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PERMANENT EDITION

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

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

JANUARY — MARCH, 1918

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This is a Key-Numbered Volume

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

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

AMENDMENTS TO RULES

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

25.[1]

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Upon appeals from orders granting or refusing a preliminary injunction or appointing a receiver, and upon appeals in habeas corpus matters and upon appeals and petitions to revise in bankruptcy, one-half hour on each side; upon writs of error three-quarters of an hour on each side, and in other cases one hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

4. Any case entitled to be heard at any term or session of the court may be submitted by either or both of the parties on briefs. Consent to submit a case on briefs may be filed at any time prior to, or at the time the case is reached for hearing.

Subdivisions 1, 2, and 4 adopted November 1, 1914, and amended June 2, 1916.

Subdivision 3 adopted November 1, 1914, and amended March 8, 1918.

[1] See, also, rules 35 (231 Fed. v, 144 C. C. A. v) and 36 (208 Fed. v, 124 C. C. A. v).

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. FREDERIC DODGE, Circuit Judge.....Boston, Mass.
Hon. GEO. H. BINGHAM, Circuit Judge.....Manchester, N. H.
Hon. CHAS. F. JOHNSON, Circuit Judge.....Portland, Me.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. JAS. M. MORTON, Jr., District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

Hon. LOUIS D. BRANDEIS, Circuit Justice.....Washington, D. C.
Hon. HENRY G. WARD, Circuit Judge.....New York, N. Y.
Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
Hon. CHARLES M. HOUGH, Circuit Judge.....New York, N. Y.
Hon. EDWIN S. THOMAS, District Judge, Connecticut.....New Haven, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York[1].....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JULIUS M. MAYER, District Judge, S. D. New York.....New York, N. Y.
Hon. AUGUSTUS N. HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. MARTIN T. MANTON, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. HARLAND B. HOWE, District Judge, Vermont.....St. Johnsbury, Vt.

THIRD CIRCUIT

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

[1] Resigned December 31, 1917.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. MARTIN A. KNAPP, Circuit Judge.....Washington, D. C.
Hon. CHAS. A. WOODS, Circuit Judge.....Marion, S. C.
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Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. D. S. C.....Charleston, S. C.
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Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia....Charleston, W. Va.

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Hon JAMES CLARK McREYNOLDS, Circuit Justice .....Washington, D. C.
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Hon. RICHARD W. WALKER, Circuit Judge.....Huntsville, Ala.
Hon. ROBERT LYNN BATTS, Circuit Judge .....Austin, Tex.
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Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. RHYDON M. CALL, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. BEVERLY D. EVANS, District Judge, S. D. Georgia .....Savannah, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. GEORGE W. JACK, District Judge, W. D. Louisiana .....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
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Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. DUVAL WEST, District Judge, W. D. Texas .....San Antonio, Tex.
Hon. W. R. SMITH, District Judge, W. D. Texas.... .....El Paso, Tex.

SIXTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. JOHN W. WARRINGTON, Circuit Judge.....Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....Grand Rapids, Mich.
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Hon. D. C. WESTENHAVER, District Judge, N. D. Ohio .....Cleveland, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee..Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

SEVENTH CIRCUIT

Hon. JOHN H. CLARKE, Circuit Justice ....Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

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

EIGHTH CIRCUIT

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

NINTH CIRCUIT

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

CASES REPORTED

CASES ON REHEARING

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

THIRD CIRCUIT.

Alexander v. Fidelity Trust Co. Rehearing granted.

Leary v. Jersey City. Rehearing granted.

NINTH CIRCUIT.

American Waterworks & Electric Co. v. Towle, 245 F. 697. Rehearing granted Feb. 11, 1918.

Elvers v. W. R. Grace & Co., 244 F. 705. Rehearing denied Jan. 7, 1918.

Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co., 245 F. 697. Rehearing granted Feb. 11, 1918.

Ford Motor Co. v. Farrington, 245 F. 850. Rehearing denied Feb. 11, 1918.

Wood v. Noyes, 245 F. 742. Rehearing denied Feb. 11, 1918.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

ATCHISON, T. & S. F. RY. CO. v. SPILLER.*

(Circuit Court of Appeals, Eighth Circuit. October 26, 1917.)

No. 4819.

1. COMMERCE ⊜87—INTERSTATE COMMERCE COMMISSION—CONDUCT OF PROCEEDINGS—EVIDENCE.

While the Interstate Commerce Commission in making investigations should not be too narrowly constrained by the technical rules as to the admissibility of proof, nor hampered by those narrow rules which prevail in trials at common law, yet, by reason of the liberality of practice in admitting testimony, it is more imperative to preserve the essential rules of evidence by which rights are asserted or defended, and the commissioners cannot act upon their own information, but the parties must be fully apprised of the evidence submitted and given an opportunity to cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal.

2. COMMERCE ⊜88—INTERSTATE COMMERCE COMMISSION—ORDERS—VALIDITY.

Administrative orders quasi judicial in character are void if hearing was denied, if that granted was inadequate or manifestly unfair, if the finding was contrary to the indisputable character of the evidence, or if the facts found do not support the order.

3. COMMERCE ⊜88—INTERSTATE COMMERCE COMMISSION—ORDERS.

An order of the Interstate Commerce Commission based on a finding unsupported by evidence is contrary to law and must be set aside by a court of competent jurisdiction.

4. COMMERCE ⊜88—INTERSTATE COMMERCE COMMISSION—TRIAL—FINDINGS.

An order of reparation made by Interstate Commerce Commission under Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 [Comp. St. 1916, § 8584]), awarding damages for a violation of section 1 (Comp. St. 1916, § 8563), prohibiting unreasonable rates, requires a finding disclosing the relation of the parties as shipper and carrier, the character and amount of the traffic out of which the claims arose, the rates paid by the shipper for the service rendered, whether they were unreasonable and whether the shipper was injured, and, if so, the amount of his damage.

5. COMMERCE ⊜91—INTERSTATE COMMERCE COMMISSION—REPARATION ORDERS.

An action against a carrier based on a reparation order of the Interstate Commerce Commission awarding damages for the exaction of unreasonable rates in violation of Act to Regulate Commerce, § 1, should proceed in all respects like other civil suits for damages, except that on the trial the findings and order of the commission are, pursuant to section 16, prima facie evidence of the facts therein stated.

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

*Rehearing denied March 11, 1918.

6. COMMERCE ⟸95—INTERSTATE COMMERCE COMMISSION—FINDINGS.
In an action on a reparation order of the Interstate Commerce Commission awarding damages for violation of Act to Regulate Commerce, § 1, prohibiting unreasonable rates, the commission's finding that claimant's assignors had paid the unreasonable rates *held* unsupported by the evidence.

7. EVIDENCE ⟸317(2)—ADMISSIBILITY—HEARSAY.
In a proceeding before the Interstate Commerce Commission for reparation order awarding damages for exaction of unreasonable freight rates, testimony that witness had obtained from commission houses to which shippers had consigned their cattle and from other sources data showing shipments by individuals not shown to be the owners of cattle is the worst kind of hearsay.

8. COMMERCE ⟸87—INTERSTATE COMMERCE COMMISSION—PROCEEDINGS—OBJECTION.
As proceedings before the Interstate Commerce Commission are conducted in an informal way, counsel are not required to present objections to inadmissible testimony with the same nicety required in an action in court, and repeated assertions that claims presented for damages on account of the exaction of unreasonable rates were unsupported by proof showed that counsel for carriers did not acquiesce in hearsay proof of claimants' demands.

9. COMMERCE ⟸95—INTERSTATE COMMERCE COMMISSION—ORDERS.
In an action on a reparation order of the Interstate Commerce Commission, where it was contended that the findings of the commission on which the order was based were unsupported by substantial evidence, the court may consider the character of the evidence introduced in support of the order.

10. COMMERCE ⟸87—INTERSTATE COMMERCE COMMISSION—PROCEEDINGS.
In a proceeding by an assignee before the Interstate Commerce Commission for damages on account of the exaction of unreasonable rates from his assignors, the assignee must establish the assignments.

11. COMMERCE ⟸87—INTERSTATE COMMERCE COMMISSION—PROCEEDINGS.
In a proceeding before the Interstate Commerce Commission by an assignee to recover damages on account of the exaction of unreasonable rates from his assignors, evidence *held* insufficient to show assignment of claims to the assignee.

12. COMMERCE ⟸88—INTERSTATE COMMERCE COMMISSION—RATES—ESTABLISHMENT.
Under Act to Regulate Commerce, § 15, as amended in 1906 (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [Comp. St. 1916, § 8583]), providing that the Interstate Commerce Commission is authorized and empowered to determine and prescribe what will be just and reasonable individual or joint rate or rates or charges to be thereafter observed for such period of time not exceeding two years as shall be prescribed in the order, it is improper for the commission, having ordered reduced rates for a period of two years, to order reparation solely on account of the previous exaction of higher rates during a previous period of over two years, for the grant of the reparation, being based entirely on the difference in rates, was tantamount to the establishment of a rate for over four years, and without giving notice as to when it should go into effect.

13. COMMERCE ⟸97—INTERSTATE COMMERCE COMMISSION—ORDERS—ACTION ON.
In an action on a reparation order of the Interstate Commerce Commission in favor of shippers based on the exaction of unreasonable rates, the question whether the rate exacted was unjust and unreasonable is open.

14. CARRIERS ⟸202—RATES—RECOVERY.
Where a rate subsequently condemned by the Interstate Commerce Commission as unreasonable was when exacted a legal rate, the shipper could not sue in a court of law and recover back any portion of such rate.

15. COMMERCE ⟸88 — INTERSTATE COMMERCE COMMISSION — REPARATION — RIGHT TO AUTHORIZE.

The Interstate Commerce Commission ordered reparation on account of the exaction of unreasonable rates during a period extending from August 29, 1906, when the commission received the rate-making power under the Hepburn Amendment to November 17, 1908, the date fixed by the commission when certain reduced rates should take effect. The reparation was measured entirely by the difference in rates. *Held*, that as the grant of reparation was practically the establishment of the rate for a longer period than authorized, and as the shipper could not, the rate having been legal when exacted, recover any sum on account of his payment thereon in a court of law, the order by the Interstate Commerce Commission was improper.

16. COMMERCE ⟸88 — INTERSTATE COMMERCE COMMISSION — UNREASONABLE RATES—DAMAGES.

Where railroad companies exacted unreasonable rates for the transportation of cattle to markets, the difference between the unreasonable rates exacted and reasonable rates subsequently established cannot be made the only basis for a reparation order for damages under Act to Regulate Commerce, § 16, without any showing that the shippers were actually damaged from the exaction of such illegal rates, for freight rates obviously would affect the prices to be paid at destination.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Actions by E. B. Spiller against the Atchison, Topeka & Santa Fé Railway Company, against the Chicago & Eastern Illinois Railroad Company, against the Chicago & Alton Railroad Company, against the Missouri Pacific Railway Company, against the St. Louis, Iron Mountain & Southern Railway Company, against the St. Louis & San Francisco Railroad Company, against the Chicago, Rock Island & Pacific Railway Company, against the Illinois Central Railroad Company, and against the Missouri, Kansas & Texas Railway Company. There were judgments for plaintiff, and defendants bring error; the causes being consolidated and heard by stipulation on the record in the case of the Atchison, Topeka & Santa Fé Railway Company. Reversed, and new trial ordered.

T. J. Norton and Gardiner Lathrop, both of Chicago, Ill. (Robert Dunlap, of Chicago, Ill., Thomas R. Morrow, of Kansas City, Mo., J. W. Jamison and C. S. Burg, both of St. Louis, Mo., and R. V. Fletcher and W. F. Dickinson, both of Chicago, Ill., on the brief), for plaintiffs in error.

B. F. Deatherage, of Kansas City, Mo., and S. H. Cowan, of Ft. Worth, Tex. (I. H. Burney, of Ft. Worth, Tex., and G. Creason, of Kansas City, Mo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. Defendant in error, hereafter called "plaintiff," commenced an action against the several plaintiffs in error, hereafter called "defendants," to recover from each of them the amount awarded plaintiff by an order of reparation made by the Interstate Commerce Commission January 12, 1914. A count for treble

damages under Act July 2, 1890, c. 647, 26 Stat. 210, and Act Aug. 27, 1894, c. 349, 28 Stat. 509, 570, was abandoned at the trial. By stipulation a jury was waived and the cases against the Atchison, Topeka & Santa Fé Railway Company and the Missouri, Kansas & Texas Railway Company were tried to the court. The trial resulted in a judgment for plaintiff against each defendant for the amount of the award against it with interest and attorneys' fees. A similar judgment was subsequently entered in the cases not tried. The total amount of the judgments aggregated $181,190.87. Each defendant sued out a writ of error from the judgment against it, but by stipulation the cases are to be heard here on the record in the case of the Atchison, Topeka & Santa Fé. At the close of all the evidence the trial court was requested by counsel for defendants to declare the law as follows: (a) That upon all the evidence plaintiff was not entitled to recover against any or all of the defendants; (b) that there was not sufficient evidence before the commission to sustain its order of reparation.

At the trial the plaintiff to maintain the issues on his part introduced in evidence the report and order of the commission, dated January 12, 1914, in the case of Cattle Raisers' Ass'n of Texas v. Missouri, Kansas & Texas Ry. Co., No. 732 (not reported No. A–583). The order of reparation covered a period of time extending from August 29, 1906, the date when the commission received the rate-making power, under the Hepburn Amendment, to November 17, 1908, the date fixed by the commission when certain reduced rates should take effect. The commission had on August 16, 1905, in case No. 732, entitled as above, found that the rates established by the carriers for the transportation of cattle from certain points of origin in Texas, New Mexico, and Oklahoma to Kansas City, St. Joseph, and St. Louis, Mo., National Stockyards, Chicago, Ill., New Orleans, and other points, were unjust and unreasonable and in violation of section 1 of the Act to Regulate Commerce (11 Interst. Com. Com'n R. 298). After the taking effect of the Hepburn Amendment upon new pleadings the commission adhered to its former ruling and established rates for the future, effective November 17, 1908 (13 Interst. Com. Com'n R. 418). The report of the commission which was made a part of the reparation order had attached thereto appendix A, with the following heading:

Consignor	Origin	Destination	Cars	Weight	Rate Paid	Rate Ordered	Amount of Refund	Interest

The information contained in this appendix is explained by the report of the commission, which reads as follows:

"Prouty, Commissioner. The commission, in its former report in this case, 13 I. C. C. 418, 435, stated that reparation would be awarded from August 29, 1906. Claims for reparation were filed with the commission covering shipments both before and after this date, but no claims are embraced in this report where delivery was made previous to the date above given.

"These claims, as filed with the commission, describe in detail the shipments on account of which reparation is claimed, stating the point of origin and the point of delivery and the carrier making the delivery. By the direc-

tion of the commission, a list of the cars with respect to which claims have been filed was furnished to each one of these delivering lines, which was requested by the commission to check the claims against their records with a view to ascertaining how many of the cars moved as appeared from the records of the defendants. These claims have been checked by these delivering roads, and no carloads are embraced in this report which did not appear from the records of the defendants to have moved as stated.

"In all cases in this report the point of origin, the point of delivery, and the delivering road are named. The complainant has no way of determining the originating carrier, where the point of origin is served by two or more carriers, nor the intermediate carrier, where such a carrier participated in the transportation.

"These shipments of live stock were in all cases consigned to some person at the delivering market, usually a commission firm. The consignor paid the freight in the first instance to the delivering carrier in all cases. Subsequently the cattle were sold upon the market and the amount of the freight deducted from the purchase price, remittance being made for the balance. In all cases, therefore, the owner and shipper of the cattle finally paid the transportation charges.

"The table attached to and made a part of this report, as appendix A, shows with reference to all shipments whose movement was admitted by the defendants the point of origin, the point and road of delivery, the rate of freight which was paid, the rate which should have been paid, and the difference between the amount of freight which was paid and the amount which should have been paid. In some cases the weight of the shipment did not appear, and in all such instances the minimum carload has been applied, since under their tariffs, the carriers must have collected at least upon the minimum.

"Referring to appendix A, we find that the persons named in the column marked 'consignor' shipped from the points named in the column marked 'origin' to the points named in the column marked 'destination,' by the line of road named as the 'delivering road,' the number of cars specified in the column headed 'number of cars,' of the aggregate net weight stated in the column marked 'weight.' We further find that said shippers paid to said delivering carriers freight upon these shipments at the rate which is named in the column headed 'rate paid.' We find that this rate was unreasonable and excessive and that a reasonable rate to have been charged on the several shipments at the time they were made would have been that rate named in the column marked 'rate ordered,' which was subsequently established by the commission, and that therefore the said delivering carriers collected from the said shippers unreasonable charges on account of the shipments by the amounts named in the column headed 'amount of refund.' We further find that by these unreasonable exactions of the said carriers the said shippers were damaged in the amounts stated in said last-named column, since they received for their cattle less by those amounts than they would have received had the rate found reasonable been charged, and that said shippers are entitled to reparation in the amounts so specified, with interest from the date of the delivery of the shipment at 6 per cent., which said interest has been computed and is stated in the column marked 'interest.'

"In case of certain of the above claims the shipper made an assignment to H. E. Crowley, at that time secretary of the Cattle Raisers' Association. The form of this assignment was the same in all cases, and was as follows:

" 'In consideration of one dollar to me in hand paid by H. E. Crowley, secretary, as well as other considerations good and valuable to me, I hereby transfer and assign to him absolutely, any and all right of action, claims, or demands which I now have, or may hereafter have, against each and every railway company over whose railroad I have shipped any cattle, for reparation or reimbursements on account of any excessive, unreasonable, discriminatory, or otherwise unlawful or unjust freight rates or other charges which I have paid to such railway company on such shipments, as per schedule of said shipments hereto attached.

" 'Having assigned my said claim as aforesaid, I also delegate to said H. E. Crowley, secretary, full authority in establishing said claim to collect data and evidence in relation thereto from all commission companies, persons or firms as if I were personally present and acting in the premises.

" 'Witness my signature hereto.

" '..... .....

" '[Post office address.] [Sign here.]'

"We find that this assignment was made by the shipper in all cases where, in appendix A, the name of such shipper is followed by the letter 'C.' Subsequently Crowley ceased to be secretary of the Cattle Raisers' Association and was succeeded by E. B. Spiller, and thereafter the shippers assigned certain other claims to Spiller. The form of assignment used was in all cases the same as that which had formerly been employed in making the assignment to Crowley. We find that those shippers whose names are followed by the letter 'S' made assignments in this manner to Spiller.

"After Crowley ceased to be secretary of the Cattle Raisers' Association he assigned all claims which had previously been assigned to him to his successor, Spiller, by assignment in due form, so that Spiller now has whatever right and title Crowley originally took under the assignments to him.

"The attorney for the complainant contended that all claims assigned to Spiller directly, or to Crowley and by him to Spiller as above, were so vested in Spiller that he was entitled to demand and receive payment of the amount of reparation due from the defendants, and that the order of reparation should be made in his favor. Upon the request of the attorney of the complainants the commission orders payment of reparation to E. B. Spiller in all cases where such assignments were made as indicated in the appendix aforesaid. Where no assignment has been made the order will run directly in favor of the owner as shown by said appendix.

"All the claims mentioned in the above appendix, with respect to which reparation is allowed, were filed with the commission within less than two years from the date when the shipment was delivered to the consignee by the delivering road.

"An order will be entered accordingly."

With the introduction of the report, order, and appendix, the plaintiff rested. Thereupon the defendant in support of the allegations of its answer introduced in evidence duly certified copies of the stenographers' notes of the hearings relative to reparation in case No. 732, Cattle Raisers' Ass'n of Texas v. Missouri, Kansas City & Texas Ry. Co. before Commissioner Prouty, at Chicago on September 19, 1912, January 24, 1913, and October 17, 1913. It was conceded by counsel for plaintiff that the freight money including the freight charge was apportioned between the carriers handling each shipment if more than one carrier was involved. A statement was also submitted by counsel for the Atchison, Topeka & Santa Fé Company showing the carriers who participated in the freight collected by said company, as shown by appendix A. It was also admitted that the Chicago, Rock Island & Pacific Railway Company, Chicago & Eastern Illinois Railway Company, Missouri, Kansas & Texas Railway Company, St. Louis, Iron Mountain & Southern Railway Company, and St. Louis & San Francisco Railway Company, were in the hands of receivers. This was all the evidence introduced at the trial below which in any way bears upon the questions raised. If there was not sufficient evidence introduced before the commission to sustain its order, then it necessarily follows there was no evidence to sustain the judgment below. As it is sought to sustain the order of the commission partly by the admissions and acquiescence of counsel for the railroads at the several

reparation hearings, it will be necessary at the expense of brevity to detail what transpired at said hearings. At the reparation hearing on September 19, 1912, Mr. Williams, assistant secretary of the Cattle Raisers' Association, was called as a witness for the claimant, and testified that he had applied during the previous four or five years or longer to certain commission houses for certain data in regard to shipments of cattle for which reparation was claimed, and from such data had prepared a statement or statements tabulating the claims for shipments of cattle made by members of the Cattle Raisers' Association and for whom said association had filed claims with the commission.

In order to explain the methods used in getting up the claims and tabulating them, the witness produced a statement of one J. H. Aikins, claimant, and testified that Mr. Aikins was a cattle dealer of quite a little prominence at Kansas City; that the witness understood that Mr. Aikins paid the charges; Aikins, however, did not handle the charges, as they were paid by the commission company for him. The witness was then asked:

"So these are really his cattle? A. These are really his cattle; at least, that is the way the stuff was given to me."

Proceeding, the witness testified that it was his understanding that shipments of cattle were often billed in the name of the caretaker; understood that Lewis who appeared as shipper in the Aikens statement was a caretaker, but that Aikins owned the cattle; understood that the commission company received the cattle and paid the charges; supposed the Missouri, Kansas & Texas was the delivering line, at least that was the information furnished him; that the account in all cases was made out against the delivering line; was informed that the shipment was delivered by the Missouri, Kansas & Texas, and originated on that road. At this point Commissioner Prouty stated to counsel:

"Commissioner Prouty: I am inclined to think, gentlemen, that the only way in which this reparation can be made up is from the books of the carriers. I do not think you could make it up from the books of these commission men, although perhaps you may be able to do that. It seems to me if you can furnish the carrier with some starting point it would not be unreasonable to require the carrier to take these statements and check them up in lieu of requiring the production of the books and files or whatever might be necessary for examination."

"Commissioner Prouty: Never mind what may have been done; it seems to be conceded here that if we can get such information as will enable the railroads to trace these shipments that they will undertake the labor of tracing them and checking them, and we want to endeavor, if possible, to get that information."

Mr. Cowan, representing claimant, replied:

"Mr. Cowan: We have the original statements made by each commission company."

The witness Williams then testified that the Cattle Raisers' Association applied to the commission companies to make up a statement for each one of their customers showing to whom the shipments were made and the freight paid; that most of the commission companies complied with this request upon blank sheets furnished for that purpose; from these blanks so furnished, statements were compiled for

each shipper against each delivering line of railroad; that he obtained the amount of overcharge from a statement made by the tariff department of the commission, and from those figures compiled the amount that each shipper was entitled to on each carload; that in making up the minimum carload weight, 22,000 pounds was used instead of the exact weight, except in the cases of Morris & Co. and E. F. Swift, where the exact weights were obtainable. Witness understood that where freight was paid on a shipment of cattle it was paid by the commission company to the railroad and the amount deducted from the proceeds of sale, except in cases where freight was paid in advance. Witness understood that the caretaker, the man who goes along with the cattle as owner, signed the live stock contract or bill of lading with the carrier; the caretaker uses this contract for his return passage, and it is then returned to the auditor of the carrier without the name of the owner of the cattle on it. The contract shows the consignee, who is always the commission company. Witness then submitted a duplicate statement of the claims against each carrier and stated that he believed the amount of overcharge in each case to be correct. This tabulated statement was received in evidence. At this point the following conversation was had between Commissioner Prouty and counsel:

"Commissioner Prouty: Now, Mr. Cowan, just what do you claim for these papers you have introduced? Just what probative force do you claim? Do you claim that the introduction of those papers along with the testimony of Mr. Williams makes out for you a prima facie case?

"Mr. Cowan: I claim that it would make out a prima facie case if I would also bring before the commission or an examiner of the commission the evidence of the bookkeepers or persons in charge of the books of these commission companies to show that they compiled these claims correctly from their books, that they are books of original entry in the regular course of business.

"Commissioner Prouty: Now, do you claim that without the production of the books themselves?

"Mr. Cowan: I can be compelled probably to produce the books themselves before an examiner, were there any use of it, or the examiner of course could be present to hear the testimony of the bookkeepers. I do not see why the books themselves should be produced, but we have no objection to going to that trouble if it is necessary.

"Commissioner Prouty: Now, Mr. Norton (representing the Atchison), what do you say, and what do the other defendants say, as to the effect of the filing of these statements and as to the production of the books? Are you satisfied to accept the statements in lieu of the bookkeepers, and are you satisfied to accept the bookkeepers in lieu of the books?

"Mr. Norton: Speaking only for my own company, I think the evidence offered amounts to a failure of proof, and I should make a motion that the case be dismissed on that account. Mr. Cowan has had since 1906 to get this matter ready. I showed you this morning what slips were in possession of the stockyards people that were intelligible, and if they have been lost in the meantime he has been guilty of laches. There is an enormous amount of money involved here, and it seems to me the proof put up to us ought to be of such a nature that we can tell whether Mr. Jones did ship a carload of freight and whether he did pay for it. That is to say, whether he sustained damage by reason of this rate. Now, nothing of that sort has been given to us. The matter Mr. Cowan had filed from time to time I submitted to our auditor's office, and they said they could not check it at all. This matter which this witness puts in this morning is almost exactly the same sort of matter.

Therefore the question is put up to us of going to great expense and labor in order to prove a case against ourselves. That is what it amounts to."

"Mr. Cowan: I do not mean that this proof is complete, of course. It would require, in addition to what was proven by Mr. Williams, proof of the bookkeepers of the commission companies that the statements they made were correct.

"Commissioner Prouty: I think you would have to have the books of account themselves. My understanding is that the books of account are the evidence themselves, and not the testimony of some man as to what they contain."

