, the shipowner is not only justified, but he is required, to use the utmost diligence to take on and discharge cargo with all possible speed. If wharves and berths are crowded, as they are now habitually crowded, the ship must do the best it can to make delivery in other ways. Under such a bill of lading, it cannot be required to wait upon the convenience of the consignees. Its business is to get the cargo out of the ship, so that it can take on another cargo at the earliest possible moment.

Of course, the shipowner, where he employs barges or lighters to take off a cargo belonging to more than one consignee, must fairly apportion the expenses of so doing among those consignees. It appears, as to such apportionment, a mistake has been made to the prejudice of the libelants, and to that extent the libel will be sustained. Its contention that the ship should have waited until the lighters furnished by its agents came alongside before beginning to discharge must be overruled.

PENNSYLVANIA SUGAR CO. v. CZARNIKOW-RIONDA CO.

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

No. 2267.

SALES ⊂=71(3)—CONTRACTS—CONSTRUCTION—"CARGO."

Defendant executed a contract reciting sale to plaintiff of 25,000 to 30,000 bags of Cuban sugar, to be shipped per steamer or steamers to be named as soon as possible. The contract provided that insurance should be covered by buyer, including risk of lighters at ports of loading and discharge, and for payment to seller in six days from the date of delivery of shipping documents to buyers for net amount of invoice. Plaintiff objecting that the contract did not contain all the items agreed upon, defendant's broker wrote a letter stating that, in reference to the contract, the understanding at the time of the sale of the cargo was that the drafts to be drawn against the cargo were to be made payable in Philadelphia, plaintiff's place of business, and that, should there be any demurrage, the same should be settled for on the basis of net registered tonnage. Plaintiff returned the contract, with a letter stating that the contract for the sale of from 25,000 to 30,000 bags of sugar had been accepted. Before any ship had been chartered, the actual furnisher of the sugar chartered a vessel, loading it with 32,000 bags of sugar. The price of the sugar having appreciated between the date of the contract and the arrival of the vessel at plaintiff's place of business, plaintiff claimed the whole of the shipment, on the theory that the word "cargo," used in reference to the contract by defendant's broker, embraced the whole shipment. *Held* that, while the word "cargo" is primarily the load of the ship, it may carry a varying meaning, and in view of the contract, and the provisions for shipment on several ships, plaintiff was not, defendant seller having the option of delivering 25,000 to 30,000 bags of sugar, entitled to more than 25,000 bags; this being particularly true, as defendant could not have required plaintiff to accept any sugar in excess of 30,000 bags.

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

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

Action by the Pennsylvania Sugar Company against the Czarnikow-Rionda Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

William B. Linn and H. B. Gill, both of Philadelphia, Pa., for plaintiff in error.

Frank R. Savidge and William F. Corliss, both of New York City, and Edwin Booth, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In this action the plaintiff, a purchaser of raw sugar from the defendant, was nonsuited in the effort to recover damages for failure to make a full delivery. The defendant shipped 32,000 bags from Cuba to Philadelphia, and the plaintiff received 25,000 bags; the remaining 7,000 being the quantity in dispute. The plaintiff sets up a right to the whole 32,000, while the defendant contends that 25,000 bags completely fulfilled the contract.

The facts (either undisputed, or in accord with the plaintiff's evidence) are as follows:

The Pennsylvania Company is a Philadelphia refiner, and the Rionda Company is a dealer in Cuban sugar, having an office in New York City, and transacting part of its business through John F. Craig & Co., a firm of brokers in Philadelphia. So far as appears, Craig & Co. were not authorized to make final contracts of sale. Shortly before June 16, 1914, the Pennsylvania Company and Craig & Co. negotiated concerning the sale of sugar, and agreed upon certain terms provisionally. The brokers sent these on to New York for approval, and in due course the following written form of agreement, dated June 16, signed by the Rionda Company, and identified as "Contract V 329," was returned to the brokers to be accepted by the Pennsylvania Company:

"New York, June 16th, 1914.

"To Messrs. Pennsylvania Sugar Company, Philadelphia, Pa.:

"We have this day sold to you for account of Czarnikow-Rionda Company, New York:

"Quantity: Twenty-five thousand to thirty thousand (25/30,000) bags * * * of Cuba centrifugal sugar.

"Shipment or clearance: To be shipped cleared during August, 1914, first half, not before 5th.

"Destination: Per steamer, or steamers, to be named as soon as possible, for Philadelphia. * * *

"Price: At two and seven-sixteenth ($2^{7}/_{16}¢$) cents per pound. Cost and freight, basis ninety-six (96°), average outturn polarization, net landed weights.

"Payment: To be made to Czarnikow-Rionda Company by cash in New York in six (6) days from date of delivery of shipping documents to buyers, for the net amount of the invoice, or by sellers or Czarnikow-Rionda Company drawing on buyers at six (6) days' sight for the net amount of the invoice with shipping documents attached.

"Delivery: Sugar to be delivered at a customary safe wharf or refinery, as directed by buyers. * * *

"Marine insurance: To be covered by buyers from shore to shore, including risk of lighters at ports of loading and discharge.

"Czarnikow-Rionda Company,

"[Signed] Manuel E. Rionda, Vice President.

"Brokers."

Craig & Co. presented this writing to the Pennsylvania Company for acceptance, but were informed that it did not contain all the terms that had been agreed upon. Thereupon the brokers communicated with the Rionda Company and were authorized to write the following letter:

"Philadelphia, June 17th, 1914.

"Messrs. Pennsylvania Sugar Co., Philadelphia—Dear Sirs: Referring to contract V 329, dated June 16th, 1914, the understanding at the time of sale of this cargo was that the drafts to be drawn against this cargo were to be made payable in Philadelphia; also that, should there be any demurrage, the same was to be settled for on the basis of net registered tonnage. The sellers, Messrs. Czarnikow-Rionda Company, authorize us to herewith confirm these conditions and same become part of contract above named.

"Yours truly, [Signed] Jno. F. Craig & Co.,

"Brokers for Messrs. Czarnikow-Rionda Co., New York."

Upon the receipt of this letter, the Pennsylvania Company signed the writing dated June 16, and returned it to Craig & Co. with the following letter:

"June 18th, 1914.

"Messrs. John Craig & Company, 143 South Front Street, Philadelphia—Gentlemen: We are enclosing herewith contract dated June 16th between the Pennsylvania Sugar Company and Czarnikow-Rionda Company in New York, covering the sale of from 25,000 to 30,000 bags Cuba centrifugal sugar at $2^{7}/_{16}$ cents a pound, for shipment the first half of August, 1914, not before the 5th. The contract has been accepted by Mr. McCarthy, secretary and treasurer of this company.

"Very truly yours, Pennsylvania Sugar Company,
"[Signed] Russel Spruance."

The two writings of the 16th and 17th are therefore to be taken together as the contract, and upon their construction the decision of the controversy depends. But, in order to give a full account of the transaction, a few more facts should be stated. At the time of signing the contract, it does not appear that any vessel had been chartered or was in contemplation, and we are not informed whether the Rionda Company then owned or controlled the necessary quantity of sugar. But on June 23 one Domingo Nazabal (who apparently furnished the sugar to fill the contract) chartered the steamship St. Andrews, and on July 24 Craig & Co. telephoned to the Sugar Company that the ship was loading with about 33,000 bags, writing on the same day that the St. Andrews was loading against "contract V 329, June 16, 25/30,000 bags of Cubas." The charter called for "a full cargo of 30,000 bags" giving the ship an option of 5 per cent. more or less, but the vessel loaded 32,000 bags, marked uniformly and stowed indiscriminately, and sailed for Philadelphia on August 5. Four bills of lading were made out, one for 15,000 bags, a second for 10,000 bags, and two others for 5,000 and 2,000 bags respectively. On August 4 the bill for 15,000 bags was presented to the Pennsylvania Company, with an approximate invoice and a draft for $109,000, and this was accepted and paid. On August 11 the Pennsylvania Company in compliance with its request received a copy of the charter party, and on the same date was presented with the second bill of lading for 10,000 bags, with an approximate invoice and a draft for $72,000 "to close contract No. V 329." The ship had not yet arrived, but the price of raw sugar (which had gone down somewhat during the whole month of July) had risen on account of the war to 5½ cents; the rise being rapid after August 3. Before accepting and paying the second draft the Pennsylvania Company telephoned to Craig & Co. that it was entitled to the whole cargo, and to this Craig & Co. assented, whereupon the draft was paid. The vessel arrived in Philadelphia on August 13, and 25,000 bags were delivered to the Pennsylvania Company and accepted, the remaining 7,000 being delivered to another refiner.

Craig & Co. had no authority, either to make or to construe the contract; as we view the matter, the whole agreement between the parties is contained in the two writings, and the conclusion of the district court was correct. The question may perhaps be stated thus: Was the express and definite provision of the contract that calls for a specified quantity of sugar within the limits named so modified by the word "cargo" as to lose its apparent meaning, and to take on the new meaning of a whole shipload, a load that exceeds the maximum limit? It

is true that a "cargo" is primarily the load of a ship; but the word, like many another, may carry a varying content, and the question of its scope in a given contract under given circumstances cannot be decided by confining the court's inquiry to its abstract meaning. We must determine what scope the parties gave it in this contract, and our opinion is that the meaning here is the same as the meaning of the definite phrase, "25,000 to 30,000 bags of Cuba centrifugal sugar." There can be no doubt that the writing of June 16, unaffected by the letter of June 17, would have been satisfied by the delivery of 25,000 bags, and we find little in the letter that indicates a different conclusion. The letter is dealing directly with two subjects only—payment in Philadelphia, instead of in New York, and the settlement of possible demurrage—and the reference to the quantity of sugar is indirect and incidental. No doubt the sugar is spoken of as "this cargo"; but we think this is no more than the writer's allusion to the large quantity (correctly described as a cargo) that had already been distinctly specified, and therefore did not need to be specified again. The letter, which was satisfactory to the Pennsylvania Company, does not indicate that the parties intended to deal with a third subject and to make another change in the terms of the writing dated June 16; it does indicate that they had in mind two subjects only and were dealing with them in plain language —changing one term of the writing, the place of payment, and adding a provision about demurrage that had not yet been referred to at all. The subject of quantity had already been expressly provided for, and if they had intended to change that also we think it likely that the method of change would have been as definite as in the other two instances, and would not have been left to the hazard of a passing reference.

Moreover, it is important to remember that, while the duty of delivering the sugar lay upon the Rionda Company, there was no obligation to deliver it as a single cargo in a single ship. Unless the privilege of delivery by "steamer or steamers" be disregarded, the bags could be brought to Philadelphia on one steamship or on more than one. The Pennsylvania Company was to take out marine insurance from shore to shore, but it had nothing further to do with the vessels or the voyage, except to point out the wharf at which the bags should be delivered; its chief concern was to get the sugar, no matter how many vessels should be needed for carriage. And this leads to the question, how much sugar did the Pennsylvania Company buy? If the word "cargo" were not in the contract, the answer would be plain, namely, from 25,000 to 30,000 bags, at the seller's option. But, as the letter of June 17 put "cargo" into the contract, the effect of introducing it must have been one of two things—either to strike out the figures and substitute "cargo," or to let the figures stand and add "cargo." If we strike out the figures, we have a contract for a "cargo" pure and simple; and who is to determine how many bags it is to comprise? Presumably it must be carried on a single vessel (and this would strike out also, and by implication, the word "steamers"), and as the seller is to furnish the vessel without restriction, would he fulfill the contract by chartering a vessel that would carry only 10,000 bags, or even a smaller number? And, if this would not fulfill such a contract, why would it not? Sure-

ly the parties did not intend to leave the quantity in such uncertainty, and we turn therefore to the other possibility—that "cargo" is to be added to the writing. We then have a contract for a cargo of 25,000 to 30,000 bags, and the question is: How much can the buyer demand under such an agreement? It may be that he could not be compelled to take more than 30,000 bags; he might perhaps say: "I contracted for a whole shipload, a single thing; but its maximum was to be 30,000 bags, and I decline to accept more than I bought." But that is not now the point; the question is: How much may he lawfully demand? He has bought a shipload, but the limits of the load are fixed, and the contract will be fulfilled if the load does not exceed 25,000 bags, and in no event is it to exceed 30,000 bags. Where, then, does he get the right to demand the whole of a load whose quantity exceeds by 2,000 bags the maximum limit in his agreement, and exceeds by 7,000 bags the minimum limit that he would have been bound to accept as a good delivery? Without prolonging the discussion, we conclude that the word "cargo," as used in this contract, does not mean a whole shipload, but does mean the quantity specified, and for this reason we see no occasion to consider in this opinion the cases where the word in other contracts has been held to bear a different meaning—e. g., Kreuger v. Blanck, 5 L. R. Exch. 179; Borrowmen v. Drayton, 2 L. R. Exch. 15. A decision closely in point is Standard Ref'y v. Castano (C. C.) 43 Fed. 279.

The judgment is affirmed.

CHESAPEAKE & OHIO COAL & COKE CO. v. TOLEDO & O. C. RY. CO.

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

No. 1519.

1. CARRIERS ⟸30—CAR DEMURRAGE—APPLICABLE TARIFF.
   A local tariff of demurrage charges applies after it has gone into effect, by notice for the required time, to all cars, including those accepted for transportation before the tariff was issued and filed with the Interstate Commerce Commission; the optional allowance of storage at destination being wholly disconnected with the service of transportation.
2. COMMERCE ⟸89—INTERSTATE COMMERCE—DEMURRAGE CHARGES—COMPLAINT TO COMMISSIONER.
   The Interstate Commerce Commission, and not the court, is the tribunal to which complaint should be made of any unreasonableness in a local tariff of demurrage charges filed with it.
3. CARRIERS ⟸100(1)—CAR DEMURRAGE—NOTICE OF ARRIVAL.
   In the absence of anything in a tariff of demurrage charges, or the statute under which it is issued requiring the carrier to give notice of arrival of cars, absence of such notice does not affect time when demurrage charges commence, notwithstanding notices are usually given on the day of arrival, as matter of courtesy or custom.

   Smith, J., dissenting.

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

Action at law by the Toledo & Ohio Central Railway Company against the Chesapeake & Ohio Coal & Coke Company. Judgment for plaintiff (238 Fed. 629), and defendant brings error. Affirmed.

Buckner Clay, of Charleston, W. Va., for plaintiff in error.

E. W. Knight, of Charleston, W. Va. (Brown, Jackson & Knight, of Charleston, W. Va., and Frank S. Lewis, of Toledo, Ohio, on the brief), for defendant in error.

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

KNAPP, Circuit Judge. The facts are stated in a signed stipulation from which it appears that on July 12, 1909, the above-named railway company, plaintiff below, issued and filed with the Interstate Commerce Commission a "local tariff," effective August 15, 1909, I. C. C. No. 1668, described in the record as Exhibit A, naming "car demurrage rules and charges applying on coal or coke transferred from cars to vessels and reshipped via Lake." On April 4, 1911, the plaintiff issued and filed another local tariff, effective May 15, 1911, I. C. C. No. 1856, described as Exhibit B, bearing the same title, and also the notation, "I. C. C. No. 1856 cancels I. C. C. No. 1668." The "rules and charges" in both tariffs are substantially the same. The stipulation further recites:

"That during the period from May 15th to June 30th, inclusive, 1911, demurrage accrued upon cars of lake cargo coal consigned to defendant and held for it on plaintiff's yards at Toledo, Ohio, after deducting from the debit demurrage days the credit demurrage days to which defendant was entitled under the tariff, to an amount of $10,562.00, unless, as defendant claims, the deductions hereinafter set out should be made therefrom.

"Defendant claims deductions because certain of the cars in controversy in the period last aforesaid were shipped from mines on the Kanawha & Michigan Railway in West Virginia, while plaintiff's tariff Exhibit A was in force, before plaintiff's tariff, Exhibit B above mentioned, was issued and filed as aforesaid, and before defendant had actual notice of the issuing and filing of said last-mentioned tariff, and because certain other cars in controversy in said period were shipped from the mines in West Virginia after said last-mentioned tariff was issued and filed, and after defendant had notice thereof, but before said tariff became effective. Plaintiff denies that the defendant is entitled to any credit or set-off for such reason, or that such defense can be made in this action."

[1] This discloses the main contention. Defendant asserts that the tariff of 1909, imposing demurrage from the 15th of August and not before, continued in full force until the 15th of May, 1911, when the tariff of that year became effective; that demurrage can be charged, or free storage allowed, only in accordance with the tariff in force at the time shipments are delivered to the carrier at point of origin; that all shipments of defendant prior to the 15th of May, when the new tariff took effect, were entitled at Toledo to the free storage provided in the previous tariff, because that tariff remained in force until the date named; and that, consequently, on such shipments the plaintiff could not lawfully impose demurrage before the 15th of August following.

It is conceded that the demurrage in dispute was assessed in accordance with the tariff of 1911, and that it accrued at the times and in the amounts claimed by the plaintiff. That is to say, the "rules and charges" of the new tariff were correctly applied to all loaded cars which had arrived at Toledo prior to the 15th of May and were then held there on yard storage. If, then, we assume, as defendant contends, that the old tariff was in effect until that date, it will at once be seen that the decisive question is whether plaintiff had the right, after accepting shipments at point of origin, and from a date of which the required 30 days' notice was given, to shorten the time that such shipments would be held at destination without charge for storage. In other words, could the plaintiff lawfully apply the new tariff to cars transported before the old tariff was canceled?

We are of opinion that this question must be answered in the affirmative. The opposing view, to say nothing else, overlooks the essential difference between the service of transportation, which must be furnished and paid for, and the accommodation of storage, which may or may not be provided. Broadly speaking, the former is a right which the carrier cannot deny or abridge, the latter a privilege which the carrier is at liberty to accord or refuse. One is obligatory, the other optional. This distinction is recognized in the regulating statute which, for example, requires the carrier's schedules to state separately all storage charges, and in the general practice of publishing such charges in a separate tariff. The freight rate in force at a given time is a unit by itself which measures, while it remains in force, the liability of the shipper for the service of transportation. In re Through Routes & Through Rates, 12 Interst. Com. R. 163. But that service is wholly disconnected, in fact and in law, with the optional allowance of yard storage, whether free or otherwise, after a shipment has reached its destination. And in respect of such storage, under either of the tariffs in question, each day is plainly a separate unit, because the shipper is free to avail himself of the privilege for whatever number of days he chooses, within the limits and upon the terms named in the tariff, or to release the cars at any time and thus avoid further payment or obligation. From this it follows that, whilst the freight rate in effect when a shipment is delivered to the carrier cannot be changed as against that shipment, the charge for optional storage at destination, when the transportation has been completed, may be lawfully increased, or the free time curtailed, upon and after the statutory notice. And it also follows that the tariff of 1911, under which the demurrage in question accrued, was "the tariff filed and in effect at the time," that is, from and after the 15th of May, and plaintiff was therefore bound under heavy penalty to strictly observe that tariff and assess demurrage accordingly. On that date the old tariff ceased to exist, for it was canceled in terms by the new issue, and the latter thereupon became the established standard of charges which plaintiff could in no wise disregard without the risk of criminal prosecution. Horton v. T. & G. R. Co. (D. C.) 225 Fed. 406.

[2] With the reasonableness or otherwise of this tariff we are not at all concerned, as that question is solely for the tribunal which ad-

ministers the statute. It is only for us to determine whether the cars transported before April 4, 1911, when the new tariff was issued and filed, as well as those transported between then and the 15th of May, when the new tariff went into effect, were subject to the "rules and charges" named and provided in that tariff. If defendant felt aggrieved by the announced intention to charge demurrage from the 15th of May instead of the 15th of August, there were ample remedies at its command. A protest could have been made, when notice of the new tariff was received, and the Commission asked to suspend it pending investigation. If that course were not taken or failed of success, a complaint of unreasonableness could have been filed, with demand for reparation, and the Commission would have had full authority, if it sustained the complaint, to order the tariff amended, or canceled altogether, and to award compensation for any injury which the defendant was found to have sustained.

Taking the facts and assumptions here considered in the aspect most favorable to defendant, we perceive no ground upon which its contention can be upheld. The service of transportation, as already pointed out, is entirely distinct from the privilege of storage at destination, and it seems clear to us that such storage should be governed by the demurrage tariff in force when the shipper avails himself of the privilege, if the required notice has been given, irrespective of the time when his cars were transported. Such a tariff is in no sense retroactive, for it applies only from a date of which the shipper has had such notice as the law presumes to be sufficient for his protection; and if he has reason to complain of a change which shortens the free time, or increases the per diem, the Commission has plenary power to afford him redress. A ruling to the contrary would not only be unfair to the carrier, but serve to give opportunity for the unjust discriminations which the commerce act especially seeks to prevent.

[3] The foregoing in effect disposes also of the claim for deductions from the aggregate charge because in certain cases—comparatively few in number—notice of arrival was not mailed to defendant on the day the cars reached the Toledo terminal. The sufficient answer to this claim is that nothing is found in the tariff in question, or in the statute under which it was issued, which required the plaintiff to give notice, by mail or otherwise; and the fact that notices were given, usually on the day of arrival, as a matter of courtesy or custom, does not imply any binding obligation on plaintiff's part, or entitle defendant to any set-off for the occasional instances of delayed notice. The point is fully covered by Hite v. Central R. of New Jersey, 171 Fed. 370, 96 C. C. A. 326, and the unreported opinion of the Commission in Pittsburg & Buffalo Co. v. Hocking Valley Ry., decided March 22, 1915. And here again it may be noted that if the 1911 tariff was faulty or defective, in failing to provide for notice of arrival, the Commission alone had authority to require its proper correction.

We agree with the court below that the defense set up is without legal merit, and the judgment in favor of plaintiff must therefore be affirmed.

SMITH, District Judge (dissenting). What appears to me the magnitude of the consequences that might follow from the erroneous conclusion of the court in this cause if generally applied to mercantile transactions of the character involved in the present case compels me to dissent. The evidence and admitted facts in the case were to the effect that the railroads, in order to obtain use for their cars at a dull season of the year, offered the shippers of coal by the tariff marked "Exhibit A" that if they would ship coal during certain months, they could have the privilege, so to say, of free storage, until navigation was opened up on the lakes and all opportunity given for the water transportation. By this tariff proposition no demurrage was to be charged on such coal shipments between 1st January and 15th August in each year. This was a perfectly clear and understandable proposition. The railroads said to the shippers of coal that during the period when water navigation was closed, transportation and the use of railroad cars to ports on the lake necessarily ceased, and their cars would be useless. To remedy this and to offer an inducement to coal shippers to give employment to cars, the railroad company notified all coal shippers who would ship coal after the 1st of January that they should not be charged with demurrage until the 15th of August in each year, i. e., should have free storage. After that date, viz. 15th August, on all coal arriving, or remaining on hand, with the railroads for which water transportation had not been provided, shippers would be charged demurrage. This tariff or contract offer by its terms remained in force until due notice was given of its cancellation. Acting upon this tariff the plaintiff in error, defendant below, shipped coal after the 1st of January, 1911, which coal was in course of transportation and out of the defendant's possession and on its way to the water port when the plaintiff below on 4th April, 1911, undertook to issue another tariff, Exhibit B, whereby this privilege of freedom from demurrage or free storage was canceled from and after the 15th day of May, 1911. The result of this change was that shippers who had already shipped their coal prior to notice of this change, which coal had passed from their possession into the hands of transporting carriers, and who had shipped it upon the hypothesis that they would be given storage without demurrage charges until the 15th of August under the tariff then in force, were notified, notwithstanding the arrangement made, that this agreement would be arbitrarily canceled and the coal which they had shipped already under and by virtue of the agreement, and depending upon it, would be charged storage. This was a plain violation of the contract, and one which destroyed the power of the shipper desiring to make contracts to deliver, to make those contracts based upon any definite mathematical calculation of what the expenses would be as affecting the prices at which deliveries should be made. As, for instance, if a coal dealer on the 1st February desired to fill an order for coal to be delivered in, say October, in making his estimate of the price at which he could deliver, he would be justified under the existing tariff in estimating that if he could get his coal to the port and provide water freight room before the 15th August, he would not be called upon to pay demurrage. To allow the transportation company delivering the coal at the port to arbitrarily

and suddenly cancel this agreement, after the coal has left the hands of the shipper, and gone into the possession of the transportation company would not only disorder the channels and methods of trade, but might ruin the individual shipper. Assuming that there is an essential difference between the service of transportation which must be furnished and paid for and the accommodation of storage, which may or may not be provided, and that the former is a right which the carrier cannot deny or abridge, the latter a privilege which the carrier is at liberty to accord or refuse, and that the former is obligatory and the latter optional, then and in that case there is less justification in permitting the carrier arbitrarily to annul a contract in the shape of an offer which was not obligatory on him, but purely optional. If it was optional for him to make it, and it was made for consideration, and accepted and acted upon by the other party to it, then there is no question whatsoever of public service regulation which would interfere to hold the contract not binding between the two.