The statements prepared by Mr. Williams being filed, counsel for claimant was directed to furnish copies of the same to each delivering carrier sought to be charged. The further hearing of the case was then adjourned to January 24, 1913. At this hearing Commissioner Prouty said:

"Commissioner Prouty: Let us see, in the first place, just what has been done by the carriers. You say you have served since the original hearing, or before that time, or since our last hearing and before that time, to each delivering line a list of the shipments with respect to which you claim to recover damages?"

Mr. Norton for the Atchison, Topeka & Santa Fé Railway Company, referring to a book containing 461 pages served by counsel for claimant upon his company, replied that the admissions were checked up by the auditor of the road with reference to the car movements and the amount of freight actually collected and as to these facts alone would he admit the correctness of the claimant's statement.

"Commissioner Prouty: Let us see just what the railroads do admit. Take this first item. This involves a shipment in the case of which Aaron & Hughes were the consignors. Somebody who may be termed 'E' was the consignee. It originated upon the Ft. Worth & Denver City Railway at Giles, Tex., and was shipped to destination No. 1, Kansas City, delivered on March 5, 1907. The shipment consisted of two cars. The rate paid was 34½ cents. The rate ordered by the commission was 31½ cents. The amount of the overcharge is $13.20. Now, the admission of the carriers would apparently show that somebody made a shipment, Aaron & Hughes perhaps made a shipment on that date and paid that rate, and are entitled to the $13.20. Do you concede, Mr. Norton, that Aaron & Hughes paid the $13.20?

"Mr. Norton: No, all that we show by that is that this car did move as stated, and that we collected there the amount specified in Mr. Cowan's sheet, or else some additional amount.

"Commissioner Prouty: Apparently you concede there that you collected the amount specified by Mr. Cowan?

"Mr. Norton: Yes.

"Commissioner Prouty: Now, it is necessary, in addition to that, for the commission to find, before it makes an order, that some individual paid that freight. Mr. Cowan, do you claim that the admission of the railroad company shows that Aaron & Hughes paid that freight?

"Mr. Cowan: Well, I do not know that I claim that the admission of the railroad is to that effect, but it would seem necessarily so, because we are prepared to prove that in all cases, without exception, there is charged up in the account sales by the commission company the amount of the freight, and that is taken out and deducted from the receipts for the cattle when sold."

Commissioner Prouty, addressing Mr. Williams, said:

"Commissioner Prouty: Where do you get your information which you put at the top of the sheet, showing the owner?

"Mr. Williams: From data furnished by the commission companies.

"Commissioner Prouty: Are there a good many cases where the name of the claimant is not the same as the name of the shipper or consignor?

"Mr. Williams: I hardly know. I suppose there are a good many; I do not remember right now, but I think in all cases they are shown as the consignor in the headings there. We tried to make that the name of the party in whose name they were shipped, so the railroads could more easily check them up."

Commissioner Prouty then said that he was of the opinion that, in addition to the checking, there must be proof as to who paid the freight. Mr. Dickinson, representing the Chicago, Rock Island & Pacific Railway Company, stated that his company had checked over the statement of claimant and found it reasonably accurate. Commissioner Prouty then said:

"Commissioner Prouty: Assuming that you do locate a particular shipment, so you are satisfied that the shipment moved and the freight money was paid by somebody, do you intend to question the fact that the money was paid by the consignor ultimately? I understand the course of business to be that these cattle are sold on the market by some commission men, and the freight money is paid by the commission man and deducted from the amount received from the sale of the cattle and the balance remitted to the owner, which of course amounts to a payment by the owner. Do you make any question that the consignor did in that way pay this freight?"

Mr. Dickinson said in reply:

"I understand that that is the course of business as practiced at the terminal markets at Kansas City and Chicago. Whether there are any exceptions I am not informed. Now, as to the party to whom the money is remitted, that is after this freight has been deducted from the selling price of the cattle, I have no advice on that at all."

Commissioner Prouty then, addressing Mr. Wright, representing the St. Louis, Iron Mountain & Southern, said:

"Do you make any question as to the right of the consignor to cover those overcharges, or rather that he is to be found to be the person who paid the overcharge?"

To which Mr. Wright replied:

"We admit that the freight charges were paid, and believe that the statements as rendered by Mr. Cowan are substantially correct, although as to who are the consignors there is some question. There are one or two cases in our list where we find a different consignor entirely from what Mr. Cowan stated. We find that the shipment was made from the point stated via the lines stated and delivered on the date, but an entirely different consignor."

Then Mr. Prouty, addressing Mr. Fletcher, who represented the Illinois Central, said:

"Commissioner Prouty: Now, Mr. Fletcher, are you disposed to question the fact that the claimant, or the person named as claimant, in these cases paid the freight?

"Mr. Fletcher: We are without any information at all on that.

"Commissioner Prouty: Suppose the books of the commission man show that the remittance was made to that individual.

"Mr. Fletcher: Without committing myself now, which I cannot be expected to do without reflection, it would seem to me, if the books of the commission merchant showed the payment by the shippers, or owners, and there could be sufficient information to identify that with these things here, it would all have to be proved as to whether the books referred to the same shipments here shown, I would say that would be competent evidence. Whether it would establish it or not, I would not undertake to say now."

At this time Commissioner Prouty stated to counsel for the railroad companies if they deemed it of any advantage to have the order entered against each of the lines participating in each shipment, and would furnish the commission the necessary information so that the commission might know by what means the shipment moved, the commission would make the order in that way, but unless such information was furnished the order would go against the delivering line. This was said to all the carriers.

Mr. Williams further testified that his information in the main was furnished by the commission companies, and in some instances came from the parties themselves. Commissioner Prouty then said to Mr. Burg, representing the Missouri, Kansas & Texas:

"Commissioner Prouty: And what do you say as to the proof required to show that the claimant has paid this freight? Is your company familiar with the manner in which this business is done?

"Mr. Burg: Not at all; at least, I am not."

Then Commissioner Prouty stated to Mr. Cowan:

"Commissioner Prouty: As soon as you have done all you can toward checking these with the railroads, you will notify the commission, and we will at once have the examiner go to work for the purpose of stating these accounts. I suppose in doing that it will be necessary for him to do part of his work in Chicago, where the books of the commission merchants are, and part in Kansas City, and perhaps part in St. Louis.

"Mr. Cowan: Yes, it will have to be done. There are a very small number in Chicago, but mainly in St. Louis and Kansas City."

The hearing was then adjourned. At the hearing on October 17, 1913, Mr. Williams produced a tabulated statement, practically the same as Exhibit A attached to the report of the commission, and hereinbefore referred to. It was called "Exhibit A" at the hearing. Commissioner Prouty referring to the tabulated statement then said to Mr. Williams, the witness:

"Commissioner Prouty: They show here certain cars, they show the date of the shipment, the initial of the car, and so forth. Do those cars correspond to the detailed statement which you filed? In other words, can you identify 135 of the cars with respect to which you filed a claim, as those 135 cars?

"Mr. Williams: I have not attempted to identify them that way. I took it for granted that they acknowledged those claims by furnishing us with this information, when we filed it with them."

Commissioner Prouty then said to the witness:

"Now, have the other roads, which you say have checked up these cars, done it in the same way or with the same detail?

"Mr. Williams: Most of them have; some have not. The Katy furnished a checking and they gave no waybill references or car numbers, nor did the Frisco."

Mr. Prouty then said to Mr. Andrews, representing the Atchison, Topeka & Santa Fé:

"Commissioner Prouty: Mr. Andrews, do you make any question as to the movement of the cars and the correctness of the statement as made by the complainant, or as verified by you with respect to those cars which you checked?

"Mr. Andrews: We do not make any admission excepting that the cars moved. That is all our checking is supposed to show; it shows on its face.

"Commissioner Prouty: Your check shows they moved from a certain point to a certain point, and that certain freight was paid?

"Mr. Andrews: We did not make any endeavor excepting to see that the cars moved, is all.

"Commissioner Prouty: And moved under the name which appears in the statement checked you?

"Mr. Andrews: I don't understand that the consignor or consignee were checked up. They show on their face. The understanding I have about it from our auditors is that they made a complete check of the movement of the cars, and the weights, etc.; but I do not think they ascertained who the shippers were.

"Commissioner Prouty: I suppose they made no ascertainment beyond the billing, but they must have checked those against the billing.

"Mr. Andrews: I don't know as to that.

"Commissioner Prouty: Do you make any question about the right of the complainant to an order for reparation as to these cars which you admit moved?

"Mr. Andrews: Why, excepting that they have not shown that they were the shippers. That is a matter that we do not admit. We take the position, also, that they have not made any special proof of damage.

"Commissioner Prouty: I understand that, but you admit that they paid the freight?

"Mr. Andrews: No, we do not admit that.

"Commissioner Prouty: You admit that somebody paid the freight?

"Mr. Andrews: No, we admit that the cars moved, and that so much was collected on each car.

"Commissioner Prouty: Somebody must have paid you the freight?

"Mr. Andrews: But we do not admit that the claimants paid the freight.

"Mr. Cowan: If your honor please, I do not believe in that qualified admission. There comes in here one time one man who represents the Santa Fé, and there comes in next time another man who represents the Santa Fé.

"Commissioner Prouty: I think we will find on the strength of these statements here that the freight was paid to the commission man and by him charged over against the owner, whose name appears on these cars that have been checked.

"Mr. Cowan: In all cases we furnished the name of the owner who paid the freight.

"Commissioner Prouty: Yes, I understand that.

"Mr. Cowan: They know that. It is a mere quibble to talk about not knowing who paid the freight. The man who owned the cattle paid the freight.

"Now, Mr. Williams, will you please get one of the original—

"Commissioner Prouty: Just wait a minute, Mr. Cowan. Do you make any question on the part of the Santa Fé in case the commission finds these cars were shipped by the persons who make the claim, who appeared on the waybills as the owners, and the freight was paid by that person—do you make any objection to the issuing of an order of reparation at this time with respect to those claims?

"Mr. Andrews: We do, on the ground that they have not shown damage.

"Commissioner Prouty: Yes, I understand that that ground is always raised. They have shown damage to this extent, that they paid a higher rate than the commission found reasonable. It is a legal question as to whether that is damage.

"Mr. Andrews: Yes, but we do not admit that these claimants are entitled to or paid the freight.

"Commissioner Prouty: I am asking you, in case the commission finds that fact, do you make any objection to an order for reparation?

"Mr. Andrews: Excepting that we do not admit that they have suffered damage.

"Commissioner Prouty: To make my question more specific: Here are 173 cars claimed by Mrs. Adair. You admit the movement of 135. Do you object to the issuing of an order with respect to those 135 cars before the question as to the remaining cars is determined?

"Mr. Andrews: We object to it on the ground that the claimants have not shown that they were damaged.

"Commissioner Prouty: Oh, well; as Mr. Cowan says, this Santa Fé Railroad should send in some one here that knows something about this case. That is not the question I am asking you. Suppose we find that they are damaged as to 135 cars. Have you any objection to an order issuing as to those 135 cars before the question has been considered as to the remaining cars? They make claim as to 173 cars?

"Mr. Andrews: Of course, we will not object to an order on that basis.

"Commissioner Prouty: That is, you have no objection to the order being split in two pieces?"

"Mr. Andrews: No, sir."

Then Commissioner Prouty said to Mr. Burg, representing the Missouri, Kansas & Texas Railroad Company:

"Commissioner Prouty: Do you understand that Mr. Williams' statement is correct, Mr. Burg?

"Mr. Burg: Substantially correct, Mr. Commissioner. Of course, we only checked those statements with reference to the movement of the cars; we did not check the freight rates.

"Commissioner Prouty: Now, Mr. Burg, have you any objection to the issuing of an order as to the claims for the cars which have been found by you to have been actually moved, provided the commission finds such other facts as it thinks warrants the issuing of an order?

"Mr. Burg: Mr. Commissioner, I see no substantial objection to that. The only thought I have in mind is this, perhaps the commission's order would go into litigation, and by issuing the order in piecemeal it might increase our expenses of litigation. But I do not see that it would make any substantial objection to it."

Mr. Humburg, representing the Chicago & Eastern Illinois Railroad Company, was called on by the commissioner to show what he admitted, if anything. Mr. Humburg said:

"This matter, if your honor please, has been handled by Judge Fletcher, who is out of the city to-day. But in going through the files I find a letter addressed to Mr. Williams under date of January 23, 1913, saying the shipments have been checked and found to be substantially correct. That there are some minor irregularities in the names of consignors, but these are apparently only such errors as arise from frequent transcriptions of waybills.

"Commissioner Prouty: You are of the opinion, then, that the checking is sufficient to identify these cars as having moved?

"Mr. Humburg: Our position upon that matter, if your honor please, is that the statement we have submitted to Mr. Williams will speak for itself. Beyond that we do not know what the situation is. That is to say, we do not know of our own knowledge who finally bore the charges; and we urge, in substance, the motion to dismiss filed with the commission on the ground shown in that motion.

"Commissioner Prouty: Now, Mr. Cowan, it is a long time since I have practiced law, but my recollection is that there is a legal maxim that every claim which can be embraced in a judgment is presumably embraced, so that a judgment upon an account covering a certain period is a bar to every claim during that period, whether the item was actually embraced or not. I do not see any reason for objection, in fact, it seems to me there is every reason for the court's position, and I do not see any objection to the issuing of an order with respect to these claims as to which the movement is admitted, an opportunity to try the matter out in court, and, if it is decided you can recover, you can then proceed to make proof as to the balance, which may be a matter of some difficulty, and it would not be worth while to take up your time and the time of the defendants to make that proof unless some good would come from it. At the same time, you must assume the responsibility, if you ask the commission to make that kind of an order.

"Mr. Cowan: I want to take an order for the claims that have been admitted. I want to take a chance.

"Commissioner Prouty: You understand there has not been anything admitted; that is to say, these railroads have not admitted you are entitled to any money. They have admitted the movement of certain cars, and they earnestly insist you are not entitled to recover; but I think the commission would find on the facts admitted that you have paid the freight and are entitled to reparation. We hold that the payment of an unreasonable charge imports damage, that of itself shows damage. Now, the railroads claim to the contrary, and are going to try that question."

"Commissioner Prouty: I might say that, if Mr. Williams can attend to this, I will ask our examiner to sit down with him immediately, just as soon as he comes to Washington, and go through these checks of the railroads and see what are admitted, so we can make up a statement based on that admission. If within the next few days you can file with the commission and serve on the defendants a statement of what you ask to have found, that might be of service to us in rendering our findings, leaving out the exact figures; a statement of facts.

"Mr. Cowan: I think, your honor, we have anticipated that by the very complete statement Mr. Williams has made alphabetically of the claim of every person against each railroad, which we would be glad to furnish, of course, to each railroad, I guess you have copies, Mr. Williams. He can furnish copies, and it shows a tabulated and convenient statement.

"Commissioner Prouty: There is one thing more; these shipments were made and the freight paid by a great many different persons. My understanding is that there has been some sort of an assignment of these claims to the secretary of the Cattle Raisers' Association or to the Cattle Raisers' Association. Now, do you ask the commission to make the order in favor of the original shipper, or do you ask the commission to make it in favor of the assignees, and, if so, what evidence do you offer of the fact of the assignment?"

"Mr. Cowan: My position is this, as I have shown by Mr. Williams this morning, and if it is not sufficiently shown we can have him testify further on the subject, or any commission man in Chicago will testify to the fact, and all the railroads know it, that by the universal custom the commission man pays the freight, which is done, I will say, in all cases. There might be a case in a thousand where it is not done. He is also the agent to collect back overcharges.

"Commissioner Prouty: Suppose we assume that the commission man did pay the freight and did charge it to the owners. That results in the owner ultimately paying the freight. The owner got so much less for his stuff than if the freight had been lower. That constitutes a claim from the owner?

"Mr. Cowan: It constitutes a claim from the owner, but by the universal custom of the defendants the commission company is the agent of the owner to pay the freight, and to collect back overcharges."

Commissioner Prouty stated that he did not think the mere filing of an assignment, unless counsel had consented to it, without an opportunity to examine it, would be sufficient. Then Mr. Cowan interrogated the witness Williams and asked the witness if he knew as a matter of fact that written assignments had been made and filed with the Cattle Raisers' Association and were in his office. Mr. Williams answered: "Yes, sir." The witness was then asked is it not a fact that "Mr. Crowley, when he retired or since he retired as secretary of the association, assigned over to Mr. Spiller all the claims which had been assigned to Mr. Crowley?" The witness: "Yes, sir." Mr. Cowan: "That is a written assignment?" Witness: "Yes, sir." Mr. Cowan then said: "These assignments were taken for nominal considerations because the Cattle Raisers' Association was prosecuting

these cases, and the secretary and general manager, being in one office, had charge of the whole matter." Witness: "Yes, sir." The blank form in the commission's report purported to be that of Mrs. Adair.

Then the following conversation was had between Commissioner Prouty and Mr. Cowan:

"Commissioner Prouty: You let us know right away, Mr. Cowan, whether you want the order made, if one is made, in favor of the original owner, or in favor of the assignee.

"Mr. Cowan: I want it in favor of the assignee, in all cases where we have an assignment. We have considered the matter quite thoroughly, and we think, and I will brief that point and submit it to the commission, that we are entitled to the order on behalf of the manager.

"Commissioner Prouty: I do not care to have you brief it; you will have to assume the responsibility in making it. You have the thing all mixed up here so I would not have any idea what ought to be done, so you make up your mind what form you think the order ought to take, and we will put the order in that form.

"Mr. Cowan: If your honor was going to stay on the commission, I might not remark that I do not think you ought to say we have the thing all mixed up; I think it is rather pertinent.

"Commissioner Prouty: I hope it is as plain to my successor as it is to you.

"Mr. Cowan: I will submit and be very glad to furnish counsel on the other side my conclusions on that subject. As I said, my partner is a very good lawyer, and when we can get together, which will be very shortly, I will get him to make up an opinion on this point.

"Commissioner Prouty: Now, of course, there is no proof here that these assignments have been executed by the persons who purport to execute them; but I take it, gentlemen of the defense, it would not be your desire to put Mr. Cowan to the necessity of making proof in each individual case. There is no doubt about it, I suppose, and we will find, unless there is some objection, that this assignment was regularly made by the person purporting to execute it."

Mr. Dickinson then said:

"Mr. Dickinson: I would like to suggest that it may be true, as far as my knowledge goes, that there is a universal custom of the commission houses to deduct freight charges from the invoice and remit the balance to the consignor; but I do not feel at liberty to admit the sufficiency or the competency of the proof that has so far been offered to sustain that proposition in this case.

"Mr. Cowan: How should I be able to prove it if it is a fact? Do you want somebody from a commission house that is thoroughly familiar with it?

"Mr. Dickinson: Of course, I am not making the proof. I do not think it would be right for me to sit here silently, and by my silence admit that you have proved that fact, so far as you have proceeded in this case.

"Mr. Cowan: If there is a question about that, I see Mr. Clifford Thorne, who is the chairman of the Iowa Commission, here, and who I think is thoroughly familiar with live stock transactions in this country.

"Commissioner Prouty: I do not believe, Mr. Cowan, that would be altogether competent proof. I rather think you have shown it already; but the testimony of one man in one section of the country that a certain thing was done in Iowa would hardly show that it was done in Texas."

"Commissioner Prouty: We will look over the record in that respect, but my impression is the commission will find from the present record that the owner paid the freight. He sent the cattle to market, sent them to a commission man, and in the ordinary course of business he paid the freight."

The commissioner then said to Mr. Cowan that he need not introduce any testimony as to what the ordinary course was with the commission companies in paying the freight. All through the hear-

ing the record shows that every one understood, from the statements of counsel for the claimant and the commissioner, that a man from each commission company would be produced, who would in the presence of counsel testify to the accuracy of the books of the commission company as to who paid the freight and what the custom was, if any, until the commissioner said that it was unnecessary as the railroads had admitted the correctness of the claims. There was no dispute on the reparation hearing or at the trial below, but that the commission had condemned the rate between the points of origin and the several markets heretofore mentioned. What we have stated covers all the evidence that was before the commission to sustain its order. It is true counsel for plaintiff say there were trunks full of other evidence, but it appears conclusively that there was no other evidence introduced than as above stated.

[1-3] In approaching the consideration of the questions raised by the assignments of error, we are not unmindful that, in making inquiry pertaining to interstate commerce, the commission should not be too narrowly constrained by technical rules as to the admissibility of proof, nor hampered by those narrow rules which prevail in trials at common law. I. C. C. v. Baird, 194 U. S. 44, 24 Sup. Ct. 563, 48 L. Ed. 860. In I. C. C. v. L. & N. R. R. Co., 227 U. S. 93, 33 Sup. Ct. 185, 57 L. Ed. 431, however, it was said at page 91 of 227 U. S., at page 186 of 33 Sup. Ct., 57 L. Ed. 431:

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (Tange Tun v. Edsell, 223 U. S. 673, 681 [32 Sup. Ct. 359, 56 L. Ed. 606]; Chin Yoh v. United States, 208 U. S. 8, 13 [28 Sup. Ct. 201, 52 L. Ed. 369]; Low Wah Suey v. Backus, 225 U. S. 460, 468 [32 Sup. Ct. 134, 56 L. Ed. 1165]; Zakonaite v. Wolf, 226 U. S. 272 [33 Sup. Ct. 31, 57 L. Ed. 218]); or if the facts found do not, as a matter of law, support the order made (United States v. B. & O. S. W. R. R., 226 U. S. 14 [33 Sup. Ct. 5, 57 L. Ed. 104]). Cf. Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20 [27 Sup. Ct. 585, 51 L. Ed. 983, 11 Ann. Cas. 398]; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301 [21 Sup. Ct. 115, 45 L. Ed. 194]; Oregon Railroad v. Fairchild, 224 U. S. 510 [32 Sup. Ct. 535, 56 L. Ed. 863]; I. C. C. v. Illinois Central, 215 U. S. 452, 470 [30 Sup. Ct. 155, 54 L. Ed. 280]; Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433 [31 Sup. Ct. 288, 55 L. Ed. 283]; Muser v. Magone, 155 U. S. 240, 247 [15 Sup. Ct. 77, 39 L. Ed. 135]."

At page 92 of 227 U. S., at page 187 of 33 Sup. Ct., 57 L. Ed. 431:

"But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551."

At page 93 of 227 U. S., at page 187 of 33 Sup. Ct., 57 L. Ed. 431:

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party main-

tain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States v. Baltimore & Ohio S. W. R. R. Co., 226 U. S. 14 [33 Sup. Ct. 5, 57 L. Ed. 104]."

[4, 5] This case was followed and approved in Florida East Coast R. Co. v. United States, 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267, and Philadelphia & Reading R. Co. v. United States, 240 U. S. 334, 36 Sup. Ct. 354, 60 L. Ed. 675. Meeker & Co. v. Lehigh Valley R. Co., 236 U. S. 412, 35 Sup. Ct. 228, 59 L. Ed. 644, Ann. Cas. 1916B, 691, was a suit to recover an award of damages made by the commission for violation of sections 1 and 2 of the Act to Regulate Commerce. The Supreme Court in this case decided that the statute regulating the procedure of the commission in making an award of damages (sections 14 and 16) required "a finding which, as applied to the present case, would disclose (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages."

The above excerpt was quoted and approved in Mills v. Lehigh Valley R. R., 238 U. S. 477, 35 Sup. Ct. 888, 59 L. Ed. 1414. It follows as a matter of course if these findings are required in order that the commission may make an award of damages they must be supported by evidence. Penna. R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. The law required that the suit in the court below should proceed in all respects like other civil suits for damages, except that on the trial the findings and order of the commission were prima facie evidence of the facts therein stated. Section 16 of the act; Meeker & Co. v. Lehigh Valley R. Co., 236 U. S. 412–434, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691; Missouri Pacific Ry. Co. v. C. E. Ferguson Sawmill Co., 235 Fed. 478, 149 C. C. A. 20; Western New York P. R. Co. v. P. Refining Co., 137 Fed. 343, 70 C. C. A. 23.

[6] With the above well-established principles in mind, we approach the consideration of the evidence, including the admissions and the so-called acquiescence of counsel for the carriers, which it is claimed justified the findings and order of the commission. As to the admissions of the carriers, the report of the commission reads:

"These claims, as filed with the commission, describe in detail the shipments on account of which reparation is claimed, stating the point of origin and

the point of delivery and the carrier making the delivery. By the direction of the commission, a list of the cars with respect to which claims have been filed was furnished to each one of these delivering lines, which was requested by the commission to check the claims against their records with a view to ascertaining how many of the cars moved as appeared from the records of the defendants. These claims have been checked by these delivering roads, and no carloads are embraced in this report which did not appear from the records of the defendants to have moved as stated."

We also find the following statement in the brief of counsel for plaintiff:

"It (the record) shows conclusively that all claims shown in appendix A were checked by the railroads, and they admitted the movement of the cars as claimed, and that the excess freight was paid. By whom paid was not admitted and that the shippers were damaged was not admitted."

We think the statements in the brief and report are rather broad in regard to the admissions of the carriers as these admissions appear in the record. Some of the carriers admitted that some of the cars mentioned in the tabulated statement furnished them had moved as stated and that the freight mentioned in the statement had been collected. This is as far as the admission goes as shown by the record; but conceding that the admissions went as far as the commission claims in their report and as counsel claim in their brief, still the case was left far from being proven. There is no warrant for claiming that the admission that certain freight moved and the freight thereon was collected made a case upon which the commission could award damages against the carriers, and these admissions are all the legitimate proof upon which the order of the commission must stand or fall.

The plaintiff was prosecuting the claims for reparation before the commission as the assignee of an owner of cattle who had shipped the same, paid the unreasonable freight rate, and thereby was injured and damaged. It was therefore necessary for the plaintiff to show who the owner was, that he paid the unlawful rate, and was damaged thereby and the extent thereof. The claim was not for an overcharge or extortion, but for damages. In every instance where the act authorizes the commission to make a pecuniary award the word "damages" is used. It is said in the report of the commission:

"These shipments of live stock were in all cases consigned to some person at the delivering market, usually a commission firm. The consignee paid the freight in the first instance to the delivering carrier in all cases. Subsequently the cattle were sold upon the market and the amount of the freight deducted from the purchase price, remittance being made for the balance. In all cases, therefore, the owner and shipper of the cattle finally paid the transportation charges."

With reference to this finding it may be said that there was no proof before the commission that a single owner of cattle mentioned in appendix A shipped cattle over the carriers' lines and paid the unlawful rate. There was no evidence that the consignee mentioned in appendix A paid the freight in the first instance to the delivering carrier, and that subsequently the cattle were sold upon the market and the amount of the freight deducted from the purchase price; remittance being made for the balance to the owner. There was talk back and forth between the commissioner conducting the reparation hear-

ings and counsel as to some custom of the commission houses along the lines suggested; but there was no proof of such custom, and counsel for the carriers, when interrogated by the commissioner in reference thereto, disclaimed any knowledge of such a custom. Counsel for plaintiff stated at the reparation hearing that he was ready to prove such a custom, but the commissioner finally concluded that it was unnecessary as the carriers had admitted the claims. The evidence in our opinion wholly fails to show who owned the cattle shipped, or who paid the freight. There was no proof that the consignors mentioned in the tabulated statement, now called appendix A, were the owners of the cattle, and it appeared beyond dispute by the testimony of the only witness sworn, that the cattle were not in all cases shipped in the name of the owner, but in the name of the caretaker. The extent to which the admissions of the carriers carried the plaintiff's case is not disputed. The only other proof that by any pretense may be claimed to show that any owner of cattle shipped them over the carriers' lines and paid the unlawful rate is the testimony of the witness Williams, who testified that during four or five years he had obtained from the commission houses and other sources "stuff" as he calls it, showing the shipment of cattle, not by the owner, and therefore damaged by the payment of the unlawful rate, but simply that a certain person shipped cattle.

[7-9] Of course, this testimony was the worst kind of hearsay, but counsel claims that it was unobjected to, and therefore in an appellate court the objection that it was hearsay cannot be made. We are of the opinion, if the proceedings before the commission are allowed to be conducted in an informal way, so far as the commission is concerned counsel engaged in the conduct of such proceedings are not required to preserve and protect their rights with the watchful nicety that would be required in courts of justice. Moreover, the record shows in many places where counsel asserted that there was an entire failure of proof, and demanded that the proceeding should be dismissed, so that it cannot be said that counsel acquiesced in the proposition that the tabulated statement, together with the admissions of the carriers, proved a case for damages against them. Again, we are not sitting for the purpose of reviewing errors in the admission or rejection of evidence. If we were and the case was an action at law, some exception and a ruling thereon by the court below would be necessary; but the question before us is whether there was any substantial evidence before the commission to justify its order. Such an inquiry permits us to consider the character of the evidence introduced to support the order. 4 Chamberlayne on Evidence, § 2702.

[10, 11] As we have said, the claim for reparation was made by Spiller as assignee of the cattle owner. It was therefore necessary for him to show such an assignment of the claims as would vest him with the legal title thereto if the award was to be made to him. The record shows that some of the claims if assigned at all were assigned to Crowley, others to Spiller, other still, and it did not appear which ones, were simply placed with the Cattle Raisers' Association for collection, and it stands undisputed that, whether assigned or placed in the hands of the association for collection, the only purpose of the

assignment or placing for collection was to enable the Cattle Raisers' Association to handle the claims for reparation. On the undisputed evidence, therefore, the legal title to the claims for reparation never vested in Spiller, and the commission was wholly without authority to cause the order of reparation to be made to him. He was not a shipper or owner of cattle, and of course was not injured through any act of the carriers. The commissioner conducting the hearing was much in doubt himself as to whom the order of reparation should be made, and the report of the commission states that it was made to Spiller because his counsel so requested, being willing to take a chance.

At the reparation hearing Mr. Cowan stated that he had the assignments of a large number of claims, which he would submit to the commission; that there were some claims not covered by assignments; and that the firm of which Mr. Cowan was a member was of the opinion that when the commission companies demanded that the claims be filed for their customers, whether they were members or not of the Cattle Raisers' Association, this was sufficient authority for Mr. Crowley and Mr. Spiller to proceed and file claims where there was no criticism of the assignment; and that, while perhaps the order of the commission ought to be made in the name of the owner of the claim, counsel thought the agency was sufficiently proven to entitle them to collect the claims.

After the statement of counsel, the commissioner said:

"There is no proof here that these assignments have been executed by the persons who purport to execute them, but I take it, gentlemen of the defense, it would not be your desire to put Mr. Cowan to the necessity of making proof in each individual case. There is no doubt about it, I suppose, and we will find, unless there is some objection, that this assignment was regularly made by the person purporting to execute it."

The remarks of the commissioner related only to the assignment of the claim of Mrs. Adair. In connection with the claimed acquiescence of counsel for the railroad companies, it may be said that we are of the opinion that, when a carrier is cited to show cause why it should not be adjudged to pay damages for collecting an unjust rate, it cannot be so adjudged by being told if no objection is made the commission will proceed and award them. Therefore the failure of counsel in this case to object to what the commissioner proposed to do in regard to the assignments does not now estop them from claiming that there was no proof of the assignment of the claims mentioned in appendix A. The witness Williams in the very nature of things could not know that over 2,000 shippers and claimants had assigned their claims to Crowley and Spiller. Our conclusion is that there was not sufficient evidence to support the finding of the commission, that the claims had been legally assigned to Spiller, and that, conceding there was, the evidence showed that the purpose of the assignment was not such as to vest the legal title of the claims in Spiller so as to authorize the commission to make the award of damages to him.

[12-15] We now reach the question as to whether there was any proof that any owner of cattle who shipped cattle and paid the unlawful rate, assuming that such fact had been shown, was damaged thereby. It appears from the report of the commission, assuming that

their findings on other branches of the case are correct, that the damages that each shipper suffered was arrived at by computing the difference between the unlawful rate condemned and the rate ordered in by the commission without any other proof than the mere shipment of the cattle and the payment of the freight. Was this the legal measure of damages? Some general observations may be made at the outset as to the general result to which the action of the commission would lead. By section 15 of the act as amended in 1906, the commission was "hereby authorized and empowered to determine and prescribe what will be just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed * * * for such period of time not exceeding two years, as shall be prescribed in the order."

In granting reparation based entirely upon the difference in rates, the commission instead of establishing a rate for the future for a period not exceeding two years, established a rate for 4 years, 2 months, and 21 days. The commission, in Arlington Heights Fruit Exchange v. S. P. Co., 39 Interst. Com. Com'n R. 88 (93), decided that to award reparation for the period between the date of service of an order establishing a rate for the future and its effective date would, in substance, be to disregard the statutory restriction that orders establishing rates for the future should not go into effect less than thirty days from the date of service of the order. The principle involved in this decision is that to grant reparation based alone upon the difference in rates is to put the rate into effect. Again, it must be presumed, in the absence of any evidence to the contrary, that the carriers involved in this litigation honestly and in good faith established the rate condemned by the commission, as just and reasonable, yet although they exercised an honest judgment they must pay damages. The case would be different if it arose from a violation of section 2, denouncing favoritism, section 3, denouncing discrimination, or section 4, prohibiting a lesser charge for a longer haul, for under each of the last-mentioned sections the carrier would know when it violated the law. It was bound to know the law, and the facts were within their own knowledge. Further, whether the carriers established an unreasonable and unjust rate is still open in this very action to the consideration of a jury, and, if all these shippers had obtained separate orders of reparation, there might be as many diverse verdicts upon the question of reasonableness of the rate as there were cases. These suggestions give rise to the inquiry as to whether reparation based on the difference in rates is lawful under section 1. Certainly all the evils that were depicted by the Supreme Court in the Abilene Oil Case, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, are possible to arise in the practice of granting reparation under section 1, based upon the difference in rates. The rate condemned was the legal rate, binding upon both the carrier and the shipper. Atchison, T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901. Manifestly, the shipper could not sue in a court of law to recover back any portion of the legal rate. Van Patten v. Chicago, etc. (C. C.) 81 Fed. 545. Can the commission accomplish the same thing by awarding damages based on the difference in rates alone? The grant of power, however, to the Interstate Commerce Commission to award reparation for any violation

of the act is broad and comprehensive, and the objections stated are rather to the manner and form of granting reparation under section 1, than to the power of the commission to grant reparation at all.

The case of Penna. R. Co. v. International Coal Mining Co., supra, was a suit to recover damages by reason of the defendant railroad company's having two rates for the shipment of coal, a rate for "free coal" and a rate for "contract coal." Under this practice, where coal had been sold for future delivery the carrier collected the published tariff rate and rebated the difference between it and the lower rate enforced when the contract of sale had been made. The coal company proved that between April 1, 1899, and April 1, 1901, it had shipped about 40,000 tons of coal on which it had paid the full tariff rate, while other companies shipping freight to the same place at the same time had been allowed on their contract coal rebates of 5, 10, 15, 25, or 35 cents per ton.

The coal company claimed that as matter of law it was entitled to recover as damages the same rate per ton on all of its shipments as had been rebated to any other person on any of its tonnage shipped at the same time over the same road. The Supreme Court held that the measure of damages adopted by the trial court was erroneous; that to show the plaintiff paid the established legal rate and another shipper received a rebate showed no damage at all, and the cases bearing upon the question are reviewed as well as the act to regulate commerce. If the carrier in the case cited could not be held liable merely for the difference between the established rate and the amount of the rebate in a case of discrimination under section 2, it certainly can be argued with much more force that a shipper who has paid the legally established rate under section 1 may not recover the difference between that rate and the rate estabished by the commission for the future without proof that his actual damage did in fact amount to that sum. In the case of Meeker & Co., v. Lehigh Valley R. Co., supra, it appeared that so far as Meeker & Co. sought to recover damages by reason of paying an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, the commission found that they were damaged to the extent of the difference between what they actually paid and what they would have paid had they been given the rate which the commission found would have been reasonable. The Supreme Court sustained this finding, and it was claimed by counsel that to so rule would be in conflict with Penna. R. Co. v. International Coal Mining Co., supra; but the Supreme Court explained that there was nothing in the Meeker & Co. Case in conflict with the former case. The court, in approving what was said in the International Coal Mining Company Case, said that in the Meeker Case the plain import of the findings of the commission were that the amounts awarded represented the claimant's actual pecuniary loss, and that in view of the recital that the findings were based upon the evidence adduced it must be presumed, there being no showing to the contrary, that they were justified by it; therefore the law as announced in the International Coal Mining Co. Case, received no modification, but on the contrary was approved in the Meeker Case. See, also, Penna. R. Co. v. Jacoby & Co., 242 U. S. 89, 37 Sup. Ct.

49, 61 L. Ed. 165; Clark Bros. Coal Mining Co. v. Penna. Ry. Co. (D. C.) 238 Fed. 642.

[16] In this case we are not dealing with the findings of the commission, but with the evidence which it is alleged did not support such findings. We therefore think that we must hold that the difference in the rate condemned and the rate established without other proof showing injury to the actual owner makes no case for damages against the carrier. So far as the record shows, the owners of the cattle might have sold them on the ranges, might have sold them f. o. b. points of origin, or might have sold them at delivered prices to which the freight charge was added. But we need not stop here. Why is the difference in the rate condemned and the rate established for the future the measure of the injury which the cattle owner received? The commission says because the owner received as much less for his cattle as the rate was unlawfully high, and therefore he was damaged in a sum equal to the difference in rates. Is this so? Have freight rates no influence upon the market price of cattle?

When we enter the domain of facts which everybody knows, to which counsel for plaintiff refers us, may we not know that freight rates may destroy commerce, may stop the shipment of cattle, that low freight rates increase the volume of transportation, and that freight rates must be such as will allow traffic to move, otherwise the carrier becomes bankrupt as well as the shipper? Can it be said that an owner of cattle who sells them upon the market is necessarily and without proof injured in the amount of the difference in the rate between a high and a low rate, assuming that the freight rate is deducted in each case from the amount for which the cattle sold? If the freight is high, is not the price of cattle affected accordingly; if so, how can we say the difference between the high and the low rate is the measure of damages? Upon reason and authority we are of the opinion that we cannot so say.

We are cited by counsel for plaintiff to the case of L. & N. Ry. Co. v. Finn, 235 U. S. 606, 35 Sup. Ct. 146, 59 L. Ed. 379, as sustaining the proposition that the commission had sufficient evidence before it to sustain its order. The case cited was a proceeding to recover upon a reparation order made by the Railroad Commission of Kentucky. The contention was made that the order was not supported by substantial evidence. The Supreme Court, in considering this contention, decided that the railroad company admitted by its answer that the rates mentioned had been charged, collected, and received by it, but denied that they were extortionate, unjust or unreasonable, and upon this ground and no other denied liability to make reparation. In its opinion the court said:

"In short, the record shows that the only question made respecting the reparation claims was the general contention that the rates charged by the company were in fact not unreasonable or extortionate; and that it was in effect conceded that the particular amounts claimed were proper to be awarded as reparation, if the rates charged were determined to be unreasonable and extortionate."

The findings and the order of the Kentucky Commission were therefore sustained, but that is not the kind of a case with which we are

now dealing. Counsel for the carriers persistently during the reparation hearings contended that there was no evidence that any owner of cattle had been damaged or that the persons named in the tabulated statement were the owners, or, if so, that they had paid the unlawful rate. Upon the contested propositions they conceded nothing. In view of what we have said, we are of the opinion that the findings and order of the commission were not sustained by the evidence. This being so, the prima facie case made by their introduction at the trial below was destroyed when the evidence upon which the findings and order were based appeared. The trial court therefore erred in refusing to declare the law to be that upon all the evidence plaintiff was not entitled to recover against any or all of the defendants.

We have not found it necessary to discuss or decide the other questions raised by counsel for defendants.

The judgment below is reversed, and a new trial ordered.

MASSES PUB. CO. v. PATTEN, Postmaster.

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

No. 123.

1. POST OFFICE ⟸14—NONMAILABLE MATTER.

Espionage Act June 15, 1917, c. 30, 40 Stat. 230, tit. 12, § 1, declaring every letter, newspaper, or other publication, matter, or thing in violation of any of the provisions of that act to be nonmailable, and section 2, declaring nonmailable every letter, newspaper, etc., containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, excludes from the mails any letters or literature in furtherance of any acts prohibited under the other titles of the statute.

2. CONSTITUTIONAL LAW ⟸90—POST OFFICE ⟸14—NONMAILABLE MATTER—FREEDOM OF SPEECH AND OF PRESS.

Espionage Act June 15, 1917, tit. 12, §§ 1, 2, declaring certain matter nonmailable, do not violate Const. Amend. 1, declaring that Congress shall make no law abridging the freedom of speech or of the press, as the statute imposes no restraint on the matter prior to publication, and no restraint afterwards except as it restricts circulation through the mails, and while liberty of circulating may be essential to freedom of the press, liberty of circulating through the mails is not essential, so long as transportation in any other way is not forbidden.

3. CONSTITUTIONAL LAW ⟸278(1)—DUE PROCESS OF LAW—EXCLUSION OF MATTERS FROM THE MAIL.

Espionage Act, tit. 12, §§ 1, 2, declaring certain matter nonmailable, do not violate Const. Amend. 5, providing that no person shall be deprived of life, liberty, or property without due process of law, though by the exclusion of complainant's magazine from the mails its business was practically ruined.

4. CONSTITUTIONAL LAW ⟸70(3)—JUDICIAL FUNCTIONS—ENCROACHMENT ON LEGISLATURE.

It is the function of the legislative department to enact law, and of the judicial department to construe and apply it; and the courts cannot pass upon the wisdom or justice of statutes, but are simply to ascertain the intent of the lawmakers as expressed therein and to give effect thereto.

5. POST OFFICE ⊂⊃14—NONMAILABLE MATTER.
The Espionage Act is not intended to repress legitimate criticism of Congress or of the officers of the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted, but only to prevent the dissemination and distribution through the mails of publications intended to embarrass and defeat the government in the successful prosecution of the war.

6. POST OFFICE ⊂⊃14—EXCLUSION OF MATTER FROM MAILS—REVIEW BY COURTS.
The Postmaster General is to determine whether a particular publication is nonmailable under the Espionage Act, and in so determining is required to use judgment and discretion; and his decision is conclusive on the courts, unless clearly wrong.

7. POST OFFICE ⊂⊃14—NONMAILABLE MATTER.
Certain articles and cartoons, published by complainant in its magazine concerning the war, conscription, etc., *held* to warrant the Postmaster General's determination that it was nonmailable under the Espionage Act, as calculated and intended to obstruct recruiting or enlistment, in violation of title 1, § 3, but not unmailable, as advocating or urging treason, insurrection, or forcible resistance to any law of the United States, in violation of title 12, § 2.

8. POST OFFICE ⊂⊃14—NONMAILABLE MATTER.
A cartoon published by complainant in its magazine, representing the Liberty Bell in a broken form, whatever its meaning, did not by itself afford any ground for exclusion of the magazine from the mails.

9. POST OFFICE ⊂⊃14—EXCLUSION OF MATTER FROM MAILS—INJUNCTION—BURDEN OF PROOF.
Complainant, suing to enjoin the postmaster from excluding its magazine from the mail, pursuant to an order of the Postmaster General holding it nonmailable, had the burden of overcoming the presumption that the Postmaster General's conclusion was right, or of showing that he had exceeded his power, or exercised it wantonly or maliciously; and this should be done by a preponderance of evidence.

10. POST OFFICE ⊂⊃14—NONMAILABLE MATTER.
The Espionage Act excludes from the mails any publication, the natural and reasonable effect of which is to encourage resistance to a law of the United States, and the words of which are used in an endeavor to persuade to resistance, though the duty to resist is not mentioned directly, and the interest of the persons addressed in resistance is not directly suggested.

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, Postmaster of the City of New York. From an order ([D. C.] 244 Fed. 535) granting a temporary injunction, defendant appeals. Reversed.

This cause comes here on appeal from an interlocutory order granting a temporary injunction commanding the defendant to transmit a certain publication through the mails, which order was entered on July 26, 1917. Thereafter, and on August 4, 1917, the aforesaid order was stayed until the hearing and determination of the appeal taken by the defendant. 245 Fed. 102, —— C. C. A. ——.

Francis G. Caffey, U. S. Atty., of New York City, for appellant.
Gilbert E. Roe, of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

ROGERS, Circuit Judge. The complainant seeks an injunction restraining the defendant, as postmaster of the city of New York, from treating the August issue of a magazine known as The Masses as nonmailable matter under the act of Congress of June 15, 1917, commonly known as the "Espionage Act," and commanding him to transmit the said magazine through the mail in the usual way.

Upon the filing of the complaint an order was entered requiring the defendant to show cause why the injunction should not issue. At the hearing affidavits were presented on behalf of the complainant to show that, if the magazines should be excluded from the mails, the business of the complainant would be practically ruined. An affidavit of the Postmaster General of the United States was presented on behalf of the defendant.

Under the provisions of Espionage Act, title 12, it became the official duty of the Postmaster General to determine what matter is nonmailable, and that official had instructed the postmaster of New York that The Masses was nonmailable. It appears that before this order was issued the solicitor for the department, the Attorney General of the United States, and the Judge Advocate General of the army, the later being a lawyer and charged with the administration of the Draft Act of May 18, 1917, were consulted, and that they each advised that the circulation of the issue in question would constitute an offense under the Espionage Act. And the Judge Advocate General informed the department that it was his opinion that the necessary effect of the issue of this August number would be to cause insubordination, disloyalty, mutiny, and refusal of duty in the naval and military forces of the United States, and that it would obstruct the recruiting and enlistment service of the United States. The learned District Judge, in a carefully prepared opinion, reached the conclusion that the August issue of the publication in question did not contain any illegal matter and that the injunction should issue.

That part of the Espionage Act which is involved here is title 12, which relates to the use of mails, and it reads as follows:

"Sec. 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing, of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: Provided, that nothing in this act shall be so construed as to authorize any person other than an employé of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

"Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable."

Section 3 of title 12 relates to the punishment to be imposed upon any person who uses or attempts to use the mails for the transmis-

sion of any matter declared to be nonmailable, and is not involved in this proceeding. But, as section 1 of title 12 makes nonmailable any matter which is in violation of any of the provisions of the act, it will be necessary to consider section 3 of title 1, which reads as follows:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years or both."

[1] It is the clear intent of title 12 to close the United States mails to any letters or literature in furtherance of any acts prohibited under the other titles of the statute. It is said that the act violates the First Amendment to the Constitution, which declares that "Congress shall make no law * * * abridging the freedom of speech, or of the press." It is also said that the act violates the Fifth Amendment, which provided that "no person shall be * * * deprived of life, liberty, or property, without due process of law."

[2] In his Commentaries on the Laws of England Mr. Justice Blackstone in speaking of the liberty of the press declares that it is "essential to the nature of a free state." It consists, he says, "in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." Volume 4, p. 151. And Mr. Justice Story, in his Commentaries on the Constitution, states that "every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press." Volume 2, sec. 1884 (4th Ed.).

In Patterson v. Colorado, 205 U. S. 454, 462, 27 Sup. Ct. 556, 558, 51 L. Ed. 879, 10 Ann. Cas. 689 (1907), the court, speaking through Mr. Justice Holmes, declares that the main purpose of the constitutional provision as to free press is "to prevent all such previous 'restraints' upon publications as had been practiced by other governments," and they do "not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Now clearly the Espionage Act imposes no restraint prior to publication, and no restraint afterwards, except as it restricts circulation through the mails. Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden.

The Act of Congress now called in question does not undertake to say that certain matter shall not be published nor that it shall not be transmitted in interstate commerce. It simply declares that such matter shall not be carried in the United States mails. In Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877 (1877), the Supreme Court held that

the power vested in Congress to establish post offices and post roads embraces the regulation of the entire postal system of the country, and that under it Congress can designate what may be carried in the mail and what excluded. In that case Mr. Justice Field, speaking for the court, said:

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

A conviction for depositing in the mail a lottery circular contrary to an act of Congress was sustained. And that decision was adhered to in Re Rapier, 143 U. S. 110, 134, 12 Sup. Ct. 374, 36 L. Ed. 93 (1892). In the latter case Mr. Chief Justice Fuller said:

"The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

In Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092 (1904), the court had before it the constitutionality of a law which authorized the Postmaster General "upon evidence satisfactory to him," and which did not provide for any trial, hearing, or inquiry of any kind, to shut out of the mails the letters of any person or company conducting a lottery or any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses. Mr. Justice Brown, writing for the court, said:

"In establishing such [postal] system Congress may restrict its use to letters, and deny it to periodicals; * * * it may admit books to the mails and refuse to admit merchandise, or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employés or injurious to other mail matter carried in the same packages. The postal regulations of this country, issued in pursuance of act of Congress, contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact, such, for instance, as liquids, poisons, explosives and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights. While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public

morality. For more than 30 years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in Re Rapier, 143 U. S. 110 [12 Sup. Ct. 374, 36 L. Ed. 93]."

[3] The court held that the fact that the Postmaster General could act and that no judicial hearing was provided for was not a fatal objection to the act. It declared:

"That due process of law does not necessarily require the interference of the judicial power as laid down in many cases and by many eminent writers upon the subject of constitutional limitations. * * * If the ordinary daily transactions of the departments, which involve an interference wth private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

The opinion of Judge Cooley in Weimer v. Bunbury, 30 Mich. 201, is cited approvingly, in which he said:

"There is nothing in these words ('due process of law'), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress."

This court holds, therefore, that the Espionage Act, in so far as it excludes from the mails certain matter declared to be unmailable, is constitutional.

The provisions contained in title 12 of the Espionage Act respecting the use of the mails do not abridge the freedom of the press, nor deprive the complainant of its property, within the meaning of the First and Fifth Amendments. Congress has not attempted to prevent the transportation of this publication as merchandise by the railways or by the express companies, and it has not authorized the confiscation of it, neither has it in any way prohibited publication.

In 1798 Congress enacted what is known as the Sedition Law. Act July 14, 1798, c. 74, 1 Stat. 596. It provided, among other things, for the punishment of any person who published any false and malicious thing against the government of the United States, or any matter intended to excite the people to oppose any law or act of the President in pursuance of law, or to resist, or oppose or defeat, any law. The act provoked great resentment throughout the country, and when it expired by its own limitation in 1801 it was not renewed. From that time until the present no similar legislation, so far as we are aware, has been enacted.

The Espionage Act now under consideration bears slight resemblance to the Sedition Law of 1798. The act as originally drafted provided that every publication "containing any matter of a seditious, anarchistic or treasonable character" should be nonmailable. But when the act was under discussion in the Senate the words above quoted were stricken out; it having been objected that they were too indef-

inite and left too much room for construction. In Cooley's Constitutional Limitations, page 429, that distinguished authority says:

"Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance or fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion."

In May's Constitutional History, c. 10, it is said that:

"When the press errs, it is by the press itself that its errors are left to be corrected. Repression has ceased to be the policy of rulers, and statesmen have at length fully realized the wise maxim of Lord Bacon, that 'the punishment of wits enhances their authority, and a forbidden writing is thought to be a certain spark of truth that flies up in the faces of them that seek to tread it out.'"

The policy of the government of the United States has conformed to the doctrine above laid down. But the fact that the policy of the government of the United States has been adverse to limiting freedom of discussion affords little assistance in construing the particular act now under consideration. In Hadden v. The Collector, 5 Wall, 107, 18 L. Ed. 518 (1866), the court speaking through Mr. Justice Field declared that:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

And in Dewey v. U. S., 178 U. S. 510, 521, 20 Sup. Ct. 981, 985, 44 L. Ed. 1170, the court, speaking through Mr. Justice Harlan, declared that:

"This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. * * * Our province is to declare what the law is."

And in White v. U. S., 191 U. S. 545, 551, 24 Sup. Ct. 171, 172, 48 L. Ed. 295 (1903), Mr. Justice Day declared:

"It is equally true that it is the business of courts to decide what the law is, and not by consideration of surmises as to the policy of the government have the effect to adjudge that to be law which has not been so enacted by the Legislature."

[4] Moreover, courts have nothing to do with the wisdom or unwisdom of a legislative act. It is the function of the legislative department to enact law, and of the judicial department to construe and apply it. The judges cannot pass upon the wisdom or the justice of the statute, but are simply to ascertain the intent of the lawmakers as expressed in the enactment, and to give effect thereto. United States v. First National Bank, 234 U. S. 260, 34 Sup. Ct. 846, 58 L.

Ed. 1298. For reasons satisfactory to the law-making body the Espionage Act has been adopted, and being valid is the law of the land.

[5] It is not intended by what has just been said to imply any doubt as to the wisdom of Congress in the enactment of the Espionage Act. The purpose of the act as we understand it was not to repress legitimate criticism of Congress or of the officers of the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted. The United States being at war in defense of American rights, Congress intended by this act, to prevent any use being made of the mails for the dissemination and distribution of publications intended to embarrass and defeat the government in its effort to prosecute the war to a successful termination. The statute is one of great importance and under it the Postmaster General, whose duty it is to execute all laws relating to the postal service, had to determine whether the particular publication in question was mailable or unmailable matter as defined in the act.