The learned judge who heard the cause in the court below was of the opinion that the tariffs were "seasonal," i. e., of force only for the navigation season of lake transportation defined therein; which under the tariff set out as Exhibit A is defined as extending from August 15th to December 21st. That it expired on December 31, 1909, and must be presumed to have been again issued on July 12, 1910. There appears no sufficient ground for this hypothesis. This tariff was not again issued, but all parties seemed to have acted under it in 1910 as if it still continued in force. By its very terms the rules and charges therein are declared effective *each year* from August 15th to December 31st inclusive. It would seem that for all cars shipped prior to notice of the change in the tariff or storage charged, and which cars therefore had been placed out of the possession of the shipper in reliance on the contract, the other party was not in a position to refuse the consideration, and as to all these cars the judgment of the court below was erroneous and should be reversed.

UNITED STATES v. MORRISEY.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1917.)

No. 4689.

ALIENS ⇐58—OFFENSES AGAINST IMMIGRATION LAW—CONTRACT LABORERS.
Under Immigration Act Feb. 20, 1907, c. 1134, §§ 4–6, 34 Stat. 900 (Comp. St. 1916, §§ 4248, 4250, 4251), making it a misdemeanor to assist or encourage the immigration of any alien by promise of employment through a foreign advertisement, etc., the offense is complete, although an alien, seeking to enter the United States in consequence of such a promise, is denied entry.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by the United States against James E. Morrisey, doing business as the Crookston Iron Works. Judgment for defendant, and the United States brings error. Reversed.

Alfred Jaques, of Duluth, Minn., U. S. Atty.

Martin O'Brien, of Crookston, Minn., for defendant in error.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

SMITH, Circuit Judge. In the District Court this case was disposed of by a judgment of dismissal of the complaint upon the sustaining of a demurrer thereto. The sole question is as to the sufficiency of the complaint. In it, it is charged:

That on or about January 21, 1915, while the defendant was conducting iron works at Crookston, Minn., he did knowingly, wrongfully, and unlawfully assist, solicit, and encourage an alien, Thomas Wilson Young, to migrate to the United States by a promise of employment in the United States through an advertisement caused by defendant to be published in a newspaper published in Winnipeg and circulated in the Dominion of Canada, called the Evening Free Press Bulletin, which advertisement was as follows:

"Wanted—First-class machinist, also a good general iron moulder. Steady work. Out of town shop. Family man. Box 337 Free Press."

That said advertisement was published at defendant's request; that at the time of its publication many iron molders were out of employment in the United States and could easily have been employed by the defendant; that said advertisement came to the attention of Thomas Wilson Young, an iron molder, who opened a correspondence with the defendant which resulted in a contract between said Young and the defendant. The complaint continues:

"That thereafter said alien, Thomas Wilson Young, in consequence of such advertisement caused to be published by the defendant in the Evening Free Press Bulletin, and in consequence of the letters above specified, written to

said alien, Thomas Wilson Young, on the 27th day of February, A. D. 1915, started from his home in Weston, Manitoba, Dominion of Canada, to Crookston, in the United States of America. That on his way to Crookston, in the United States, to wit, at Winnipeg, in the Dominion of Canada, said alien, Thomas Wilson Young, was intercepted by the immigration authorities of the United States, taken before a board of special inquiry of inspectors in said Winnipeg, at a meeting held Saturday, February 27, 1915, and was by such board of inquiry refused admission to the United States as one coming to the United States in violation of the immigration laws of the United States, and as a contract laborer within the meaning of such laws."

Plaintiff asked judgment for the sum of $1,000. The demurrer was filed on the ground that said complaint failed to state facts sufficient to constitute a cause of action. The action was brought under the act of the Fifty-Ninth Congress of February 20, 1907, entitled "An act to regulate the immigration of aliens into the United States." 34 Stats. 898, 900, c. 1134. This law provides:

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section 2 of this act.

"Sec. 5. That for every violation of any of the provisions of section 4 of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

"Sec. 6. That it shall be unlawful and be deemed a violation of section 4 of this act to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under promise or agreement as contemplated in section 2 of this act, and the penalties imposed by section 5 of this act shall be applicable to such a case: Provided, that this section shall not apply to states or territories, the District of Columbia, or places subject to the jurisdiction of the United States, advertising the inducements they offer for immigration thereto, respectively."

The sole question argued is as to the effect of the stopping of the contemplated immigrant before he reached the United States. It is substantially conceded that, if he had ever reached the United States under the allegations of the complaint, the defendant would have been liable.

The defendant chiefly relies upon United States v. Craig (C. C.) 28 Fed. 795. That opinion was delivered by Judge Brown, afterwards one of the Justices of the Supreme Court of the United States. The opinion is learned and able, as one would expect any opinion to be from its author. It is announced in that case that under the act of February 26, 1885 (23 Stat. 332, c. 164), the offense described in the act

was not completed until the alien had entered the territory of the United States. We do not deem it necessary to discuss the question raised as to whether that was dictum or not.

The defendant also relies upon United States v. Borneman (D. C.) 41 Fed. 751. That opinion was by Green, District Judge, and does not substantially discuss the question, but announces the same rule under the same statute. The defendant also cites United States v. Michigan Cent. R.. Co. (C. C.) 48 Fed. 365, but we confess we cannot see its application.

None of the cases cited were under the same act as this one. The act of 1885 (23 Stat. 332) was entitled:

"An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia."

This title necessarily implied that the immigrant must arrive in the United States and it has been said that:

"The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the Legislature." Holy Trinity Church v. United States, 143 U. S. 457, 462, 12 Sup. Ct. 511, 513 (36 L. Ed. 226).

The first section of that act provides that it shall be unlawful for any person to prepay the transportation of any alien under contract or agreement made previous to the importation or migration of such alien to perform labor. Section 2 (Comp. St. 1916, § 4245) provides that all contracts or agreements which may hereafter be made to perform labor or services by any person in the United States previous to the migration or importation of the person or persons shall be utterly void. Section 3 provides that for every violation of the provisions of section 1 the person violating the same by knowingly assisting, encouraging, or soliciting the immigration of any alien into the United States shall forfeit and pay, etc. This section refers to the first section, which in turn refers to contracts "made previous to the importation or migration of such alien."

The act under which this proceeding is brought carries with it none of the inferences to be drawn from the title of the act of 1885. The law in question is entitled "An act to regulate the immigration of aliens into the United States," and the language of this statute does not closely follow the language of the old.

The identical question here involved was presented in United States v. New York Central & H. R. R. Co. (in the District Court of the Northern District of New York in 1916) 232 Fed. 179. Judge Ray, long chairman of the judiciary committee of the House of Representatives, delivered the opinion, and he held that under the act of 1907, where the defendant solicited the importation of a contract laborer, he was guilty under the statute. His opinion was affirmed by the Circuit Court of Appeals of the Second Circuit in New York Central & H. R. R. Co. v. United States, 239 Fed. 130, 152 C. C. A. 172.

The question thus presented is of vital importance to the defendant, but not to others, for by an act to regulate the immigration of aliens to,

and the residence of aliens in, the United States, passed February 5, 1917 (39 Stat. 874, c. 29), the law is expressly made applicable to every "attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer or contract laborers into the United States."

After the most careful consideration we are constrained to follow the opinion of the Circuit Court of Appeals in the Second Circuit and hold that the fact that the defendant's misconduct was discovered before the contract laborer reached the United States and the government prevented his coming here did not make the defendant guiltless under the act of 1907.

The judgment of the District Court is reversed, and the cause remanded, with directions to set aside the order sustaining the demurrer to the complaint and overrule the same, and give the defendant an opportunity to answer if he should be so advised.

HOOK, Circuit Judge (dissenting). I think that under the Contract Labor Law of February 20, 1907 (34 Stat. 900), mere solicitation, without the entry of the alien into the United States, was not an offense. The act of February 5, 1917, subsequent to the offense charged, penalized solicitation without entry for the first time.

ILLINOIS CENT. R. CO. v. NORRIS.

(Circuit Court of Appeals, Seventh Circuit. August 23, 1917.)

No. 2452.

1. LIMITATION OF ACTION ⊂=123—INJURIES TO SERVANT—DECLARATIONS—SUFFICIENCY.

Plaintiff's original declaration, seeking to recover for the death of a brakeman killed while engaged in cutting out cars from a train used in interstate commerce, when the conductor gave a signal for the moving of cars while the brakeman was between them, is not, for failure to allege a duty on the part of the conductor to the brakeman, and its violation, insufficient under Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (Comp. St. 1916, § 8657), for the statute makes a carrier liable to personal representatives of an employé who dies from injuries resulting in whole or in part from the negligence of any of the employés of the carrier; and hence, though demurrer was erroneously sustained to the declaration and an amended declaration filed more than two years after the death of the brakeman, the action cannot be barred on the theory that plaintiff failed to bring the action within two years of the date of accrual.

2. MASTER AND SERVANT ⊂=279(5)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action under Comp. St. 1916, § 8657, for the death of a brakeman killed while engaged in interstate commerce, evidence *held* sufficient to warrant findings that defendant railroad company and its conductor were negligent.

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3. MASTER AND SERVANT ⟸216(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where it was the duty of a conductor of a freight train to look out for the brakeman as much as possible in switching operations, though each was to look out for himself, a brakeman, a short distance from the conductor, who went between the cars to cut off the air brakes from cars to be switched, and whose presence there could easily have been ascertained, because his lantern was no longer visible along the train, did not assume the risk arising from the conductor's negligent orders to the engineer to move the cars.

4. PLEADING ⟸214(8)—DEMURRER—ADMISSIONS.

While a demurrer for purposes of argument admits all of the averments in the pleading challenged, nevertheless it cannot be used as an admission against the party interposing it.

5. EVIDENCE ⟸210—JUDICIAL ADMISSIONS—MOTION.

Where, before suit under Comp. St. 1916, § 8657, plaintiff made a claim under a state Workmen's Compensation Act for the death of a brakeman, statements in plaintiff's motion to quash a writ of certiorari brought by defendant to vacate an award in plaintiff's favor, which purported to set forth the testimony taken in the proceeding, cannot, in the subsequent action under the federal act, be received as an admission by plaintiff.

6. EVIDENCE ⟸207(2)—ADMISSIONS—CHANGE OF THEORY.

In an action under Comp. St. 1916, § 8657, defendant is entitled to show that plaintiff, in a previous proceeding on the same cause of action brought under a state Workmen's Compensation Act before the Industrial Board, adopted another theory as to the accident; but such showing is not conclusive.

7. EVIDENCE ⟸320—ADMISSIBILITY—HEARSAY.

In an action under Comp. St. 1916, § 8657, brought for the death of a brakeman, killed while engaged in interstate commerce, the conductor, in charge of the train on which the brakeman was employed, was on cross-examination asked if he did not, in a previous proceeding brought by plaintiff under a state Workmen's Compensation Act, state that the accident happened in a particular manner. It appeared that the conductor in his statement in the workmen's compensation proceeding described the accident, not only from his personal knowledge, but from it coupled with his opinion based on statements made to him. *Held*, that the question whether the conductor gave certain description was improperly admitted.

8. MASTER AND SERVANT ⟸412—WORKMEN'S COMPENSATION—REVIEW—HARMLESS ERROR.

In such case, where the question whether the conductor was negligent in directing switching operations while the brakeman was between the cars was disputed, and his hearsay statement bore on that issue, such cross-examination was prejudicial error.

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

Action by Maude Norris, administratrix of the estate of Herbert Norris, deceased, against the Illinois Central Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Action for damages arising out of the death of Herbert Norris. Verdict and judgment for defendant in error, herein called the plaintiff. Herbert Norris, a brakeman employed by plaintiff in error, herein called the defendant, died as a result of injuries received while occupied in the line of his employment on a freight train engaged in interstate commerce. The train crew, of

which deceased was one, was composed of five members, the engineer, fireman, two brakemen, and a conductor, and this crew at the time of the injury was engaged in switching out cars at Centralia, Ill. The main train was on the main track and faced south, and the rear brakeman was stationed to the rear of the train. Norris was a front brakeman, and with the conductor was cutting out and switching cars to the side track. Plaintiff claims that deceased was between two cars, cutting the line, when the conductor signaled the engineer to back up. Norris' foot was somehow caught between the point of the side track and the main track, and he was knocked down and run over. After being backed, the train was again moved forward. The injury occurred about 9 o'clock p. m., and Norris died the next day. The engineer testified that, very shortly before he received the signal to back up, he saw on the same side of the train two lanterns, one of which he believed was carried by the brakeman and one by the conductor. The conductor testified that he did not know where Norris was, and that he did not see him nor his lantern shortly before he gave the signal to back up, and that he did not know, nor was it his duty to find out, Norris' exact position before giving the signal to back up.

Prior to the commencement of this action, a claim was filed with the Industrial Board of the state of Illinois, and counsel for the plaintiff there contended that the accident was an unavoidable one, and occurred without any negligence on the part of the railroad's employés. The trial court refused to let defendant show this fact on the trial. In the course of the trial, plaintiff called the conductor as her witness, and he testified with apparent willingness. After the cross-examination, but not in respect to anything brought out thereon, plaintiff's attorney asked the witness whether he did not make a certain answer to a certain question before the Industrial Board, and over the defendant's objection the witness was directed to answer. More detailed reference to the testimony appears in the opinion. On September 10, 1915, the declaration was filed and summons issued. Norris was injured September 14, 1913. The original declaration was, upon demurrer, held insufficient. An amended declaration was filed more than two years after the date of the death. Defendant thereupon pleaded the statute of limitations, but a demurrer to this plea was sustained.

The following errors are assigned: (a) Failure of the court to hold plaintiff's claim barred by the statute of limitations. (b) Failure of the court to direct verdict in defendant's favor. (c) Erroneous admission of evidence. (d) Erroneous rejection of evidence.

Bruce A. Campbell, of East St. Louis, Ill., for plaintiff in error.
Jacob Zimmerman, of Effingham, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] Defendant contends that the liability created by Act April 22, 1908, c. 149, § 1 (Comp. St. 1916, § 8657), is barred in the instant case, because the personal representatives of the deceased failed to bring this action within two years from the date the cause of action accrued. It admits the declaration was filed within two years from the date of Norris' death, yet it is claimed, the original declaration being insufficient to state a cause of action, the statute of limitations was not tolled until the amended and sufficient declaration was filed. It is unnecessary for us to decide in this case whether an action is begun within the meaning of this act by the issuance of a summons upon the filing of an insufficient declaration. We are convinced that the original

declaration (held insufficient by the District Court) stated a cause of action against the defendant.

The particular attack upon the declaration as originally filed was directed to the failure of the pleader to allege a duty on the part of the conductor to the brakeman and its violation, and much dependence in support thereof is placed on the case of McAndrews v. C. L. & S. Railway Co., 222 Ill. 232, 78 N. E. 603. We are convinced that the declaration in the present case is distinguishable from the declarations in the cases cited in defendant's brief, including the McAndrews Case. Section 8657, Compiled Statutes 1916, expressly imposes upon the carrier a liability to the personal representatives of an injured employé who dies from injuries resulting in whole or in part from the negligence of any of the employés of such carrier. Plaintiff in this case alleged facts to show that the carrier was engaged in interstate commerce at the time of the injury, and the act referred to unquestionably applied and governed the rights of the parties to this action. It was therefore unnecessary to assert in the declaration the particular duty which the conductor owed to the brakeman, for Congress by this act imposed a liability on the railroad in case injury resulted to one employé through the negligence of another. Irrespective of the act of Congress, it is doubtful if greater particularity would have been required to sustain the original declaration, although in many jurisdictions it would have been subject to a motion to make more definite and certain.

The original declaration being sufficient, nothing remains of defendant's contention that the action was not brought within two years from September 15, 1913.

[2] Defendant further contends that the evidence, viewed most favorably to the plaintiff, fails to support a verdict against it, and that the motion to direct the verdict for the defendant should have been granted. The alleged negligence of the defendant was based upon the action of the conductor in directing the engineer to back up the train when Norris was between the cars and subject to be injured by any sudden and unexpected movement of the cars. It appears from the testimony of the engineer that, immediately before receiving this signal to back up, he looked out of the cab window and saw, upon the same side of the train, light from two different lanterns, and it is well nigh impossible to conclude that these two lanterns were held by any one other than the conductor and the brakeman, Norris. It is therefore contended by the plaintiff that, the brakeman being between the conductor and the engineer shortly before the signal to back was given and he having disappeared at the time the signal was given, the conductor was negligent in directing a movement of the train which was necessarily fraught with such danger to the life of the brakeman.

Defendant contends that, notwithstanding this evidence, it was free from neglect, because of the testimony of the conductor to the effect that he did not see the brakeman, and that it was not his duty to locate him before giving the signal. We cannot accept the defendant's contention, notwithstanding the conductor's statement that each employé

looked out for himself, and that it was not customary for a conductor to ascertain where his men were before he gave a signal. We are convinced that the evidence warranted the jury in finding the conductor negligent upon the facts disclosed by the testimony in this case. The testimony justified the jury in finding that the conductor had good reason to believe the brakeman was between the cars. It was the brakeman's duty to go between the cars and release angle cocks and shut off the air in switching cars.

Where the brakes are operated by air, it is necessary for the brakeman or conductor to "cut the line" as well as to uncouple the cars. Norris had been constantly so engaged to the knowledge of the conductor. He was supplied with a lantern. Both men were busily engaged in a common task and were only a short distance apart. If Norris' lantern was not in sight, the conductor had good reason to believe that he was between the cars. The conductor, on cross-examination, admitted that it was the duty of each of them (the conductor and the brakeman) "to look out for each other as much as possible." We conclude that the jury was amply justified from all the evidence in finding the conductor guilty of negligence in the respect claimed by the plaintiff.

[3] Nor did the deceased assume the risk of such signal being carelessly given. We may well accept the statement that each employé, in switching operations, was to look out for himself, and yet a brakeman could not be said to have assumed the risk arising from the negligent conduct of the conductor. The brakeman was not chargeable with notice that his fellow employé would violate a rule or a custom. He had reason to believe the conductor would not move the train while he was between the cars. If, as the conductor said, it was his duty to look out for the brakeman as much as possible, the brakeman had a right to assume that such duty would not be violated. We conclude no error was committed in submitting both the questions of defendant's negligence and the deceased's assumption of risk to the jury.

[4, 5] Complaint is also made because the court refused to receive in evidence, as offered by the defendant, a certain written motion made by the attorney for the plaintiff, appearing at that time as the attorney for the Industrial Board of the state of Illinois, and also refusing to receive proof offered by the defendant to the effect that the plaintiff's attorney before the arbitration board contended that the accident was an unavoidable one, and occurred without any negligence on the part of the employés of the railroad.

The Industrial Board of the state of Illinois decided in plaintiff's favor, and the defendant in this action secured a writ of certiorari from the circuit court of Cook county to vacate the award of the Industrial Board. The claimant before the Industrial Board was the plaintiff in this case, and her attorney appeared to support the position taken by the Industrial Board. He moved to quash the writ of certiorari, and as one of his grounds asserted:

"Third. That at night the conductor, six or seven cars away from Norris, was making a coupling, and while doing so Norris stepped onto the rails

near the switch point to turn the handle cock in the air hose, and his foot slipped in between the rail and the switch point. On account of his heavy, stout shoes, he could not extricate himself. The conductor gave the signal to back up, and the train backed until the car, where Norris turned the angle cock in the air, reached the conductor, and then he gave the signal for the train to be pulled ahead over the switch point, and when he got up to the switch he found Norris between the tracks with his leg crushed. This was an unavoidable accident, without any negligence whatever. Therefore the federal Employers' Liability Act does not apply. The federal Employers' Liability Act does not cover the field of injuries to employés, but is expressly limited by the title of the act to liabilities in certain cases by the act itself. Its field is limited to those injuries resulting in whole or in part from negligence. * * *"

This evidence was properly excluded. While statements made by parties in their pleadings or in open court are generally admissible in evidence in other proceedings against the party making them, and this rule extends to statements of the attorneys for such parties, the excluded evidence above set forth does not come within this rule because it does not purport to be a statement of the plaintiff or her attorney. Plaintiff's attorney was merely moving to quash a writ of certiorari. Both the writ and the motion were necessarily based on the testimony received before the Industrial Board. So far as it is an admission, a motion to quash a writ of certiorari is not unlike a demurrer to a pleading. In the case of a demurrer, for the purposes of the argument, the allegations appearing in the pleading challenged are admitted. Nevertheless a demurrer cannot be used as an admission against the party interposing it. Anheuser-Busch Brewing Ass'n v. Bond, 66 Fed. 653, 13 C. C. A. 665; Lawler v. Couch, 80 Ind. 369.

[6] A motion to quash a writ of certiorari, where one of the grounds therefor contains a statement that purports to set forth the testimony taken in the proceedings reviewed, should not, for that reason, be received in evidence as an admission of the moving party. But the court erred in refusing defendant the right to show that plaintiff's attorney before the Industrial Board took the same position in respect to these facts as appeared in the motion to quash, as quoted above. Such testimony, while not conclusive on the plaintiff, was admissible. Jones on Evidence (2d Ed.) § 257; Allen v. U. S. Fidelity Co., 269 Ill. 234, 109 N. E. 1035.

[7, 8] Defendant further complains because the court, against its objection, required the conductor to testify concerning statements made by him before the Industrial Board in response to a general question put to him. The witness was called by the plaintiff, and testified with apparent willingness. After being cross-examined, but not in respect to anything brought out on the cross-examination, plaintiff's attorney asked this question:

"And then wasn't this question asked you, 'Now will you describe the accident as near as you can" and didn't you then say, 'Well, Norris and I were switching out cars, and I was in the neighborhood of six or seven cars from Mr. Norris, making a coupling, and I gave the signal to the engineer, so that he reduce the speed of the head portion of the train so that it was safe to make the coupling, and he just about stopped the head end of the train.