The Espionage Act being constitutional, the question which arises, then, is whether the action of the Postmaster General in excluding The Masses from the mails warranted the District Judge in issuing an injunction commanding him to allow it to be transmitted by mail. The Postmaster General is the head of the Post Office Department. The obligations of his oath of office oblige him to see that the provisions of the Espionage Act are carried into effect, so far as they relate to the use of the mail, and that matter declared by the act to be nonmailable shall be excluded from the mails. The performance of that duty involves the exercise of his judgment and discretion. To what extent can the courts control him by injunction in the performance of this duty?

In Decatur v. Paulding, 14 Pet. 497, 599 Appx., 10 L. Ed. 559, 609 (1840), a mandamus to compel the Secretary of the Navy to comply with a resolution passed by Congress granting a pension was refused. The Secretary, acting under the advice of the Attorney General, decided that Mrs. Decatur was not entitled to claim the pension under the resolution as she had applied for and received her pension under the general law, and she could not have both. The opinion was by Chief Justice Taney, who said:

"The duty required by the resolution was to be performed by him (the Secretary of the Navy) as the head of the executive department of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress, or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise [his] judgment and discretion. * * * The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."

In United States ex rel. Dunlap v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354 (1888), the court held that a mandamus to the Commissioner of Pensions was properly refused. The Commissioner had decided adversely an application for an increase of a pension under

21 Stat. 281, c. 236. The opinion was by Mr. Justice Bradley, who said:

"The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, as service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them."

In American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90 (1902), the Supreme Court reversed the court below, which had dismissed a bill asking for an injunction to restrain a postmaster from carrying out an order of the Postmaster General withholding mail on the ground that the person to whom it was addressed was engaged in a scheme for obtaining money through the mails by means of fraudulent pretenses. The Supreme Court, in reversing the judgment, did so with instructions to issue the temporary injunction as applied for. The case was decided upon a demurrer, so that the allegations in the bill of complaint were taken as true, and the bill averred facts showing that the complainant's business was legitimate and not fraudulent. If the business was not fraudulent, the Postmaster General had no authority under the act to withhold the mail.

In Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074 (1903), it was held that neither an injunction nor a mandamus would lie against an officer of the Land Department to control him in discharging an official duty which required the exercise of his judgment and discretion. Mr. Justice Peckham, writing for the court, said:

"Whether he [the Secretary of the Interior] decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. * * * The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts."

In Bates & Guild v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894 (1904), the bill asked for an injunction to compel the Postmaster General to transmit through the mails, as matter of the second class, a publication alleged to be a periodical and to enjoin him from enforcing an order made by him denying it entry as such. The bill was dismissed and the injunction denied. Mr. Justice Brown, writing for the court, said that:

"Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."

Again he says:

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and

discretion of the head of a department, his decision thereon is conclusive, and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

And he concludes:

"While, as already observed, the question (that decided by the Postmaster General) is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final."

In Public Clearing House, supra, the court held that it was within the power of Congress to intrust the Postmaster General with the power of seizing and detaining letters upon evidence satisfactory to himself and that his action would not be reviewed by the court in doubtful cases. The act authorized the Postmaster General, upon evidence satisfactory to him that any person was conducting a scheme or device for obtaining money or property through the mails by fraudulent pretenses, to instruct postmasters at any post office at which registered letters arrived directed to any such person to return the same to the postmaster at the office at which they were originally mailed with the word "Fraudulent" stamped upon the outside.

In Smith v. Hitchkock, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. 119 (1912), a bill was filed to restrain the Postmaster General from revoking orders according second-class mail privileges to the plaintiffs. The ground of the bill was that the privileges had been annulled without granting the hearing required by the act (31 Stat. 1099, 1107), and that the publications were periodical publications within the meaning of the act (20 Stat. 355, 358, 359). The Postmaster General had decided that the publication was not a "periodical" and could not be carried as second-class matter, but would have to go as third-class and pay the higher rate. Mr. Justice Holmes, speaking for the court, said:

"Thus a question of law is raised, although, as suggested in Bates & Guild Co. v. Payne, 194 U. S. 106, 108 [24 Sup. Ct. 595, 48 L. Ed. 894], we should not interfere with the decision of the Postmaster General, unless clearly of opinion that it was wrong. * * * We have no such clear opinion."

See, also, Lewis Publishing Co. v. Morgan, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190; Parish v. MacVeagh, 214 U. S. 124, 131, 29 Sup. Ct. 556, 53 L. Ed. 936; Johnson v. Drew, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; Burfenning v. Chicago, St. Paul, etc., R. Co., 163 U. S. 321, 323, 16 Sup. Ct. 1018, 41 L. Ed. 175.

[6] This court holds, therefore, that if the Postmaster General has been authorized and directed by Congress not to transmit certain matter by mail, and is to determine whether a particular publication is nonmailable under the law, he is required to use judgment and discretion in so determining, and his decision must be regarded as conclusive by the courts, unless it appears that it is clearly wrong.

We come, therefore, to consider the authority vested by Congress in the Postmaster General to determine whether he acted within his jurisdiction when he excluded the complainant's magazine from the mails. The Espionage Act is entitled:

"An act to punish acts of interference with 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."

Title 12 of the act is the only one relating to the use of the mails. And section 1 of that title expressly declares that:

"Every * * * publication * * * of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails."

As any publication which is in violation of any provision of the act is nonmailable, an examination of the act as a whole is necessary, and shows that the following matter is made nonmailable:

(1) Any matter advocating or urging treason or forcible resistance to any law of the United States. Title 12, § 3.

(2) Any matter containing information respecting the national defense and which is intended to be used to the injury of the United States or to the advantage of any foreign nation. Title 1, § 1.

(3) Any matter containing information, intended to be communicated to the enemy, with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of the war, or the plans or conduct of any naval or military operations, or with respect to any measures undertaken or intended for the fortification or defense of any place, or any other information relating to the public defense which might be useful to the enemy. Title 1, § 2.

(4) Any matter, when the United States is at war, containing false statements willfully intended 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 matter willfully intended to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, and matter willfully intended to obstruct the recruiting or enlistment service of the United States. Title 1, § 3.

The excluded publication is a magazine known as The Masses. By its own statement it is a radical and revolutionary publication, not revolutionary, however, in that it desires to overturn existing forms of government by force of arms, as it is opposed to war. It is revolutionary, not only in matters political, but in art and literature and religion as well. It is a monthly publication of about 50 pages, and has a circulation of from 20,000 to 25,000 copies each month. For a number of years it has passed freely through the mails to its subscribers throughout the United States.

[7] The objectionable matter was contained in the August issue and consisted of certain articles. These were entitled: "A Question," "A Tribute," "Conscientious Objectors," "Friends of American Freedom." Besides these articles, there were four cartoons, which were also objected to. These were entitled: "Liberty Bell," "Conscription," "Making the World Safe for Capitalism," and "Congress and Big Business."

In the article entitled "A Question" the editor writes:

"I would like to know to-day how many men and women there are in America who admire the self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these men of genuine courage as a 'Round-up of Slackers'? Are there none to whom this

picture of the American republic adopting toward its citizens the attitude of a rider toward cattle is appalling? I recall the Essays of Emerson, the Poems of Walt Whitman, which sounded a call never heard before in the world's literature, for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man. * * * I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the state, because they will not do what they do not believe in doing. Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press, and induce the American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world."

The article idealizes those who resist the conscription law, and it represents them as heroic. In saying that the law violates sacred rights and is contrary to liberty, and that those who refuse to submit to it are heroes, it incites disobedience to the statute.

The poem entitled "A Tribute" represents as martyrs worthy of admiration two notorious persons who had just been convicted under an indictment charging them with conspiracy to induce persons not to register under the Conscription Act. It reads in part as follows:

"Emma Goldman and Alexander Berkman
Are in prison to-night,
But they have made themselves elemental forces.
Like the water that climbs down the rocks,
Like the wind in the leaves,
Like the gentle night that holds us,
They are working on our destinies,
They are forging the love of the nations."

The statement that these two individuals have made themselves elemental forces akin to the rocks and trees and rivers, under ordinary circumstances, would be harmless; but coming at this particular time, and after their conviction, the inference being that their greatness grows out their offense and that they are worthy of admiration and honor, it is equivalent to saying that their unlawful conduct is worthy to be followed.

The article "Conscientious Objectors" refers to a number of letters written from English prisons by conscientious objectors. These letters are printed in the same issue of the magazine, and the article recommends those in this country who intend "to stick it out to the end" (resist conscription to the end) to read thoroughly the letters. The article declares:

"We believe that our protestors against government tyranny will be as steadfast as their English comrades. It is not by any means as certain that they will be as polite to their guards and tormentors, but we hope they will remember that these are acting under official compulsion and not as free men. * * * There are some laws which the individual feels that he cannot obey, and which he will suffer any punishment, even that of death, rather than recognize as having authority over him. This fundamental stubbornness of the free soul, against which all the powers of the state are helpless, constitutes a conscientious objection, whatever its original sources may be in political or social opinion. It remains to be demonstrated that a political disapproval of this war can express itself in the same heroic firmness that has in England upheld the Christian objectors to war as murder."

The article, taken as a whole, may well be regarded as intended to encourage objectors to be as steadfast protestors against "government tyranny" as their English comrades. In other words, it is an encouragement to disobey the law.

The article "Friends of American Freedom" is devoted to Alexander Berkman and Emma Goldman, already commented upon in this opinion as having been convicted of a conspiracy to induce persons not to register. The article pays them "tribute of admiration for their courage and devotion." There is an allusion to the fact that Berkman and Goldman had advocated in their paper, Mother Earth, that those liable to the military draft, who do not believe in the war, should refuse to register. The natural effect of it is to encourage those who have objections to war not to register as the Conscription Act requires. Admiration of conspirators convicted of the offense of seeking to defeat the operation of the Conscription Act is equivalent to an approval of their crime and an encouragement to others to disobey the law in like manner.

In considering the cartoons, we may observe that political cartoons have long been used as a very effective means of political propaganda. They were so employed in France during the French Revolution and in England as early as the days of Walpole. In this country they were used during the Revolution, in the War of 1812, and in the Civil War. The brilliant cartoons of Nast, satirizing the Tweed Ring in the city of New York, were conceded at the time to have exerted a powerful influence in the destruction of that corrupt combination. A cartoon may be a leading article. It has been described as "a leading article transformed into a picture." It can express ideas as lucidly and clearly as printed words, and there is no escape from legal responsibility because pictures, rather than words, are used.

[8] In the cartoon entitled "Liberty Bell," the Liberty Bell is presented in a broken form. The idea meant to be conveyed may be that there is no such thing as liberty left in the United States. But whatever it means, taken by itself, it would afford no ground for exclusion from the mails.

The cartoon entitled "Conscription" portrays a youth lying across the mouth of a cannon with his arms chained to the wheels of the gun carriage. "Democracy," in the form of a nude woman, is tied by her extended arms and her crossed feet to a wheel. And "Labor," crouched down on the gun carriage, a pitiable object, is fastened in like manner. A woman is on her knees on the earth at the side of the cannon in utter despair, with her head bent back and her arms uplifted, while a child lies neglected at her side. The counsel for the complainant admits in his brief that this cartoon—

"is a powerful argument against the Conscription Law. It says, in effect, that the youth of the land are by it forced into military service; that the law binds labor to military service as well; that it causes great agony and suffering to the womanhood of the country, and that the mothers of the country with children too small to be subject to the 'Draft' pray to God that the Draft Law may be repealed before their children come to military age, and that Democracy is trampled under foot by such a law. That is what this picture says."

But that is not what it says to us. It seems to us to say: This law murders youth, enslaves labor to its misery, drives womanhood into utter despair and agony, and takes away from democracy its freedom. Its voice is not the voice of patriotism, and its language suggests disloyalty. If counsel wished the court to understand that in his opinion the effect of the cartoon would not be to interfere with enlistment, we are not able to agree with him. That it would interfere, and was intended to interfere, was evidently the opinion of the Postmaster General; and this court cannot say that he was not justified in his conclusion.

The cartoon "Making the World Safe for Capitalism" shows a Russian absorbed in studying a paper marked "Plans for a Genuine Democracy." On one side of him Japan and England appear in a threatening attitude, and on the other Mr. Root and Mr. Russell, members of the commission sent by the United States to Russia, appear in the guise of advisers. Mr. Root has in his hands a noose, labeled "Advice," with which it is intended to entrap or choke to death the Russian Democracy. The court cannot say that the Postmaster General was not warranted in concluding that this cartoon was intended to arouse the resentment of some of our citizens of foreign birth and prevent their enlistment.

In the cartoon "Congress and Big Business" Congress is represented by a disconsolate individual who is ignored by a number of overdeveloped men of Big Business gathered around a table inspecting a large paper spread over it and labeled "War Plans." Congress is quoted as saying: "Excuse me, gentlemen, where do I come in?" "Big Business" replies: "Run along now; we got through with you when you declared war for us." This cartoon is intended to stir up class hatred of the war and to arouse an unwillingness to serve in the military and naval forces of the United States. The clear import is, if the war was brought on by "Big Business," then let "Big Business" carry it on, and let Labor stand aloof. The court cannot say that the Postmaster General was clearly wrong in concluding that it would interfere with enlistments.

[9] In the case at bar, giving to the complainant the most favorable construction, the burden is upon it to overcome the presumption that the Postmaster General's conclusion is right, or that he has exceeded his power or exercised it wantonly or maliciously. See Judge Mayer's opinion in Sanden v. Morgan (D. C.) 225 Fed. 266, 269 (1915). This the complainant should do by a preponderance of evidence. And this the complainant has not done.

[10] It may be conceded that the language of the statute cannot have one meaning in an indictment and another when the question arises respecting the exclusion of matter from the mail as containing that which violates the provisions of section 3 of title 1. If the magazine is nonmailable under that section, it may be that the editor has committed a crime in publishing it, for which, upon conviction, he may be fined not more than $10,000, or imprisoned for not more than 20 years, or both. The District Judge thought no crime had been committed, and that the magazine was therefore mailable, because

the publication did not in so many words directly advise or counsel a violation of the act. He declared that:

"If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that, by such language, Congress had no such revolutionary purpose in view."

This court does not agree that such is the law. If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may willfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest, seems to us too plain for controversy. To obstruct the recruiting or enlistment service, within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient. In granting the stay of the injunction until this case could be heard in this court upon the appeal Judge Hough declared that:

"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.'"

With this statement we fully agree. Moreover, it is not necessary that an incitement to crime must be direct. At common law the "counseling" which constituted one an accessory before the fact might be indirect. See Wharton's Criminal Law (11th Ed.) § 266. Bishop lays down the rule thus:

"Every man is responsible criminally for what of wrong flows directly from his corrupt intentions. * * * If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." 1 Bishop on Criminal Law, § 641.

And in Regina v. Sharpe, 3 Cox's C. C. 288, it is laid down that:

"He who inflames people's minds and induces them by violent means, to accomplish an illegal object, is himself a rioter, though he take no part in the riot."

In conclusion, we are satisfied that the publication involved contains no matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, in violation of section 2 of title 12. The Postmaster General's exclusion of the publication from the mails is not put on the ground that it contained any such matter. It is not so clear that the publication is free from matter which involves an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States.

The Postmaster General thought it contained matter objectionable on that ground, and a difference of opinion upon that phase of the matter is possible.

The question whether the publication contained matter intended willfully to obstruct the recruiting or enlistment service is less doubtful. Indeed, the court does not hesitate to say that, considering the natural and reasonable effect of the publication, it was intended willfully to obstruct recruiting; and even though we were not convinced that any such intent existed, and were in doubt concerning it, the case would be governed by the principle that the head of a department of the government in a doubtful case will not be overruled by the courts in a matter which involves his judgment and discretion, and which is within his jurisdiction.

The order granting the preliminary injunction is reversed.

WARD, Circuit Judge (concurring). I think the sole ground on which the order of the Postmaster General can be sustained is that some parts of the August number of The Masses were intended to obstruct and do obstruct the recruiting or enlistment service of the United States. This involves a conclusion of fact to be drawn by him from the cartoons and text of this particular number. Advice to resist the law may be indirect as well as direct, and the conclusion of the Postmaster General in matters of fact, whether we agree with him or not, is final. I think it important, however, to say that not every writing, the indirect effect of which is to discourage recruiting or enlistment, is within the statute. In addition to the natural effect of the language on the reader, the intention to discourage is essential. Arguments in favor of immediate peace, or in favor of repealing the Conscription Act, do this indirectly. It is, notwithstanding, the constitutional right of every citizen to express such opinions, both orally and in writing, and Congress cannot be presumed to have intended by the Espionage Act to authorize the Postmaster General to exclude such articles, written honestly and without the intention of advising resistance to the law. His authority in the premises depends exclusively upon the statute, as was well stated by Mr. Justice Peckham in American Magnetic School of Healing v. McAnnulty, 187 U. S. 109, 23 Sup. Ct. 39, 47 L. Ed. 90.

"Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and, if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, arguendo, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact."

HAMMOND v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. October 25, 1917.)

No. 2503.

1. PUBLIC LANDS ⟸13—CUTTING TIMBER—QUESTIONS FOR JURY—TRUTH OF TESTIMONY.

Where there were circumstances and matters of fact testified to which, if true, tended to show that cutting of timber from public land was done by defendant or under his direction, whether the testimony was true was a matter for the jury to determine.

2. PUBLIC LANDS ⟸13—CUTTING TIMBER—DIRECTION OF VERDICT.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099, as amended by Act March 3, 1891, c. 559, 26 Stat. 1093 (Comp. St. 1916, § 4992), provides that in certain states, in any civil action for trespass on public timber lands or to recover timber or lumber cut therefrom, it shall be a defense that it was cut or removed by a resident of the state for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the state; the amendatory act requiring that the cutting be under rules prescribed by the Secretary of the Interior. Act June 3, 1878, c. 150, 20 Stat. 88 (Comp. St. 1916, §§ 4989–4991), authorizes bona fide residents of certain states to cut and remove timber from public lands, such lands being mineral and not subject to entry, except mineral entry, subject to rules and regulations prescribed by the Secretary of the Interior. *Held* that, where defendant, charged with cutting timber from public land, introduced evidence tending to show that the lands were mineral lands, and that the party doing the cutting had complied with the rules established by the Secretary of the Interior, and sought a verdict in his favor on the ground that the cutting was authorized under the act of 1878, the court did not err in refusing to direct a verdict on the ground that the cutting was justified under the acts of 1891 which relate to timber lands, and not to mineral lands, especially where there was testimony tending to show trespasses subsequent to March 3, 1891.

3. APPEAL AND ERROR ⟸273(5)—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF SPECIFIC EXCEPTION.

To entitle an appellant to call in question instructions given by the trial court, the exceptions thereto must be sufficiently specific to direct the court's attention to the particular errors complained of, to the end that the court may correct the error, should one be found to exist, before the retirement of the jury.

4. APPEAL AND ERROR ⟸274(5)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EXCEPTION.

In an action for the value of timber cut from public land, the court charged that, if defendant knowingly and willfully cut and converted the timber, plaintiff was entitled to the market value of the timber at the time of its disposal or sale, that if defendant acted under the honest, but mistaken, belief that he had a right to cut the timber, then in assessing the damages the jury would fix the value at the time of conversion less the amount added to its value before sale, or, in other words, if there was added certain value by reason of manufacturing the timber into lumber, then the measure of damages would be the difference between the expenses incurred in manufacture and the selling price, and that in fixing the amount of the verdict the jury should include interest on the value of the lumber from the date of conversion. Defendant excepted "to the measure suggested by the court," adding that defendant claimed that the only measure was the value of the stumpage in the tree, and that the instructions added another element to this value, and also excepted to the instructions "with regard to interest." *Held*, that the exception was dis-

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

*Rehearing denied February 11, 1918.

tinctly based on the contention that the only measure of damages was the value of the stumpage, and that the court was in error in instructing that the jury were authorized to award anything above this amount and in instructing them to add interest.

5. PUBLIC LANDS ⟸13—CUTTING TIMBER—MEASURE OF DAMAGES.

Where a person, without any intention to violate any law or do any wrongful act, cuts and removes timber from public lands in the honest, though mistaken, belief that he has the right to do so, the measure of damages is the value of the timber after it was cut at the place where it was cut, and not the difference between the expenses incurred in manufacturing it into lumber and the price for which the lumber was sold, which would include all profits on the lumber.

6. DAMAGES ⟸208(9)—INTEREST—DISCRETION OF JURY.

In an action for the value of timber cut from public land in Montana, where under the existing statutes no interest was recoverable in actions for conversion, whether interest should be included in the damages was in the discretion of the jury, and the court erred in directing the jury as a matter of law to allow interest, especially where the government waited 17 years before bringing suit.

Gilbert, Circuit Judge, dissenting.

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 the United States against A. B. Hammond. Judgment for plaintiff (226 Fed. 849), and defendant brings error. Reversed and remanded.

This action was brought by the United States to recover the value of certain timber alleged to have been cut and removed from certain specifically described public lands of the United States situate in the state of Montana—the complaint as amended alleging that from time to time during the year 1885 down to and including the year 1894 the defendant to the action (plaintiff in error here), acting as the general manager of certain corporations of the state, known, respectively, as the Montana Improvement Company, Limited, Blackfoot Milling & Manufacturing Company, Missoula Mercantile Company, and Big Blackfoot Milling Company, without any right so to do, entered upon the said lands and cut and caused to be cut down certain of the timber then standing thereon, and to be removed and manufactured into 21,185,410 feet, board measure. of lumber, and converted and caused to be converted to his own use and that of the said corporations the whole thereof, all the time well knowing that the said timber and lumber was the property of the government, and that neither he nor the said corporations had any right whatever to any thereof. The complaint alleged that the value of the timber while standing was $1 per thousand feet, board measure, $5 per thousand feet, like measure, after being felled and prepared for sawing into lumber, and $10 per thousand feet, board measure, after being manufactured into lumber; and alleging that the corporations named ceased to exist subsequent to the commission of the acts complained of, and that the said acts were directed by the defendant to the action, the plaintiff prayed judgment against him for $211,854.10, being at the rate of $10 a foot for the lumber alleged to have been so manufactured from the timber alleged to have been so cut and removed from the plaintiff's lands.

There having been a verdict in favor of the plaintiff for $51,040, and judgment accordingly against the defendant for that sum, with costs taxed at $1,617.49, the latter has brought the case here by writ of error; the chief points made in his behalf being that the evidence in the case wholly failed to sustain the material allegations of the complaint (all of which were put in issue by the answer of the defendant), and therefore that the court below erred in

refusing his motion for a directed verdict in his favor, and, further, that error was committed by the trial court in the matter of the measure of damages properly applicable to the case, including the question of interest.

Charles S. Wheeler and W. S. Burnett, both of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Frank Hall, Sp. Asst. to Atty. Gen., both of San Francisco, Cal.

E. S. Pillsbury and Oscar Sutro, both of San Francisco, Cal., amici curiæ.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

ROSS, Circuit Judge (after stating the facts as above). The object of the government's attorney in alleging in the complaint the value of the timber while standing, as well as its value after being felled and prepared for sawing, and after being made into lumber, obviously was to enable the plaintiff to recover the amount of damages the law fixes as the proper measure, in view of the facts of the case and in the event the evidence should establish its right to recover from the defendant at all, which measure, it is well settled, depends upon whether the wrong alleged was willfully or innocently committed, the condition of the property at the time of the alleged conversion, and the then status of the defendant to the action. Woodenware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; Pine River Logging Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164; United States v. St. Anthony R. R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548.

The evidence shows that a portion of the public lands from which the timber in question was cut is situate along the Hell Gate river and the other portion along the Blackfoot river; the one portion being more than 20 miles from the other. It is not contended that either the Blackfoot Milling & Manufacturing Company or the Big Blackfoot Milling Company had anything to do with the cutting of any of the timber upon any of the government lands situate along the Hell Gate river; but it is claimed in behalf of the government that the defendant to the action caused it to be cut through his control of the Montana Improvement Company and the Missoula Mercantile Company; and *that* he strenuously denies.

The former corporation was the successor in interest of a partnership called E. L. Bonner & Co., composed of the defendant Hammond, E. L. Bonner, J. H. Robertson, and R. A. Eddy, and the Missoula Mercantile Company was the successor in interest of a partnership called Eddy, Hammond & Co., composed of the defendant Hammond, R. A. Eddy, and E. L. Bonner. The latter firm was formed in 1876, and engaged in a general merchandise business in the then small town of Missoula. The firm of E. L. Bonner & Co. was a contracting one, to which the Northern Pacific Railroad Company gave a contract to clear 250 miles of its right of way in Montana when engaged in building its road through that state; the firm being appointed agent of the road to enter upon the public lands and there cut the ties, piling, and timber

necessary for the construction of the road, including its bridges, stations, etc. When the road was completed in 1882 the Montana Improvement Company was organized, 51 per cent. of the stock of which was taken by the railroad company; the remainder being taken by various persons, including the members of the firm of E. L. Bonner & Co. (the defendant Hammond taking one-fifteenth of such stock), pursuant to a contract made between the respective parties, and pursuant to which contract Bonner & Co. transferred to the improvement company all of the mills which the firm had used in supplying the railroad company with timber and lumber in the construction of its road, together with the surplus lumber that the firm had accumulated in the prosecution of that work; and the improvement company also acquired by the contract the right to cut timber upon all of the lands of the Northern Pacific Company within the state of Montana.

It appears from the record in the case, as well as from litigation that subsequently arose between the government on the one side and the Northern Pacific Railroad Company and the Montana Improvement Company on the other, that the organizers of the latter company supposed that by the contract mentioned the company acquired the right, not only to cut timber from the lands of the railroad company, but also had by virtue of the act of Congress of June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the territories to fell and remove timber on the public domain for mining and domestic purposes" (20 Stat. 88), the right to cut like timber, not only from the mineral lands of the United States, but also on the other lands of the government lying in close proximity thereto and having the general character of mineral lands. Accordingly in the year 1883 it undertook the construction of a dam in the Blackfoot river, with a view of building a mill there for sawing the lumber from the timber it contemplated cutting from all of those lands. The mill was built, and when the company commenced cutting the timber it soon found the government questioning the rights asserted by the railroad company as well as itself (United States v. N. P. R. R. Co., 140 U. S. 703, 11 Sup. Ct. 1030, 35 L. Ed. 593; Id., 6 Mont. 361, 12 Pac. 769), and concluded to wind up and liquidate its affairs. Among its properties was the sawmill so built, which mill it sold in the fall of 1885 to F. A. Hammond, a brother of the defendant to this action, agreeing to move and install it for the purchaser in Hell Gate Canyon, which it did, and F. A. Hammond then proceeded to operate the mill in the sawing, among other timber, of such as he cut from the government lands along the Hell Gate river, until the sale by him within a few months, to wit, in May, 1886, of all of his interest to George W. Fenwick, who was a brother-in-law of the Hammonds. From the time of such sale Fenwick operated the mill in the sawing, among other timber, of such as he also cut from those government lands.

In 1885 the Missoula Mercantile Company was incorporated, of whose stock the defendant, A. B. Hammond, acquired and thereafter held one-third, and of which company he was a director. His testimony is positive to the effect that he never, either directly or indirectly, had any interest in the mill, business, or property of either F. A. Hammond or of Fenwick in the Hell Gate region, or participated in

any of its profits, or gave any directions with respect thereto; and such also is the testimony of Fenwick. And the defendant also testified that the Missoula Mercantile Company had no interest in any of the property or business of Fenwick, or in the profits thereof, although it is admitted that he received his supplies from the Mercantile Company, being one of its customers, and that he also had an office in its store building. At the time of the alleged cuttings of timber on the public lands along the Hell Gate river those lands were unsurveyed. Not so, however, as respects those situate along the Blackfoot. They had been surveyed; the odd sections cut over being owned by the Northern Pacific Railroad Company, and the even sections by the United States.

Henry Hammond, another brother of the defendant, had, in July 1885, acquired from the Montana Improvement Company the dam and dam site on the Blackfoot river (or what remained of the dam after a flood which destroyed it in part), and he proceeded to build a sawmill there, known as the Bonner mill, which mill he proceeded to operate for the sawing of timber cut by him on lands situate along the Blackfoot river, until, in 1888, he conveyed all of his interest to the Blackfoot Milling & Manufacturing Company, receiving for such interest one-fourth of the stock of that corporation; the defendant, A. B. Hammond, owning one-fifth of such stock. One of the conditions of such conveyance was that Henry Hammond should continue to operate the mill under lease from the Blackfoot Milling & Manufacturing Company for a certain term, with the privilege of an extension, which, in his testimony, he claims to have done; the books being kept at Missoula. During the year 1891 the Big Blackfoot Milling Company acquired the property and business interests of the Blackfoot Milling & Manufacturing Company; Henry Hammond becoming its president and manager and the owner of one-fourth of its stock. He so remained until about the close of 1895, when all of the property was sold by the Big Blackfoot Milling Company to a third party—the Anaconda Company.

The testimony of Henry Hammond is positive to the effect that, during all of the time he was operating both individually and as lessee, the defendant, A. B. Hammond, had no interest, directly or indirectly, in any of the property or the profits thereof, and that, during the time of the ownership of the property by the Big Blackfoot Milling Company and its operation under the presidency and management of the witness, the defendant, A. B. Hammond, had no interest, directly or indirectly, in his quarter or in the profits thereof. It is not disputed that during the aforesaid operations of Henry Hammond some timber was cut upon some of the public lands along the Blackfoot river that are described in the complaint; but it is insisted that the evidence shows that the defendant, A. B. Hammond, not only had nothing to do with such cutting, but that such of the timber as was cut upon the public lands by Henry Hammond, individually and as president and manager of the Big Blackfoot Milling Company, was cut through inadvertence and not intentionally.

[1] It is hardly necessary to say that all of the material questions of fact as to which there was substantially conflicting evidence were for the exclusive determination of the jury. And while it is very

earnestly insisted on behalf of the appellant that there was no substantial testimony tending to show that any of the cutting of timber upon the lands of the United States for which the action was brought was done by or under his direction, and that, therefore, he was entitled to a directed verdict in his favor, we cannot, after a very attentive examination of the record, so hold. These are circumstances, as well as matters of fact testified to, which, if true (and that of course was for the jury to determine), tended to support the contention of the government, and to sustain the verdict of the jury finding the defendant liable for the unlawful trespasses and conversions. It would serve no useful purpose to specify them, and therefore we pass to the remaining questions—the measure of damages as declared in the instructions of the court, the question of interest, and the contention on behalf of the plaintiff in error that a statute passed by Congress March 3, 1891, constitutes a complete defense to the action, and that the court should have so instructed the jury.

The instruction which is the basis of the latter contention, and which was requested and refused, is in these words:

"I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant."

The law relied upon by the plaintiff in error in support of the contention is found in section 8 of the first of the two acts passed March 3, 1891 (26 Stat. 1099), which, so far as pertinent to the case, is as follows:

"In the states of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the district of Alaska and the gold and silver regions of Nevada, and the territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such state or territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same."

The title of that act is:

"An act to repeal timber-culture laws and for other purposes."

By a second act passed the same day (26 Stat. 1093) and entitled "An act to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled 'An act to repeal timber culture laws and for other purposes,'" Congress so amended the said provision of section 8 as to read:

"In the states of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and in the district of Alaska, and the gold and silver regions of Nevada and the territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such state or territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, * * * but this act shall not operate to repeal the act of

June third, eighteen hundred and seventy-eight: providing for the cutting of timber on mineral lands." Comp. St. 1916, § 4992.

It will be readily seen that by the first of those two acts it is made a defense if the defendant shows that the timber was cut or removed for use in the state or territory where the lands are situated, by a resident thereof, for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same; and by the second of the acts it is made a defense if the defendant shows that the timber was cut or removed for use in the state or territory where the lands are situated, by a resident thereof, for agricultual, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same.

The defendant pleaded in his answer that the timber which was cut and removed from the public lands along the Hell Gate river was so cut and removed under and by virtue of the permission granted in and by the act of Congress of June 3, 1878 (1 Supp. to R. S. 1874–1891, p. 166, 20 Stat. 88 [Comp. St. 1916, § 4989]), which provided, among other things:

"That all citizens of the United States and other persons, bona fide residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: Provided, the provisions of this act shall not extend to railroad corporations."

[2] As will be seen, the public lands from which timber was permitted to be cut by the act just quoted from were mineral lands; and upon the trial of the case the defendant introduced evidence tending to show that the lands situated along the Hell Gate river were mineral lands within the meaning of that act, and that Fenwick had complied with its provisions and with the rules established thereunder by the Secretary of the Interior. Having done so, and thus claimed from the jury a verdict in his favor in so far as those lands were concerned, on the ground that the act of June 3, 1878, authorized the cutting complained of, we think it manifest that the trial court did not err in refusing to direct a verdict for the defendant because of section 8 of the acts of March 3, 1891, supra, for both of those acts related, not to mineral, but to timber, lands; the second and supplemental one expressly declaring that it should "not operate to repeal the act of June 3, 1878, providing for the cutting of timber on mineral lands." Moreover, while the first of the acts passed March 3, 1891, was clearly a bar to the action for such of the timber as was shown to have been theretofore cut by or under the directions of the defendant from the timber lands of the government for use in Montana for agricultural, mining, manufacturing, or domestic purposes, and that had not been

transported out of the same, the court could not with propriety have given the instruction requested; there being testimony given tending to show such trespasses on the lands of the plaintiff subsequent to March 3, 1891.

Upon the question of the measure of damages, the instruction to the jury was as follows:

"If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and willfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted, in whatever condition or form it may have been at the time of its disposal or sale.

"If you find that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest, but mistaken, belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant, and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacture of said lumber and the price for which it was sold in the market.

"In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time."

To that instruction the counsel for the defendant excepted in these words:

"Next, as to the measure of damages: We except as to the measure suggested by the court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your honor's instructions add to it another element.

"I also except to your honor's instructions with regard to interest."

[3] It is insisted on behalf of the government that the exceptions were not sufficiently specific; and it was so held by the trial court in denying the motion that was made by the defendant for a new trial. The rule is established by decisions almost innumerable that, to entitle an appellant to call in question instructions given by a trial court to the jury, the exception or exceptions taken thereto must be sufficiently specific to direct the attention of the court to the particular error or errors complained of, to the end that the court may correct the error, should one be found to exist, before the retirement of the jury. One of the cases in the Supreme Court upon the subject is that of McDermott v. Severe, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162, where the trial court gave this instruction upon the question of damages, to which a general exception was taken:

"The jury are instructed that, if they find a verdict for the plaintiff, they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put, during the remainder of his life, in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg; and for such pecuniary loss, as the direct result of the injury, which the jury

may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

The Supreme Court said:

"The court's attention was not called to any particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections, which in fairness to the court ought to have been called to its attention, in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct, to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 86, 15 Sup. Ct. Rep. 491, 39 L. Ed. 624, 629.

"It is now objected that to permit a recovery for a pecuniary loss, as covered in the instructions, would allow the infant plaintiff to recover compensation for his time before as well as after he has reached his majority, and that during infancy his father is entitled to recover any wages he might earn. If the defendant wished the charge modified in this respect, he should have called the attention of the court directly to this feature. The charge in this respect was general, permitting a recovery for a pecuniary loss directly resulting from the injury. It would be very unfair to the trial court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal.

"Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. The court said: 'The jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg.' Where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it. It is not unlikely that the court might have given more ample instruction in this respect, had it been requested so to do. But what was said limited the compensation to the direct consequences of the physical injury."

The case of United States v. United States Fidelity & G. Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696, cited by the attorney for the appellee, was a suit upon a bond, tried without a jury, in which the government claimed to be entitled to recover as against the Guaranty Company, in addition to the penal sum mentioned in the bond, interest thereon from the date of the principal's default, or at least from the time when it was said the surety was notified of the default. The court said:

"The only exception taken in the trial court to furnish support for the present contention was: 'To the failure of said court to * * * decide that plaintiff is entitled to interest on the sum of $6,500 from the 1st day of September, 1905, and to the failure of the court to enter judgment against the defendant for such interest.' We do not think this is sufficient to attribute error to the trial court as for overruling a claim for interest on the penalty of the bond from the time of demand made upon the surety, or notice to it of the principal's default. No such point was raised. The claim that was made and overruled was for interest from the time of the default, irrespective of notice to the surety; and that presents a very different question of law.

"The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may

thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court"—citing cases.

See, also, the very recent decision of this court in Sam Yick v. United States, 240 Fed. 60, 65, — C. C. A. —.

[4] In the present case the exception of the defendant to the charge of the court as to the measure of damages and as to the right of the plaintiff to interest on any amount the jury might find the plaintiff entitled to was distinctly based upon the contention of the defendant that the only measure of damages that could exist under the case as presented was the value of the stumpage in the tree, and that the court was in error in instructing the jury that they were authorized to award the plaintiff anything above that amount, and in instructing them to add interest to any amount to which the plaintiff might be found entitled. That, in our opinion, is the obvious meaning of the language of the exceptions, and the only meaning to which it is fairly entitled.

It remains, therefore, to consider whether the instructions given upon those subjects were erroneous. In the brief of the counsel for the government it is said that it is "difficult to determine what rule of damages will apply in cases of innocent conversion," and that the proper measure to be applied in such cases declared by the Supreme Court in the case of United States v. St. Anthony R. R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 1164, "is wholly inconsistent with the rule adopted by the court in Woodenware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, and likewise the language of the Court in Pine River Logging Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164," but that in those cases "there is no expressed intention to overrule" the Woodenware Case.

[5] While the latter statement is quite true, the court in the St. Anthony Case did distinctly adjudge that any one who, without any intention to violate any law or to do any wrongful act, cuts and removes timber from the lands of the government in the honest, although mistaken, belief that he has the right to do so, is liable only for the "value of the timber after it was cut at the place where it was cut"—expressly distinguishing such a case from the Cases of the Woodenware Company and the Pine River Logging Company, and expressly declaring that "in both of those cases the parties doing the cutting did it willfully and in bad faith." 192 U. S. 524, 543, 24 Sup. Ct. 339, 48 L. Ed. 548. See, also, decisions of this court in United States v. Coughanour, 133 Fed. 224, 66 C. C. A. 278; United States v. Van Winkle, 113 Fed. 903, 51 C. C. A. 533; United States v. Teller, 106 Fed. 447, 45 C. C. A. 416; United States v. N. P. R. R. Co. (C. C.) 67 Fed. 890; United States v. Eccles (C. C.) 111 Fed. 491.

Such being the law, we can but regard as clearly erroneous the instruction of the court below to the jury that, although they should find "that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest, but mistaken, belief that he or they had the right under the law to cut and remove such timber" they should, in the event of a verdict for the plaintiff,

fix the value of the same at the difference between the expenses incurred in its manufacture and the price for which the lumber was sold—which, of course, included in the plaintiff's damages all of the profits derived by the defendant.

The verdict of the jury being for the lump sum of $51,040, it is manifestly impossible for the court to know the different elements entering into their calculation. For the appellant it is contended that:

They placed the stumpage value at $1 per thousand feet.

16,000,000 feet at $1 per thousand	$16,000.00
They took $1 per thousand feet as profit	16,000.00
They allowed interest from 1895 to 1912—17 years at 7 per cent.—equal to 119 per cent. on the stumpage value	19,040.00
Making a total of	$51,040.00

On the contrary, it is insisted on behalf of the government, and we think rightly, that the record furnishes no sufficient basis for that contention, and that the result arrived at by counsel is purely speculative. But that the jury *may* have reasoned in the same way clearly shows the harm that may have resulted to the defendant from the erroneous instruction given respecting the measure of damages.

[6] In the case of United States v. St. Anthony R. R. Co., supra, the Supreme Court, in directing the entry of judgment in favor of the government for the value of the timber after it was and at the place it was cut, allowed the government no interest on the amount for which judgment was directed; and that judgment of the Supreme Court is strongly relied upon by the appellant here as showing error on the part of the court below in directing the jury to include interest from the time of conversion to the time of the verdict. But the most that can be claimed by the appellant for that case as regards interest is the silence of the court; for the question does not appear to have been suggested or considered.

In the case of White et al. v. United States, however, decided by the Circuit Court of Appeals for the Fifth Circuit (202 Fed. 501, 121 C. C. A. 33), where the intestate of the plaintiffs in error was a willful trespasser upon lands of the government, and cut timber thereon which was manufactured into lumber, and for which the government was given a verdict and judgment for the full value of the lumber at the time of its conversion, with interest from the date of conversion to the date of the trial of the action—a period of 13 years—the court held that the recovery of the plaintiff should have been without interest, saying:

"Interest in actions of tort in the federal courts is not allowable as a matter of right; but its allowance, as part of plaintiff's damages, is discretionary with the jury. Eddy v. Lafayette, 163 U. S. 448–467 [16 Sup. Ct. 1082, 41 L. Ed. 225]. The jury were not instructed by the court below that they possessed any such discretion, and probably included interest in their verdict upon the idea that the plaintiff was entitled to it as matter of right, and not of discretion. It is true the plaintiffs in error do not assign error because of this omission of the court, but a plain error may be noticed by us, in the absence of any assignment. In view of the long and unexplained delay on the part of the government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest."

Counsel for the government say that the case of Eddy v. Lafayette, 163 U. S. 456, 16 Sup. Ct. 1082, 41 L. Ed. 225, where the Supreme Court declared that "undoubtedly the rule, in cases of tort, is to leave the question of interest as damages to the discretion of the jury," is distinguishable from the present one for the reason that there was in that case "nothing showing that the railroad company had benefited by its tort, while in the case of conversion of personal property interest is allowed upon the theory that the estate of the tort-feasor has been enriched, and that between the time of conversion and the rendition of judgment he has had the use and benefit of the property converted."

We agree that the case of Eddy v. Lafayette is distinguishable from the present one in the respect stated by the counsel for the government; still the Circuit Court of Appeals for the Fifth Circuit in White et al. v. United States—a case precisely similar to the present one—did distinctly hold, not only that it is a matter for the discretion of the jury whether or not interest should be allowed on the amount of damages found, but that the exercise of a proper discretion would deny such interest where, as there, there was an unexplained delay of 13 years on the part of the government in instituting the suit. In the present case there was a delay of about 17 years.

At common law:

"In actions for conversion, the measure of damages is ordinarily the value of the goods. * * * Interest may be allowed in addition to the value of the goods at the time of conversion if the jury think fit." Halsbury's Laws of England, vol. 10, pp. 344, 345.

In Lincoln v. Claflin, 7 Wall. (74 U. S.) 132, 19 L. Ed. 106, which was an action for the fraudulent obtaining and conversion of the property of the plaintiffs, the Supreme Court said:

"It is possible that the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury."

And in United States v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112, where the government, after a delay of more than 10 years sued to recover back money paid to the defendant, the same court said:

"More than ten years elapsed after the payment to Sanborn before his right to retain the money was questioned by suit or otherwise. When the facts, disclosed by the evidence, were first discovered by the officers of the government whose duty it was to institute legal proceedings against the defendant, does not appear. It is entirely consistent with the record that the long delay which occurred is without excuse. In Redfield v. Ystalyfera Iron Co., 110 U. S. 174 [3 Sup. Ct. 570, 28 L. Ed. 109], the question was whether the plaintiff was entitled under the circumstances of that case, to recover interest, the action being against a collector, to recover damages for an illegal exaction of customs dues. The court, after observing that interest is recoverable as of right, when reserved expressly in the contract, or when implied by the nature of the promise, said: 'But where interest is recoverable not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly with-

held.' We think that the same rule should be applied against the government when, in a case like the present one, it has long delayed an assertion of its rights, without showing some reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him."

In District of Columbia v. Robinson, 180 U. S. 93, 21 Sup. Ct. 283, 45 L. Ed. 440, which was an action against the government for alleged trespasses upon the plaintiff's land, and digging and carrying away certain gravel, the trial court at the request of the plaintiff gave this instruction:

"If the issues joined upon both of the defendant's pleas, which issues are submitted to the jury, are found by them in favor of the plaintiffs, then they are instructed that they may assess such damages in favor of the plaintiffs as they believe from the evidence would make the plaintiffs whole, and may [include] enhance the damages by any sum not greater than the interest on the amount from August 28, 1882, when this action was brought, to the time of this trial [as part of the plaintiffs' damages], if the jury [see fit to include such interest as damages, and may consider the time during which the plaintiffs and their testator were kept out of their money between those dates] shall find from the evidence that such allowance would be reasonable and just."

The Supreme Court, in passing upon the objection to the instruction, said:

"The objection is to the interest. It is not claimed that in cases of tort interest may not be allowed in the discretion of the jury. It is asserted that under the circumstances of the case the court should not have submitted the claim of interest to the jury. But it was the plaintiffs' right to have invoked the exercise of the discretion of the jury, and the circumstances of the case were to be considered by it in exercising such discretion, and presumably were considered."

In the comparatively recent case of Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606, which was an action for the conversion of certain cattle in the then territory of Oklahoma, the statute of which territory provided that "the detriment caused by the wrongful conversion of personal property is presumed to be, first, the value of the property at the time of the conversion, with interest from that time," the Supreme Court said:

"It may be that in the absence of statute the general rule is that in actions for tort the allowance of interest is not an absolute right (Lincoln v. Claflin, 7 Wall. 132 [19 L. Ed. 106]; The Scotland, 118 U. S. 507 [6 Sup. Ct. 1174, 30 L. Ed. 153]; District of Columbia v. Robinson, 180 U. S. 92 [21 Sup. Ct. 283, 45 L. Ed. 440]; Frazer v. Bigelow Carpet Co., 141 Mass. 126 [4 N. E. 620]), but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other states have done the same."

In the present case it is undisputed that under the Montana statutes existing during the time of the conversions complained of no interest was recoverable. It results from what has been said that the court below erred in directing the jury as matter of law to allow interest on the value of the property. We are of the opinion that that question should have been left to the discretion of the jury, to be determined by them in view of all the facts and circumstances of the case.

The judgment is reversed, and the case remanded to the court below for a new trial.

GILBERT, Circuit Judge (dissenting). I am unable to agree that the judgment should be reversed for errors in the instructions. The rule of damages as established by the Woodenware Case and Pine River Logging Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164, is that:

"Where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."

The present case is brought by the pleadings within the second clause of this rule, for the complaint alleges that the conversion occurred after the logs had been manufactured into lumber, and therefore after value had been added to it by the work of the defendant. The judge of the court below evidently took this view of the law applicable to the case, and instructed the jury that in assessing the damages they should fix the value of the timber at the time of conversion, "less the amount which was added to its value before sale," and explained the charge by saying:

"In other words, if you find that timber was so cut and removed from lands of complainant, and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market."

No objection was taken to the charge on the ground that the selling price was not evidence of value. The sole objection was that the only permissible measure of damages was the value of the "stumpage in the tree," and that the instructions had added to that measure "another element." But the cases above cited hold that the stumpage value is not the criterion in a case in which conversion is alleged to have occurred after the logs have been converted into lumber. In the Woodenware Case the court cited with approval Winchester v. Craig, 33 Mich. 205, in which the Michigan court said:

"The court under one branch of the charge instructed the jury to allow the market value at Detroit, or Toledo, less the sum of money which defendants expended in bringing it to market. This, we think, was as favorable as the plaintiff had any right in this case to expect. This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit upon what they had done, but protected them to the extent of the advances they had made; and this, we think, was correct."

The doctrine of that decision was reaffirmed in Anderson v. Besser, 131 Mich. 481, 91 N. W. 737, in which the court held that where the defendant cut the timber from plaintiff's land in good faith, under belief of title, and removed it to the railroad and sold it, the measure of damages in an action of trover therefor was the market value of the logs at the place of sale, less the reasonable cost of cutting and hauling. The latest expression of the Supreme Court of the measure of damages in such a case as this is found in United States v. St. Anthony R. R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548, a case in

which timber had been cut in good faith on government land. The court said:

"We think the measure of damages should be the value of the timber after it was cut at the place where it was cut."

The court there rejected the value of stumpage in the tree as the measure of damages, and expressly affirmed that the measure of damages was the value of the timber after value had been added thereto by the labor and expense of cutting the same. That decision distinctly meets and conclusively answers the exception, and the only exception, of the defendant to the instruction on the measure of damages in the present case. It was followed in adopting a rule of damages in United States v. Denver & R. G. R. Co. (C. C.) 190 Fed. 825.

As to the alleged error in the instruction of the court on the question of interest, I think that the exception taken by the defendant was clearly insufficient to direct the attention of the court below to the point which is now presented to this court. The exception was:

"I also except to your honor's instruction with regard to interest."

As was pointed out in the opinion of the court below in denying the motion for a new trial (226 Fed. 852), the instruction covered two distinct propositions: First, the right of the plaintiffs to recover interest; and, second, the rate at which it was to be estimated. If at that time it was the intention of counsel for the defendant to raise the objection that the question whether interest should be allowed should have been left to the determination of the jury, the attention of the court should have been directed to that precise point. The proposition that the allowance of interest was discretionary with the jury was not presented to the court at that time, or at any time on the trial of the cause in the court below. It is not to be doubted that, if the precise objection had been pointed out and the authorities cited, the court below would have given appropriate instructions. Counsel at the conclusion of a trial ought not to be permitted to hold back an important point of objection to an instruction, and thereby mislead the trial court and secure a reversal on appeal.

ANGELUS v. SULLIVAN et al.

(Circuit Court of Appeals, Second Circuit. October 22, 1917.)

No. 130.

1. ARMY AND NAVY ⟸20—COMPULSORY SERVICE AND DRAFTS—STATUTORY PROVISIONS.

The Conscription Act of May 18, 1917, c. 15, is within the express power conferred on Congress by Const. art. 1, § 8, to raise and support armies, as the Constitution does not prescribe the mode in which the powers shall be exercised, but confers it fully, completely, and unconditionally, and it is for Congress to determine the means by which the armies shall be raised.

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

2. CONSTITUTIONAL LAW ⟸83(2)—PERSONAL RIGHTS—PROHIBITION OF INVOLUNTARY SERVITUDE.

The Conscription Act of May 18, 1917, does not violate Const. Amend. 13, providing that neither slavery nor involuntary servitude, except as punishment for crime, shall exist within the United States, as the purpose of that amendment is to abolish slavery and make peonage impossible, and men drafted into the military or naval service are not held in slavery nor involuntary servitude within that amendment.

3. CONSTITUTIONAL LAW ⟸62—DELEGATION OF LEGISLATIVE POWERS TO EXECUTIVE.

The Conscription Act of May 18, 1917, is not unconstitutional as delegating to the President the power to raise armies, as Congress has authorized the President to resort to conscription, and has determined the class of persons who shall be subject to it, and it is within the power of Congress to give the President a discretion in respect to specified matters, the distinction being whether the power to make a law has been delegated, or whether authority or discretion as to its execution, to be exercised under and in pursuance of the law, has merely been conferred.

4. CONSTITUTIONAL LAW ⟸318—DUE PROCESS OF LAW—PROCEEDINGS UNDER CONSCRIPTION ACT.

Conscription Act May 18, 1917, § 4, providing for the creation of local and district boards, with jurisdiction to hear and determine all questions of exemption, and providing that their decisions shall be final, except that the President may affirm, modify, or reverse any such decision in accordance with rules and regulations prescribed by him, does not deny due process of law to a person asserting a right of exemption as an alien who has not declared his intention to become a citizen, as due process of law does not in every case require a judicial trial.

5. ARMY AND NAVY ⟸20—COMPULSORY SERVICE AND DRAFT—REVIEW BY COURTS.

Under Conscription Act, § 2, excluding aliens who have not declared their intention to become citizens from the persons subject to draft, section 4 providing for the creation of boards to pass on questions of exemption and making their decisions final, and the presidential regulations promulgated June 30, 1917, where a person claiming a right of exemption as an alien, who has not declared his intention to become a citizen, was given a full hearing by the local and district boards, and such boards did not reject or refuse to consider any evidence that he was entitled to present, their decision against the claim of exemption was final and could not be interfered with by the courts.

6. ARMY AND NAVY ⟸20—COMPULSORY SERVICE AND DRAFTS—REVIEW BY COURTS.

A decision of the boards created under the Conscription Act on a question of exemption is final only where the board has proceeded in due form, and the party involved is given a fair opportunity to be heard and to present his evidence, and if an opportunity to be heard is denied, or if the proceedings of the boards are without or in excess of their jurisdiction, or so manifestly unfair as to prevent a fair investigation, or if there has been a manifest abuse of the discretion with which they are invested, the aggrieved party has a right to go into the courts for the protection of his rights.