At that time the brakeman, Norris, was about 6 car lengths from me. He stepped in to pull the angle cock in the air hose, and his foot slipped in between the switch point and the rail, and, having on a pair of heavy shoes, he was unable to get his foot out, and on making the coupling I gave the signal to back up, and when they backed up as far as I wanted them to I cut off right where he had turned this angle cock in the air. Then I gave the signal for the engine to be pulled ahead over the switch point. About the time I got to the switch, I heard him hollow, and the cars moved off, and he was between the tracks with his leg crushed, and those six cars had been backed or pulled over him. We had to pull the rail over to get his foot out. We then sent a man for the ambulance.' A. I said it in substance."

It appears from testimony subsequently given that the conductor was in fact called to testify before the Industrial Board, and that his testimony there given was not restricted to what he saw, nor what he knew; but he was permitted to describe the accident, basing his opinion upon statements made to him, and he was permitted to draw conclusions from facts which he observed, and facts concerning which he had been informed. From this answer, thus made before the Industrial Board, the jury could fairly infer, and in fact could hardly conclude otherwise, that the conductor saw Norris step in between the cars just before he directed the movement of the train, which resulted in the deceased's injury.

It was known to the plaintiff's counsel that the conductor did not see the accident, and in fact could not have described the accident, except from hearsay statements. The plaintiff knew that the conductor's answer to the question propounded to him was based upon hearsay statements. It was highly prejudicial to the defendant, and there was no justification or explanation offered for its reception. In view of the dispute over the conductor's alleged negligence, we are unable to say that the error was not prejudicial.

Judgment is reversed, and the cause remanded for new trial.

EVANS v. CROWN GASOLINE & OIL CO.

BLAIR et al. v. EVANS et al.

(Circuit Court of Appeals, Third Circuit. November 1, 1917. On Motion for Reargument, December 10, 1917.)

No. 2283.

APPEAL AND ERROR ⊂=266(2)—NECESSITY OF EXCEPTION—DECREE ON AUDITOR'S REPORT.

Where, after exceptions to the first report of the auditor making distribution of funds realized by a receiver appointed in a creditors' suit were sustained, appellants filed no exceptions to the auditor's amended report and schedule, either before him or when the schedule was filed in court, and a final decree directing distribution according to such schedule was entered, an appeal from such decree, taken after distribution and on the same day an order discharging the receiver was entered, presents nothing for review.

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

Bill in equity by George M. Evans against the Crown Gasoline & Oil Company, in which the Potter Trust Company was appointed receiver. From the decree for distribution of assets, S. S. Blair and others appeal. Appeal dismissed.

R. E. Anderson and John A. Blair, both of Pittsburgh, Pa., for appellants.

Leonard K. Guiler, of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In the court below, this was a creditors' bill, and the appeal before us is by S. S. Blair and other bondholders from the decree distributing a fund in the hands of the receiver. The fund was raised by selling the company's real estate, upon which certain bonds had been secured by mortgage, and one matter before the auditor appointed to distribute was an attack by the appellants upon the claim of George Evans, another bondholder; the ground of attack being that while Evans was a director of the company he had accepted bonds as collateral security for an antecedent debt at a time when he knew the company to be insolvent. The auditor sustained the objection and excluded the bonds. Evans filed exceptions to the report on December 7, 1916, and renewed the exceptions a week later when the report was filed in the District Court. On March 2 the court filed an opinion reversing the auditor and holding that Evans was entitled to share on an equal footing with the other bondholders, and on March 6 sent the report back to be corrected. Thereupon the auditor prepared an amended schedule, but to this the appellants filed no exceptions, either before him or afterwards when the schedule was filed in court. Accordingly on May 12, 1917, the following final decree was entered:

"And now, May 12, 1917, it appearing to the court that on March 6, 1917, an order of this court was filed and entered referring the auditor's report in the above-entitled case back to the auditor for the purpose of making distribution in accordance with the opinion of this court, and that more than sixty (60) days have elapsed since said order of court was filed and entered, and no appeal has been taken therefrom; and it further appearing to the court that on May 1, 1917, the auditor's amended schedule of distribution was filed, and that ten (10) days have elapsed since said amended schedule of distribution was filed, and no exceptions have been filed thereto, by reason whereof said report has been confirmed absolutely in accordance with the rules of this court, the Potter Title & Trust Company, receiver of the Crown Gasoline & Oil Company, is hereby ordered and directed to make distribution to the parties entitled thereto in accordance with said amended schedule of distribution."

In accordance with this decree the receiver proceeded to distribute, and on June 27 was discharged by a formal order. On the same day the present appeal was taken from the decree of May 12, and we are now asked to say that the decree was wrong, and to make "the necessary orders * * * directing the appellee to make restitution to the appellants in the sum of $19.28 for each bond held by them."

In our opinion the correctness of the decree is not properly before us, for the reasons therein recited, and for other reasons that are not disputed. No exceptions were filed to the amended schedule; it was not questioned either before the auditor or the court below; a decree has been entered confirming it absolutely in accordance with the rules of the District Court; the money has been paid to the parties therein specified, and in the amounts named; and the receiver has been discharged. In obedience to the well-established rules of orderly procedure in a court of first instance and in a court of review, nothing is presented now except the formal correctness of a final decree that comes before us without having been objected to in the court below, and in our opinion the appeal should be dismissed. The fund is gone, and the receiver is protected by the court's decree of May 12, as well as by the order of discharge; and of course, as long as the decree stands unreversed, no order of restitution can be made.

The appeal is dismissed.

On Motion for Reargument.

PER CURIAM. The merits of this appeal were not overlooked, but as they seem to be in favor of the appellee we took the opportunity to call attention to the loose practice disclosed by the record, especially as looseness of practice is a good deal more frequent now than it used to be, and often hampers us in the proper disposal of business.

The motion is refused.

FELL BREWING CO. v. ADAMO et ux.

(Circuit Court of Appeals, Third Circuit. November 28, 1917.)

No. 2306.

1. APPEAL AND ERROR ⟸1002—REVIEW—VERDICT.
A verdict on conflicting evidence is conclusive on appeal.

2. APPEAL AND ERROR ⟸909(1)—REVIEW—FINDING.
In an action against a brewing company for the death of a small child, run over by the rear wheel of its wagon when he fell from a step between the front and rear wheels, the question whether the driver's motion directing the child to get off was so threatening as to amount to negligence must, where the only witness as to the accident, save the driver, illustrated the same, be, on appeal, treated as a jury question; it having been so treated below.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action by Antonio Adamo and wife against the Fell Brewing Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Robert W. Archbald, of Scranton, Pa., and J. E. Brennan, of Carbondale, Pa., for plaintiff in error.

John Memolo and David J. Reedy, both of Scranton, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In this action the plaintiffs, who are alien subjects of the king of Italy, recovered damages from a Pennsylvania corporation for the death of their son, a child four years old. At the trial, testimony was offered that tended to prove the following facts:

About half past one o'clock on September 11, 1914, the wagon, a heavy vehicle loaded with 75 cases of bottled beer and driven by a man named Corby, was proceeding slowly in a southerly direction along one of the streets in Carbondale, and the boy was on the sidewalk not far from the wagon; he may have been observed by Corby, but in any event he followed the wagon along the sidewalk for a short distance, and then ran out into the roadway; Nelson, the driver of a farm wagon a few feet in the rear, called to the child to "look out"; but the child either did not hear or did not heed the warning, and continued to run toward the company's wagon, and finally mounted a step or bar between the front and the hind wheels; while he was on the step, Nelson called to Corby, "Look out, there is a boy trying to get on your wagon," whereupon Corby turned and looked at the boy, making a gesture of some kind with his hand, but did not stop; the boy immediately fell off the step and was run over by the hind wheel, sustaining injuries from which he died almost at once; the wagon went forward perhaps 50 feet after Corby received Nelson's warning and saw the child on the step.

[1] Nelson was the only witness to the accident, and every important item of his testimony was denied by Corby, who declared that he did not see the child until after the injury, and that he heard no warning and made no gesture. But the jury accepted Nelson's account, and the verdict, if supported by submissible evidence, is conclusive on appeal.

[2] Only one point is in dispute: Was the judge warranted in allowing the jury to find that Corby's gesture was so threatening in character as to amount to negligence, considering the age of the child and the other circumstances? Barre v. Reading, etc., Ry., 155 Pa. 170, 26 Atl. 99; Satinsky v. Brewing Co., 187 Pa. 57, 40 Atl. 821; Brennan v. Merchant & Co., 205 Pa. 258, 54 Atl. 891; Hyman v. Tilton, 208 Pa. 641, 57 Atl. 1124; McCabe v. Kain, 250 Pa. 444, 95 Atl. 574; Di Meglio v. Railway, 249 Pa. 319, 94 Atl. 1095; Bucci v. Waterman, 25 R. I. 125, 54 Atl. 1059. The case lies within a narrow compass and is undoubtedly close, but the company has not convinced us that the trial judge was mistaken. When Nelson testified concerning Corby's gesture, he illustrated by appropriate action; and this, of course, was seen by the jury, although it could not be reproduced on the notes. We cannot know, therefore, what degree of threat or violence may have been indicated, and in the absence of this essential information we cannot decide that the gesture was not negligent in character. In Pa. R. R. v. Glas, 239 Fed. 258 (152 C. C. A. 244) we considered a similar question. There it was important to determine the position of a break or crack in an arch bar on a railway truck, and the printed record left the fact in doubt. But a witness had pointed out the position to the jury, and in the court's opinion Judge Woolley said:

"It does not appear in the record whether the crack was on the outside or the inside of the arch bar when in position upon the truck, and therefore the record does not show whether, upon inspection, it could be seen. The arch bar, however, was described to the jury, and the position of the crack was indicated to them by the witness who discovered it. In the course of his testimony, he said:

" 'Right where it came up like this (indicating), and then it went out over the box; it was cracked right in the end there, in the short bend.'

"Just how much was before the jury that is not before us with respect to the exposed or hidden location of the break, the record leaves in doubt, but that there was something before the jury that is not before us, there is no doubt. We must therefore assume, that the matter indicated to the jury, though not disclosed by the record, was such as to support the verdict. Wagner v. Standard Sanitary Mfg. Co., 244 Pa. 310, 91 Atl. 353."

These remarks are relevant in the present case, and support the conclusion we have reached.

The judgment is affirmed.

FIRESTONE TIRE & RUBBER CO. v. SEIBERLING.

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

No. 2954.

1. PATENTS ⟸321—INFRINGEMENT—PRO FORMA DECREES—PRACTICE.
Pro forma interlocutory decrees by the trial court are not favored.
2. PATENTS ⟸324(5)—INFRINGEMENT—REVIEW—DISMISSAL.
In a suit for infringement of patent, defendant, after argument and submission of an appeal from an interlocutory decree for complainant, set up the recent discovery of a Belgian patent as important, as bearing on the validity and scope of one of the patents in suit, and asked that it be permitted in some method to bring the patent into the record before decision. It appeared that defendant was not guilty of laches in discovering the patent, and that it was of such superficial resemblance to one in suit that, if it were excluded and the decree below affirmed, further litigation would be probable. *Held*, that there was no available procedure, unless the parties stipulate otherwise, to bring the patent into the case, except to dismiss the appeal without prejudice and remand the case, with directions that it be reopened for additional proofs.
3. PATENTS ⟸324(6)—INFRINGEMENT—DISMISSAL OF APPEAL.
In such case, directions that the suit be reopened for additional proofs, and that, in the light of the original record and such proofs, it again be heard and decided, is not beyond the power of the Circuit Court of Appeals.

In Equity. Bill by Frank A. Seiberling against the Firestone Tire & Rubber Company. From an interlocutory decree for complainant, defendant appeals. After remand, but before decision, defendant set up the recent discovery of a Belgian patent, said to be important as bearing on the validity and scope of one of the patents in suit, and on motion to reopen prayed permission to bring the patent into the record before decision. Appeal ordered dismissed, unless within 15 days parties by stipulation dispose of the matter of the newly discovered patent.

See, also, 234 Fed. 370; 235 Fed. 891, 149 C. C. A. 203.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The court below made the usual interlocutory decree for complainant in a patent case. After the appeal had been argued and submitted to this court, but remained undecided, the appellant alleged the recent discovery of a Belgian patent, said to be important as bearing on the validity and scope of one of the patents in suit, and asked that it be permitted in some method to bring this patent into the record before the case was decided. We have reached three conclusions:

The first is that the delay in the discovery of the patent is so far accounted for that reopening should not be denied on the ground of laches.

The second is that the Belgian patent bears a sufficient relation to the controversy, so that the interests, both of the parties and of the

public, make it inadvisable to proceed to a final decision without the presence in the record of this patent and such proofs as the parties desire to take concerning it. In saying this, we intimate no opinion as to whether it will eventually be found materially pertinent; we say only that it has enough superficial resemblance to the second patent in suit so that, if it were excluded from present consideration, and if the decree below were affirmed, further litigation would be probable.

[1, 2] The third is that, giving due regard to the merely appellate jurisdiction of this court, and to the rule that pro forma decrees by the trial court are not favored (Cramp v. Curtiss, 228 U. S. 645, 649, 33 Sup. Ct. 722, 57 L. Ed. 1003), there is no available procedure (unless all parties agree otherwise), except to dismiss this appeal, without costs and without prejudice, and remand the case, with directions that it be reopened for additional proofs on this subject, and that, in the light of the original record and these additional proofs, it be again heard and decided by the trial court. If there shall then be another appeal, the present printed record can be used, with the necessary supplement, and the necessary further hearing in this court will be immediate.

[3] We have decided the issues of laches and prima facie pertinence rather than remit them to the trial court, as we did in Wagner v. Meccano, 235 Fed. 890, 149 C. C. A. 202, because this case has been finally argued before us. A reversal of the decree by us might materially affect some proceedings below which depend on the decree; and we perceive no lack of power to give, regarding an interlocutory decree, those directions which we have specified. See Greene v. U. S. Co. (C. C. A. 1) 124 Fed. 961, 962, 60 C. C. A. 93.

Accordingly, unless within 15 days the parties otherwise dispose of the matter by stipulation, the appeal will be dismissed, and a mandate immediately issue in accordance herewith.

BARBER v. REO MOTOR CAR SALES CO.

(District Court, S. D. New York. June 12, 1917.)

1. PATENTS ⟸314—DISMISSAL BY PLAINTIFF.
   While a plaintiff cannot dismiss his bill, so as to deprive a defendant of rights established during the progress of the trial, plaintiff, in a suit for infringement of a patent, may, after the introduction of evidence and before submission, withdraw his charge of infringement as to one claim of the patent and proceed as to another.

2. PATENTS ⟸167(1)—CLAIMS—DRAWINGS.
   Drawings attached to a patent may be used to explain any obscurity in the specifications, and to show the form and position of the parts.

3. PATENTS ⟸59—PRIOR ART—EVIDENCE.
   Though foreign patents were not issued more than two years before plaintiff's application, so as to constitute a bar under Rev. St. § 4886 (Comp. St. 1916, § 9430), yet, where the date of their issuance antedated that of plaintiff's invention, such patents were properly cited to show anticipation or prior state of the art.

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

4. PATENTS ⊂⊃328—INFRINGEMENT—ANTICIPATION.
Barber patent, No. 781,802, for improvements in valves and valve gear for explosive engines, *held* anticipated and limited by the prior state of the art, and, as limited, not to be infringed by defendant's device.

In Equity. Bill by William Barber against the Reo Motor Car Sales Company. Bill dismissed.

Fred Francis Weiss, of New York City (Samuel E. Darby, of New York City, of counsel), for plaintiff.

Wetmore & Jenner, of New York City (Edmund Wetmore, Lawrence E. Sexton, and Robert D. Eggleston, all of New York City, of counsel), for defendant.

HAZEL, District Judge. The Barber patent, No. 781,802, dated February 7, 1905, on application filed February 24, 1902, for improvements in valves and valve gear for explosive engines, is asserted by complainant to be infringed by the defendant company as to claim 9 only, which is for an exhaust valve and operating mechanism in its adaptation and use of an inlet valve in combination with an explosion motor. The case was tried before me in open court, and evidence taken relating to infringements of claims 8 and 9 for the inlet and exhaust valve, respectively; but after the summing up of counsel was completed complainant offered to withdraw claim 8, relating to the inlet valve, from further consideration, and to rely solely on claim 9. Defendant objected to the proposed withdrawal, and nothing further was done at the time; but since then complainant has notified defendant's solicitor in writing that he elected to withdraw claim 8 as an issue herein. Defendant, still opposing such withdrawal, contends that, as much of the evidence taken related to claim 8, its validity should be determined by the court.

[1] Ordinarily a plaintiff has the undoubted right to dismiss his bill at any time upon the payment of costs, even where the case has been tried and the defense made; but, when it appears that during the progress of a trial rights of a defendant have been established, it is not, it has been held, just to deprive him of them. Chicago & Alton R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081. In Georgia Pine Turpentine Co. v. Bilfinger et al. (C. C.) 129 Fed. 131, the trial court held that, where a preliminary injunction had previously been granted, the plaintiff would not be permitted, after the case was tried, to dismiss the bill without prejudice, and as it appeared that infringement was not proven the defendant was entitled to a decree on the merits. But no such extreme condition is here presented. The withdrawal of a single claim after the taking of evidence and the summing up of counsel was not prejudicial to the rights of the defendant, and is an expedient not infrequently resorted to in patent litigation. In Thomson-Houston Electric Co. v. Elmira & H. Ry. Co. (C. C.) 71 Fed. 886, Judge Coxe distinctly approved such procedure, remarking that the practice should be encouraged.

[2-4] Therefore, without ruling as to claim 8, though incidental refer-

ence thereto is necessary, the issues will be narrowed to claim 9, which reads as follows:

"9. In an explosion motor, the combination with an explosion chamber having a T-shaped gas passage, the main central or stem portion of which forms the exhaust orifice of the explosion chamber of a screw plug closed at the outer end, open at the inner end, and having a perforated peripheral wall, so as to give free communication between the central hollow thereof and the main stem or central passage and the explosion chamber located in the head portion of the T-shaped passage, a puppet valve, the stem of which projects outward through the head of the plug seated upon the inner end of the plug, so as to cut off communication between the main stem portion of the T-passage and the explosion chamber, except when the same is forced away from the seat and toward the explosion chamber, a spring for normally keeping the valve in the closed position and means for forcing the valve stem inward, so as to open the valve actuated by the motor and adapted to be removed from contact with the valve stem without removal from the support thereof, so as to permit of removal of the plug and valve by the unscrewing of the plug, substantially as shown and described."

Said claim relates wholly to an exhaust valve structure having a screw plug and valve cage and mechanism for taking it out of its casing by unscrewing the plug. It has five elements: (1) The explosion chamber, with a T-shaped gas passage forming the exhaust orifice of the explosion chamber; (2) a screw plug; (3) a puppet valve; (4) a spring for keeping the valve closed; (5) means for opening the valve by forcing the valve stem inward and for removal of the stem by unscrewing the plug, as is more particularly described therein.

Valves of different kinds and appearances are necessary appliances for combustion engines. A comparison of claims 8 and 9 discloses an additional element in the latter for removing the exhaust valve without disconnecting any operating mechanism. The desired result, according to the specification, is secured by first taking out the set screw *42* to permit turning aside cam rod *40*, journaled at the lower end, thus bringing the extension arm *41* out of line or jointure with the valve stem and allowing the covering for the valve to be unscrewed. To replace the exhaust valve it is necessary simply to screw the screw plug back into the casing and turn the cam rod back in line with the under portion of the valve stem, thus joining them, and to hold the cam rod in contact with the valve stem at the elongated slot, permitting its reciprocation.

The Barber patent in suit was held valid and infringed in a prior litigation between the patentee and the Otis Motor Sales Company (D. C.) 231 Fed. 755 (affirmed 240 Fed. 723, — C. C. A. —), and in that case the issues were substantially the same as here, involving the same operating mechanisms. The evidence, however, as to the validity or scope of the involved claim, is more complete, and a different prior art is submitted herein, which persuades me to another conclusion. An understanding of the inlet valve would, I think, be helpful to an understanding of the essential features of claim 9. The inlet valve is used in connection with an explosive motor having the usual cylinder and piston operated by a crank shaft, the gas entering the cylinder through openings in the wall of a screw plug or valve cage, which incloses or covers a valve ordinarily kept closed by a spring

around its stem. It is opened by air pressure, and the vapor allowed to pass into the explosion chamber of the motor; it is seated on a ring and firmly held in position by the screw-threaded valve cage, which screws into the inlet orifice and may be locked therein. The exhaust valve, although made somewhat differently, also has a screw plug valve cage with perforated side walls, closed at the lower end and open at the upper end. The valve cage, covering the valve, is made to screw into the exhaust orifice, and is preferably located underneath the inlet orifice; the valve stem extending through and out of the valve plug at its inner side, while the puppet valve is kept in continuous contact by a spring with the valve seat. There is also a T-shaped gas passage, as specified in the claim.

The evidence does not show that the patentee herein was the first to invent a mechanism for screwing the exhaust valve to the casing of the explosion chamber to render removal easy. Nor was he the first to connect a screw plug and valve by its stem to a cam rod, which operated the valve in its reciprocation. In the litigation before Judge Ray, involving this patent, no prior art structures or combinations, like those in the patents to Hirsch, Hall, and Jerram, to which reference is hereinafter made, were shown. Indeed, the learned court in his opinion expressly said that each and every prior patent in evidence disclosed a valve cage which had one or more obstructions to its ready removal, and that no one had fully solved the problem of ready removability until Barber came into the field. The evidence before me is persuasively to the contrary, unless the testimony offered by complainant to antedate the invention is sufficiently convincing to establish the fact.

It is undeniable that a new combination or arrangement of parts to achieve a new result constitutes a new invention, and this is true, even though the principal elements of the combination or subcombination are old, provided they have not before been assembled in a single device to produce the same result. The prior patents to Bousfield, Fessard, and Wohlgrath, which were not before the court in the prior case, seem to me clearly to show that inlet valves having in combination elements similar to complainant's, including a T-shaped gas passage, were known to the skilled in the art. For instance, in the British patent of April 3, 1900, to Bousfield, just prior to the Barber invention, there is an inlet valve (operating automatically) covered by a screw plug (the assemblage being in one piece, not in two, as in complainant's), which may be readily unscrewed from its casing. The specification explicitly states that, when the valve plug is unscrewed, there is easy access to the exhaust valve located in the valve box across from the inlet valve with a space between; their chambers being in communication with the carburetor. Although the arrangement of the valve assemblage appears to have been somewhat different from complainant's, in which the two valves are removed independently of each other, still, giving effect to Professor Pryor's testimony, it appears that the Bousfield device has in combination the various elements of claim 9 in suit, except the fifth, which relates to means for removing the exhaust valve. Such structure discloses a screw plug and

seat around a puppet valve held in place by a spring and screwed into the casing; there are perforated side walls in the screw plug for the gas to flow from the inlet to the explosion chamber when the valve is open; and there is a gas passage for allowing the incoming gas to pass to the screw plug and valve which when in position is at right angles to the inlet. There is no obstruction to the easy removal of the screw plug by unscrewing it from the casing. Its similarity to defendant's inlet valve construction is marked, and any differences there may be are in the dimensions, size of perforations, and screw thread only.

The Fessard patent, No. 639,160, issued December 12, 1899, and the French patent to Wohlgrath, show automatic inlet valves having singly the essential elements in combination of the inlet valve of the Barber patent. Fessard shows a T-shaped gas passage in the stem part, forming the inlet, with a valve seat ring located in the head portion of the passage. There are, it is true, a few structural differences relating to the size of the perforations, screw threading, and annular ring; but these are not essential differences. Their use was in connection with internal combustion, and they were operated in the same way and for the same purpose as the inlet valve of the Barber engine in suit. Accordingly, the inquiry must be whether the addition of mechanism for removing the exhaust valve created a new combination, by which a new result was accomplished. The record shows several prior patents claimed by defendant to be anticipatory.