7. CERTIORARI ⟸16—RIGHT TO REMEDY—DECLARATION THAT DECISION SHALL BE FINAL.

The law courts have a general superintending control by certiorari over all inferior tribunals acting in a judicial or quasi judicial character, and jurisdiction is not entirely taken away by a statute declaring that the judgment of the inferior tribunal shall be final.

8. HABEAS CORPUS ⇐16—NATURE OF RESTRAINT—MILITARY AUTHORITY.
An individual restrained of his liberty by a decision of an executive officer or board declared final by statute may nevertheless be entitled to a writ of habeas corpus upon a proper showing, and, where a board denies a full and fair hearing to an individual claiming an exemption from military service under the Conscription Act, he may, if restrained of his liberty, sue out a writ of habeas corpus and obtain his liberty.

9. INJUNCTION ⇐94—PERSONAL RIGHTS—ADEQUACY OF REMEDY AT LAW.
A person denied a full and fair hearing on his claim of exemption under the Conscription Act is not entitled to an injunction restraining the local board, and all persons claiming to act in their authority, direction, or control, from certifying his name to the military authorities for military service, and directing them to grant him the exemption claimed, as courts of equity do not enforce mere personal rights as distinguished from property rights, there being a full and adequate remedy at law for the redress of wrongs to the person.

10. INJUNCTION ⇐7—EXISTENCE OF OTHER REMEDY—CERTIORARI.
Courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior quasi judicial tribunals on matters properly pertaining to their jurisdictions, and do not review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law by certiorari.

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

Suit by John Angelus against John Sullivan and others, as members of the Local Board for Division No. 155 of the City of New York, state of New York. From an order dismissing the bill of complaint, complainant appeals. Affirmed.

Charles Recht, of New York City, for appellant.

Francis G. Caffey, U. S. Atty., of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This suit was instituted for the purpose of securing a review in the courts of the action taken by the local and district exemption boards created under an act of the Congress of the United States known as the Conscription Act, approved May 18, 1917.

The complainant alleges that he is a subject of Austria-Hungary, and that he arrived in the United States on November 10, 1913. He avers that neither he nor his father at any time made declaration of intention to become a citizen of the United States, and that he is therefore an alien who has not declared his intention to become a citizen. He charges that as such he is not subject to conscription under the provisions of the Conscription Act, which provides that aliens who have not declared their intention to become citizens are not subject to the draft provided for in the said act. He avers that he filed an affidavit in due form, claiming exemption from military service by reason of the fact of his being an alien who had made no declaration of his intention to become a citizen, and that the defendants, who constitute local board No. 155 of the city of New York, which division has jurisdiction over the district in which he resides, denied his application for exemption; and that upon appeal to the district board of the city of New York, which is the local board having jurisdiction of appeals

from local board No. 155, the finding of the local board was affirmed. He has accordingly been certified and ordered to report for military service. He asks an injunction enjoining the defendants, and all persons claiming to act in their authority, direction, or control, from certifying his name to the military authorities for military service, and that the defendants be directed to grant him the exemption from military service to which he is entitled under the act, and to strike his name from the list of persons certified to as subject to military service. An order was granted by a judge of the District Court directing the defendants to show cause why they should not be enjoined and restrained pendente lite. Upon the return of the order to show cause, a special appearance was filed for the defendants, and motion was made to dismiss the proceedings for lack of jurisdiction. The motion was granted. In granting the motion the District Judge said:

"I think Congress had no intention that the courts should interfere with this drafting proposition. It is a military measure in time of war, and it would be most subversive of military control and the proper disposition of this extremely difficult new problem if the courts should interfere in this situation. If Congress had intended that the courts should review the action of the local and district boards it would have so provided, and, unless an appellate court says to the contrary, I am of the opinion that a District Court of the United States should resolve any doubt in favor of the government; any other view might tend seriously to embarrass the work of raising an army, with its manifold difficulties and its tremendous detail. If those who believe they are entitled to exemption were able to apply to the courts, it would be a most disturbing situation and directly contrary to my understanding of the intent of Congress. Congress intended this to be an executive measure, to be carried out by the executive branch of the government, without interference of the courts."

The appeal is taken from this order, and the complainant claims not only that the Conscription Act is unconstitutional, but that the District Court has jurisdiction to grant the relief asked for in the complaint.

[1] This court has no doubt as to the constitutionality of the act of Congress. The Constitution, art. 1, § 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.

In May, 1777, the General Assembly of Virginia had passed a Conscription Act which had been drafted by Thomas Jefferson. Writ-

ings of Thomas Jefferson (Ford's Ed.) vol. 2, p. 123. And other of the colonies had resorted to like measures. The Constitution adopted by New York in 1777 declared, "It is the duty of every man who enjoys the protection of society to be prepared and willing to defend it." 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. Conscription was resorted to on both sides during the Civil War, and the validity of the draft laws was upheld by the courts in the North and in the South. McCall's Case, Fed. Cas. No. 8669 (1863); Lanahan v. Birge, 30 Conn. 438, 443 (1862); Kneedler v. Lane, 5 Phila. (Pa.) 485; Id., 45 Pa. St. 238 (1863); In re Griner, 16 Wis. 423 (1863); Matter of Spangler, 11 Mich. 298 (1863); Druecker v. Salomon, 21 Wis. 621, 94 Am. Dec. 571 (1867); Allen v. Colby, 47 N. H. 544 (1867); Ex parte Coupland, 26 Tex. 386 (1862); Jeffers v. Fair, 33 Ga. 347 (1862); Barber v. Irwin, 34 Ga. 28 (1864); Parker v. Kaughman, 34 Ga. 136 (1865); Ex parte Hill, 38 Ala. 429 (1863); Ex parte Bolling, 39 Ala. 609 (1865); Gatlin v. Walton, 60 N. C. 333 (1864); Burroughs v. Peyton, 16 Grat. (57 Va.) 470 (1864).

And Judge Cooley, in his Principles of Constitutional Law, p. 99, discussing the power of Congress over armies, declares that "all persons capable of performing military duty, irrespective of age or previous exemptions, may be compelled to do so under laws for the purpose." The argument made against the constitutionality of the draft act of 1863 has always been regarded as extremely weak. The argument was that liability to compulsory military service was due, before the adoption of the Constitution, to the states; that it had not been granted to the federal government by the Constitution; and that it must, therefore, still be enforced, if at all, by the states. "Whether a power can be implied," said Mr. Lincoln, "when it is not expressed, has often been the subject of controversy; but this is the first case in which the degree of effrontery has been ventured upon of denying a power which is plainly and distinctly written down in the Constitution." Washington, who presided over the deliberations of the Constitutional Convention, transmitted to Congress, in the second year of his administration, a bill which provided for compulsory military service, which was jointly drawn by himself and General Knox, who was Secretary of War at the time. See American State Papers, vol. 1, p. 5.

The validity of the draft act of 1863 never was passed on by the Supreme Court. Mr. Justice Field, however, although the question was not directly involved, said in Tarble's Case, 13 Wall. 397, 408 (20 L. Ed. 597) (1871), in speaking of the power of the government to raise and support armies:

"The execution of these powers falls within the line of its duties, and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. * * *"

So in Jacobson v. Massachusetts, 197 U. S. 11, 29, 25 Sup. Ct. 358, 362 (49 L. Ed. 643) (1905), in discussing the liberty secured by the

Constitution of the United States, Mr. Justice Harlan, speaking for the court, declared that it did not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint, and he added that—

"he may be compelled by force, if need be, against his will, and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends * * * upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger."

[2] The Thirteenth Amendment to the Constitution did not restrict the power granted to Congress in the first article to which allusion has already been made. The amendment provides that—

"neither slavery nor involuntary servitude, except as punishment for crime, whereof the parties shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

The clear purpose of this amendment was to abolish slavery and to make peonage impossible. In discussing in the Slaughter House Cases, 16 Wall. 36, 72 (21 L. Ed. 394) (1872), the Thirteenth and Fourteenth Amendments, Mr. Justice Miller said:

"But what we do say, and what we wish to be understood, is that, in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

The Supreme Court in a recent case—Butler v. Perry, 240 U. S. 328, 36 Sup. Ct. 258, 60 L. Ed. 672 (1915)—sustained the validity of a state law which required every able-bodied male person over the age of 21 years and under the age of 45 years, who had resided in a county within the state for 30 days or more, to work on the roads and bridges of the county for 6 days, of not less than 10 hours each, in each year when summoned to do so. The act provided also that a person might render the required services by a substitute, or in lieu thereof pay the road overseer a certain sum to be turned into the county treasury. It was claimed that the act violated the Thirteenth Amendment, as it imposed involuntary servitude. The court, speaking through Mr. Justice McReynolds, declared that 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," he said, "no novel doctrine with respect to 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."

It is not a fair and just construction of this amendment to hold

that it was intended to withdraw from Congress the power to pass a Conscription Act. It affords no basis for the claim that it restricts the otherwise unlimited power of the Congress to raise armies. Men drafted into the military or naval service of the United States are not held either in slavery or in a state of involuntary servitude within any construction which can properly be placed on the Thirteenth Amendment. The basis for this construction is, as will appear more fully in a subsequent part of this opinion, that the act leaves to the determination of a board the decision of the exemption from military service which the complainant claims makes the decision final without a right of appeal to the courts.

[3] 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. See Field v. Clark, 143 U. S. 649, 681, 12 Sup. Ct. 495, 36 L. Ed. 294. The true distinction has been said to be between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. The latter may be. Cincinnati, Wilmington, etc., R. Co. v. Commissioners, 1 Ohio St. 88.

Assuming then that the Conscription Act is not unconstitutional, we come to inquire whether the District Court was in error when it dismissed the complainant's bill. The District Judge dismissed the bill because in his opinion the act of Congress left the decision of the question of exemption to the final decision of a special tribunal created for the purpose.

[4] The act, after authorizing the President to draft men into military service of the United States and exempting from such draft certain classes, gives him authority to create throughout the several states and territories and the District of Columbia local boards. It provides in section 4 that "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." It also confers authority on the President to create district boards in each federal judicial district, and then provides as follows:

"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 per-

sons from the selective draft, under the provisions of this act, not included within the original jurisdiction of such local boards.

"The decisions of such 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."

But it is said that the act is unconstitutional, in that it deprives the complainant of his liberty without due process of law, contrary to the Fifth Amendment of the Constitution, which declares that no person shall be deprived of life or property without due process of law. The Supreme Court has, however, held that a judicial trial does not prevail in every case. Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 280, 15 L. Ed. 372 (1855). And in U. S. v. Ju Toy, 198 U. S. 253, 263, 25 Sup. Ct. 644, 646 (49 L. Ed. 1040) (1905), the court, speaking through Mr. Justice Holmes respecting the Chinese Exclusion Act (Act Sept. 13, 1888, c. 1015, 25 Stat. 476 [Comp. St. 1916, §§ 4306, 4314]), under which the decision of the Department of Labor is final as to the exclusion, said: "If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial." That the decision of the question whether a person of Chinese descent was born in the United States, and therefore entitled to enter the country, or whether he was born in China and under the Exclusion Act not entitled to enter, may be intrusted to an executive officer whose decision is final, and that it is due process of law is established law. We see no reason why the same doctrine is not equally applicable to the case in hand. And we therefore hold that the complainant is not deprived of due process of law by being compelled to submit to the final decision of the local and district boards the question whether he is a subject of Austria-Hungary and whether he has not declared his intention to become a citizen of the United States.

The President in the exercise of the authority conferred on him has prescribed the rules and regulations for the local and district boards, and they were announced by the Secretary of War on June 30, 1917. And section 41 of the rules and regulations so prescribed is as follows:

"In the case of a claim of appeal filed by or in respect of any person from the final decision of a local board within the jurisdiction of such district board, the district board shall, if the name of such person is on the list certified to such district board by a local board within its jurisdiction as a person called and not exempted or discharged, examine and consider the claim, affidavits, and record in respect of such person filed with such district board by the local board.

"The district board may receive additional evidence in support of or in opposition to any such claim, provided such additional evidence is filed in the form of affidavits within five days after the receipt by such district board of the notice of filing a claim of appeal by or in respect of such person. Within five days after the closing of proofs in any such case, the district board shall decide in favor of or against any such claim, and shall affirm, modify, or reverse the decision of the local board. The decision of the district board shall be final.

"The district board shall thereupon notify, on a form provided by the Provost Marshal General for that purpose, the person by whom or in respect of whom such claim of appeal was filed that the district board has affirmed,

modified, or reversed, as the case may be, the decision of the local board. If the decision of the local board is affirmed, such person shall stand as called for military service to be finally accepted as hereinafter provided."

It thus appears that the complainant seeks to have the District Court set aside a decision on his exemption claim which the act and the rules and regulations of the President declare to be final.

The complainant's right of exemption is based on the provisions of section 2 of the Conscription Act, which provides that "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"; and on section 18 of the rules and regulations prescribed by the President, which enumerates the persons or classes of persons to be exempted by a local board. Among others it exempts any person who is a subject of Germany, whether such person has or has not declared his intention to become a citizen of the United States. It then exempts "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."

It also provides that "the claim to be exempted must be made by such person, or by some other person in respect of him, on a form prepared by the Provost Marshal General, and furnished by the local boards for that purpose." Such claims must be filed with the local board which notified such person that he is called for service on or before the seventh day after the mailing by the local board of the notice required to be given such person of his having been called for service. 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.

[5] If the complainant is, as he alleges, a subject of Austria-Hungary, and has never declared his intention to become a citizen of the United States, as he also alleges, it is perfectly clear that he is not subject to the draft. Whether his allegations in this respect are true must, however, be determined in the manner prescribed by the act.

It appears from the allegations of the complaint that the complainant filed an affidavit claiming exemption by reason of the fact that he was an alien, and that the local board denied his application, and that he appealed to the district board, which affirmed the local board. It thus appears that the complainant was heard, and it is nowhere alleged that he was denied a full hearing or that the board rejected or refused to consider any evidence that he was entitled to present. In the absence of such a showing, we have no doubt that the decision of the board is final and cannot be interfered with by the courts.

[6] We do not, however, agree with the statement of the District Judge heretofore quoted, that there can be no interference of the courts in the action of these boards. We think a decision of the boards is final only where the board has proceeded in due form, and where the party involved is given a fair opportunity to be heard and

to present his evidence. But if an opportunity to be heard should be denied, there can be no doubt as to the right of the aggrieved party to come into the courts for the protection of his rights. And we do not believe that the District Judge meant to say that a decision must be regarded as final under such circumstances.

[7] The law courts have a general superintending control by certiorari over all inferior tribunals acting in a judicial or quasi judicial character. And jurisdiction is not entirely taken away by the words of a statute which declares that the judgment of the inferior tribunal shall be final.

In Rex v. Moreley, 2 Burr. 1014 (1760), the statute provided "that no other court whatsoever shall intermeddle with any cause of appeal upon this act; but they shall be finally determined in the quarter-sessions only." An application was made to the King's Bench, Lord Mansfield presiding, for a writ of certiorari to remove several orders made by a justice of the peace, and it was claimed that the writ could not issue because of the language of the statute. But the court was unanimously of the opinion that a certiorari ought to issue, and it was said that "a certiorari does not go to try the merits of the question, but to see whether the limited jurisdictions have exceeded their bounds." "The jurisdiction of this court," it was said, "is not taken away, unless there be express words to take it away; this is a point settled." Citing 11 Co. 64b; 4 Mod. 145; Salk. 45; 2 Hawk. P. C. 211. And see Lawton v. Commissioners, 2 Caines (N. Y.) 179 (1804); Rex v. The Justices, 3 D. & R. 35 (1823); State v. Falkinburge, 15 N. J. Law, 320, 322 (1836).

[8] And if an individual is restrained of his liberty by a decision of an executive officer or board declared final by statute, he may nevertheless be entitled to a writ of habeas corpus upon a proper showing. Thus in Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369 (1908), the Supreme Court reversed the court below, and directed a writ of habeas corpus to issue upon an application made by a Chinese person who alleged that he was a citizen of the United States and detained unlawfully under a decision or order made by the commissioner of immigration at the port of San Francisco after a hearing, which decision had been affirmed by the Department of Commerce and Labor. But in that case the petitioner alleged that he had been prevented by the officials of the commissioner from obtaining testimony, and that if he had been given a proper opportunity he could have produced overwhelming evidence that he had been born in the United States and had departed to China on a temporary visit. The court in its opinion said:

"The decision of the department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the commissioner's fiat on the other, when one or the other must give way, the latter must yield."

And in directing the writ to issue Mr. Justice Holmes said:

"The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner

proves his citizenship, a longer restraint would be illegal. * * * But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

There can be no doubt, therefore, that under the Conscription Act, where a board has denied a full and fair hearing to an individual claiming exemption from military service, he might, if restrained of his liberty, sue out a writ of habeas corpus and obtain his liberty.

[9] But whatever remedy the complainant may have or not have, there can be no doubt that he is not entitled to the relief he asks in his bill of complaint. It has heretofore been laid down by the text-writers and the courts as beyond the scope of the powers of a court of equity to enforce mere personal rights as distinguished from property rights. This, it need not be said, has not been due to the fact that equity regarded rights of property as more sacred than rights of the person. But the reason for it lies in the fact that equity affords no remedy where there is a full and adequate remedy at law, and that the ordinary process of the law courts are fully adequate for the redress of wrongs to the person.

In Bispham's Equity (8th Ed.) p. 58, the rule is laid down that:

"Equity is concerned only with questions which affect property, and it exercises no jurisdiction in matters of wrongs to the person as to political rights, or because the act complained of is merely criminal or illegal."

In Kerr on Injunctions Ed. pp. 1 and 2, it is said:

"A court of equity is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. A court of equity has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. If a charge be of a criminal nature, or an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained."

In the later editions of this work this statement is omitted because of an act of Parliament which has authorized the courts of that country to grant injunctions in cases where formerly they did not possess the power.

In 16 Am. & Eng. Encyc. of Law, p. 363, the law is stated as follows:

"A court of equity has no criminal jurisdiction and cannot interfere to prevent the commission of criminal or illegal acts unless there is some interference, actual or threatened, with property or rights of a pecuniary nature; but when there is such interference, and there is no adequate remedy at law, the fact that the act may be criminal will not divest the jurisdiction of equity to prevent it."

And in the case of In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 487 (31 L. Ed. 402) (1888), the Supreme Court, speaking through Mr. Justice Gray, said that "the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property." To assume jurisdiction in other classes of cases he says would be to "invade the domain of the courts of com-

mon law, or of the executive and administrative department of the government."

Mr. Justice Brewer in the case of In re Debs, 158 U. S. 564, 593, 15 Sup. Ct. 900, 910 (39 L. Ed. 1092) (1895), speaking for the court and discussing the power of a court of equity to issue an injunction, declared that:

"Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

In Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 23 Sup. Ct. 498, 47 L. Ed. 778 (1903), Mr. Justice Brown, speaking for the court as to the jurisdiction of a court of equity, cites approvingly In re Sawyer, supra, saying that no further reference is deemed necessary.

In Truax v. Raich, 239 U. S. 33, 37, 33 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283 (1915), Mr. Justice Hughes refers to In re Sawyer, and declares that while a court of equity generally has no jurisdiction to restrain criminal prosecution under unconstitutional enactments, still it has such jurisdiction "when the prevention of such prosecutions is essential to the safeguarding of rights of property."

In Green v. Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90 (1895), a case in the Circuit Court of Appeals for the Fourth Circuit, Chief Justice Fuller, sitting as a Circuit Judge and writing the opinion, it was held that a court of equity had no jurisdiction of a bill seeking to enjoin a county supervisor of registration from performing the duties prescribed by the state registration laws, on the ground that such laws were unconstitutional and operated to deprive the plaintiff and others of their right to vote. In the course of his opinion the Chief Justice said:

"It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral which do not affect any right of property."

In Corliss v. E. W. Walker Co. (C. C.) 57 Fed. 434, 31 L. R. A. 283 (1893), Circuit Judge Colt said:

"There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. * * * It follows from this principle that a court of equity has no power to restrain a libelous publication."

In Taylor v. Kercheval (C. C.) 82 Fed. 497 (1897), District Judge Baker said:

"It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights; such courts have no

jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government except under special circumstances, and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts unless they affect or threaten to invade rights of property."

In Muhler v. Hedekin, 119 Ind. 481, 20 N. E. 700 (1889), the court, speaking of a court of chancery, declared that:

"The subject-matter of their jurisdiction relates to civil property, * * * actual or threatened, is the foundation of chancery jurisdiction. It is not concerned with matters of a political nature. * * * The general principle that equity possesses no power to revise, control, or correct the action of public, political, or executive officers or bodies, is, of course, well understood."

In Chappell v. Stewart, 82 Md. 323, 33 Atl. 542, 37 L. R. A. 783, 51 Am. St. Rep. 476 (1895), a bill alleged that defendant had employed detectives to watch the plaintiff and thereby caused annoyance and damage to him, and asked for an injunction to restrain the alleged conduct. The injunction was refused by the court below, and the Supreme Court affirmed, and said:

"Courts of equity exercise a very extensive jurisdiction in cases involving property rights. * * * In this case it is alleged that rights affecting the complainant's person have been violated, and that there is a purpose to persist in violating them. The ordinary processes of the law are fully competent to redress all injuries of this character. They have always been considered beyond the scope of the powers of a court of equity."

Numerous other cases have announced the same doctrine, a few of which are cited. Fletcher v. Tuttle, 151 Ill. 41, 53, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220 (1894); City of Chicago v. Chicago City Ry. Co., 222 Ill. 560, 570, 78 N. E. 890 (1906); Brown v. Birmingham, 140 Ala. 590, 596, 37 So. 173 (1903); Winnett v. Adams, 71 Neb. 817, 824, 99 N. W. 681 (1904); Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 550, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (1902); Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. (N. S.) 304; Northwestern Law Review, vol. 3, p. 1.

[10] And the rule is that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior quasi judicial tribunals, on matters properly pertaining to their jurisdictions, and that they do not review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law by writ of certiorari. See High on Injunctions (4th Ed.) vol. 2, § 1311.

In Moore v. Smedley, 6 Johns. Ch. (N. Y.) 28, Chancellor Kent said:

"I cannot find, by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors, in their examination and allowance of accounts * * * and causing the money to be raised * * *; the review and correction of all errors, mistakes, and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official acts of public officers, belongs to the Supreme Court. * * * It has always been a matter of legal, and never a matter of equitable, cognizance."

And see Mayor v. Merserole, 26 Wend. (N. Y.) 132, reversing s. c., 8 Paige, Ch. (N. Y.) 198; Van Doran v. Mayor, 9 Paige, Ch. (N. Y.)

388; Hyatt v. Bates, 40 N. Y. 164; McBride v. Newlin, 129 Cal. 36, 61 Pac. 577.

Counsel for complainant pressed upon our attention at the argument the case of Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457, decided by the Supreme Court in 1806. In that case the plaintiff claimed exemption from military service on the ground that as a justice of the peace he was not liable to serve in the militia. It appears that a militia fine had been imposed on him, and the defendant had entered his house and taken away his goods. The action was in trespass vi et armis. The court held that a justice of the peace within the District of Columbia was exempt from the performance of military duty, and, speaking through Chief Justice Marshall, said:

"It follows, [therefore] from this opinion that a court-martial has no jurisdiction over a justice of the peace as a militiaman; he could never be legally enrolled; and it is a principle that the decision of such a tribunal, in a case clearly without the jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers. The judgment is reversed."

And counsel in his brief informs us that "there is practically no difference in principle between the Wise Case and the one at the bar on the main point, namely, that the person attempted to be drafted is not subject to the draft act, and therefore nothing which is done with respect to him is lawful." But conceding that what was done in the Wise Case was unlawful, counsel certainly would not have us believe that the justice of the peace could have righted his wrong in a court of equity.

While disagreeing, therefore, with the opinion expressed by the District Judge, that the courts cannot interfere with the action of the boards and holding, 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.

Order affirmed.

WARD, Circuit Judge. I concur in the opinion of the court without expressing any opinion as to the precise jurisdiction of courts of equity over purely personal rights, or any opinion as to whether an unlawful compulsion of a man's labor or services does not concern property as well as personal rights.

SOCIETE NOUVELLE D'ARMEMENT v. BARNABY.*

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917.)

No. 2914.

1. APPEAL AND ERROR ⟸850(1)—REVIEW—SCOPE—"GENERAL FINDING"—"SPECIAL FINDING."

Under Rev. St. § 649 (Comp. St. 1916, § 1587), providing that, when issues of fact are tried to a federal court, the findings may be either general or special and shall have the same effect as a verdict, and section 700 (Comp. St. 1916, § 1668), providing that the rulings of the court in the progress of the trial, if duly excepted to, may be reviewed, and when the finding is special may extend to a determination of the sufficiency of the facts found to support the judgment, findings in an action tried to the court may be either general or special, the former being a complete determination of all matters, and the latter only a determination of the ultimate facts on which the law must be determined, and where the finding is general nothing is open to review but rulings during trial not included in the finding, though where the finding is special its sufficiency to support the judgment may be reviewed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Finding; Special Finding.]

2. APPEAL AND ERROR ⟸268(2)—REVIEW—EVIDENCE.

In an action tried to the court, the question whether a special finding is supported by any competent evidence may be raised by a request for special findings and an exception to those made, while in case of a general finding the matter can only be raised by a request generally for the aggrieved party and an appropriate exception to the refusal.

3. PLEADING ⟸432—COMPLAINT—SUFFICIENCY.

While on demurrer a complaint should be construed most strongly against the pleader, the complaint should, after answer and judgment, receive, if possible, such a construction as to support it.

4. LIMITATION OF ACTIONS ⟸27—CONSTRUCTION—ORAL CONTRACTS.

A contract partly written and partly oral falls within the statute of limitations applicable to oral contracts.

5. LIMITATION OF ACTIONS ⟸87(6)—STATUTE—ACCRUAL OF ACTION.

Plaintiff's right of action for compensation for acting as agent of defendant, a nonresident, within the state of Washington, did not accrue, so as to start running the three-year period of Rem. & Bal. Code Wash. § 168, until the appointment of his successor on whom process could be served, for service of summons will not be sustained, where on a person who is party plaintiff.