In the Hirsch patent, No. 532,555, of 1895, there is a T-shaped gas passage, with a main central or main portion forming the exhaust orifice of the explosion chamber, together with the other elements included in claim 9. There are shown means for operating a rock lever, supported at one end by a double grooved cam. The lower end of the rock lever comes in contact with the valve stem and forces it inward to open the valve. Complainant contends that the rock lever means for actuating the valve are not practicable for automobile engines, and also that the Hirsch patent was not directed toward providing for removal of the valve. This view of the Hirsch patent is perhaps not without merit, and it may therefore be passed.

But the Hall British patent, No. 4,191, of 1899, is not believed to be open to this criticism. It provided for an exhaust valve mechanism applicable to automobiles, which could be readily and easily removed. The means employed to accomplish such object are strikingly similar to Barber's. Hall used a push rod to force the valve stem inward to open the valve, and adapted a sleeve and casing for mounting the cam rod, and pivoted it, so that, when the screw nut, which held the cam rod in an upright position, was loosened, the cam rod and sleeve around it, as well as the casing at the lower end, swung away from the exhaust valve by unscrewing the valve plug in substantially the same way as in the Barber patent. On this point the specification says:

"This enables me, by slacking out one or two screws, to swivel this cam rod out of position and withdraw the exhaust and gas valves without interfering with any other parts, and saves me from taking it out of gear or time with the crank shaft."

And again:

"The engine also has an improved arrangement of exhaust governor gear by which the exhaust and gas valve may be taken out without interfering with any of the valve parts, or without having to throw the said gear out of time with the crank shaft."

To avoid the effect of the Hall disclosure, complainant, conceding that the fifth element of claim 9 is shown, claims nevertheless that the valve structure is not disclosed to have all the elements in combination; that such structure does not have an explosion chamber with a T-shaped gas passage, the main central or main portion of which forms the exhaust orifice of the chamber, nor a screw plug open at one end and closed at the other, nor a perforated peripheral wall for communication between the central passage and the explosion chamber. But I feel that I cannot ignore the uncontradicted testimony of Professor Pryor upon these points.

It is true, as argued, that the Hall specification does not in words describe the exhaust valve and mechanism with particularity; but I agree with the expert witness that the drawing accompanying the patent to an appreciable extent indicates its form and character. On cross-examination, Professor Pryor testified that the Hall patent and drawings showed to him that the exhaust valve was screwed into the cylinder as indicated by the hex nut over the valve spring, while the screw threading and stem implied a seat ring for the valve and a T-shaped passage through which exhaust gases leave the cylinder from the explosion chamber; such gases passing under the valve and to the right or left into the exhaust orifice. There was, I think, sufficient ground for this assumption; for though the outlet from the exhaust chamber in the Hall structure was located at an angle, and had no straight-stemmed T-passage for the escape of the vapor, the gases nevertheless passed out of what is technically regarded as a T-passage. The exact kinds of screw plug and seat used are not shown in the Hall drawing; but it is evident that the valve was covered and had peripheral openings and an annular seat, with holes for gas passage. The skilled in the art would in my opinion have had no difficulty, at the time Barber applied for his patent, in understanding from the Hall specification the broad embodiment of the combination in suit.

There has never been a doubt but that drawings attached to a patent may be used to explain any obscurity in the specification; indeed, they are usually considered a part thereof, and may even be relied upon to some extent to ascertain the form and position of some of the parts. Banker v. Bostwick et al. (C. C.) 3 Fed. 517; Hogg et al. v. Emerson, 11 How. 587, 13 L. Ed. 824; Walker on Patents (5th Ed.) 71. And in Consolidated Bunging Apparatus Co. v. Metropolitan Brewing Co., 60 Fed. 93, 8 C. C. A. 485, it was substantially held in this judicial circuit, Judge Lacombe writing the opinion of the court, that a patent for a mechanical combination is anticipated by a prior device containing the same elements, although in the latter patent there was no description of the advantages of using the combination in the way pointed out in the patent last issued. There it appeared that a certain kind of valve was an element of a combination, and the drawing and specification showed a somewhat different valve; but the claim

was not limited to the latter kind of valve. See, also, Saunders et al. v. Allen, 60 Fed. 610, 9 C. C. A. 157; Keene v. New Idea Spreader Co., 231 Fed. 701, 145 C. C. A. 587; Stow v. Chicago, 104 U. S. 547, 26 L. Ed. 816.

Importance is also attached by defendant to the Jerram British patent, No. 3,720, of 1900, which has an explosion chamber with a T-shaped gas passage, the main central or stem portion of which forms the exhaust orifice of the explosive chamber, and a screw plug that closes the outer end, the inner end being open, with peripheral openings for communication between the explosion chamber and the main stem or passage. Means are also shown for forcing a puppet valve inward to open the exhaust valve, consisting of a rock lever, which engages the valve stem to open the valve. Complainant argued that such patent was not to secure the ready removability of the valve and that the arrangement was impracticable for automobile use. But, conceding this point, I nevertheless incline to the view that this patent, though not anticipatory, bears upon the scope of the claim with which we are herein concerned.

Although the Otto engine contains a valve cage with openings in the side walls, together with a T-shaped gas passage, puppet valve, and spring, it is not believed important, as it discloses no means for screwing the cage into the cylinder, and it belongs to flange valve structures considered in the Otis Case, which the patentee designed to improve.

But, if I am not mistaken in believing that the valve mechanism of Barber was not in a broad sense new, a question certainly arises as to whether, in view of other prior devices showing cam rods and rocker arm connections for operating the exhaust valve, it involved invention to mount the cam rod in the manner specified in the patent in suit. Hall's disclosure persuades me that the patentee was not the first to overcome the difficulty in removing the exhaust valve from its casing, and he is entitled at most to protection only for his specific embodiment; i. e., the particular valve structure and operating mechanism to which reference has hereinbefore been made.

There was testimony to carry back the Barber invention, and it was contended that both the Hall and Jerram patents were too late to be either anticipations or publications, within the meaning of section 4886 of the Patent Statute (Comp. St. 1916, § 9430). In order to constitute a bar, these patents would have to have been dated or issued more than two years before February 24, 1902, the filing date of the application for the Barber patent. Such, however, not being the fact, evidence was introduced as to the time when Barber conceived and completed his invention, with a view of carrying its date back of the dates of the claimed anticipating patents. The testimony on this point, however, does not remove a reasonable doubt in my mind as to the completion of his invention before the spring or summer of 1901. He claims that he commenced work on his invention in the fall of 1897 and that rough sketches were then made; but in the Otis Case he swore that the preliminary sketches for the valve were made in 1898, and in another case involving his patent he swore the sketches were made in 1899. They were not produced for my inspection, although it was stated that they had been before the court in the Otis Case, with

the exception of two sheets; the others being claimed to have been mislaid or stolen. The pattern maker testified, it is true, that he made patterns of the valve at Barber's request in 1898, and that later there was some machining done; but none of the three witnesses who testified as to patenting prior to the filing date state that they actually saw the valve in operation in connection with a motorcycle earlier than the spring or summer of 1901. Moreover, their testimony referred to the inlet valve construction exclusively, and not to the instrumentality for removing the exhaust valve. The Hall and Jerram patents were granted March 17, 1900, and June 12, 1900, respectively; but, as the evidence does not carry the date of Barber's invention back of either, they were properly cited to prove anticipation or the prior state of the art.

In the Otis Case there were in evidence prior patents describing push rods with tappets; but they were considered immaterial by the court, inasmuch as they did not include the combination in suit. Here, however, the proofs are that prior patents, not before the court in the Otis Case or before the Examiner of Patents, substantially embody the combination, having parts equivalent to the parts of claim 9, and therefore claim 9 is entitled to only a narrow construction. In the Hall, Jerram, and Hirsch patents the removal of the valve mechanism was somewhat different from complainant's, whose main object, as heretofore indicated, was the quick and easy removability of the valve mechanism. Claim 9 is, at most, of narrow scope and of limited application, and does not include all kinds of removable valve actuating mechanism for easily and quickly taking the valve from its casing for cleaning and repairing. Defendant's structure, an overhead inlet valve, wherein the push rod is removed from its support by the rocker arm, which actuates the valve stem and presses it downward, to permit unscrewing the valve plug, does not resemble complainant's valve mechanism, and is not, in view of prior disclosures to which reference has been made herein, an infringement of claim 9 in suit.

The bill is therefore dismissed, with costs.

BARBER v. OTIS MOTOR SALES CO.

(District Court, N. D. New York. November 1, 1917.)

PATENTS ⇐324(6)—SUIT FOR INFRINGEMENT—REHEARING AFTER AFFIRMANCE.

Where, after a decree finding validity and infringement of a patent has been affirmed by the Circuit Court of Appeals, and a mandate sent down on which an interlocutory decree has been entered, another District Court, on additional evidence of the prior art, held the patent not infringed by the same structure, the first court, in the interest of uniformity of decision, may properly request the Circuit Court of Appeals to recall its mandate and return the record, that the District Court may be reinvested with jurisdiction to set aside its decree, receive additional evidence, and reconsider the case; but where the new evidence offered is not newly discovered, in such sense as would entitle defendant to a new trial

at law, but should have been discovered and produced on the hearing, such action will be taken only on condition that defendant pays the expenses unnecessarily incurred, including counsel fees to complainant.

In Equity. Suit by William Barber against the Otis Motor Sales Company. Application for a request to the Circuit Court of Appeals to recall its mandate, and for a rehearing. Granted on conditions.

For prior opinion, see 231 Fed. 755.

This is an application to this court for an order opening and vacating the decree entered herein by this court pursuant to the mandate of the Circuit Court of Appeals, Second Circuit (240 Fed. 723, 153 C. C. A. 521), affirming the decision of this court, and the interlocutory decree entered thereon, to the effect that claims 8 and 9 of the patent issued to William Barber, assignor to Ada S. Barber, No. 781,802, dated February 7, 1905, and applied for February 24, 1902, were valid and infringed by the defendant, and also for the making of a request by this court to the Circuit Court of Appeals to recall its mandate, all to the end that this court may be at liberty to make an order reopening the case and allowing the introduction of new and additional evidence, bearing not only on the validity of the claims of the patent in issue but on the question of infringement, notwithstanding the affirmance by the Circuit Court of Appeals of the prior decision of this court and the entry of a decree pursuant thereto.

Wetmore & Jenner, of New York City, for the motion.

Fred F. Weiss, of New York City (Samuel E. Darby, of New York City, of counsel), opposed.

RAY, District Judge (after stating the facts as above). This application is based on alleged newly discovered evidence bearing on the question of the validity of the claims in issue of the patent in suit and on the question of infringement as well, and which alleged newly discovered evidence consists of a large number of patents, the most of which constitute what is commonly known in patent litigation as the prior art. The application is also based upon the decision of Judge Hazel (245 Fed. 938) in a suit upon the same patent, and one of the claims in issue, wherein William Barber was plaintiff and Reo Motor Car Company of New York, Incorporated, was defendant, and in which suit, pending and tried in the Southern district of New York, Judge Hazel decided that conceding validity to the claim in issue before him there was no infringement. As I read Judge Hazel's opinion he in fact holds that the claim, in view of the prior art, is invalid. Judge Hazel's decision rests upon the patents referred to alleged to constitute newly discovered evidence, and which patents were not before this court when it decided this case against the Otis Motor Sales Company, and were not before the Circuit Court of Appeals when it affirmed the interlocutory judgment and decree of this court, and later on motion of the defendant denied a reargument.

This suit was instituted in May, 1915, and was brought to a final hearing in November or December of that year, and was decided by this court March 31, 1916, and a decree for the complainant to the effect above stated was duly entered April 8, 1916 (D. C.) 231 Fed. 755. It was referred to Charles W. Higgison, of Utica, N. Y., as special master, to fix the gains, profits, etc., and it was after or at about the time that the complainant had completed its proofs on such

reference that application was made to stay further proceedings in such accounting, to the end that appropriate application might be made to the court to reopen the proofs on the ground of such newly discovered or newly produced prior patents. In the meantime the appeal referred to, to the Circuit Court of Appeals, had been taken, and the decision of affirmance rendered. The decision of the Circuit Court of Appeals was rendered in December, 1916 (240 Fed. 723, 153 C. C. A. 521), and a rehearing was denied by that court in January, 1917, whereupon the accounting referred to proceeded.

There is a Reo Motor Car Company, which is a Michigan corporation having its principal place of business at Lansing, Mich., and this corporation manufactures the alleged infringing devices. That corporation is the real defendant in all these litigations, and in this suit on the trial it openly avowed in court that it was back of the defense, and in fact defending the suit. It is probable, from the condition of the record, that the Michigan corporation would be bound by any final decree in this suit. At least, this is the contention of the complainant here. The Reo Motor Car Company of New York, Incorporated, is a dealer in or sales agent in New York for the motor cars carrying the alleged infringing device manufactured by the Reo Motor Car Company of Michigan. The case referred to before Judge Hazel was at issue early in 1917, or before, and the trial and argument was had in March, 1917. In that suit the alleged newly discovered patents were set up and had been discovered before issue was joined in that case. In April, 1917, the defendant in this suit moved this court for an order staying further proceedings before the special master on the accounting; the avowed object on the hearing being to obtain a reopening of this suit in case Judge Hazel should decide on such patents that the claims in suit in that case, as well as in this case, were invalid, one or both, or that, if found valid, there was no infringement. No application was then made to this court, or to the Circuit Court of Appeals, looking to a reopening of the decrees in this suit and the introduction in evidence of such alleged prior patents, which were before Judge Hazel, but which had not been put in evidence in this case. By common consent further proceedings on the accounting were suspended without the entry of any formal order to that effect.

Following the handing down of the decision by Judge Hazel in the suit against Reo Motor Car Company of New York, Incorporated, and following the argument of the application for a stay of the accounting made to this court the attention of the present counsel for Otis Motor Sales Company was called to the decision of the Circuit Court of Appeals in Sundh Electric Co. v. Cutler Hammer Mfg. Co. (Same v. General Electric Co.) 244 Fed. 163–170, where the proper procedure in a case like this is indicated. Notwithstanding that decision, the present counsel for the defendant in this suit in July or August, 1917, applied to the Circuit Court of Appeals for an order recalling its mandate and permitting the defendant to move in the District Court for the Northern District of New York to reopen this cause. August 16, 1917, that motion was denied on the ground "that

such a request should come from the district judge and not from the party." Thereupon this motion was formally made.

As I understand, when the District Court has decided an equity cause and entered a decree in accordance with its decision, and an appeal therefrom is taken to the Circuit Court of Appeals, and the record is made up and transmitted to that court and filed therein, the District Court loses jurisdiction in the case for the time being, as jurisdicion of the cause has then been transferred to the Circuit Court of Appeals. After the Circuit Court of Appeals has heard the appeal and decided the case, and sent down its mandate to the District Court in accordance with its decision, it becomes the duty of the District Court to enter a decree or judgment as the case may be in accordance with the direction of the Circuit Court of Appeals and in compliance therewith. It then resumes jurisdiction of the case for that purpose. To that end, on the coming in of the report of the special master on the accounting, its jurisdiction, not to change its decision affirmed, as in this case, by the Circuit Court of Appeals, but to enter a final decree is reinstated. In this cause this court has obeyed the instructions and mandate of the Circuit Court of Appeals and has made the judgment of that court the judgment of this the District Court. The District Court has the right in its discretion, I assume, to request the Circuit Court of Appeals to make an order permitting it to open and vacate its judgment or decree made in obedience to and in compliance with the mandate of the Circuit Court of Appeals, and also requesting the Circuit Court of Appeals to recall its mandate and vacate it and return the record to the District Court, if that be necessary, and it seems to me that it is necessary, to the end that the District Court may be at liberty to reopen the trial and hearing of the case, and receive newly discovered or additional evidence, and make a new and a different decision, if such new evidence warrants such action. All that this court can now do is to address such a request to the Circuit Court of Appeals, on being satisfied that such course will bring about a full consideration of the case and a more just decision.

The defendant in this case sells the cars containing the alleged infringing device made by the Reo Company of Michigan. This is the alleged infringement complained of. The Reo Company of New York sells the same device, and that was the infringement complained of in that suit. It would be unfortunate, I think, at least confusing, to have a decision and final decree in this suit holding the claims of the patent valid and infringed by the device in question, and another final decree in the suit tried before Judge Hazel, holding the patent either invalid or not infringed by the same device. The Barber patent and the claims in issue, especially the one finally in issue before Judge Hazel, are either valid or invalid and the device complained of made by the Reo Company of Michigan either infringes or it does not infringe and all suits involving those particular questions or the particular question of infringement ought to be in accord. This court ought not to have such pride of opinion that it is not willing, if leave is granted, to open its decree heretofore made and admit the patents

referred to, alleged prior art, and reconsider the case, and then make such decree as it thinks the facts and the law warrant and demand.

It is contended by the defendant in this suit, Otis Motor Sales Company, that this court should make the request referred to of the Circuit Court of Appeals and in so doing indicate its purpose to reopen the case and receive the alleged newly discovered and the additional evidence and reconsider the case, without the imposition of terms and without imposing as a condition the payment of counsel fees, etc., for the labor expended already in the trial of this cause and on appeal to the Circuit Court of Appeals on the record heretofore made. This contention may as well be disposed of in the very beginning.

When this suit was instituted in May, 1915, it was the duty of the defendant to carefully, systematically, and thoroughly examine the prior art as disclosed by the records in the Patent Office and otherwise and elsewhere. All or substantially all of the patents now offered and proposed to be introduced on a rehearing or retrial of this cause are in, and then were in, the United States Patent Office, and were discoverable and obtainable. There is no claim that they were hidden or concealed or in any out of the way place or places. Just why they were not then discovered does not satisfactorily appear. They were not pleaded, and were not introduced in evidence in this cause, nor in any cause, until the trial before Judge Hazel in the case against the Reo Motor Car Company of New York, Incorporated. The complainant here contends that for this reason, or these reasons, these patents do not constitute newly discovered evidence, and that the proposed action on the part of this court ought not to be taken because of the laches of the defendant in this suit in not discovering and presenting such patents. Ordinarily, and in ordinary actions at law, such would be the conclusion. The evidence was in existence, and where it ought to be, and where it naturally would be, and where all searchers would look for it. If the search had been sufficiently thorough and exhaustive, these patents would have been discovered. But they were not discovered.

I am not satisfied that this application ought to be denied, on the ground that the defendant in this suit failed to discover and present these patents, provided it is willing to pay to the complainant or his attorneys the expense the complainant has been put to in the trial of this case and on appeal to the Circuit Court of Appeals with the record in its present condition. The complainant here employed counsel at great expense, subpœnaed witnesses, and attended court on the trial and final hearing, and also employed counsel on the appeal to the Circuit Court of Appeals, and proceeded all the way through without knowledge of the defense, or claim of defense, now sought to be introduced into the case. To reopen this case, and allow the introduction of these patents at this stage, without imposing what may seem to be harsh terms on the defendant, would be grossly unjust to the complainant. After a careful examination of the record, and the proceedings heretofore had in the Circuit Court of Appeals, and the decision of Judge Hazel, and the patents sought to be introduced on a rehearing of this case, I am of opinion that the ends of justice

will be best served by making the request to and asking the permission of the Circuit Court of Appeals referred to, to the end that the cause may be reopened, and these patents and other evidence introduced into the case, on condition that the defendant pay to the special master his fees and expenses, which fees are fixed at $25 per day, and the further sum of $3,000 counsel fees and expenses of counsel on the trial and final hearing of this case and the hearing in the Circuit Court of Appeals heretofore had, and in attendance before the special master on the accounting. There is no hardship to the defendant in the imposition of this condition, for the reason that the manufacturer of these infringing devices, the Reo Motor Car Company of Michigan, is the real defendant here.

If this condition is complied with, within 20 days after the entry of an order in compliance herewith, there will be an order requesting the Circuit Court of Appeals to grant permission to this court to set aside and vacate its decree made in obedience to the mandate of that court, and requesting that court to recall its mandate and take such measures as may be necessary to fully reinvest the District Court with jurisdiction to open the case and receive such further evidence as may be offered by either party, and when that is done, if done, this cause will be reopened, to the end that such evidence may be introduced. If the parties fail to agree on the number of days' service to which the special master is entitled and the amount of his expenses, then same may be taxed on motion before the District Court.

LANDON v. PUBLIC UTILITIES COMMISSION OF KANSAS et al.

(District Court, D. Kansas, First Division. August 13, 1917.)

No. 136-N.

1. COMMERCE ⇐15—"INTERSTATE COMMERCE"—TRANSPORTATION AND SALE OF NATURAL GAS.

The piping of natural gas from one state, where it is produced, into another state, where it is distributed to consumers, constitutes interstate commerce; and its character is not changed by the fact that the gas is stored in the latter state merely as a necessary incident to its proper and efficient transportation.

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

2. COMMERCE ⇐12—VALIDITY OF STATE REGULATIONS—INTERSTATE COMMERCE.

The power of a state to control public utilities doing business within its boundaries may not be so exercised as to impose a direct burden on interstate commerce.

3. COMMERCE ⇐57—INTERSTATE COMMERCE—INTERFERENCE WITH BY STATE.

The action of a state commission in assuming jurisdiction to fix and regulate rates to be charged to consumers by the receiver of a corporation engaged in piping natural gas into such state from another and distributing it to consumers *held* unconstitutional, as a direct interference with interstate commerce, and as depriving the receiver of his property without due process of law.

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

4. RECEIVERS ⇐90—ASSUMPTION OF CONTRACTS.
A contract made by a corporation is not binding on its receiver, unless affirmatively adopted by him; and while, ordinarily, he is required to indicate his election within a reasonable time, it is not necessary, where an order has been made that the contract should not be binding on the receiver, unless expressly so ordered by the court.

In Equity. Suit by John M. Landon, receiver of the Kansas Natural Gas Company, against Public Utilities Commission of Kansas and others. On final hearing for injunction against the Missouri defendants. Granted.

See, also, 242 Fed. 658; 234 Fed. 152.

Chester I. Long, of Wichita, Kan., John H. Atwood, of Kansas City, Mo., and Robert Stone, of Topeka, Kan., for complainant.

H. O. Caster and F. S. Jackson, both of Topeka, Kan., for Public Utilities Commission of Kansas.

James D. Lindsay, of Jefferson City, Mo., for Public Service Commission of Missouri.

T. S. Salathiel, of Independence, Kan., for Kansas Natural Gas Co.

J. A. Harzfeld and A. F. Evans, both of Kansas City, Mo., for city of Kansas City, Mo.

H. J. Smith, of Kansas City, Kan., for city of Kansas City, Kan.

W. E. Stringfellow, of St. Joseph, Mo., for St. Joseph Gas Co.

T. F. Doran, of Topeka, Kan., for Consumers' Light, Heat & Power Co.

Charles Blood Smith, of Topeka, Kan., for Fidelity Title & Trust Co. and Sharitt, receiver.

Charles L. Faust, of St. Joseph, Mo., for city of St. Joseph, Mo.

E. F. Cameron, of Joplin, Mo., for city of Carl Junction, Mo.

M. T. January, of Nevada, Mo., for city of Nevada, Mo.

George J. Grayston, of Joplin, Mo., for Joplin Gas Co.