6. JUDGMENT ⟸956(1)—CONCLUSIVENESS—BURDEN OF PROOF.

Defendant, having asserted plaintiff's action was barred by his former recovery, has the burden of proving the contention.

7. APPEAL AND ERROR ⟸850(1)—REVIEW—SCOPE.

Where defendant in an action tried to the court made no request for special findings, a general finding for plaintiff is conclusive as to matters of fact involved.

8. EVIDENCE ⟸543(2)—EXPERTS—COMPETENCY.

One who had for nearly all his life followed the business of ship's agent and broker is competent to testify as to the value of one's services as ship's agent.

9. JUDGMENT ⟸954—SPLITTING CAUSES—EVIDENCE.

Where defendant contended plaintiff had split his cause of action and was barred because of his former recovery, evidence as to the nature of his causes of action was admissible.

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

*Rehearing denied January 7, 1918.

10. APPEAL AND ERROR ⇐1050(1)—REVIEW—HARMLESS ERROR.
The erroneous admission of evidence, where harmless, is no ground for reversal.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by J. R. Barnaby against the Societe Nouvelle d'Armement. There was a judgment for plaintiff, and defendant brings error. Affirmed.

James Kiefer, of Seattle, Wash., for plaintiff in error.

William H. Gorham, of Seattle, Wash., for defendant in error.

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

WOLVERTON, District Judge. It is stated by the complaint herein that:

"During said three years last past (the defendant) has maintained and is now maintaining a general agent at Seattle, Wash., for the more convenient transaction of its business in said state."

Par. 3. "That between the 29th day of October, 1910, and the 6th day of June, 1912, in the state of Washington and the Province of British Columbia, in the Dominion of Canada, plaintiff rendered services as a ship's agent to the defendant, at its special instance and request, in writing."

Par. 4. "That the reasonable value and worth of said services is the sum of five thousand ($5,000.00) dollars."

The plaintiff in error here was the defendant below.

The defendant, for answer, denied each and every allegation contained in paragraphs 3 and 4, and for a separate defense set up that the same matters set forth as constituting plaintiff's cause of action had been litigated in a previous action, and that the action was not begun or commenced within the time limited by the statutes of the state of Washington, to wit, within three years from the rendition of the services sued for.

The cause was tried by the court, without the intervention of a jury. The court filed a written opinion, but found generally for the plaintiff. The finding contains a statement, as follows: "Defendant excepted to all the foregoing findings, and its exception allowed."

There were no special findings asked or rendered. The record contains this statement, following the close of the testimony:

"And thereupon upon oral argument Mr. Gorham, attorney for plaintiff, contended that under all the evidence in the case plaintiff was entitled to judgment, and Mr. Kiefer on behalf of defendant contended that his objection to the admission of any evidence in support of the complaint must be sustained, and the evidence stricken, and further that in any event under all the evidence in the case the defendant was entitled to judgment."

In the opening statement of counsel for plaintiff, he indicated that he relied upon certain letters as evidencing the contract of employment, which contained no direct promise of compensation for the services rendered, and that such letters would be supplemented by oral tes-

timony as to the reasonable value of such services. Thereupon objection was made to the introduction of any evidence in support of the complaint, for the reason that it was apparent from the record that the action was barred. The court reserved its ruling until after the final argument. It was then agreed that all of plaintiff's evidence should go in subject to the same objection. When the court made its findings, no ruling whatever was made in response to the objections, and consequently no exceptions were saved. The court, however, did consider the testimony offered and received, because otherwise it could not have found as it did for the plaintiff.

The first assignments of error relied upon are the fourth and fifth in order of assignment. The fourth predicates error upon overruling the objection of the defendant to the reception of any evidence in support of the complaint, and the fifth because the evidence shows plaintiff's cause of action was barred by the Washington statute of limitations.

The plaintiff seeks to meet these assignments on the grounds: First, that there was no ruling of the court with reference to the admission of the testimony, and no exceptions saved; and, second, that neither at the close of plaintiff's case, nor at the close of all the testimony, was there any ruling of the court excepted to upon motion for judgment or a challenge to the sufficiency of the evidence.

[1] This brings up for review the practice of the federal courts respecting the findings of the court where a cause is submitted without the intervention of a jury, and the manner of reserving objections and exceptions appropriate to a review of such findings on appeal.

When issues of fact in civil cases are tried to the court, its findings may be either general or special, and shall have the same effect as the verdict of a jury. Section 649, R. S. Section 700, R. S., provides that:

"The rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court; * * * and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The Supreme Court has construed these sections of the statute to mean that they provide two kinds of findings in regard to the facts, namely, general and special. The general verdict is on all the issues for plaintiff or defendant, and a special finding or verdict is not a mere report of the evidence, "but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest." Whether the finding be general or special, it has the same effect as the verdict of a jury; it is conclusive as to the facts found. The general verdict which includes, or may include, mixed questions of law and fact, is conclusive of both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law. By a special verdict, the question is presented as it would be if tried by a jury, namely, whether the facts found require a judgment for plaintiff or defendant; and, this being a matter of law, the

ruling can be reviewed on the record. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608.

Where the issues of fact are submitted to the court and the finding is general, nothing is open to the review of the losing party except the rulings of the court in the progress of the trial, in which is not included the general finding of the court, nor the conclusion embodied in such general finding. Insurance Co. v. Folsom, 18 Wall. 237, 248, 21 L. Ed. 827; Cooper v. Omohundro, 19 Wall. 65, 69, 22 L. Ed. 47.

"Only rulings upon matters of law, when properly presented in a bill of exceptions," says the court in Stanley v. Supervisors of Albany, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 1238, 30 L. Ed. 1000, "can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment."

And it has been expressly held that, where the only matter presented by the bill of exceptions which the court is asked to review arises upon an exception to the general finding of the court upon the evidence adduced at the trial, no law is presented which the court can review. Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862.

Such is the interpretation of the statute.

[2] But where a finding is supported by no competent evidence, a question of law is presented which is reviewable on appeal. The inquiry pertains to the practice or the manner by which such a question may be raised or brought into the record. Judge Taft has lucidly stated the practice, in Humphreys v. Third Nat. Bank (6th Ct.) 75 Fed. 852, 855, 21 C. C. A. 538, 542. If a party, having submitted his case to the court, wishes to raise any questions of law upon the merits on review, "he," says the distinguished jurist, "should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and, if he wishes to except to the conclusions of law drawn by the court from the facts found, he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general finding in favor of the party is treated as a general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of the insufficiency of the evidence."

A request, however, to the court, if opportunely made, to find for the aggrieved party generally, upon refusal duly excepted to, will put the matter at large and compel a review of the facts to determine whether there is any sufficient evidence to uphold the general finding, in like manner as if a request had been made to the court to direct a verdict on the ground of insufficiency of the evidence. National Surety Co. v. United States, 200 Fed. 142, 118 C. C. A. 360; Bunday v. Huntington, 224 Fed. 847, 140 C. C. A. 415.

We do not understand that in any event the appellate court will look into the evidence to determine whether the trial court has rightly decided the question of fact, unless it be that there is no sufficient evidence to support the finding. In other words, it will not try the case,

as a jury tries it, to determine the weight or preponderance of the evidence, but only to determine whether there is any competent evidence sufficient to support the finding.

This brings us to an examination of the record to determine what questions the plaintiff in error has here for our consideration. It made no request to the court for any special findings; nor did it make any request for a general finding of any kind. It did except to the general finding made, which exception was allowed. But this was not sufficient, under the statute or the authorities, to require an examination of the evidence to determine even whether it was sufficient to support the finding.

As to the introduction of the testimony respecting the statute of limitations, there was no ruling of the court, and consequently there were no exceptions saved. The plaintiff in error should have specially requested a ruling, so that it might save its exceptions. But, as the court used the testimony for determining what its general finding should be, it was equivalent to overruling the objections made. Yet there is lacking the exception. Under the circumstances, we are disposed to treat the exception as if it were actually saved, as any semblance of a trap, as Judge Taft has called it, into which the plaintiff in error has been inadvertently led, should be obviated.

We are then to determine whether the plaintiff, in the present state of the record, has stated a cause of action, in view of the statute of limitations of the state of Washington.

[3, 4] It is urged by defendant that, in view of the allegation that defendant has, during the three years last past, maintained a general agent at Seattle, the plaintiff has failed to state a good cause. Such a conclusion does not necessarily follow, for it might be that the plaintiff was such agent part of the time. Were the question raised upon demurrer, the complaint under the rule would be required to be construed most strongly against the pleader. But not so where the defendant has answered and gone to trial. In such a case, the complaint is to receive a liberal construction, so as to uphold the action if it can reasonably be done. The defendant has not only answered, but has itself set up the statute of limitations. This brings into the record every element of the statute to be applied in determining whether or not it has run against plaintiff's action.

The first contention as to the statute is that, the contract being partly in writing and partly verbal or in parol, it must be construed as an oral contract, and the statute would run in three years. This contention must be sustained on the authority of Ingalls v. Angell, 76 Wash. 692, 137 Pac. 309. That court held to a contrary view in an earlier case (Caldwell v. Hurley, 41 Wash. 296, 83 Pac. 318), but the later case is controlling.

[5] It appears, however, that Jolivet succeeded the plaintiff as the agent of the defendant company in Washington, and that he did not come to the position until July, 1913; the action having been begun in February, 1916; so it must be that the plaintiff was the agent of the company up to that date, or there was no such agent in the state upon whom service could be made.

A service of summons will not be sustained where it is upon a person who is a party plaintiff, or who is plaintiff's assignor. 32 Cyc. 554; Buck v. Ashuelot Mfg. Co. & Trustees, 4 Allen (86 Mass.) 357; Atwood v. Sault Ste. Marie Light Co., 148 Mich. 224, 111 N. W. 747, 118 Am. St. Rep. 576; St. Louis & Sandoval C. & M. Co. v. Edwards, 103 Ill. 472; St. Louis & Sandoval C. & M. Co. v. Sandoval C. & M. Co., 111 Ill. 32; People v. Feicke, 252 Ill. 414, 96 N. E. 1052; White House Mountain Gold Min. Co. v. Powell, 30 Colo. 397, 70 Pac. 679.

The case of Schubach v. Redelsheimer, 92 Wash. 124, 158 Pac. 739, is clearly distinguishable from the foregoing.

It appears therefore that there was no one in the state until July, 1913, upon whom service could be made, and consequently, under section 168, Rem. & Bal. Code, the statute did not begin to run against the plaintiff until after that date, and hence the present action was begun within three years, within the meaning of the Washington statute. It results therefore that the objection to the testimony respecting the statute of limitations should have been overruled, as it was in effect.

[6, 7] The next contention of plaintiff in error is that the cause of action of defendant in error merged in and is barred by his former recovery. The former recovery is a matter pleaded by the defendant, and the burden of substantiating it devolved upon it. In this the company is concluded by the general finding of the court; the defendant's position here being such, as we have seen, that it cannot insist upon inquiry into the fact.

[8] The next assignment of error relates to the qualification of the witness Currie to testify respecting the value of the services rendered by the plaintiff. The witness had followed the business of ship's agent and broker nearly all his life. His qualification to testify concerning the value of plaintiff's services would seem to be ample. The stricture made that he was not qualified in the line of preparing such cases for trial is without merit.

[9] The remaining assignments of error insisted upon are the eleventh to the eighteenth, inclusive. The testimony objected to all relates to the inquiry whether the matter in controversy or the account sued upon was involved in a former action which had been tried and determined in the superior court of Washington. There was an issue under the pleadings whether the matter here involved was not litigated or ought not to have been litigated in the former action. In other words, the question was whether the plaintiff had not been guilty of splitting his demand, and bringing two actions, where he ought to have instituted only one, covering the whole matter. The very natural course in such a case would be for the court to hear the testimony, and the question would then follow, under the testimony, whether there was but one demand or two, or whether the plaintiff had in reality, and in legal effect, split an obviously single demand. The testimony objected to was manifestly pertinent and material for the purpose of solving the issue presented under the pleadings. The court subsequently found that the plaintiff had not split his

demand, and found that he was entitled to recover. This by the general finding, which the plaintiff in error is not in a position here to controvert. There was no error in admitting the testimony.

It is further insisted that the amount allowed the plaintiff is grossly excessive. In this, again, the defendant is concluded by the record. The finding in that respect was not properly brought to the attention of the court below for a special finding, and no proper exceptions were saved. But, waiving the irregularity of presenting the controversy here, we are unable to perceive that the amount allowed was in fact excessive.

[10] The matter allowed to go in as involved in the ninth and tenth assignments might very properly have been excluded, but the error was obviously harmless, and a reversal cannot be predicated thereon.

It follows from these considerations that the judgment of the trial court should be affirmed, and it is so ordered.

GARWOOD v. SCHEIBER et al*

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2924.

1. APPEAL AND ERROR ⇐S50(1)—REVIEW—SCOPE.
In an action at law the question whether there is any evidence to support a general finding or verdict may be raised on writ of error, though not the question of the weight of the evidence.

2. APPEAL AND ERROR ⇐268(2)—REVIEW—SCOPE.
In an action tried to the court, the question whether there is any evidence to support a finding may be preserved by requests for special findings or by a general request to find for the aggrieved party and an exception to the refusal.

3. APPEAL AND ERROR ⇐268(2)—REVIEW—EXCEPTIONS.
Where, in an action tried to the court, there was a general finding for defendants, an exception to the judgment on the ground the evidence was insufficient to justify it does not present for review on error the question of the sufficiency of the evidence.

4. FRAUD ⇐58(1)—VENDOR AND PURCHASER—ACTIONS—EVIDENCE.
In an action by the purchaser to recover as an abatement damages for the worthlessness of a portion of the land, evidence *held* to show that the sale was in gross and that the vendors were guilty of no fraud or deceit.

5. FRAUD ⇐52—VENDOR AND PURCHASER—ACTION—EVIDENCE.
In an action to recover for the alleged worthlessness of the land sold, where the vendors contended the sale was in gross, evidence that shortly after plaintiff's purchase she was offered the amount paid is admissible, tending to show that the land was sold for a gross sum, as contended by defendants, and not by the acre.

6. APPEAL AND ERROR ⇐1050(2)—REVIEW—HARMLESS ERROR.
In an action by the purchaser on account of the alleged worthlessness of part of the land, evidence as to reclamation warrants for work after the purchase and the purchaser's suit to quiet title was harmless, though remote, and is no ground for reversing a judgment for the vendors.

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

*Rehearing denied January 7, 1918.

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 Isabelle Garwood against Joseph Scheiber and others. There was judgment for defendants, and plaintiff brings error. Affirmed.

On September 27, 1911, the plaintiff, who is the plaintiff in error here, entered into a contract with Joseph Scheiber, Morris Scheiber, and John Scheiber, for the purchase from them of certain real property, described as containing 600 acres, more or less, "at and for the price of seventy-five thousand dollars," upon terms specified in the contract. The contract provided, also, for the purchase of the live stock and personal property used in connection with the lands, at prices named by a schedule attached thereto. The contract culminated in a deed to the real property and a transfer of the personal property, made by the Scheiber brothers to the plaintiff, on November 1, 1911. Later, on October 11, 1913, the plaintiff instituted the present action to recover for an abatement of the purchase price in two particulars, namely, $18,750, being the value of 150 acres of said real property at $125 per acre, which land she alleges to be worthless, and $13,000, being the reduced value of 200 acres, or the difference between $125 per acre and $60, which latter figure she alleges to be the true value of such acreage. Her cause of action is based upon fraud and deceit. She alleges that she was induced to purchase by the false and fraudulent representations of the defendants and their agents, namely, that the realty in question extended to a certain levee, and not beyond, that the entire tract of 600 acres was clear, arable land, that 250 acres were under cultivation and growing alfalfa, and that said ranch consisted of "six hundred acres of the finest alfalfa land in the state of California"; whereas, she further avers, said 600 acres are not in fact all level, or clear, or arable, or adapted to the growing of alfalfa, that only about 450 acres are outside of the levee, and that the 150 acres lying beyond the levee are practically worthless, 77 acres thereof being inundated and submerged with water, and not worth more than $10 an acre, while, as to the balance, it would cost plaintiff more than its value to reclaim it and put it in condition for cultivation and use for agricultural purposes.

The defendants deny all fraud and misrepresentation, and set forth that the sale of the real and personal property was the subject of and constituted a single transaction, and, by way of estoppel, that the plaintiff has previously instituted a suit to rescind the contract in toto.

The cause was tried by the court without the intervention of a jury, and a general finding was rendered for the defendants. A writ of error is prosecuted from the judgment which followed the finding.

Lloyd Macomber, of San Francisco, Cal., for plaintiff in error.

Arthur E. Miller, of Sacramento, Cal., and A. H. Hewitt, of Yuba City, Cal., for defendants in error.

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

WOLVERTON, District Judge (after stating the facts as above). The case has been presented here as if turning upon the question whether the evidence supports the general finding of the court. Counsel for Miss Garwood says, however, that in the consideration of the facts in the case he neither asks nor expects the court to weigh evidence. This, according to the contention, resolves the inquiry into whether there is any evidence in the record to support the finding; not whether the same is supported by a preponderance or the weight of the evidence.

[1, 2] There is no rule of law or practice, that we are aware of, by which, in an action at law, the question of the weight of the evidence can be presented to the appellate court on writ of error. By proper and opportune motion and exception, the question may be presented to such court whether there is any sufficient evidence to support the general finding; and, if there is, the finding will not be disturbed. But the court will not look into the testimony for the purpose of determining what the finding should be according to the weight thereof. The manner of reserving questions of law, upon the merits for review, is stated by Taft, Circuit Judge, to be as follows:

> The party "should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general finding in favor of the party is treated as a general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of the insufficiency of the evidence." Humphreys v. Third Nat. Bank, 75 Fed. 852, 855, 21 C. C. A. 538, 542.
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> "A request, however, to the court," as we have said in Societe Nouvelle d'Armement v. Barnaby, 246 Fed. 68, — C. C. A. —, recently decided, "if opportunely made, to find for the aggrieved party generally, upon refusal duly excepted to, will put the matter at large and compel a review of the facts to determine whether there is any sufficient evidence to uphold the general finding, in like manner as if a request had been made to the court to direct a verdict on the ground of insufficiency of the evidence."

[3] Now, the only exception saved respecting the sufficiency of the evidence to support the finding is found in the bill of exceptions, and is in the following language:

> "Plaintiff excepts to said judgment and decision upon the ground that the evidence is insufficient to justify said decision, and that said decision is against law, and complains that said decision is entirely unsupported by the evidence and is contrary to the evidence, and complains of said decision as error, and excepts thereto"—specifying certain particulars in which it is claimed the evidence is insufficient, namely, among others, that it shows that the land was sold by the acre, and not in gross; that plaintiff bought the same as 600 acres, at the agreed price of $125 per acre; that the land was represented to her as 600 acres of first-class alfalfa land, and the evidence shows there was an absolute shortage of 70 acres; that there were only 450 acres which could be used for any agricultural purpose whatsoever; and that, of the 450 acres, 200 were subject to overflow to the extent that the raising of alfalfa thereon was a commercial impossibility, etc.

There is further statement in the record that, at the close of the session of the court of July 28, 1915, while the trial was still pending, but unfinished, counsel for plaintiff stated to the court that he desired it to render findings when making its decision, and to make findings of fact, but that the court declined to grant the request because it had not been made before the commencement of the trial. Otherwise, there was no request to make special findings, or to find generally for the plaintiff in any amount.

This record is insufficient to raise the issue, or to present to this court the question of the sufficiency of the testimony to support the

general finding. In the Barnaby Case, supra, there was contained in the general finding this language, "Defendant excepted to all the foregoing findings, and its exception allowed"; and we held that this was insufficient to raise the question, as to the sufficiency of the evidence to support the general finding, in this court. The proposition is fully discussed in that case, and reference is made thereto without further elaboration here.

[4] However, notwithstanding this failure to bring the question properly into the record for the consideration of the court, we have very carefully examined the whole of the testimony presented by the bill of exceptions, and are fully satisfied it is ample to support the finding. Indeed, we believe the weight of the testimony to be that way. A thing to be deprecated in the controversy is the action of Dr. Ramos. It appears that he had been an English army officer, was a graduate from the New York University, or from Harvard, perhaps from both, and was with Dr. Loomis in postgraduate work in the hospital in New York. Miss Garwood had implicit confidence in him, and was at the time engaged to be married to him. She advised with him in the purchase of the ranch. It does not appear, however, that he made any representations concerning the property that were not true, or that he gave her any advice that he would not have acted upon if he had been purchasing for himself. It does appear, however, that he prevailed upon the agents who were instrumental in bringing about the sale of the property to divide their commission with him to the extent of $1,500. Miss Garwood insists that she knew nothing of this transaction, and did not share in the amount received by Dr. Ramos. Yet there is testimony from which it is inferable that she had knowledge of it. She was herself insisting upon some division of the commission, though she protests that she was not aware that the division had been consummated until long after the purchase was closed. Dr. Ramos is dead, and his story of the matter cannot be had. The division of the commission made no difference, however, in the amount of the purchase price of the property that was asked by the Scheiber brothers, and received by them. When the transaction had been closed, the Scheibers paid the commission to the agents, and it was the commission only that was divided. The Scheibers had nothing to do with the division, nor did it at all enter into the consideration which they were to receive for the property.

The case was presented by the plaintiff on the theory that the sale was by the acre, while the defendants contended that it was a sale in gross; that is, the entire ranch, containing 600 acres, more or less, for a gross sum. The plaintiff claimed that there were 150 acres not suitable for cultivation, and that 70 acres of this were practically in the bed of the stream; Feather river having changed its course. And hence it is insisted that she should have an abatement of the purchase price, namely, $125 per acre, for the whole of the 150 acres, and a further abatement on 200 acres remaining to the extent of $65 per acre, because not adaptable as the best alfalfa land.

The 150 acres concerning which complaint is made consist of two tracts of about equal acreage. One of these lies between the levee and the new channel of Feather river, and the other lies beyond the

new channel, extending to the old. Mulvany says that now this latter is in the bottom of the river. This is refuted by the testimony of Von Geldern, who made a survey of the ranch in July, 1915, and found that the land between the two levees, that is, between the new levee and the artificial or new channel of Feather river, had an elevation of 14 feet above the water in the river, and the land to the west of the new channel of 12 feet above the old river channel, that is, "12 feet higher than the stage of the water at that time." So it cannot be that this latter tract is in the bed of the river. It is shown by the testimony that the former of the tracts is a wooded lot, and that both were and are used for pasturage. Beyond this, it appears that the wooded lot, if cleared, is adaptable for producing alfalfa.

The plaintiff herself testifies that she was never shown the correct boundaries of the land, and was assured that the whole tract was the finest alfalfa land in the state. This is the alleged fraud constituting the basis of her action. In this she is corroborated, in a way, by the testimony of Brown, who assisted Crane and Dike in making the sale, and that of Dike and Crane. Brown says that, at a time when he, Dike, Crane, Ramos, and Miss Garwood were met together in Sacramento, they talked about what could be done with this land, and continues:

"We represented to Miss Garwood that this land was particularly adapted to alfalfa and dairy business and that there were 600 acres of it. Mr. Dike made these representations, my best recollection is. He said that the land consisted of 600 acres of the very finest alfalfa land. It was stated to Miss Garwood by all three parties at that meeting that she could not obtain anything better in alfalfa, than it was—than those 600 acres. There was nothing said about any of the land not being as good as some of the rest of the land. As far as I remember, it was all represented as being uniformly of the finest kind, first class."

A little later he says the ranch was "sold as a total providing they took the stock." Brown was on the place on July 4, 1911, however, and according to his own statement, was informed that there was a lot beyond the levee where the Scheibers got their wood.

Crane testifies that he did not handle the deal, but that it was his impression that the land was first-class alfalfa land. He was present at the conversation alluded to by Brown, and all he has to say respecting it is that the land was represented by Dike as being first-class alfalfa land.

Previous to any negotiations with Miss Garwood, Dike and Brown tried to buy the land for themselves. Dike says:

"We stated the land was adapted to raising alfalfa; that 300 acres were in alfalfa and the balance being used for pasture, but most of it adapted to alfalfa."

Although present at the meeting Brown refers to, he makes no mention of the conversation which Brown attempts to narrate. Dike further says the land "was sold as a whole tract containing 600 acres."

What Bucholz had to say during the negotiations was not pertinent testimony in the case, as he was not an agent of the Scheibers, and had no authority to bind them.

In refutation of this testimony, it appears that before the sale was consummated Miss Garwood was brought in direct relations with the defendants themselves, and talked with them about the premises, the acreage, and the condition, quality, and adaptability of the land, and that they represented the conditions as they really existed. Miss Garwood was three times on the premises before the sale was closed. She went there on purpose to look them over, for her own satisfaction, and was shown the approximate boundaries. She was told by one of the Scheibers, at least, that a portion of the land lay over beyond the levee, and was asked to go upon the levee and see for herself. She excused herself by saying she had a lame ankle. We have no reason to doubt the credibility of the Scheibers in the least, and believe them to be straightforward. Upon the other hand, Brown and Dike seem, throughout the transaction and in their relations to the present trial, to be acting a dual rôle, and their testimony does not impress us as being altogether reliable. Furthermore, the more reliable testimony substantiates the view that the property at the time of the purchase was reasonably worth all the plaintiff gave for it. Mulvany, her own witness, says:

"For its size, the Scheiber ranch is rated as one of the best alfalfa ranches in the community, probably more alfalfa land in one body. The Scheiber ranch is the largest."

The land seeded to alfalfa, amounting to from 250 to 300 acres, is generally rated in value at $250 per acre. The 200 acres not seeded, but inside of the levee, are conceded by plaintiff to be worth $60 per acre; but this acreage is shown to be worth much more. So that there is here, without considering the land beyond the levee, more than full value, according to what Miss Garwood paid for the ranch. At any rate, she has lost nothing by the transaction. Nor has she been misled to her detriment, or defrauded out of anything. She has shown no reason whatever, in view of the whole testimony, why any part of the purchase price of the property she now holds should be abated to her. Seeing that she has not been defrauded to her loss or damage, the doctrine as to sale by the acre or sale in gross is without application, as it could not avail her in any event. The fraud being eliminated, she has no basis for her action.

This conclusion renders it unnecessary that the question of estoppel be considered.

Certain objections were made and exceptions reserved to the admission of testimony, which we will now examine.