J. W. Dana, of Kansas City, Mo., for Wyandotte Gas Co. and Kansas City Gas Co.

BOOTH, District Judge. I had supposed until this morning that there was to be simply an informal conference by the receiver and his counsel in case No. 1351 Equity with reference to the question of the advisability of making a change in the rates for the coming winter and as to what those rates should be; but I am advised that other parties interested have been notified, and I think wisely so, as the conference might well take a broader scope than what I had supposed it was to take, because the question of rates is one in which a good many parties are interested. It is also a question upon which the court desires to get all the light possible before making any definite order.

It might very likely be of advantage, if not to all, at least to some of you, to know what decision has been reached upon the issues touching the Missouri defendants which were tried and submitted at Kansas City a few weeks ago in case 136–N Equity. I have not been able to prepare a written opinion for filing with regard to these issues; but I have, however, reached certain conclusions, and I think, perhaps, it

would be just as well that I should state what these conclusions are at this time, and then, if I think it advisable, I will reduce them later to writing and have them filed. If this is the desire of the attorneys, I will follow this plan, because I think it may have some bearing upon the discussion as to what rates the court may order, and also have some bearing as to the position the attorneys may take upon one side or the other, and especially those representing Missouri defendants.

By a former decision, which was filed in April, and by a decree that was entered upon that decision, the issues in case No. 136–N, so far as they related specially to the Kansas defendants were disposed of, but the issues so far as they related specially to the Missouri defendants, and also the issue as to the status of the supply contracts, were held open for taking further evidence and for further consideration.

The jurisdictional questions raised by the Missouri defendants do not require further discussion. They have been disposed of by the former decisions, viz. the decision of the enlarged court, found in 234 Fed. 152, and the decision of this court filed April 21, 1917 (242 Fed. 658).

The principal issues in which the Missouri defendants are interested involve two main questions: First. Whether the acts of the Missouri Commission and of the Missouri defendants, or of certain of them, have been of such a character as to call for an injunction against them on behalf of the receiver. That question resolves itself into two subordinate questions: (a) Whether the business which is being carried on by the receiver, viz. the transportation of natural gas from Oklahoma and sale thereof in Missouri constitutes interstate commerce; (b) whether the acts of the Missouri Commission, or any of them, can be held to be acts which in effect deprive the receiver of the property of the company without due process of law. The second main question, and one in which not only the Missouri defendants, but also the Kansas defendants, are interested, is the question as to the status of the supply contracts originally made by the Kansas Natural Gas Company, or its predecessor, with various distributing companies, or their predecessors. This question, again, is divisible into two subordinate questions: (a) As to the status of the supply contracts as between the original parties or their assignees; and (b) the status of the supply contracts as to the receiver.

The relief sought by the receiver is: First, by way of injunction against the defendants, and especially against the Missouri Commission, restraining them from interfering with the carrying on of the business of transportation and selling of natural gas from Oklahoma into Missouri. The claim of the plaintiff is that the business thus carried on is interstate commerce, and that the Missouri Commission and some of the other defendants have attempted to unduly and directly burden this interstate commerce and to place restrictions upon it; and further it is claimed that the acts of the Missouri Commission in effect take away the property of the receiver without due process of law. Secondly, by way of injunction as against all of the defendants to prevent them or any of them from instituting any suits or proceedings or taking any steps without the consent of this court to enforce the provisions of the so-called supply contracts, which they

claim, or which some of them claim, are still in force as against the receiver—the receiver claiming: (1) That these supply contracts were invalid in their inception; (2) that, even if they were valid, yet, nevertheless, by reason of the changed circumstances, and by reason of the provisions in the contracts themselves looking towards a change of circumstances, they are no longer binding upon the original parties to these contracts; (3) that even if the contracts were valid in their inception, and still are existing valid contracts between the original parties, yet they are not at this time binding upon the receiver.

Similar relief is also sought by the Kansas Natural Gas Company and by several of the distributing companies. Several of the distributing companies and some of the cities take the position that these supply contracts are at present valid existing contracts upon the receiver as well as upon the original parties. Others of the distributing companies take the position that, while the contracts may be valid and existing between the original parties, yet they do not contend that they are binding upon the receiver.

[1] Now, as to the question of interstate commerce, I have gone over the record as well as I could within the time that I have been able to give to it, and in my judgment the facts upon which this issue stands in regard to the Missouri defendants are substantially the same as in the case against the Kansas defendants. The differences in them are not vital, and most of them in my judgment are immaterial. The question of storage has been presented and pressed with great earnestness, as being a very important factor to be taken into consideration in determining this question of interstate commerce. But to my mind the evidence shows that such storage as exists is merely incidental to the transportation of the gas, and in fact that it is a necessary incident to the proper and efficient transportation of the gas. Hence, this storage being merely incidental, it seems to me that it does not change the character of the business from interstate to intrastate commerce. Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; Western Oil Co v. Lipscomb (June 4, 1917) 244 U. S. 346, 37 Sup. Ct. 623, 61 L. Ed. 1181; McFadden v. Railway Co., 241 Fed. 562, —— C. C. A. ——.

Arguments have been made, and pressed with great earnestness, which are in substance to the effect that the court erred in holding in the former decision that the business was interstate commerce, and that in fact the entire business transacted by the receiver, whether relating to the state of Kansas or to the state of Missouri, is not interstate commerce. I have given to this matter all the attention which I have been able to give it, and also to the arguments of counsel upon this question. While I admit that there may be possible doubt as to the correctness of the conclusion reached, yet I do not see any reason at this time for reversing the decision as to the Kansas defendants; and I hold as to the Missouri defendants that the business transacted by the receiver in transporting natural gas from Oklahoma and selling it in Missouri is interstate commerce.

[2] It has been suggested by counsel that the situation presents a clash between the principle that a state may control public utilities do-

ing business within its boundaries and the principle that a state may not directly impose a burden on interstate commerce. If there is such a clash between these two principles, then I am clearly of the opinion that the decision must be in favor of the principle that the state may not directly burden or interfere with interstate commerce. That principle must prevail, rather than the principle that the state under all circumstances must have the fullest control over a public utility doing business within its borders. Whether there is such a clash between these two principles is not necessary for me to determine at this time.

[3] The Missouri Commission has made no orders fixing general rates for the sale of gas by the receiver within the state of Missouri, as was the case in regard to the Kansas defendants. But the Missouri Commission has done certain specific acts; amongst others, it has suspended schedules of rates which were agreed upon by the receiver and the distributing companies, and has threatened the distributing companies with further action against them if they should undertake to enforce those rates. It has also taken the position through its counsel in open court that it would recognize no rates as valid, unless those rates were first submitted to the Commission for its approval and approved by it. Not only that, it has taken jurisdiction over complaints by the distributing companies, and in some instances I think by the cities, as to rates; but, instead of proceeding to hearing upon these complaints, it has suspended the hearings from time to time, without attempting to reach any definite conclusion. It has attempted, by order made in August, 1916, to establish a new rate for natural gas in Kansas City, Mo. In these various acts the defendant cities have severally participated. The result of all this is that the receiver is seriously hampered in his business, and the distributing companies are also seriously hampered in their business, in attempting to put in a schedule of rates for the various cities in Missouri. In my judgment these acts on the part of the Missouri Commission constitute an attempt to directly interfere with and directly burden interstate commerce. I am likewise of the opinion that they also in effect constitute the taking of the property of the receiver without due process of law.

Now, as to the second main question, namely, the question of the supply contracts: These supply contracts were entered into by the original parties during the years from 1905 to 1908 or 1909, and perhaps later. As far as I have been able to examine them, they all contain one clause, which is very similar, and I do not know but it is identical in its wording:

"However, as the production of gas from the wells and the conveying of it from long distances is subject to accidents and interruptions and failures, the party of the first part does not under this contract undertake to furnish the parties of the second part with an uninterrupted supply of gas for the period named herein, but only to furnish such supply for such a period of time as the wells and pipe lines of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying. And it is expressly understood and agreed by the parties of the second part that the party of the first part shall not be liable for any loss, damage, or injury that may result, either directly or indirectly, from such shortages or interruptions; but said party of the first part agrees to use diligence to supply the parties of the second part with a constant and sufficient supply of merchantable gas for all consumers."

All the contracts which I have examined contain a provision similar to that quoted. They all contain, also, or at least those which I have examined contain, certain provisions restrictive on the parties to the contract, restrictive as to the right of the parties furnishing the gas to furnish it to any other person or corporation doing business in the zone or district specified, and restrictive as against the distributing companies to prevent them from purchasing gas from any other person or corporation than the person named in the contract who is furnishing the gas, except under certain conditions.

In April, 1912, the Supreme Court of Kansas had occasion to review these contracts, and, while there is a difference amongst counsel as to just what the judgment of that court was in its effect, I think it must be conceded by all that the Supreme Court of the state of Kansas took the view that there were certain clauses, at least, in those contracts that were contrary to the statutes of the state of Kansas, and also contrary to public policy. It may very well be doubted whether those same restrictive clauses were not also a violation of the statutes of the United States against trusts and monopolies. State v. Kansas Natural Gas Co., No. 17977 (no written opinion filed); Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

With full knowledge of these facts, the United States District Court of the state of Kansas made an order in October, 1912, touching these contracts, and the gist of that order was that those contracts should not be binding upon the receiver, except upon further express order of the court. The Circuit Court of Appeals for this circuit in a decision in a case arising out of this general gas controversy upon a contract, not a supply contract, but a lease contract, also held that that contract was not binding upon the receiver, and took occasion in its decision to refer to the above-mentioned express order of the United States District Court of Kansas. K. C. Pipe Line Co. v. Fidelity Co., 217 Fed. 187, 133 C. C. A. 181. On two separate occasions the district court of Montgomery county, Kan., has held that these supply contracts are not merely not binding upon the receiver, but invalid in their inception, as being against the statutes of the state of Kansas, and being also against the statutes of the United States, as well as against public policy.

[4] There never has been any formal adoption by the receiver of these supply contracts. In such case it is not the law that a contract shall be binding upon the receiver until it is disavowed by him, but the law is that it is not binding upon the receiver until it is accepted by him; and, while it is true that ordinarily the law requires the receiver to indicate within a reasonable time whether or not he will accept a contract, in this particular case the court relieved the receiver of any necessity for taking any action by expressly ordering that the contract should not be binding upon the receiver until the court by its order made it binding. It was not necessary for the receiver to take any action on his part. If the other parties to the contract wished to have these contracts made binding upon the receiver, the court was open to them to make an application, and upon that application the court would have made such an order as was deemed necessary. No such action was ever taken, and the order of the court made in October,

1912, still stands, that these contracts are not binding upon the receiver until the further orders of the court may make them so.

Now, whether these contracts were originally valid or invalid, and whether they became functi officio, even if they were valid in their inception, are questions that it is not necessary for the court to decide at this time. The Kansas Natural Gas Company has in its pleadings prayed to have these contracts set aside as to it. I do not deem it advisable at this time to make any decision with regard to the validity of the contracts as between the original parties to them, whether they are still valid, whether they have ceased to be valid, or whether they were invalid in their inception. While I shall deny the prayer of the Kansas Natural Company at this time, it will be without prejudice to any action on the part of that company that it may see fit to take, whether in the cases that are pending in this court No. 1351 Equity, or No. 1 Equity, or otherwise. If it should see fit to take proper action to determine the validity of these contracts, this decision will not prejudice it from so doing.

The conclusions which I reach are that the business transacted by the receiver in Missouri is interstate commerce, that the supply contracts are not binding upon the receiver, that the Missouri Commission should be enjoined, and that such of the other defendants as have done acts or made any threats towards commencing any suit or proceedings, looking towards the enforcement of the supply contracts as against the receiver, should also be enjoined. A decree may be prepared accordingly.

UNITED STATES v. STEPHENS.

(District Court, D. Delaware. November 13, 1917.)

No. 1.

1. ARMY AND NAVY ⊂=20—CONSCRIPTION FOR FOREIGN SERVICE—"MILITIA."
Congress under the power given by Const. art. 1, § 8, to declare war, raise armies, and do all things necessary and proper for execution of that power, can by conscription organize the militia of the United States, as defined by National Defense Act June 3, 1916, § 57 (Comp. St. 1916, § 3041), for foreign warfare, and as incident thereto provide for enforced registration of those liable to the service, as done by Selective Draft Act May 18, 1917, § 5; the power given by such section of the Constitution to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, with the implied inhibition against calling it out for any other purpose, relating to the organized state militia as such.

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

2. ARMY AND NAVY ⊂=20—CONSTITUTIONAL LAW ⊂=84—RELIGIOUS LIBERTY —SELECTIVE DRAFT LAW—"LAW RESPECTING AN ESTABLISHMENT OF RELIGION OR PROHIBITING THE FREE EXERCISE THEREOF."
Selective Draft Act May 18, 1917, § 4, exempting ministers and students in recognized theological schools, is not a "law respecting an establishment of religion, or prohibiting the free exercise thereof," within the meaning of Const. Amend. 1.

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3. STATUTES ⊂⊃64(1)—EFFECT OF PARTIAL INVALIDITY.
Were provision of Selective Draft Act May 18, 1917, § 4, exempting clergy and divinity students unconstitutional, it, while falling, would not affect the rest of the act, which is clearly separable therefrom.

4. ARMY AND NAVY ⊂⊃20—CONSTITUTIONAL LAW ⊂⊃62—DELEGATING LEGISLATIVE POWER—ESTABLISHING "COURTS"—SELECTIVE DRAFT BOARDS.
Const. art. 3, § 1, vesting the judicial power in the Supreme Court and such inferior courts as Congress may establish, is not contravened by Selective Draft Act May 18, 1917, § 4, authorizing the President to create and establish boards, to determine, subject to review by him, questions of exemption; they, though clothed with discretionary and quasi judicial powers, being essentially part and parcel of the executive machinery of the government.

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

5. STATUTES ⊂⊃64(1)—EFFECT OF PARTIAL INVALIDITY.
Were Selective Draft Act May 18, 1917, § 4, in so far as providing that certain officers and classes of persons, though exempt from selective draft, shall not be exempt from service in any capacity that the President shall declare to be noncombatant, to be held to contemplate involuntary servitude, in contravention of Const. Amend. 13, it would merely fall, and, being separable, not affect any other provision of the act.

6. ARMY AND NAVY ⊂⊃20—CONSTITUTIONAL LAW ⊂⊃62—DELEGATING LEGISLATIVE POWER—RAISING ARMY.
Selective Draft Act May 18, 1917, § 1, providing that the President be and hereby is "authorized" to raise, organize, officer, and equip all or such number of the increments of the regular army provided for by National Defense Act June 3, 1916, as he may deem necessary to raise all organizations of the regular army to the maximum enlisted strength authorized by law, to draft and organize and officer any or all members of the National Guard and of the National Guard Reserves, and to raise by draft as therein provided, and organize, officer, and equip an additional force of 500,000, or such part or parts thereof as he may at any time deem necessary, considered with the preceding words, "In view of the existing emergency, which demands the raising of troops in addition to those now available," and with section 2, providing that the enlisted men required to raise and maintain the organization of the regular army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this act provided, shall be raised by voluntary enlistment, or, if and whenever the President decides that they cannot effectually be so raised or maintained, then by selective draft, and with Joint Resolution April 6, 1917, declaring a state of war between the United States and the Imperial German Government, and that the President is authorized and "directed" to "employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German Government," does not delegate to the President the power, vested in Congress, to raise an army; it not attempting to give him an uncontrolled option to take or omit to take steps for the organization and equipment of the miliary forces of the United States as contemplated by Congress, but merely committing to him the execution of the general scheme of Congress, with necessarily large discretionary powers.

Donald Stephens was indicted for failure to register under Act May 18, 1917. On demurrer to indictment. Demurrer overruled.

Charles F. Curley, U. S. Atty., of Wilmington, Del.
Henry Budd, of Philadelphia, Pa., for defendant.

BRADFORD, District Judge. An indictment has been found against Donald Stephens charging him with violation of the act of Congress of May 18, 1917, entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States." The defendant has demurred to the indictment, and its sufficiency is now to be determined. Section 5 of the above act, so far as pertinent to this case, is as follows:

"Sec. 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the regular army, the navy, and the national guard and naval militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall wilfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: * * * Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

Pursuant to the above section and on the day of the approval of the act the President made proclamation to all persons subject to registration in the several states and District of Columbia, that the registration would be had June 5, 1917, at the registration place in the precinct wherein they had their permanent homes, and defining the class of persons required to register.

The indictment alleges in substance that the defendant June 5, 1917, being included in the class of persons subject to registration under the act, was required by the President's proclamation to present himself for and submit to such registration at the proper registration place in the district of Delaware, on the day and between the hours designated in the proclamation, and unlawfully and wilfully failed and refused so to present himself for and submit to registration. The grounds of demurrer are in substance as follows: (1) That the act of May 18, 1917, is in violation of section 8 of article I of the Constitution. (2) That it is in violation of article I of the amendments to the Constitution. (3) That it is in violation of section 1 of article III of the Constitution. (4) That, in so far as it provides for the assignment of drafted persons to service other than military, it is in violation of article XIII of the amendments to the Constitution. (5) That in other respects it is in violation of the Constitution.

[1] Section 8 of article I so far as material to the consideration of this case is as follows:

"Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to * * * provide for the common defence and general welfare of the United States; * * * to declare war; * * * to

raise and support armies; * * * to provide and maintain a navy; * * * to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress; * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc.

In section 57 of the act of Congress of June 3, 1916, entitled "An act for making further and more effectual provision for the national defense, and for other purposes," 39 Stat. 166, 197 (Comp. St. 1916, § 3041), it was provided:

"The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the national guard, the naval militia, and the unorganized militia."

It is urged on the part of the defendant that Congress possesses only such powers as have been expressly or by fair implication conferred upon it by the Constitution; that the "militia of the United States" includes all able-bodied citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be older than the minimum and younger than the maximum ages above specified, subject to exceptions not pertinent in this connection; that the only purposes for which Congress is empowered to provide for calling forth the militia are to "execute the laws of the Union," to "suppress insurrections," and to "repel invasions"; and that the war in connection with which the act of May 18, 1917, provides for a registration, contemplates military service in foreign fields, and not merely the accomplishment of the ends for which the militia under the terms of the Constitution can be compulsorily called out. It is not denied, but conceded, that the regular army as constituting part of the permanent military establishment of the United States may be compelled to render military service abroad. But it is asserted that this obligation results from the fact that the soldiers of the regular army in their contract of enlistment consent to such service, and that without such consent they could not constitutionally be sent abroad to take part in the war. In other words, it is contended that, however exigent the demand for military operations on a large scale in Europe, however inadequate the regular army to conduct those operations, the government is powerless in this dire struggle between democracy and a powerful autocracy practising the atrocities of barbarism and threatening the freedom of the world to compel any one not belonging to the permanent military forces of the nation, to fight for this country in the only place where, perchance, his efforts may be of avail. Were such the case, the American nation would present a pitiable spectacle of emasculated sovereignty. But I regard the contention as utterly unsound. The fundamental right of self-preservation forbids any construction of the Constitution so lim-

iting powers of Congress essential to continued national existence. In the preamble to the Constitution it is declared that the people of the United States "do ordain and establish this Constitution" in order to "provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." As means to the attainment of those beneficent ends the Constitution empowers Congress to declare war, to raise and support armies, to provide and maintain a navy, and, in addition to the provisions touching the militia, to enact all laws necessary and proper for carrying these powers into execution. These broad powers, essential to the welfare and life of the nation, are not, I think, restricted or impaired in any manner by the provisions touching the militia.

The power of Congress to raise armies, like the power to declare war, is unconditional, unqualified and absolute; and Congress is the exclusive judge of the necessity for the exercise of the power and of the means and manner prescribed by it for its exercise. The constitutional provisions relating to the militia manifestly apply to state militia in contradistinction to militia of the United States. Otherwise it would be difficult to understand the provision "reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Further, the clause providing for "calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions" is predicated upon the organization of the militia, without which the ends intended could not be attained. The provisions of the Constitution relating to the militia having application only to the organized state militia, it does not follow, from the lack of power in Congress to send such militia to fight in a foreign country, that Congress has not power to organize the militia of the United States and send it to any part of the globe deemed best for the conduct of military operations. There is no necessary or logical connection between the two propositions. The militia of the United States, as defined in the act of June 3, 1916, is sufficiently inclusive to embrace most, if not all, of the individuals composing the militia, organized or unorganized, of the several states. But should they by conscription be drafted into an army destined for foreign parts they would necessarily lose the character of organized state militia, and the implied constitutional inhibition against calling out the organized state militia except to "execute the laws of the Union, suppress insurrections and repel invasions" would cease to apply. The power of Congress to declare war and raise armies is absolute and paramount, and must be recognized, even if the exercise of the power interferes with the organization of the state militia in such manner as to leave no subject to which the inhibition can apply. That power infinitely transcends, in importance, the retention of organization of state militia with the result that it can be used for no useful purpose, except the accomplishment of the three specified objects within or substantially within the national domain.

War was formally declared by the United States against Germany April 6, 1917. The joint resolution containing the declaration sets forth:

"That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States."

Under these circumstances the position taken on the part of the defendant that, although an able-bodied American citizen of proper age, he has not given his consent and, therefore, cannot be compelled to serve his country in a foreign field, or submit to registration, cannot be maintained. That the exercise of the constitutional power to raise armies should be dependent upon the consent of the proposed soldiers is a startling proposition which this court is not prepared to accept. In Angelus v. Sullivan, 246 Fed. 54, — C. C. A. —, the Circuit Court of Appeals for the Second Circuit said with respect to the act in question:

"This court has no doubt as to the constitutionality of the act of Congress. The Constitution, article I, § 8, expressly provides that the Congress shall have power to raise and support armies, and to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. The purpose of the conscription act is to raise an army, and the right to raise it does not involve the exercise of an implied power but of one expressly granted. How can the courts deny to Congress a right which the Constitution in plain and distinct terms confers upon it? The Constitution in conferring the power upon Congress has not prescribed the mode in which the power shall be exercised. The power is conferred fully, completely and unconditionally. It is for the Congress to determine the means by which the army shall be raised. It is left to its judgment whether it shall be raised by calling for volunteers, or whether it shall be raised by conscription. At the time the Constitution was adopted conscription was not an unknown mode of raising armies, but had been resorted to by governments throughout the world. * * * If it had been intended that Congress should not have the power to raise anything but a volunteer army the grant of power would have been restricted and not made unconditional."

I am satisfied that Congress under the power to declare war, to raise armies, and do all things necessary and proper for the execution of that power, has full constitutional authority by conscription to organize the militia of the United States for foreign warfare, and, as incident to the exercise of that authority, to provide for and enforce the registration of those liable to serve. Further, it does not appear that the army the Government is engaged in raising may not be used to "execute the laws of the Union, suppress insurrections and repel invasions," as well as to serve abroad; and it is not denied that for the former purposes the militia of the United States may be compelled to register and render military service.

[2, 3] The second ground of demurrer is that the act of May 18, 1917, violates article I of the amendments to the Constitution. That article provides, among other things, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In section 4 of the act it is provided:

"Regular or duly ordained ministers of religion, students who at the time of the approval of this act are preparing for the ministry in recognized

theological or divinity schools, * * * shall be exempt from the selective draft herein prescribed; and nothing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organization."

It is argued that "the exemption of members of 'recognized' churches which hold certain beliefs and the holding to service of persons, not members of such churches, or of any church, who hold the same belief, is an act of establishment of religion, in the sense in which the words are used in the Constitution, i. e. the conferring of a benefit upon a person, qua church member, which would be refused to the same person were he not such a member."

And further, that the "exemption of the clergy and divinity students by section 4 is a direct move in the establishment of religion. It recognizes them as a class exempt from certain duties of other citizens, and is a direct legislative support of recognized churches or sects by bestowing an immunity upon their leaders."

There are two answers to the second ground of demurrer. Section 4 is not a "law respecting an establishment of religion, or prohibiting the free exercise thereof." Clearly it does not prohibit the free exercise thereof, nor is it a law respecting an establishment of religion in the sense in which those words are used in the amendment. The framers of the Constitution intended to prohibit the union of church and state, and to that end withheld from Congress the power to legislate for the official recognition or management of a religious organization as an institution connected with or upheld by the government. I find nothing in section 4 violative of the first amendment properly construed. But were it otherwise, while the provision criticized would fall, the rest of the act would not be affected; for those provisions are clearly separable from the other provisions of the act, and "it is a settled rule 'that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable.'" Presser v. Illinois, 116 U. S. 252, 263, 6 Sup. Ct. 580, 583, 29 L. Ed. 615.

[4] The third ground of demurrer is that the act is violative of section 1 of article III of the Constitution. That section provides that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 4 of the act provides:

"The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards, and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment,

to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this Act authorizing the President to exclude or discharge from the selective draft 'Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces, or the maintenance of national interest during the emergency.' The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district. Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this Act, not included within the original jurisdiction of such local boards. The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision. Any vacancy in any such local board or district board shall be filled by the President, and any member of any such local board or district board may be removed and another appointed in his place by the President, whenever he considers that the interest of the nation demands it. The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft."

It is contended on the part of the defendant that under the above provisions the boards intended to be created and established by the President possess judicial functions and are inferior courts in the sense in which those words are used in the section of the Constitution now considered, and as such could be ordained and established, not by the President, but only by Congress, and that therefore those provisions constitute an unconstitutional attempt by Congress to delegate authority to the President. The boards undoubtedly possess discretionary or quasi judicial powers, but are not inferior courts in the constitutional sense. The raising of an army by authority of Congress under an act providing for it is an executive and not a judicial function. Congress having by joint resolution declared war against Ger-

many, provided in and by the act of May 18, 1917, among other things, for the raising of an army by draft or conscription, and that certain persons and classes of persons should be exempt or might be exempted by the President from the selective draft. Authority was given to the President, who is at once the commander in chief of the army and navy and the chief executive of the nation, to create and establish the local and district boards. The function of these boards, unlike that of judicial tribunals, is not the administration of justice as between man and man, or the punishment of offences against society, but is, while discretionary or quasi judicial, essentially executive in its nature. The boards are constituted for the purpose of determining who are and who are not to be compelled to render military service. The local boards have power to hear and determine, subject to review as provided in the act, questions of exemption thereunder, and questions of or claims for including or discharging individuals or classes of individuals from the selective draft, subject to exceptions as provided in the act. The district boards are given power to review and affirm, modify or reverse the decisions of the local boards, and also to hear and determine questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, not included within the original jurisdiction of the local boards. Further, decisions of the district boards may in accordance with rules and regulations to be prescribed by the President be affirmed, modified or reversed by him. All these powers and duties relate exclusively to the efficient raising and composition of an army, and belong to the executive branch of the government. Their discretionary or quasi judicial character does not affect their essentially executive, in contradistinction to judicial, nature. There are many boards of public officers admittedly constituting part of the executive department of the government, clothed with discretionary and quasi judicial powers. The nature and purpose of their functions rather than their discretionary character furnish the test for determining whether they belong to the executive or to the judicial department. It is true that phraseology is employed in connection with the local and district boards which could appropriately be applied to judicial as distinguished from executive functions, but this circumstance cannot change the essential nature of the boards as part and parcel of the executive machinery of the government.

[5] The fourth ground of demurrer is that the act, in so far as it provides for the assignment of drafted persons to service other than military, is a violation of article XIII of the amendments to the Constitution, declaring that "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted," shall not exist within the United States, or any place subject to their jurisdiction. Section 4 of the act provides, as above stated, that certain officers and classes of persons shall be exempted from the selective draft, but that "no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant." It is argued that this provision contemplates involuntary servitude in the sense of the Constitution. It is not necessary to dwell

upon this contention. If it be assumed that the provision is invalid it would fall, but, being separable, would not affect the force of other portions of the act. An assignment, actual or potential, by the President of a person exempt from the draft to service in a noncombatant capacity is wholly unrelated to an unlawful omission to submit to registration, for which the defendant has been indicted. It may be added, however, that the Supreme Court, in Butler v. Perry, 240 U. S. 328, 332, 36 Sup. Ct. 258, 259 (60 L. Ed. 672), has used language of much significance on this point, as follows:

"This amendment was adopted with reference to conditions existing since the foundation of our government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."

[6] Another ground of demurrer was assigned ore tenus at the hearing, to the effect that the act of May 18, 1917, is unlawful in that the power to raise an army is vested in Congress, and Congress by the act does not exercise that power, but attempts "to give the President power at his discretion to raise an army and in a very great measure to determine of whom it shall consist."

Congress is empowered by the Constitution to raise armies; but mere congressional volition cannot accomplish the end. It requires a declared legislative intent followed by action to effectuate it. Such action cannot be taken by the members of Congress, for it not only would be impracticable, but would involve an encroachment by the legislative upon the executive branch of the government. It is, therefore, necessary, that executive agencies shall expressly or impliedly be directed or required by Congress to give practical effect to the legislative intent. This is necessarily involved in an exercise of power to raise armies. The act of May 18, 1917, provides in substance that "the President be and he is hereby authorized" to raise, organize, officer and equip all or such number of increments of the regular army provided by the national defense act of June 3, 1916, or such parts thereof as he may deem necessary to raise all organizations of the regular army to the maximum enlisted strength authorized by law; to draft into the military service of the United States, and organize and officer, any or all members of the national guard and of the national guard reserves; and to raise by draft as therein provided, and organize, officer, and equip, an additional force of 500,000 men, or such part or parts thereof as he may at any time deem necessary. The contention on the part of the defendant, based upon the application to the President of the term "authorized," assumes that no duty to take action is imposed on him, but that the act undertakes to vest in him an uncontrolled option to take or omit to take steps for the organization and equipment of the military forces of the United States as contemplated by Congress. This is a false assumption. The act

when read in connection with the joint resolution declaring war, and other legislation in pari materia, leaves no doubt on this point. By that resolution the President is not only "authorized" but expressly "directed" to "employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German Government." It is so improbable as to be well nigh morally impossible that Congress intended by the act in question to authorize the President to disregard what it had less than a month and a half previously so solemnly and emphatically "directed" him to do. Further, it appears on the face of the act that it was passed "in view of the existing emergency, which demands the raising of troops in addition to those now available." That the act did not confer a mere option, but an obligation, upon the President is further apparent from the following portion of section 2:

"That the enlisted men required to raise and maintain the organizations of the regular army and to complete and maintain the organizations embodying the members of the national guard drafted into the service of the United States, at the maximum legal strength as by this act provided, shall be raised by voluntary enlistment, or if and whenever the President decides that they cannot effectually be so raised or maintained, then by selective draft; and all other forces hereby authorized, except as provided in the seventh paragraph of section 1, shall be raised and maintained by selective draft exclusively," etc.

And in the deficiency appropriation act of June 15, 1917, the sum of $2,658,413 is appropriated for "all expenses necessary in the registration of persons available for military service and in the selection of certain such persons and their draft into military service." The people of the United States through their representatives in Congress having by joint resolution declared war against Germany, and directed the President to employ the entire naval and military forces of the United States to carry it on, and having pledged the resources of the country to bring the war to a successful termination, and Congress by the act of May 18, 1917, having empowered the President to organize and equip the military forces of the United States for the prosecution of the war, the public was vitally interested that such organization and equipment should be effected, and it became the duty of the President to act, equally as if, instead of the word "authorize," the words "empowered and directed" had been employed.

Large discretionary powers in carrying into execution the general scheme or plan defined by Congress properly were conferred upon the President as the chief excutive and commander of the army with respect to the choice of means and other details. Legislative treatment of such matters with the requisite particularity and with reference to varying conditions and exigencies is impracticable, and committing them to the executive branch of government is not to be treated as a delegation of legislative power. There is nothing novel or repugnant to the Constitution in thus disposing of them. In Angelus v. Local Board, supra, the court said:

"But it is said that this particular act is unconstitutional because Congress has delegated to the President the power to raise armies. The objection is without merit. The Congress has authorized the President to resort to conscription and has determined the class of persons who shall be subject

to it. It is the duty of the President to see that the law is carried into execution, and it is within the power of Congress to give him a discretion in respect to certain specified matters. The cases are numerous in which the courts have sustained the grant of powers which involve in a large degree the exercise of discretion and judgment. And it has been the practice of Congress for years to pass laws which have invested the President with discretionary authority that cannot be considered a delegation of legislative power."

The provisions of the act of May 18, 1917, for the organization and equipment of the military forces of the United States, being constitutional and valid, the provision requiring registration to effectuate that purpose, for alleged non-compliance with which the defendant has been indicted, also is constitutional and valid; and therefore the demurrer must be overruled, and the defendant required to plead to the indictment.

Ex parte BECK.

(District Court, D. Montana. September 29, 1917.)

No. 620.

1. ARMY AND NAVY ⟸20—DRAFT BOARDS—JURISDICTION.
   Special tribunals, such as local and district boards created by Selective Draft Act May 18, 1917, are quasi judicial bodies of inferior and limited jurisdiction, and have authority to hear and determine only such matters as the law directs.
2. JUDGMENT ⟸477—QUASI JUDICIAL TRIBUNALS—VALIDITY—COLLATERAL ATTACK.
   Decisions of quasi judicial tribunals of limited jurisdiction, if unaffected by fraud or mistake, are conclusive, whenever collaterally questioned, where the tribunal has proceeded according to law and has not exceeded its jurisdiction, but are void, if in excess of jurisdiction, or contrary to law.
3. APPEAL AND ERROR ⟸31—QUASI JUDICIAL TRIBUNALS.
   Any person aggrieved by the proceedings of a quasi judicial administrative body may appeal to the civil courts.
4. JUDGMENT ⟸496—QUASI JUDICIAL TRIBUNAL—COLLATERAL ATTACK—JURISDICTION—PRESUMPTION.
   A judgment of an inferior quasi judicial tribunal of limited jurisdiction, when questioned in a civil court, cannot be upheld, unless the jurisdiction of the tribunal affirmatively appears; there being no presumptions in favor of the judgment.
5. JUDGMENT ⟸496—COLLATERAL ATTACK—PLEADING AND PROVING JURISDICTION.
   For a judgment of an inferior tribunal with quasi judicial powers to be upheld, its jurisdiction in the matter must not only be pleaded, but proven.
6. HABEAS CORPUS ⟸23—ISSUANCE—RIGHT TO ISSUE WRIT.
   Where the facts are not in dispute, but only a question of law is involved, in an attack on the judgment of a quasi judicial tribunal with inferior jurisdiction committing petitioner, a writ of habeas corpus may issue in the beginning, without delay to determine how the tribunal will act.
7. ARMY AND NAVY ⟸20—SELECTIVE DRAFT LAW—ALIENS.
   Selective Draft Act, requiring registration of men for military service, though requiring aliens who have not declared their intention to be-

come a citizen to register, exempts them from military service. Provision is made in the act for exemption of registrants, on filing claims for exemption within seven days after notice mailed to appear before the local boards for physical examination. The act also provides that, if any person fails to appear for physical examination, he shall be recorded as physically qualified, but if he later appears the board may examine him. Pamphlet 1917, form 19, p. 18, issued by the War Department, forbids local boards from calling or listing for military service aliens who have not declared their intention to become citizens. *Held*, that such an alien, though he did not, within seven days after the mailing of notice to appear for physical examination, claim his exemption, must, whenever his alienage is established, be granted his exemption, which is of a different nature than the exemptions given others for dependent families, etc., and he cannot, having claimed his exemption and shown his alienage, be lawfully certified into military service.

8. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT LAW—AUTHORITY OF DISTRICT BOARD—ALIENS.

After certifying relator to the local board for military service, a district board appointed under the Selective Draft Act is without jurisdiction to reject, on the ground that his alienage was not established, relator's claim for exemption as an alien who had not declared his intention of becoming a citizen.

9. HABEAS CORPUS ⊂=16—ISSUANCE OF WRIT—RESTRAINT BY MILITARY AUTHORITY.

Where the certification of relator into military service was improper under the Selective Draft Act, relator being entitled to exemption as a nondeclarant alien, he is, having been arrested as a deserter and held for trial by court-martial, entitled to habeas corpus to secure his release.

10. HABEAS CORPUS ⊂=34—ISSUANCE OF WRIT.

A writ of habeas corpus, directed to an army officer to secure the discharge of a nondeclarant alien who had been wrongfully certified into military service under the Selective Draft Act, cannot be denied on the theory that the army officer in obeying the writ would expose himself to punishment for violation of the orders of his superiors, for the officer's remedy is not by resistance to the writ of habeas corpus, but by appeal, and it cannot be assumed that his superiors, his orders being general, would direct him to disobey a mandate of the court having jurisdiction.

In the matter of the application of John Beck for writ of habeas corpus directed to one Jesse B. Roote, Major. Writ issued.

W. D. Rankin, of Helena, Mont., for petitioner.

B. K. Wheeler, U. S. Atty., and Jesse B. Roote, both of Butte, Mont., for respondent.

BOURQUIN, District Judge. This application for habeas corpus with haste has been instituted, rule nisi heard, argued, and decided, all summarily, indeed, in and because of which the parties have ignored defects of substance in practice, in petition, and in return, and for evidence resorted to admissions, statements, and other matter in the nature of evidence, all to the end that a grave issue might be speedily determined. The whole, including the decision, is unsatisfactory—the latter in research and reasoning, though not in judgment reached.

Petitioner seeks release from the custody of respondent, Maj. Jesse B. Roote, an army officer, who holds petitioner as a military prisoner charged with desertion and for trial by court-martial. Is petitioner in

military service? is the vital issue. If he is, the military have jurisdiction over him, and this court has not jurisdiction to release him by habeas corpus. If he is not in military service, the reverse is true. Whether or not he is in military service depends upon whether or not the selective draft local and district boards legally certified him for the draft.

Inquiring briefly into these boards, they are administrative bodies created by the selective draft law, with powers, duties, and procedure conferred by the law and rules not inconsistent with the law and prescribed by the President. They have many familiar analogies, viz. land department officials, immigration boards and inspectors, tax and customs boards, special and military commissions, courts-martial, and the like.

[1-4] Such bodies and persons are special tribunals vested by law with authority and duty to hear and determine such matters as the law directs. They are but quasi judicial, and of inferior and limited jurisdiction. But within this jurisdiction, if they proceed as the law directs, their decisions with some exceptions not material here, if unaffected by fraud or mistake, are conclusive upon the courts and wherever collaterally questioned. On the other hand, if they have not, or exceed their jurisdiction, or substantially depart from the procedure by law prescribed for them, their proceedings and decisions are without jurisdiction and void everywhere. Any person aggrieved by their proceedings can always appeal to the civil courts to inquire therein. Such inquiry extends no further than whether or not they had and kept within jurisdiction and proceeded in substantial conformity to statutes and rules, whether or not there is competent and adequate evidence tending to support their decisions, and whether or not the latter are free from fraud or mistake. If the answers thereto are affirmative, the courts cannot disturb the proceedings or decisions of such special tribunals. If negative, the courts must and will set them aside or deprive them of effect. When questioned in the civil courts, the rule in respect to all such tribunals is that set out in McClaughry v. Deming, 186 U. S. 63, 22 Sup. Ct. 786, 46 L. Ed. 1049 (wherein the court declared void the sentence of a court-martial), viz.:

"To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. * * * There are no presumptions in its favor, so far as these matters are concerned. * * * Their authority is statutory, and the statute * * * must be followed throughout. The fact necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

[5, 6] And it is not enough to plead all this, but it must be proven by whomever would defend them. All this is familiar and settled law. Other cases variously illustrating it are Dynes v. Hoover, 20 How. 80, 15 L. Ed. 838, United States v. Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636, Harnage v. Martin, 242 U. S. 386, 37 Sup. Ct. 148, 61 L. Ed. 382, and cases in them cited. Where the facts are not in

dispute, and so but a question of law, the writ issues in the beginning. There is no necessity to wait to see what the special tribunal will do. The one in custody is entitled to liberty. Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317; United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917. Note that herein petitioner pursued the remedies, his before the boards, to the end.

[7-9] With this law in mind, adverting to these proceedings, it appears petitioner is an alien, citizen of Denmark, who has not declared his intention to become a citizen of this country. Respondent indirectly admits alienage, and it has been so treated and argued throughout. In addition, it is proven by petitioner's affidavit hereinafter referred to and in evidence. The selective draft law excludes such aliens from the draft, and from armies to be raised by draft, but, to the end that they may be known and excluded, includes them in the registration. So clear is this, the War Department directs that, even though such aliens desire and ask to enter the military, the local boards must not call nor list them therefor. Pamphlet 1917, form 19, page 18, filed by respondent. All other men are included in the draft, though some may secure exemption.

There is a broad distinction between aliens' exclusion and others' exemption. Exclusion is aliens' right and the nation's right, which neither they nor boards can waive, because the law forbids to draft them. Exemption is others' privilege, which they can waive, or the boards in instances disallow, because the law permits to draft them. It is thought aliens' exclusion is intended less for the benefit of aliens than for the benefit of the nation, viz. so that the draft armies will be composed only of men who owe permanent allegiance, or are about to assume it, to this country, and so will be better soldiers. In principle, petitioner's case is like, but stronger than, that which resulted in Wise v. Withers, 3 Cranch (7 U. S.) 331, 2 L. Ed. 457. Therein a law for the District of Columbia provided for enrollment in the militia of all certain persons except those exempt by the laws of the United States. A United States law exempted from militia duty all United States officers. Wise was a justice of the peace, and the military authorities, denying he was a United States officer and exempt, enrolled him. Thereafter they tried him by court-martial and sentenced him to pay a fine. Refusing to pay, the collector of militia fines seized Wise's goods. Wise sued the officer in trespass. In holding Wise was entitled to recover, Chief Justice Marshall said:

> Wise was a United States officer and exempt; "that a court-martial has no jurisdiction over" him "as a militiaman; he could never be legally enrolled; and it is a principle that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."

Had Wise been imprisoned, for the reasons stated by the great Chief Justice he would have been entitled to habeas corpus. Apparently the exemption there was an absolute exclusion like that of petitioner here. And here, as there, petitioner "could never be legally" certified; "a court-martial has no jurisdiction over" him; the court-martial and its

officer "are all trespassers" in proceeding against him. To sift out aliens, the War Department recognizes their exclusion is not an "exemption," as the term is used in the law; but, no special rule provided for them, they are incorporated with and called exemptions for convenience. See Form 19, supra, page 20.

The rules provide that within seven days after notice mailed to appear before the local board for physical examination, claim for exemption must be filed, though the board may allow it to be filed later. And if the claimant within ten days thereafter, or later, if the board allows it, presents to the board an affidavit of prescribed form and substance, and such other evidence by affidavits as the board may require, the board "shall" exempt him. If any person fails to appear for physical examination, he shall be recorded as physically qualified; but, if he appears later, the board may examine him. If the board denies exemption, an appeal lies to the district board, which may receive additional evidence. The latter's decision is final in cases of aliens. After decision, the district board certifies all not exempt to the local board, which thereupon notifies those so certified that they are selected for military service and to report therefor at a time stated. From the latter time, those so notified are in the military service. The certification aforesaid is the last official act of the district board.

It appears petitioner did not receive the notice mailed to appear for physical examination, so failed both to file claim of exemption within seven days and also to appear for examination. Thereupon the local board recorded him physically qualified. Otherwise informed, petitioner appeared later and the board examined him. The next day he presented to said board his claim of alien exemption and supporting affidavit, in prescribed form and substance, and the board received and filed them. Later, without requiring other evidence, the board disallowed exemption, because the claim was filed too late. Petitioner appealed to the district board, and it affirmed the disallowance, without inquiry into the merits, and certified him to the local board. It notified petitioner that he was selected for military service and to appear therefor at a time stated. Petitioner so appeared, but in the meantime instituted herein habeas corpus proceedings against the local board. The night of the day petitioner had so appeared the district board took steps to quash said proceedings "for the good effect," and procured respondent to arrest petitioner as a deserter. It may here be noted that petitioner had not failed nor refused to appear, nor departed from his home, where arrested. Even if legally in military service, he had the right to inquire thereof in this court, without incurring unwarranted arrest as a deserter. The district board then spread upon its minutes its understanding of past events in relation to the proceedings, and concluded: "* * * Further, there is no sufficient proof of his being an alien." Respondent merely suggests that this is a "decision" by the district board, and conclusive. Without further comment upon this "decision," it suffices to say that at that time the board's jurisdiction over petitioner and the proceedings had ended—was exhausted when it certified him to the local board; so the "decision" is void. In view of the premises,

the court is constrained to and does hold that the boards so far departed from the procedure prescribed for them by the President that they exceeded their jurisdiction when they certified petitioner as not exempt and for the draft, and hence such certification is void. Since aliens cannot be lawfully drafted, the boards are bound to receive and determine upon the merits claims of alienage whenever filed, so long as the boards' jurisdiction has not expired by final certification of the claimants to the local board.

However they become satisfied of alienage, boards are bound to exclude aliens, even though no claims of exemption are filed; for otherwise the law is violated and also the board members' oath of office to "well and faithfully discharge the duties of" their office—in other words, to administer the law as Congress has written it. This exclusion is the vital thing, and time for claims and affidavits only incidental machinery to accomplish it. Taking the law and the rules by four corners, the rules themselves so intend. The defeat of claim of exemption by delay has no application to alien exclusion. And boards are instructed by the War Department to exclude aliens, even though they desire and ask to be included. Furthermore, the rules provide for opening defaults. The local board opened petitioner's. And the law and rules obviously intend that thereupon the decision of the claim shall be on the merits, and not an arbitrary rejection because of a sometime, but vacated, default. And that is the law in all legal procedure. In fact, the boards have not determined that petitioner is not an alien, but peremptorily denied his exemption. His affidavit of alienage, by the rules made full proof of alienage, unless the boards required more evidence, was ignored by them.

In respect to petitioner the boards' certification was no legal basis for the local board's notice to petitioner that he was selected for military service, and so said notice was by mistake and void. It follows petitioner was not at any time, and is not now, in the military service; so he is not a deserter, is illegally imprisoned by respondent, and is entitled to habeas corpus to compel his release, and it is awarded to him by the court. The King v. Commanding Officer, 1 K. B. 176, is not contra. There the status of the petitioner was determined on the merits, by the magistrate who filled the office of the boards here.

[10] Respondent suggests, somewhat significantly, the court is bound to say, that his superior officers order him to hold petitioner, and that to disobey may subject him to punishment, even that of death; that, if this court grants habeas corpus ordering him to release petitioner, respondent will be very embarrassed, in that obedience to either will be disobedience to the other. It is not understood that the orders to respondent are other than general, to imprison all deserters. It is not understood any order to respondent even hints to him to disobey a decree of any court of the United States—a decree that within its jurisdiction is the law of the land, therein to be held inviolate, to be executed and obeyed by military and civilians alike, so long as it is unreversed. Respondent's commander in chief, the President, is required by law and duty to uphold and execute as the law of the land any such decree

until reversed. All law requires him to do so; and no law, military or civil, permits him not to do so. That he will not do so, but, on the contrary, will unlawfully order respondent to resist the decree and writ, is unthinkable. Any such order and punishment of respondent for that disobedience of it, to which the law would constrain him, would be arrogance and tyranny equal, to put in mildly, to Prussia's worst, and demanding the earnest consideration of all men solicitous for law and order—for liberty. The suggestion is dismissed as unjust to respondent's superiors, gentlemen and officers of this great nation. At any rate, no court can be influenced by anything of that sort.

So long as courts are open, all litigants are free to enter them; and the courts, considerate of the jurisdiction of all analogous tribunals, and careful not to invade such jurisdiction, will administer justice within their own jurisdiction, confident their decrees will be executed and obeyed. Courts render decrees; other officers execute them; others obey them. Courts halt arbitrary conduct everywhere (for that the people created them), and defiance of their decrees in due time is always accounted for. In a decision, citation lost, it is recorded that in 1815, at New Orleans, under circumstances somewhat like the instant case, Gen. Jackson defied the court's writ of habeas corpus and imprisoned the judge. In due time, the general's power lapsing, by the court he was cited for contempt, and therefor he was fined (and he paid) $1,000. And see Ex Parte Merryman, Fed. Cas. No. 9487.

Respondent's remedy is not resistance, but appeal, whereon the Supreme Court by rule provides that petitioner shall give bail to answer the judgment of the appellate court. And the Manual for Courts-Martial, 390, issued by the War Department directs respondent to "note an appeal."

The rule is made absolute, and the writ will issue.

THE ANTILLA.

THE PACIFIQUE.

(District Court, E. D. Virginia. September 18, 1917.)

SALVAGE ⇐31—AID TO SHIP ON FIRE AT SEA—COMPENSATION.

The steamship Antilla, laden with sugar and having another steamer in tow, was on a voyage from the West Indies to New York when, at a point 126 miles south of Cape Henry, a fire started in her cargo. In answer to her wireless call for help, a revenue cntter went to her assistance, and also requested libelant, who was master of a tug to follow, which he did with the owner's consent, meeting the vessels 18 miles from the capes. The cutter had subdued the fire to some extent, and with the help of the tug the Antilla was finally towed to Norfolk and beached. During that time the fire twice broke out again, but was finally extinguished by the tug with assistance. In all, the tug spent three days and nights in active, laborious service rendering prompt and efficient aid at some risk. The Antilla and cargo were worth over $1,000,000, and the saved value was $585,000. The tug was new, worth $50,000, earning $125

per day, and especially equipped for fighting fire. She was ready to start with an ocean tow when called for the service. *Held*, that she was entitled to a salvage award of $9,000.

In Admiralty. Suits for salvage by John E. Scott, master of the tug Albatross, against the steamship Antilla and the steamer Pacifique. Decree for libelant for salvage in the first suit, and for towage in the second.

Hughes, Little & Seawell, of Norfolk, Va., for libelant.

Chauncey I. Clark and Burlingham, Montgomery & Beecher, all of New York City, and Hughes & Vandeventer, of Norfolk, Va., for respondents.

WADDILL, District Judge. This is a suit for salvage services rendered the Antilla and the Pacifique, during the existence of a fire on the Antilla, while she was en route from the West Indies to the port of New York, laden with sugar, and having in tow the steamer Pacifique, also bound to New York from Cuba. The Antilla was proceeding up the coast on the afternoon of Saturday, October 7, 1916, when fire broke out in her cargo on the high seas, at a distance of 126 miles south of Cape Henry. Wireless calls for assistance were sent out, and the fire raged furiously during Saturday afternoon and night and Sunday. In answer to her S. O. S. signal, late on Saturday night, the steamer Somerset came up, and took on board most of the crew of the Antilla. Early on Sunday morning the steamer Morro Castle also responded to the call. Neither one of these vessels rendered the Antilla assistance, except to take members of the crew on the Somerset, and some women members of the families of the crew of the Pacifique were transferred to the Morro Castle, and both vessels proceeded on their voyage, it having been ascertained that the revenue cutter Onandago was on her way to the Antilla. She did later arrive on Sunday evening, and, after getting the fire under control, finally brought her into port, aided by the Albatross as hereinafter mentioned.

When the message calling for assistance was received by the revenue cutter, an officer on the Onandago approached the master of the tug Albatross, which was then lying at the Norfolk & Western piers, having just arrived from the north, and due to leave the following morning, with a tow of barges for Boston, and got the tug's master to agree to go to the assistance of the Antilla. The Onandago immediately left for the burning ship, in charge of her first officer; the master, several of the officers, and part of the crew being ashore at the time. After communication with its owners, the tug left Norfolk on Monday morning, taking out the master, four officers, and eight or ten seamen of the crew of the Onandago, and proceeded to the relief of the Antilla, finding her about 1 o'clock p. m. some 18 miles outside of Cape Henry. At that time the Antilla was in tow of the Onandago, and had the naval tug Sonomo alongside, and the Pacifique loose from her astern, at anchor. The Albatross went to the Antilla, and the captain of the Onandago had a conversation with the master of the Antilla, and told him that the Albatross was the tug he had sent out in response to his call for assistance. The captain of the Antilla says that he re-

fused the services of the Albatross, as not needed, he having called for a revenue cutter and naval tug, and not an ordinary tug for hire, and finally told the captain of the Onandago that he would leave the matter of the employment of the Albatross to him. The Albatross then went up to the Antilla, and transferred the officers and remainder of the crew of the Onandago to that ship, and the Onandago started towing again; the Sonomo having in the meantime left. While engaged in this towing service, the Onandago's hawser parted, and the tide and current brought her on the side of the Antilla. The Onandago told the Albatross to put a line on the Onandago, and pull her up ahead of the Antilla, which she did, and the Onandago and the Albatross towed the Antilla in tandem into Lynnhaven Inlet.

Up to this period of time, and until the arrival of the tow at Lynnhaven Inlet about 7 o'clock on Monday night, the Albatross had had no occasion to fight fire on the Antilla; the same having been gotten under control by the Onandago and the Sonomo before the arrival of the Albatross. Upon reaching Lynnhaven Inlet, however, the fire broke out again, when the Albatross ran two lines of fire hose, 2½-inch and 1½-inch, respectively, on the Antilla, and pumped water until midnight or early morning, when the fire was subdued; the Onandago also assisting in this service. The master of the Antilla, on Tuesday morning, the weather continuing very rough, asked the master of the Albatross to proceed to Norfolk to get his agent, Mr. O'Brien, which was done. The weather having moderated on Tuesday afternoon, the Albatross passed a line to the Onandago, which passed a line to the Antilla. The Merritt & Chapman tug Resolute having in the meantime appeared, she was engaged by the Antilla to assist, and fastened a line to the stern of the Antilla, so she could act as a rudder for her; and in that order the cutter, tugs, and tow proceeded into Hampton Roads, and when near Sewell's Point, on account of her condition, the Antilla was beached. After arriving at Sewell's Point, the fire again broke out on the Antilla, and the Albatross again put her hose on board, and the Resolute also, and again subdued it. About midnight the Albatross went to Norfolk. On the next day the Albatross was again ordered to the Antilla, for the purpose of putting her further up on the flats, which was done, and, the fire having been gotten under control, the service was completed.

The Antilla was a large vessel, 358 feet long, 45 feet beam, 16.3 deep, 3,562 tons gross, engaged in trade between New York, Cuban and Mexican ports, and with her cargo was valued at more than $1,000,000, and the ship in its damaged condition was valued at $585,000. The Pacifique was a very much smaller vessel. The Albatross was an ocean-going tug, 286 tons gross, 194 feet long, 127 feet keel, 26 feet beam, 13.8 feet deep, and draft 15 feet, with horse power of 750 tons, comparatively new, in first-class condition, equipped with improved fire-fighting appliances, and had been selected to go to the aid of the burning ship because of her special fitness for the work required. She was worth more than $50,000, and at the time was earning $125 per day, and her owners, by reason of the interruption to its business, sustained loss of some $2,100.

The facts stated clearly entitle the libelant to assert a claim for salvage, which is not disputed by the respondent; and the sole question to be determined is: What will be a proper award? There is no dispute that the services were rendered, nor is there any material controversy over the existence of the elements ordinarily entering into making a proper award for salvage, such as timely and successful service, large values, some danger, and the loss of valuable time from other engagements by the libelant. It is true the Antilla's master in his testimony sought to discredit the libelant's claim, and minimize what was done, with a view of showing that the services were of little value, and voluntarily performed without solicitation.

This view of the case is negatived by the entire testimony. Indeed, the court was not favorably impressed with the conduct and attitude of the Antilla's master in this respect, as it was quite apparent that he was more than willing to accept the gratuitous assistance of the government in saving his ship; and although the revenue cutter and naval tug, the Sonomo, had rendered the greatest service in bringing his burning vessel in more than 100 miles, he was disinclined to accept outside service that would cost money, although the revenue cutter had acted in his behalf in employing the Albatross, with a view of securing the necessary aid, to prevent, and which largely prevented, what otherwise would have been an enormous loss, and he seemed utterly lacking in appreciation of what had been done for him when in extreme peril especially by the libelant, who at much inconvenience and loss to his owner had promptly responded to his calls for help.

After responding to the call of the revenue cutter, which had been summoned at the instance of the burning ship as aforesaid, at inconvenience and great sacrifice to the tug's business, which consisted of towing loaded barges of coal from the port of Norfolk to New England ports, then ready and waiting to be transported, the tug spent three days and nights in active, laborious work in the effort to render the Antilla every possible service, in assisting in bringing in the burning ship some 18 miles out on the high seas into safe harbor, and twice extinguishing, or materially aiding in extinguishing, a raging fire on the ship, and promptly, intelligently, and efficiently worked night and day in the effort to do so.

Having regard to the urgency of the service, the large values involved, the loss of time to the tug in the execution of the employment in which it was engaged, the success attained in the enterprise, and the promptness with which the service was rendered, the court believes that an award of $9,000 should be made against the Antilla, with costs.

Regarding the claim asserted against the Pacifique, the court does not think that the libelant is entitled to any award, save reasonable towage service in going down, after the Antilla had been brought into harbor, and towing the Pacifique in, for which the sum of $100 is allowed, without costs.

A decree in accordance with the foregoing will be entered on presentation.

UNITED STATES v. GALLEANNI et al.

(District Court, D. Massachusetts. October 9, 1917.)

No. 1268.

1. CONSPIRACY ⊜33—TO DEFRAUD GOVERNMENT—NATURE OF OFFENSE—SELECTIVE DRAFT ACT.

Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1916, § 10201), declares that if two or more persons conspire either to commit an 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 shall be punished. Selective Draft Act May 18, 1917, § 5, requiring persons therein specified to register for selective draft for military service, makes it a misdemeanor for any person subject to registration willfully to fail or refuse to present himself. *Held* that, as the United States was entitled to have persons subject to registration perform their duty according to law, a conspiracy to prevent persons subject to registration from registering is a conspiracy to deprive the United States of a right to which it was entitled, and therefore to defraud it, within Criminal Code, § 37.

2. INDICTMENT AND INFORMATION ⊜106—SUFFICIENCY—WRITINGS REFERRED TO.

An indictment alleging that in pursuance of a conspiracy to prevent registration, by counseling and inducing persons subject to registration under Selective Draft Act May 18, 1917, not to register, which alleged that defendant caused to be published in a newspaper a statement, a translation of which was attached to the indictment, is not defective because an exact copy of the statement was not incorporated therein.

3. CRIMINAL LAW ⊜45—SOLICITATION.

As a failure to register pursuant to Selective Draft Act May 18, 1917, is a misdemeanor, and must be construed as an aggravated offense in view of the existing war, the solicitation and counseling of persons not to register is an indictable common-law offense, though the solicitation is of no effect and registration is not prevented.

4. CRIMINAL LAW ⊜89—UNITED STATES COURTS—JURISDICTION—CONSPIRACY.

Under Criminal Code, § 37, declaring that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished, federal courts have jurisdiction of a prosecution for conspiracy to persuade the commission of what would be a crime at common law, but is not made criminal by any federal statute.

Louis Galleanni and others were indicted under Criminal Code, § 37, for a conspiracy to violate Selective Draft Act May 18, 1917, by inducing persons subject to registration not to register. On demurrer. Demurrer overruled.

The United States Attorney, for the United States.

Pettine & De Pasquale, of Providence, R. I., for defendants.

MORTON, District Judge. This is an indictment in three counts: The defendants have demurred to each. Many grounds of demurrer are assigned; but as to each count the substantial question is whether the facts therein alleged constitute a crime.

The first and third counts allege, in substance, that the defendants conspired to counsel, command, and induce large numbers of persons subject to registration under the act of May 18, 1917, not to register, and to procure such persons to commit the offense of willfully and unlawfully failing to register. In pursuance of the conspiracy, the defendants are alleged to have caused to be published, in a newspaper called "Cronaca Sovversiva," a certain statement (a translation of which is set out in the indictment) calculated to induce persons not to register. Neither of these counts charges that any person subject to registration failed to register because of the defendants' acts.

The second count charges a conspiracy to cheat and defraud the United States by counseling, commanding, and inducing a large number of persons subject to registration, etc., not to register, and alleges the publication of the same newspaper statement in pursuance of such conspiracy.

The act referred to (section 5) requires the persons therein specified to register in accordance with regulations to be prescribed by the President, and makes it a misdemeanor for any person subject to registration willfully to fail or refuse to present himself therefor. Criminal Code, § 37 (Comp. St. 1916, § 10201), provides as follows:

"If two or more persons conspire either to commit any offence 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 $10,000, or imprisoned not more than two years, or both."

[1, 2] Discussing first the sufficiency of count 2: The United States was entitled to have persons subject to registration perform their duty and register according to law; and a conspiracy to prevent their doing so was a conspiracy to deprive the United States of a right to which it was entitled, and therefore to defraud it, within the meaning of section 37. Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; Curley v. United States, 130 Fed. 1, 64 C. C. A. 369. The failure to incorporate into the indictment an exact copy of the statement, the publication of which is alleged as an overt act done in pursuance of the conspiracy, is not a good ground of demurrer, either as to this or as to the other counts. United States v. Grunberg (C. C.) 131 Fed. 137 (C. C. 1st Cir.). This count properly charges a crime; and the demurrer to it must be overruled.

[3] As to counts 1 and 3: The object of the conspiracy described in each of these counts was the mere counseling and persuasion of persons subject to registration, not to register. If willful failure or refusal to register is to be regarded as an "aggravated offense"—and under the circumstances then surrounding the country, to which the court ought not to shut its eyes, I think it must be so regarded—what the defendants did was a common-law crime. "It is an indictable offense at common law for one to counsel and solicit another to commit a felony or other aggravated offense, although the solicitation is of no effect, and the crime counseled is not in fact committed." Morton, C. J., Commonwealth v. Flagg, 135 Mass. 545, 549; United States v. Lyles, 4 Cranch, C. C. 469, Fed. Cas. No. 15,646. But no statute of the United States makes such solicitation criminal.

[4] The question as to the counts under discussion, therefore, is whether a conspiracy to commit that which would be at common law an offense against the United States, but which is not alleged to be a fraud on the United States, and is not made a crime by any federal statute, is punishable under section 37, supra. This depends upon the meaning to be given to the words "any offense against the United States" in that section. In Re Coy (C. C.) 31 Fed. 794, the indictment charged, in substance, that 11 named defendants did conspire "to induce, aid, counsel, procure, and advise one Allen Hisey to unlawfully neglect * * * to perform a duty required and imposed by the laws of the state of Indiana relating to and affecting a certain election." It was held by Mr. Justice Harlan that the indictment set forth an offense of which the United States court had jurisdiction. His opinion was cited in full, with approval, by the Supreme Court in a footnote to In re Coy, 127 U. S. 731, 733, 8 Sup. Ct. 1263, 32 L. Ed. 274. The statute under which the Coy Case was decided (R. S. § 5440) is substantially the same as the present section 37 (Comp. St. 1916, § 10201).

Upon the point under discussion, I am unable to distinguish the indictment in the Coy Case from the one before me. The objections now urged do not appear to have been called to the attention of the court in that case, nor to have been considered by it; but the decision covers the present case. While there are expressions to the contrary (see Thomas v. United States, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. [N. S.] 720; United States v. Lyman [D. C.] 190 Fed. 414), I deem it my duty to follow the Coy decision, and in accordance therewith to rule that counts 1 and 3 do sufficiently charge crimes against the United States.

Demurrer overruled as to each and every count in the indictment.

BEATTY OIL & GAS CO. v. BLANTON et al.

(District Court, E. D. Kentucky, at Covington. August 14, 1917.)

1. MINES AND MINERALS ⟸79(4)—OIL AND GAS LEASE—CONSTRUCTION—PAYMENTS OF ROYALTY.

   Where an oil lease, granting plaintiff the right for 10 years to explore for oil, but containing a covenant on plaintiff's part to complete a well within one year from its date or to pay the lessor certain sums for each additional year completion should be delayed, payment to be made quarterly in advance, provided that payment should be by check payable to the order of the lessors mailed to one of them or deposited to his credit in the specified bank, the bank was constituted the lessors' agent to receive payment, and payment could be made to it by check, as well as to the lessors direct.

2. MINES AND MINERALS ⟸78(5)—OIL AND GAS LEASE—CONSTRUCTION—ACCEPTANCE OF ROYALTY.

   Where a bank, which was made the agent of the lessors to receive payments, which entitled the lessee in an oil lease to delay completion of a well, received a quarterly payment, which required to be in advance, after the date fixed and the lessor after notice acquiesced, the lease cannot be forfeited for the lessee's failure to make the payment at the time fixed.

3. COURTS ⊂=310—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Where plaintiff, a Delaware corporation, sued in the District Court for Kentucky, its lessors, citizens of that state, seeking to prevent forfeiture of an oil lease, the fact that the owner of a rival lease, subsequently executed by the lessors, was also a Delaware corporation, does not deprive the federal court of jurisdiction based on diversity of citizenship; the rival lessee not being a party.

4. MINES AND MINERALS ⊂=78(1)—OIL AND GAS LEASE—RIGHT OF LESSEE.

An oil lease giving the lessee right for 10 years to explore for oil on the demised premises entitles him to possession of the premises for exploration purposes.

5. INJUNCTION ⊂=138—RIGHT TO—JURISDICTION.

Where plaintiff's cause of action against two of the defendants was to prevent waste, equity may grant him relief against other of the defendants who were aiding and abetting those committing waste, even though the cause of action primarily against such defendants might be legal rather than equitable in its nature.

In Equity. Suit by the Beatty Oil & Gas Company against Alex Blanton, S. J. Blanton, Harry Daniel, and others. On motion by plaintiff for preliminary injunction. Motion sustained as to named defendants.

B. R. Jouett, of Winchester, Ky., for plaintiff.
E. C. O'Rear, of Frankfort, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on motion of plaintiff for a preliminary injunction.

[1] The defendants Alex Blanton, S. J. Blanton, and Harry Daniel have alone appeared and objected to the motion. They object to the motion on two grounds. One is that plaintiff's lease was forfeited by failure to pay the quarterly rental, due November 4, 1916, and hence it has no rights thereunder which it is entitled to have protected. The lease in question granted to the lessee the right for 10 years to explore for oil and contained a covenant on his part to complete a well within one year from its date, or pay to the lessor at the rate of 10 cents per acre for each additional year that the completion was delayed, payable quarterly in advance. Defendants contend that a failure to pay any quarterly installment of the rent as covenanted, without more, terminated the lease by forfeiture, notwithstanding there was no express clause of forfeiture. Plaintiff does not oppose this contention, and I assume it to be sound without investigation. It meets defendants here with the claim that the quarterly rental was paid on November 4, 1916, and by reason thereof the lease was not thus forfeited. The lease, as to the payment of the rental, provided that it should be "by check payable to the order of the parties of the first part, mailed to Alex Blanton to Alcorn, Ky., or deposited to Alex Blanton's credit in W. B. Williams & Sons' Bank." Thereby the bank was constituted the lessors' agent to receive payment of the rent and it would seem that it was sufficient to make payment to it by check as well as to the lessors directly.

[2] Under the evidence I am constrained to hold that the lease was not forfeited by the failure to pay this rental. The defendants

have themselves established that the rental was paid not later than November 10, 1916. On that date the bank notified the lessors by postal card that it had been paid, and defendants have produced the card giving the notice. I think the evidence warrants the conclusion that the check for the rental was deposited on the 4th. But if it is open to claim that it was not, and that it was deposited on a later date, before or on the 10th, this was sufficient to save the forfeiture. The bank was the lessors' agent. It accepted the check as payment. The lessors had not theretofore notified it not to accept it after the due date. And after they received notice of the payment they did not repudiate it, but acquiesced in it.

[3] The other ground is that this court has no jurisdiction because the Cumberland Producing & Refining Company, the owner of one-half of the rival lease executed January 22, 1917, is a Delaware corporation, the same as plaintiff, and hence there is no diversity of citizenship. But the Cumberland Company is not a party to the suit, and plaintiff has a cause of action against the objecting defendants, between whom and plaintiff there is diversity of citizenship.

[4, 5] Plaintiff under its lease is entitled to possession of the leased premises for the purpose of exploration. The Blantons, the lessors, are preventing him from taking possession and siding with the rival lease. In Lindlay v. Raydure (D. C.) 239 Fed. 928, 938, I noted that a lessee under such a lease cannot bring ejectment to recover possession, relying mainly on Judge Lurton's opinion in the Tennessee case. It is held otherwise in Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 Atl. 207, 26 L. R. A. (N. S.) 614. I am inclined to think that this is the better doctrine. If so, it does not follow that plaintiff cannot maintain this suit against the Blantons. It only follows that as to them the case should go to the law docket.

But possibly by virtue of the act of February 26, 1906 (section 2366a, Kentucky Statutes), the relation between the Blantons and plaintiff is a trust one, and their refusal to permit it to enter is a breach of trust of which equity has jurisdiction. However, the cause of action against Daniel and Morris is equitable, to wit, to prevent waste, and this is sufficient to justify the granting of equitable relief against the Blantons also, particularly so as by their conduct they are aiding and abetting Daniel and Morris. I cannot see why the fact that this court has no jurisdiction to grant relief against the Cumberland Company is any reason why relief should not be granted against the objecting defendants, to which the plaintiff is entitled.

The motion for preliminary injunction is sustained. It should be limited to the Blantons and Daniel. Parsons, Harrison, and Foster are not wronging plaintiff, and Morris does not seem to be before the court.

MEMORANDUM DECISIONS.

ASANO MIYAZAKI, alias Asano Yamada, alias Asano Tsuda, v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3068. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. cxxvii, 79 C. C. A. cxxvii).

BALLARD v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 12, 1917.) No. 4919. In Error to the District Court of the United States for the Eastern District of Oklahoma. J. Berry King, of Tahlequah, Okl., and Denton & Lee, of Muskogee, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and Archibald Bonds and Paul Pinson, Asst. U. S. Attys., all of Muskogee, Okl.

PER CURIAM. Writ of error dismissed on motion of defendant in error for failure of plaintiff in error to file briefs, etc.

In re BARR et al. (Circuit Court of Appeals, Sixth Circuit. May 11, 1917.) No. 3030. Petition to Revise in the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge. Moore & Darwin, of Chattanooga, Tenn., for petitioner. Clarence T. Boyd, of Nashville, Tenn., opposed. Dismissed pursuant to stipulation.

BLESSING et al. v. BURKLEY et al. (Circuit Court of Appeals, Eighth Circuit. December 14, 1916.) No. 4715. Appeal from the District Court of the United States for the District of Nebraska. Mahoney & Kennedy, of Omaha, Neb., for appellees.

PER CURIAM. Appeal dismissed, with costs, for want of prosecution, on motion of counsel for appellees.

BLOW et al. v. BOICE. (Circuit Court of Appeals, Eighth Circuit. February 8, 1917.) No. 4891. Appeal from the District Court of the United States for the District of Kansas. A. S. Wilson and S. C. Westcott, both of Galena, Kan., and R. E. Hollingshead, of Joplin, Mo., for appellee.

PER CURIAM. Cause docketed, and appeal dismissed, at costs of appellants, for want of prosecution, on motion of appellee.

BONE et al. v. ROGERS et al. (Circuit Court of Appeals, Sixth Circuit, June 7, 1917.) No. 2990. Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge. J. J. Moore, of Pikeville, Ky., and Hager & Stewart, of Ashland, Ky., for appellants. Auxier, Harman & Francis and Stratton & Stephenson, all of Pikeville, Ky., for appellees. Dismissed pursuant to stipulation.

BROWN v. BROWN. (Circuit Court of Appeals, Eighth Circuit. July 10, 1916.) No. 4747. Appeal from the District Court of the United States for the Western District of Oklahoma. Kos Harris and V. Harris, both of Wichita, Kan., for appellee.

PER CURIAM. Cause docketed and appeal dismissed, without costs to either party in this court, on motion of appellee.

CAPEWELL v. WAECHTER et al. (Circuit Court of Appeals, Ninth Circuit. October 16, 1917.) No. 3008. In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska. E. Coke Hill, of Ruby, Alaska, Louis K. Pratt, of Fairbanks, Alaska, and Orrin K. McMurray, of Berkeley, Cal., for plaintiff in error. Jas. K. Brown and McGowan & Clark, all of Fairbanks, Alaska, for defendants in error.

PER CURIAM. Writ of error dismissed for noncompliance by plaintiff in error with the provisions of rules 23 and 24 of the Rules of Practice of this court (150 Fed. xxxiii, 79 C. C. A. xxxiii).

CHICAGO GREAT WESTERN R. CO. v. LEHNER. (Circuit Court of Appeals, Eighth Circuit. April 5, 1917.) No. 4808. In Error to the District Court of the United States for the Northern District of Iowa. Carr, Carr & Evans, of Des Moines, Iowa, for plaintiff in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of plaintiff in error.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO. v. OSBORNE. (Circuit Court of Appeals, Eighth Circuit. July 2, 1917.) No. 4847. In Error to the District Court of the United States for the Western District of Arkansas. T. S. Buzbee and H. T. Harrison, both of Little Rock, Ark., for plaintiff in error. Covington & Grant, of Ft. Smith, Ark., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties; taxation of attorney's fee for defendant in error waived.

CHICAGO & N. W. RY. CO. v. McNEELY. (Circuit Court of Appeals, Eighth Circuit. September 19, 1916.) No. 4707. In Error to the District Court of the United States for the District of Nebraska. A. A. McLaughlin, Wymer Dressler, and Lyle Hubbard, all of Omaha, Neb., for plaintiff in error. M. F. Harrington, of O'Neill, Neb., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of plaintiff in error.

CHIYE KAJIKAMI v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3064. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

CLAPP v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 21, 1916.) No. 4119. Appeal from the District Court of the United States for the Western District of Oklahoma. E. C. Stanard, J. H. Wahl, and C. H. Ennis, all of Shawnee, Okl., and C. F. Smith and Everest & Camp-

bell, all of Oklahoma City, Okl., for appellant. Isaac D. Taylor, Asst. U. S. Atty., of Oklahoma City, Okl.

PER CURIAM. Appeal dismissed, without costs to either party in this court, on motion of appellant.

CLARK v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. July 2, 1917.) No. 4981. In Error to the District Court of the United States for the Western District of Oklahoma. John A. Fain, of Lawton, Okl., U. S. Atty.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, on motion of defendant in error.

COSKERY v. McFARLIN. (Circuit Court of Appeals, Eighth Circuit. May 9, 1917.) No. 173. Petition to Revise Order of the District Court of the United States for the Southern District of Iowa. Coffin & Hippee, of Des Moines, Iowa, for petitioner.

PER CURIAM. Petition to revise dismissed, at costs of petitioner, on motion of petitioner.

CRESCENT MILLING CO. v. H. N. STRAIT MFG. CO. (Circuit Court of Appeals, Eighth Circuit. May 10, 1917.) No. 4812. In Error to the District Court of the United States for the District of Minnesota. Harris Richardson and Walter Richardson, both of St. Paul, Minn., for plaintiff in error. Cobb, Wheelwright & Dille, of Minneapolis, Minn., for defendant in error.

PER CURIAM. Writ of error dismissed for want of jurisdiction, at costs of plaintiff in error, on motion of defendant in error. See, also, 245 Fed. 984, — C. C. A. —.

CRESCENT MILLING CO. v. H. N. STRAIT MFG. CO. (Circuit Court of Appeals, Eighth Circuit. May 10, 1917.) No. 4813. In Error to the District Court of the United States for the District of Minnesota. Harris Richardson and Walter Richardson, both of St. Paul, Minn., for plaintiff in error. Cobb, Wheelwright & Dille, of Minneapolis, Minn., for defendant in error.

PER CURIAM. Writ of error dismissed for want of jurisdiction, at costs of plaintiff in error, on motion of defendant in error. See, also, 245 Fed. 984, — C. C. A. —.

CRESCENT MILLING CO. v. H. N. STRAIT MFG. CO. (Circuit Court of Appeals, Eighth Circuit. May 10, 1917.) No. 4814. Appeal from the District Court of the United States for the District of Minnesota. Harris Richardson and Walter Richardson, both of St. Paul, Minn., for appellant. Cobb, Wheelwright & Dille, of Minneapolis, Minn., for appellee.

PER CURIAM. Appeal dismissed for want of jurisdiction at costs of appellant, on motion of appellee. See, also, 245 Fed. 984, — C. C. A. —.

DETROIT UNITED RY. v. MARENTETTE. (Circuit Court of Appeals, Sixth Circuit. May 18, 1917.) No. 3053. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Corliss, Leete & Moody and William G. Fitzpatrick, all of Detroit, Mich., for plaintiff in error. Selling & Brand, of Detroit, Mich., for defendant in error. Dismissed on motion.

DUNAVANT et al. v. MALLORY. (Circuit Court of Appeals, Eighth Circuit. December 5, 1916.) No. 4744. In Error to the District Court of the United States for the Eastern District of Arkansas. A. B. Shafer, of Memphis, Tenn., for plaintiffs in error. Allen Hughes, of Memphis, Tenn., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiffs in error, on motion of plaintiffs in error.

EITARO YAMADA v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. December 22, 1917.) No. 3067. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty, of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

FUHS v. GILBRECH. (Circuit Court of Appeals, Eighth Circuit. February 2, 1917.) No. 4884. Appeal from the District Court of the United States for the Southern District of Iowa. Erwin & Newell, of Davenport, Iowa, for appellee.

PER CURIAM. Appeal docketed and dismissed, at costs of appellant, for want of prosecution, on motion of appellee.

GALBRAITH v. AHLEN. (Circuit Court of Appeals, Eighth Circuit. June 22, 1917.) No. 189. Petition to Revise Order of District Court of the United States for the District of Minnesota. Morphy, Bradford & Cummins, of St. Paul, Minn., for petitioner. Francis Muekel, of Chaska, Minn., for respondent.

PER CURIAM. Petition to revise dismissed, without costs to either party in this court, per stipulation of parties.

G. H. WALKER & CO. et al. v. NORTH AMERICAN CO. et al. (Circuit Court of Appeals, Eighth Circuit. March 10, 1917.) No. 4806. Appeal from the District Court of the United States for the Eastern District of Missouri. J. D. & Loomis C. Johnson and Fordyce, Holliday & White, all of St. Louis, Mo., for appellants. Thomas Bond and W. F. Evans, both of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, at costs of appellants, with prejudice, per stipulation of parties.

GOLDBERG et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 4, 1916.) No. 4848. In Error to the District Court of the United States for the Eastern District of Missouri. Arthur L. Oliver, U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, etc., on motion of defendant in error.

GRIGSBY v. MILLER et al. (Circuit Court of Appeals, Ninth Circuit. November 19, 1917.) No. 3083. Appeal from the District Court of the United States for the District of Oregon. Almon E. Roth, of San Francisco, Cal., for appellees.

PER CURIAM. Upon motion of counsel for appellees, and good cause therefor appearing, ordered, appeal dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix). For opinion below, see 240 Fed. 188.

HARRIS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 28, 1917.) No. 4894. In Error to the District Court of the United States for the Eastern District of Oklahoma. R. A. Howard, of Ardmore, Okl., and Denton & Lee, of Muskogee, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and Archibald Bonds, Asst. U. S. Atty., both of Muskogee, Okl.

PER CURIAM. Reversed, without costs to either party in this court and cause remanded for new trial. Confession of error filed by counsel for government.

INTERVENING STOCKHOLDERS' COMMITTEE OF AMERICAN LUMBER CO. et al. v. DETROIT TRUST CO. (Circuit Court of Appeals, Eighth Circuit. September 17, 1917.) No. 4974. Appeal from the District Court of the United States for the District of New Mexico. A. F. Freeman, of Ann Arbor, Mich., for appellants. Harold T. Clark, of Cleveland, Ohio, E. W. Dobson, of Albuquerque, N. M., and Sidney T. Miller, of Detroit, Mich., for appellee.

PER CURIAM. Appeal dismissed per stipulation and consent of parties.

IRON SILVER MINING CO. v. SKINNER, Collector. (Circuit Court of Appeals, Eighth Circuit. September 5, 1917.) No. 4882. In Error to the District Court of the United States for the District of Colorado. John A. Ewing and William V. Hodges, both of Denver, Colo., for plaintiff in error. Harry B. Tedrow, U. S. Atty., of Boulder, Colo., for defendant in error.

PER CURIAM. Writ of error dismissed per stipulation of parties, without costs to either party in this court.

JESSUP v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 16, 1917.) No. 2979. In Error to the District Court of the United States for the Second Division of the District of Alaska. Hugh O'Neil, of Nome, Alaska, for plaintiff in error. F. M. Saxton, U. S. Atty., of Nome, Alaska.

PER CURIAM. Writ of error dismissed for noncompliance by plaintiff in error with provisions of rules 23 and 24 of the Rules of Practice of this court (150 Fed. xxxiii, 79 C. C. A. xxxiii).

JUNG JOONG, alias Chin Yep, alias Chin Young Ick, alias Sang My Farn, v. Edward WHITE, as Commissioner of Immigration, Port and District of San Francisco. (Circuit Court of Appeals, Ninth Circuit. October 25, 1917.) No. 3045. Appeal from the District Court of the United States for the First Division of the Northern District of California. George A. McGowan, of San Francisco, Cal., for appellant. John W. Preston, U. S. Atty., of San Francisco, Cal.

PER CURIAM. By consent of counsel for the respective parties, ordered, appeal dismissed for the noncompliance by appellant with provisions of rules 23 and 24 of the Rules of Practice of this court (150 Fed. cxxix, cxxxi, 79 C. C. A. cxxix, cxxxi).

KENNEDY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 6, 1916.) No. 4849. In Error to the District Court of the United States for the Eastern District of Missouri. Walter N. Davis, of St. Louis, Mo., for plaintiff in error. Arthur L. Oliver, U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, on motion of defendant in error, etc.

KOICHI ISHII v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3063. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

McCASKELL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 6, 1917.) No. 4866. In Error to the District Court of the United States for the Western District of Arkansas. J. V. Bourland, U. S. Atty., of Ft. Smith, Ark.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, for want of prosecution, etc., on motion of defendant in error.

McINTYRE-MANN TIMBER LAND CO. et al. v. ROSENFELD. (Circuit Court of Appeals, Eighth Circuit. February 2, 1917.) No. 4860. Appeal from the District Court of the United States for the Eastern District of Arkansas. John M. Moore, of Little Rock, Ark., and Danaher & Danaher, of Pine Bluff, Ark., for appellants. Henry M. Armistead, of Little Rock, Ark., for appellee.

PER CURIAM. Appeal dismissed, at costs of appellants, except attorney fee for appellee waived, per stipulation of parties.

MARENTETTE v. DETROIT UNITED RY. (Circuit Court of Appeals, Sixth Circuit. June 30, 1917.) No. 3052. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Selling & Brand, of Detroit, Mich., for plaintiff in error. Corliss, Leete & Moody and William G. Fitzpatrick, all of Detroit, Mich., for plaintiff in error. Dismissed pursuant to stipulation.

MASA KEAN v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3066. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered appeal in the above-entitled cause dismissed for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

NATIONAL SURETY CO. v. WENTZ et al. (Circuit Court of Appeals, Eighth Circuit. November 13, 1916.) No. 4770. In Error to the District Court of the United States for the District of Nebraska. T. S. Allen, of Lincoln, Neb., for plaintiff in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of plaintiff in error.

NATSU ISHII v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3065. Appeal from the District Court of the United States for the Territory of Hawaii. Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal in the above-entitled cause dismissed

for the noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

NEFF v. SMITH. (Circuit Court of Appeals, Eighth Circuit. December 13, 1916.) No. 4701. Appeal from the District Court of the United States for the District of Kansas. George F. Beatty, of Salina, Kan., for appellant. I. A. Smith, of Kansas City, Kan., for appellee.

PER CURIAM. Appeal dismissed, with costs, on motion of appellee, for failure to file brief for appellant, pursuant to rule 24.

O'NEILL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. November 20, 1916.) No. 4841. In Error to the District Court of the United States for the District of Minnesota. Albert R. Allen, of Fairmont, Minn., and Charles M. Oneill, of Duluth, Minn., for plaintiff in error. Alfred Jaques, U. S. Atty., of Duluth, Minn.

PER CURIAM. Cause docketed and writ of error dismissed, without costs to either party in this court, on motion of defendant in error and stipulation of parties.

POMATI v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 22, 1917.) No. 3060. Appeal from the District Court of the United States for the Second Division of the Northern District of California. John W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal.

PER CURIAM. Upon motion of counsel for the appellee, and good cause therefor appearing, ordered, appeal dismissed for noncompliance by the appellant with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (150 Fed. xxix, 79 C. C. A. xxix).

R. WILLIAMSON & CO. v. LUMINOUS UNIT CO. (Circuit Court of Appeals, Seventh Circuit. October 18, 1917.) No. 2495. Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois. Suit by the Luminous Unit Company against R. Williamson & Co. From a decree for complainant (241 Fed. 265), defendant appeals. Affirmed. Carlos S. Andrews and A. Miller Belfield, both of Chicago, Ill., for appellant. Harry Lea Dodson, of Chicago, Ill., for appellee. Before BAKER and ALSCHULER, Circuit Judges.

PER CURIAM. The decree appealed from found valid and infringed United States patent No. 1,076,418, October 21, 1913, to Guth, for new lighting fixture, and found valid, but not infringed, United States patent No. 1,082,322, December 23, 1913, to Guth, in the same art, and found appellant guilty of unfair competition against appellee in making and marketing a fixture which resembles appellee's product and ordered injunction and accounting. The record satisfies us that the inventions for which the said patents were granted show some patentable advance even in this very much crowded art, that appellant's infringement of the first-named patent is plainly apparent, and that unfair competition appears in the very close simulation by appellant of appellee's product in respect to unessential and nonfunctional details. We find that the issues presented by this controversy were properly disposed of by the decree entered in the District Court, and that decree is accordingly affirmed.

ST. LOUIS TRANSFER RY. CO. v. WATKINS. (Circuit Court of Appeals, Eighth Circuit. July 5, 1917.) No. 4979. In Error to the District Court of the United States for the Eastern District of Missouri. T. M.

Pierce and J. L. Howell, both of St. Louis, Mo., for plaintiff in error. Bartley & Douglass, of St. Louis, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties; taxation of attorney fee for defendant in error waived.

SCHMIDT v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 19, 1916.) No. 4815. In Error to the District Court of the United States for the District of North Dakota. John F. Sullivan, of Mandan, N. D., for plaintiff in error. M. A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Cause docketed and writ of error dismissed, with prejudice, without costs to either party in this court, per stipulation of parties.

SCHWIRTZ v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. March 19, 1917.) No. 4916. In Error to the District Court of the United States for the District of North Dakota. John E. Greene, of Minot, N. D., for plaintiff in error. M. A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Writ of error docketed and dismissed, without prejudice, on motion of plaintiff in error and stipulation of parties. See, also, 245 Fed. 989, — C. C. A. —.

SCHWIRTZ v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 18, 1917.) No. 4986. In Error to the District Court of the United States for the District of North Dakota. John E. Greene, of Minot, N. D., for plaintiff in error. M. A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, per stipulation of counsel for respective parties. See, also, 245 Fed. 989, — C. C. A. —.

SHERA v. MERCHANTS' LIFE INS. CO. et al. (Circuit Court of Appeals, Eighth Circuit. December 18, 1916.) No. 4728. Appeal from the District Court of the United States for the Southern District of Iowa. F. T. Hughes and E. L. McCoid, both of Keokuk, Iowa, for appellant. Maurice E. Locke, of Dallas, Tex., for appellees.

PER CURIAM. Settled, and decree of District Court (237 Fed. 484) affirmed, with costs, per stipulation of parties.

SHUCART et al. v. COCA-COLA CO. et al. (Circuit Court of Appeals, Eighth Circuit. October 21, 1916.) No. 4783. Appeal from the District Court of the United States for the Eastern District of Missouri. James L. Hopkins, of St. Louis, Mo., for appellees.

PER CURIAM. Cause docketed and appeal dismissed, with costs, pursuant to rule 16, on motion of appellees.

SHUCART v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 8, 1917.) No. 4763. In Error to the District Court of the United States for the Eastern District of Missouri. Benj. J. Klene, of St. Louis, Mo., for plaintiff in error. Arthur L. Oliver, U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, per stipulation of parties.

SIOUX CITY SERVICE CO. v. SNYDER. (Circuit Court of Appeals, Eighth Circuit. September 4, 1916.) No. 4726. In Error to the District Court of the United States for the Northern District of Iowa. J. L. Ken-

nedy, of Sioux City, Iowa, for plaintiff in error. Henderson & Fribourg and M. L. Sears, all of Sioux City, Iowa, for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties. Attorney fee defendant in error waived.

SKIRVIN v. FIRST NAT. BANK OF NORMAN, OKL., et al. (Circuit Court of Appeals, Eighth Circuit. January 26, 1917.) No. 4690. Appeal from the District Court of the United States for the Western District of Oklahoma. McAdams & Haskell, of Oklahoma City, Okl., for appellant. Stuart, Cruce & Cruce, Ledbetter, Stuart & Bell, and H. A. King, all of Oklahoma City, Okl., for appellee.

PER CURIAM. Appeal dismissed, at costs of appellant, per stipulation of parties.

SOUTHERN RY. CO. v. SMITH. (Circuit Court of Appeals, Sixth Circuit. May 11, 1917.) No. 3056. In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge. L. D. Smith, of Knoxville, Tenn., for plaintiff in error. Pickle, Turner, Kennerly & Cate, of Knoxville, Tenn., for defendant in error. Dismissed pursuant to stipulation.

STROUD v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 19, 1916.) No. 4748. In Error to the District Court of the United States for the District of Kansas. L. C. Boyle, I. B. Kimbrell, and M. J. O'Donnell, all of Kansas City, Mo., for plaintiff in error. Fred Robertson, U. S. Atty., of Kansas City, Mo.

PER CURIAM. Judgment reversed, without costs to either party in this court, and cause remanded, with directions to grant a new trial, on motion of plaintiff in error and statement of United States attorney for Kansas.

STUDEBAKER CORP. v. SANITARY STREET FLUSHING MACH. CO. (Circuit Court of Appeals, Eighth Circuit. September 4, 1916.) No. 4590. Appeal from the District Court of the United States for the Eastern District of Missouri. Duell, Warfield & Duell, of New York City, and W. B. & Ford W. Thompson, of St. Louis, Mo., for appellant. Clifton V. Edwards, of New York City, for appellee.

PER CURIAM. Appeal dismissed, without costs to either party in this court, per stipulation of parties.

TERMINAL R. R. ASS'N OF ST. LOUIS v. KIDWELL. (Circuit Court of Appeals, Eighth Circuit. July 5, 1917.) No. 4980. In Error to the District Court of the United States for the Eastern District of Missouri. T. M. Pierce and J. L. Howell, both of St. Louis, Mo., for plaintiff in error. S. Thorne Able, of St. Louis, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties; taxation of attorney's fee for defendant in error waived, etc.

TOMKINS CATTLE CO. v. SAN LUIS VALLEY LAND & MINING CO. (Circuit Court of Appeals, Eighth Circuit. September 4, 1916.) No. 4727. In Error to the District Court of the United States for the District of Colorado. John R. Smith and F. E. Gregg, both of Denver, Colo., for plaintiff in error. Charles W. Waterman and Caldwell Martin, both of Denver, Colo., for defendant in error.

PER CURIAM. Judgment of District Court affirmed, at costs of plaintiff in error, per stipulation of parties.

UHRICH et al. v. VAN KANNEL REVOLVING DOOR CO. (Circuit Court of Appeals, Eighth Circuit. April 23, 1917.) No. 4809. Appeal from the District Court of the United States for the District of Kansas. Helm & Helm, of Louisville, Ky., for appellants. Titian W. Johnson, of Washington, D. C., for appellee.

PER CURIAM. Appeal dismissed, without prejudice, at costs of appellants, on motion of appellants.

UNITED STATES v. LOHN. (Circuit Court of Appeals, Eighth Circuit. April 30, 1917.) No. 4614. Appeal from the District Court of the United States for the District of Minnesota. Alfred Jaques, U. S. Atty., of Duluth, Minn. R. J. Powell, of Minneapolis, Minn., for appellee.

PER CURIAM. Appeal dismissed, without costs to either party in this court, per stipulation of parties.

UNITED STATES v. MISSOURI & IOWA INV. CO. (Circuit Court of Appeals, Eighth Circuit. April 30, 1917.) No. 4615. Appeal from the District Court of the United States for the District of Minnesota. Alfred Jaques, U. S. Atty., of Duluth, Minn. R. J. Powell, of Minneapolis, Minn., for appellee.

PER CURIAM. Appeal dismissed, without costs to either party in this court, per stipulation of parties.

UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 4, 1916.) No. 4769. Appeal from the District Court of the United States for the District of New Mexico. Catron & Catron, of Santa Fé, N. M., for plaintiff in error. S. Burkhart, U. S. Atty., of Albuquerque, N. M.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, per stipulation.

WILEY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. June 18, 1917.) No. 4971. In Error to the District Court of the United States for the Western District of Oklahoma. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, on motion of defendant in error and consent of plaintiff in error.

WOLF BROS. & CO. v. HAMILTON BROWN SHOE CO. (Circuit Court of Appeals, Eighth Circuit. September 12, 1916.) No. 4743. Appeal from the District Court of the United States for the Eastern District of Missouri. Lawrence Maxwell and S. M. Johnson, both of Cincinnati, Ohio, and Percy Werner, of St. Louis, Mo., for appellant. Luke E. Hart and Henry S. Priest, both of St. Louis, Mo., for appellee.

PER CURIAM. Appeal dismissed, with costs, per stipulation of parties.

ZARAFONITIS v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. October 4, 1917.) No. 3114. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Ralph Davis, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn. Dismissed pursuant to motion.

END OF CASES IN VOL. 245

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