[5] One Silva was permitted to testify that, shortly after the plaintiff had purchased the property, he offered her what she gave for it, and that she declined to accept his offer. The plaintiff was asked whether this offer had been made to her by Silva; the purpose of the testimony being to show the value of the property at the time of the purchase. Under the issue tendered, and in view of the theories of the respective parties in presenting the cause, we have no doubt of the competency and materiality of the testimony. It surely was pertinent in support of the theory of the case maintained by the de-

fendants. If the sale were in gross—and this is what the defendants maintained—it was pertinent to substantiate its gross value. It was for the court to say, under the testimony, whether the sale was in gross or by the acre, at a named price, and, in order that the case might be wholly tried, it was necessary to receive all the testimony offered by the parties tending to support their respective theories of it.

This discussion relates to plaintiff's exceptions 2, 3, and 4. Exception 7 is of like character.

[6] Exception 5 relates to the admission in evidence of a judgment roll in the case of Isabelle Garwood v. L. M. Curtis et al., being a record of the superior court of Sutter county, Cal. This was a case instituted by the plaintiff to quiet the title to the very property which she purchased from the Scheibers. The contract of purchase provided for the bringing of the suit if it was found from the abstract that it seemed necessary, and $250 of the purchase price was retained for the purpose of bearing the expense of such a suit.

Exception 6 pertains to the admission in evidence of a reclamation district warrant, payable to the plaintiff, which had to do with certain reclamation work that was done or was to be done subsequent to the purchase. The relevancy of these matters of testimony would seem to be somewhat remote to the issue presented, but their admission could have done the plaintiff no harm, and therefore is not reversible error.

Finding no error in the record, the judgment will be affirmed.

LOUIE DING et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917. Rehearing Denied October 22, 1917.)

No. 2955.

1. CRIMINAL LAW ⟸775(3)—INSTRUCTIONS—ALIBI.
In a prosecution for conspiring to violate Act May 6, 1882, c. 126, § 11, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 117 (Comp. St. 1916, § 4298), by bringing into the United States aliens not lawfully entitled to enter, instructions, on the defense of alibi, that if a defendant was present when the conspiracy was entered into and did not afterward become a party to it he could not be convicted, but a party may be guilty of a conspiracy though absent, and that it is sufficient if the conspiracy was entered into within three years prior to filing the indictment, were sufficient, for the personal presence of defendant was not necessary, and it is enough that it was entered into within three years of the filing of the indictment.

2. CRIMINAL LAW ⟸369(2)—EVIDENCE—OTHER OFFENSES.
In a prosecution for conspiring to bring into the United States aliens not entitled to enter, where there was evidence that defendants were to also bring in opium at the same time, evidence that they did so was admissible, though there was no charge of unlawfully importing opium.

3. CONSPIRACY ⟸47—BRINGING IN ALIENS—EVIDENCE.
In a prosecution for conspiring in violation of Act May 6, 1882, § 11, as amended by Act July 5, 1884, to bring into the United States aliens not entitled to enter, evidence *held* to warrant a conviction.

4. CRIMINAL LAW ⊂=823(15)—TRIAL—INSTRUCTIONS—"REASONABLE DOUBT."
A charge that a "reasonable doubt" is one for which you can give a reason and is not an imaginary or speculative one and may be such a doubt as would cause a reasonable person to hesitate, taken together, is not bad because defining a reasonable doubt as one for which a reason can be given.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

5. CRIMINAL LAW ⊂=825(1)—TRIAL—INSTRUCTIONS.
In the absence of a request for a more definite instruction, an instruction that the jury were not concerned with the fact that defendants jointly charged with those on trial had pleaded guilty but had not been sentenced was not erroneous; the jury being charged to consider whether such defendants who testified had been offered immunity.

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

Louie Ding and another were convicted of conspiracy to violate Act May 6, 1882, § 11, as amended by Act July 5, 1884, by bringing into the United States aliens not lawfully entitled to enter, and they bring error. Affirmed.

Plaintiffs in error, Louie Ding and Louie Lung Gin, together with a number of others, were indicted for conspiring to violate section 11 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, relative to the bringing into the United States from a foreign country of aliens not lawfully entitled to enter the United States. Plaintiffs in error, two codefendants, were convicted, and have prosecuted writ of error.

Walter S. Fulton and William R. Bell, both of Seattle, Wash., for plaintiffs in error.

Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash.

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

HUNT, Circuit Judge. Defendants urge that the lower court erred in its instruction upon the defense of alibi. In examining the charge it is necessary to keep in mind the fact that the indictment alleged that the conspiracy was formed at Seattle on December 10, 1915; that two of the overt acts, taking and delivering a letter, were charged respectively to have been done on that day; that another act, boarding a launch at Seattle for Vancouver, was charged to have been done on December 11th; that another, embarking on a launch at Vancouver, was alleged to have been done on December 15, 1915; and that two others, the embarking on a motorboat, were charged to have been done on December 14, 1915.

[1] In the instruction complained of, the court, after defining alibi and stating that Ding asserted that he was not in Seattle when the conspiracy charged was entered into, said:

"If the defendant Ding was not here at the time that the conspiracy was entered into, of course, he would not, and did not, become a member of it afterwards, and, of course, he could not be held in this indictment. A party may be guilty of a conspiracy even though he is absent, however, in another state; his presence is not necessary, providing testimony would justify a conclusion that he entered into the conspiracy when he was absent. In this case the testimony is that the conspiracy was entered into while he was here. Now the testimony is somewhat indefinite as to just when that conspiracy was entered into. The government charges it was entered into on the 10th day of December. Now it is not necessary that the government show that this conspiracy was entered into on the 10th day of December. If the testimony shows that the conspiracy was entered into at any time within three years prior to the time of the filing of this indictment by the grand jury, which was on the 27th day of March, 1916, it would be sufficient, and it would be immaterial where the defendant Ding was at the time when the overt acts were done, or at the time when the coconspirators went to British Columbia, if you find they did go to British Columbia, and bring over, or attempt to bring over, persons who were prohibited by law from entering the United States."

When the defendants excepted upon the ground that the defense of an alibi made the time material as fixed by the evidence of the prosecution, the court said:

"My instruction with relation to the exact time not being material may have been just a little general. Now, while the law is, it being sufficient if the offense was proven at any time within three years prior to the time of the filing of the indictment, this conspiracy entered into, and some overt act done, the conclusion must be arrived at from the evidence. You would not be justified in coming to a conclusion as to that arbitrarily; it must be predicated upon testimony, and that is submitted to you as to what the testimony is on the part of the government, and on the part of the defense," etc.

We think these instructions were sufficient to inform the jury of the law applicable to the issue of an alibi. The charge being conspiracy, the personal presence of the defendants was not necessary in the making up of the combination, and the court made it clear enough that the particular conspiracy charged in the indictment and the defendants participating in it must be established although the exact date that it was alleged to have been formed need not be proved, provided the evidence showed that it was entered into within three years before the finding of the indictment. Wharton's Criminal Evidence, 676; Jenkins v. State, 45 Tex. Cr. R. 173, 75 S. W. 312; Glover v. United States, 147 Fed. 426, 77 C. C. A. 450, 8 Ann. Cas. 1184; Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

[2] Upon the trial the prosecution introduced in evidence 150 tins of opium which had been taken to Seattle on the same boat that was used by the conspirators to convey a number of Chinamen charged to have been illegally brought into the United States. Defendants objected contending that, inasmuch as defendants were not charged with the illegal importation of opium or with a conspiracy to import opium illegally, any evidence concerning transactions with respect to the importation of the 150 tins related to a separate independent offense, and therefore was prejudicial and confusing. We cannot sustain the point There was evidence to show that Ding and Lim Jim and one Lortie were together before and during December, 1915; that it was planned

that Lortie should go to Vancouver, get opium from Lim Jim, and bring it to Seattle for Ding and Jim; that Lortie obtained Chinese letters from Ding and delivered them to Jim and another Chinaman in Vancouver; that telephone talks were had between persons at Ding's in Seattle and Lim Jim's in Vancouver; that two defendants, other than these plaintiffs in error, arranged for the Chinamen to board the boat at Vancouver for Seattle, and Lortie received 150 tins of opium from Lim Jim and brought them to Seattle on the same launch with the Chinamen; that the opium was seized and the Chinamen arrested in Seattle; that Ding and Lung Gin were arrested in Portland, Or., Lortie and others in Seattle.

Lortie testified that Ding introduced him to Lim Jim, and that when he went to Lim Jim's place shortly before the importation of the Chinese it was agreed between the two that he would bring back 150 or 155 tins of opium when he brought the Chinamen. Another witness said that Lortie wanted him to go to Vancouver "to get a load of Chinese and some opium."

In the development of the case the evidence concerning the opium was so interwoven with the evidence to show the movements and purposes of the defendants for combining unlawful efforts to bring the Chinamen unlawfully into the United States that the court committed no error in admitting it, and, as it had such direct relation to the case at hand, the mere fact that it tended to show that defendants had committed another offense did not render it incompetent or irrelevant upon the main issue tried.

[3] It is said that there was not sufficient evidence to justify the conviction of defendant Louie Lung Gin, but we think the record shows there was. Ding told Lortie to bring the Chinese to Gin and another person and that Gin would pay him. Gin met Lortie the night the Chinamen arrived in Seattle, and Lortie gave Gin directions about the Chinamen and the opium. Gin engaged the automobile which was taken to the dock to receive the Chinamen and was there to receive the party when it arrived and acted with the members of it with evident knowledge of the whole scheme.

[4] In defining a "reasonable doubt" the court charged as follows:

"Now, a 'reasonable doubt' is just such a doubt for which you can give a reason. When a juror is convinced to a moral certainty of the truth of the fact, then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural, or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusions."

Defendants object to the declaration that a reasonable doubt is such a doubt as the jury are able to give a reason for. We concede that the phraseology objected to is not a clear explanation, but when it is considered in connection with the whole instruction there was no reversible error. This court so held in Griggs v. United States, 158 Fed. 572, 85 C. C. A. 596, and similar ruling was made by the Court of Appeals for the Second Circuit in Marshall v. United States, 197 Fed. 511, 117 C. C. A. 65.

[5] The court in a portion of its instructions, among other things, told the jury that they were not concerned with the fact that the defendants who were jointly charged with those on trial had pleaded guilty but had not been sentenced. This is urged as error upon the ground that the matter was properly of concern in that the evidence of such codefendants against defendants on trial came from a polluted source and would not justify conviction "unless corroborated by other disinterested and credible testimony." But the language objected to was not left without explanation, for the court charged that the jury could take the fact referred to into consideration with all the evidence of the witnesses, including their demeanor in weighing their testimony, and consider whether such witnesses had been offered immunity or "anything of that kind." We find no misdirection in such a charge, and, in the absence of a request for a more definite instruction, defendants cannot well argue that the court ought to have gone farther in advising the jury as to the weight to be given to the testimony of the codefendant witnesses. Diggs v. United States, 220 Fed. 545, 136 C. C. A. 147.

Finding no prejudicial error, the judgment is affirmed.

FREDERICK v. PEOPLE'S BANK OF CALIFORNIA.

In re DRUM.

(Circuit Court of Appeals, Third Circuit. November 7, 1917.)

No. 2296.

BANKRUPTCY ⊂=303(3)—PREFERENCES—WHAT CONSTITUTE.

In a suit to set aside, as a preference, a mortgage given by a bankrupt, evidence *held* to show that the creditor bank took the mortgage in good faith, and insufficient to show that it, or its alleged agent, who was also associated with the bankrupt, had reasonable cause to believe that the enforcement of the mortgage would effect a preference.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of the bankruptcy of R. B. Drum. The People's Bank of California filed its proof of a secured debt based on a mortgage, which claim was challenged as a preference by Elliott Frederick, trustee. From an order of the District Court allowing the claim, the trustee appeals and petitions for revision. Affirmed.

A. E. Kountz, of Pittsburgh, Pa., for appellant.

H. A. Jones, of Washington, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. In the administration, in the court below, of the bankrupt estate of R. B. Drum, the People's Bank of California filed its proof of a secured debt of $6,000, based upon a mortgage given to it September 27, 1915, by the said Drum on certain of his real estate.

The claim was challenged as an alleged illegal preference given within four months of the mortgagor's bankruptcy. On hearing, the referee held the bank had cause to believe Drum was insolvent when it accepted the mortgage, and rejected the claim. On certificate, the court below, in an opinion [1] printed in the margin, held the contrary, and reversed the referee. Thereupon the trustee took this appeal.

[1] Opinion of Orr, District Judge:

"The referee has certified to this court the question: 'Was the mortgage given to the People's Bank of California for $6,000 a voidable preference?' The following, taken from the report of the learned referee, is a proper statement of some of the facts in this case: 'R. B. Drum, for some time prior to his bankruptcy, had been engaged in business as the Allenport, Fredericktown & Granville Supply Company, operating three general stores at different points in Washington county, and on September 27, 1915, executed to the People's Bank of California, Pa., a $6,000 mortgage upon two lots of ground in the borough of California, Pa., and on the 15th day of December, 1915, made a voluntary assignment for the benefit of his creditors, and on the 7th day of January, 1916, and within four months of the execution of the $6,000 mortgage, a petition in bankruptcy was filed against him, and on the 29th day of January he was adjudged a bankrupt. The People's Bank of California, Pa., have filed a proof of secured debt in the sum of $6,000, and the trustee in bankruptcy of R. B. Drum has filed a petition to reduce this claim to a general claim on the ground that it is a voidable preference under the bankruptcy act. From the testimony it appears that at the time this bankruptcy proceeding was started, and for more than one year prior thereto, W. J. Weaver, of California, Pa., had been financially associated with Mr. Drum, and had been and was manager of the three stores of which R. B. Drum was owner, and that Mr. Weaver was more familiar with the business affairs of R. B. Drum than Mr. Drum himself. It also appears that Mr. Weaver, at the time the mortgage was executed by Mr. Drum, on September 27, 1915, and for one year prior thereto, had been a director in the People's Bank of California, Pa., and had attended the meetings of the board of directors on an average of once a week, and had been present when the matter of the mortgage to R. B. Drum had been discussed by the bank, and had been instrumental in having this mortgage taken by his bank.'

"Further material facts are as follows: Before the giving of the mortgage, and up until the time of the voluntary assignment, Mr. Drum's financial reputation was good. Although he had real estate other than that embraced in the mortgage in question, there did not appear to be any other mortgage recorded against him, nor did there appear to have been any judgments entered against the bankrupt from the 1st day of September, 1910, to the 1st day of December, 1915. So far as appears in this case, the said W. J. Weaver was and is a man of financial responsibility. It further appears that, for a considerable period prior to the giving of the mortgage, the bankrupt had an active account with the bank, in which were deposited, so far as the bank knew, the receipts from part of the business enterprises in which the bankrupt was engaged, and the average daily balances and the credit of the bankrupt were by no means inconsiderable. The said Weaver believed that the bankrupt was insolvent, and because of this belief became liable to the bank for moneys loaned to the bankrupt to an amount which, on or about the 7th of September, 1915, aggregated $10,064.18. By lending the bankrupt the credit to that amount, the said Weaver appeared upon the books of the bank to be a debtor to the bank in that sum. Some time prior to the giving of the mortgage, a bank examiner, having made an examination of the bank, called the attention of Mr. Weaver to the fact that under the law the limit of his liability to the bank would be $7,500, and that his liability exceeded that amount by the difference between such sum and the amount of the loans for which Weaver had become liable. The state of Pennsylvania, some time afterwards, called for a report of the true condition of the bank at the close of business on Sep-

Aided by a full discussion of the case by counsel, we have carefully examined the testimony and duly considered the report of the referee and the opinion of the court. On final analysis, the case turns on questions of fact, and as these questions are fully discussed by the court below in the marginal opinion, and a repetition by us would serve no useful purpose, we restrict ourselves to saying that we agree with

tember 7, 1915, and on the 16th of September, 1915, a report was made to the banking department of the state of Pennsylvania, which showed the facts as ascertained by the bank examiner. On September 23, 1915, the banking commissioner notified the bank that the loans to W. J. Weaver, a director of the bank, were in excess of the legal limit, and asked for a reply, after the matter should have been considered by the board of directors. By reason of these conditions and this demand on the part of the commissioner of banking, the proposition was made to the board of directors of the bank by Mr. Weaver that Mr. Drum should execute his mortgage to the bank for $6,000 and that the bank should treat as paid two notes upon which Weaver was liable, aggregating $4,000, in order that the loans for which Weaver was liable to the bank would be within the limit fixed by law. On October 7th following the bank, by the hand of its president, wrote to the commissioner of banking that they were complying with his request as rapidly as possible, and on the 19th of October they made further answer to the commissioner's letter of September 23d, advising him that the said W. J. Weaver, a director, 'has reduced his liabilities more than $4,000.' At the time of taking the mortgage, there was no consideration by the board of directors of any question as to Mr. Drum's financial standing. Subsequently other loans were made by the bank to Drum, and the indebtedness to the bank upon such loans, when they were greatest, aggregated $1,200.

"The referee was of the opinion that Weaver, as manager of Drum's enterprises, must have known that Drum was insolvent, because, as the referee finds, there did not appear to be any change in his financial condition after the giving of the mortgage, and, further, the referee was of the opinion that Mr. Weaver, as a director of the bank, was the agent of the bank in securing the mortgage for Mr. Drum, and that therefore the bank was affected with the knowledge that Mr. Weaver had as such agent. He therefore held that the proof of debt filed by the bank as being secured to the extent of $6,000 (the amount of the mortgage) should be reduced to a general claim, upon the ground that the mortgage was a voidable preference under the Bankruptcy Act. This court is of the opinion that the referee erred in his conclusions. In cases of this kind the burden of proof rests upon the trustee. The burden rested upon the trustee, therefore, to establish by the evidence that Weaver had knowledge of Drum's financial condition, and, next, that Weaver was the agent of the bank.

"As to Weaver's knowledge, the trustee appears to have relied upon the presumption that the manager of a business knows the financial condition of the person carrying on the business, coupled with some evidence that there was no change in Mr. Drum's financial condition between the time of giving the mortgage and the date of the voluntary assignment. The evidence relied upon in connection with such presumption is not very satisfactory, when coupled with the testimony that accounts receivable believed to have been good at the time of making the mortgage became uncollectable afterwards. It is not necessary, however, to decide the question in this case upon the insufficiency of the proof offered by the trustee in this regard. The case is without difficulty when we consider the failure of the trustee to sustain by the evidence the proposition that Weaver was the agent of the bank and that his knowledge of the condition of the bankrupt was the knowledge of the bank. If Weaver was not the agent of the bank, acting for the bank in the procuring of the mortgage in question, the bank's right to the enforcement of the mortgage cannot be destroyed simply by reason of the fact that bankruptcy followed within four months from this date, because there is no evidence whatever

the conclusion, reached by it, that the bank took this mortgage in good faith; and we go a step further, and find the fact to be that Weaver, the alleged agent of the bank, as well as the bank itself, then had no reasonable cause to believe that the enforcement of such mortgage would effect a preference.

The decree below will therefore be affirmed.

that anybody else connected with the bank than Weaver, and even with regard to him it is doubtful, had any reason to believe that Drum was insolvent. If Weaver knew of the insolvency of Drum, he was interested in having Drum's liabilities to the bank so rearranged that he (Weaver) should not be called upon to pay them. The demand of the state department that Weaver's liabilities to the bank should be reduced to the limit fixed by law imposed upon Weaver the duty of reducing his liabilities to the bank, and imposed upon the bank the duty to require Weaver to reduce such liabilities. We see at once that Weaver's interests and the interests of the bank are not wholly in common, so far as their relations with Drum, the bankrupt, appear. If Weaver did have knowledge that Drum was insolvent, it was to his interest to conceal the fact from the bank until he should have been relieved of some of his liabilities to the bank by reason of his association with Drum upon the paper held by the bank. It cannot be assumed that the bank, in view of Weaver's solvency, would have surrendered its right to proceed against Weaver in consideration of a mortgage by Drum which might be deemed an unlawful preference. The law regards an officer, and especially a director, who is personally interested in a transaction, as trying to conceal his knowledge from the bank, because his interest will be better served by keeping silent. In other words, in cases like the present, it is not to be supposed that a director of a corporation will tell about matters in which his personal interest draws the other way. A citation of authorities supporting these general statements of the law would serve no good purpose, because the question whether or not the knowledge of a director may be imputable to his corporation depends upon the particular facts in each case.

"In the case at bar, there is no evidence which justifies any other conclusion than that which has been reached by this court. The exceptions to the report of the referee must be sustained, the certified question must be answered 'No,' and the claim of the People's Bank of California, Pa., should be allowed."

PETERSON v. WASSERMAN et al.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1917.)

No. 2441.

HOMESTEAD ⊂=163—ABANDONMENT—WHAT CONSTITUTES.

St. Wis. 1915, § 2983, provides that a homestead to the value of $5,000 shall be exempt from liability for the debts of the owner, that such exemption shall not be impaired by temporary removal with intention to reoccupy the same as a homestead, nor by the sale thereof, but shall extend to the proceeds derived from such sale to an amount not exceeding $5,000, while held with intent to procure another homestead therewith, for a period not exceeding two years. A bankrupt, who owned a homestead in one Wisconsin city, sold his business therein and removed to another town to engage in manufacturing. Less than a year after his removal to the second town, his factory burned, and he lost his investment, having no insurance. Thereupon he removed to a third town, where he engaged in business and voted. After being in the third town for some time, he disposed of the premises which he had occupied as a homestead in the first city. At the time of his removal he intended to make his home in the town where he carried on his manufacturing, if his business was successful, and had no intention, if successful, to return to the first city, wherein was located his former homestead. *Held*, that the bankrupt's mere vague intention to return, perhaps, at some future time, and reoccupy his homestead, did not preserve his rights therein, and his removal from the town wherein he carried on his manufacturing to a third town showed an intent to abandon it, so that proceeds from the sale of such homestead were subject to his debts.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Suit by Charles B. Peterson, trustee in bankruptcy of Samuel H. Wasserman, bankrupt, against Bertha Wasserman and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

The action was brought by the trustee in bankruptcy to recover the proceeds of the sale of certain real estate in Sheboygan, Wis., which at one time constituted the bankrupt's homestead. The District Court found as facts that in 1911 and theretofore the bankrupt with his family resided on the premises, title to which was in the bankrupt, subject to a mortgage of $1,400; that in January, 1911, bankrupt sold his grocery business at Sheboygan and went to Marinette, Wis., to engage in the manufacture of brooms, and that in the middle of that year he moved his family there; that early in 1912 his broom factory burned, and, having no insurance, he lost his investment, and shortly thereafter moved his family to Rhinelander, Wis., where he was in the junk business for about a year, and that in September, 1913, he bought a bankrupt stock of merchandise and started a store at Rhinelander, which he conducted until 1914, when the petition in bankruptcy was filed; that at Rhinelander he voted at the primary and general election for 1914; that after being at Rhinelander for some time he concluded to sell the Sheboygan property and invest the proceeds in a homestead at Rhinelander, and accordingly the property was put on the market, resulting in its sale December 3, 1914, for $800, cash and some lots worth about $200, all of which, less certain expenses of sale, came into the possession of the bankrupt's wife; that on moving to Marinette the bankrupt intended to make that place his home, if his business was successful, and he had no present absolute intention of returning to Sheboygan, any such intention being conditioned on his want of success in business elsewhere; that at Marinette his business prospered for a time, when the loss of his broom business caused the purpose to fail for which

he had come to Marinette; that on going to Rhinelander he at first thought that some time later he would return with his family to Sheboygan, but there was no evidence of any contemporaneous statement or declaration by the bankrupt at the time of his going either to Marinette or to Rhinelander respecting his intention to reoccupy the Sheboygan property; that, in the words of the finding of the court, "the defendants Samuel H. Wasserman and Bertha Wasserman never acquired any other homestead, and they kept the property in Sheboygan throughout the period of their changes of residence until they formed the intention to sell the Sheboygan property for the purpose of purchasing a home in the city of Rhinelander; that the fact that the defendant Samuel H. Wasserman retained the title to the Sheboygan property throughout said period is evidence of his intention to keep it as his homestead and not to surrender or abandon his homestead rights therein." The court found that the bankrupt had not abandoned his right of homestead in the property, and that the proceeds of the sale were exempt, and free of the claims of his creditors, and dismissed the complaint.

The Wisconsin statute providing for the homestead exemption is as follows (section 2983): "A homestead to be selected by the owner thereof consisting, when not included in any city or village, of any quantity of land, not exceeding forty acres, used for agricultural purposes; and when included in any city or village of any quantity of land not exceeding one-fourth of an acre and the dwelling house thereon and its appurtenances owned and occupied by any resident of this state shall be exempt from seizure or sale on execution, from the lien of every judgment and from liability in any form for the debts of such owner to the amount in value of five thousand dollars, except laborers', mechanics' and purchase money liens and mortgages lawfully executed, and taxes lawfully assessed and except as otherwise provided in these statutes, and such exemption shall not be impaired by temporary removal with the intention to reoccupy the same as a homestead nor by the sale thereof, but shall extend to the proceeds derived from such sale to an amount not exceeding five thousand dollars, while held, with the intention to procure another homestead therewith, for a period not exceeding two years. Such exemption shall extend to land not exceeding altogether the amount and value aforesaid, owned by a husband and wife jointly or in common and to the interest therein of a tenant in common or two or more tenants in common, having a homestead thereon, with the consent, expressed or implied, of the cotenants, and to any estate less than a fee held by any person by lease, contract or otherwise."

Emerson Ela; of Madison, Wis., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). That the property constituted Wasserman's homestead while he lived at Sheboygan is undisputed. If at the time of the sale the homestead right still inhered, it is clear the sale itself did not operate to defeat that right, as the statute permits sale to be made of the homestead, and provides that the proceeds shall be exempt for two years, if intended to be invested in another homestead, and it is not questioned that, as found, it was intended to invest in another homestead. The question here is whether Wasserman's conduct, as indicated, amounted to an abandonment of the homestead, so that at the time of the sale he had no homestead right in the property.

The homestead exemption is of statutory origin, to be measured by the statute which created it, as construed by the courts of the state. The Wisconsin statute provides that "such exemption shall not be impaired by temporary removal with intention to reoccupy the same as a homestead." Though stated in Binzel v. Grogan, 67 Wis. 147, 29 N.

W. 895, that in the interest of the homestead the statute should be given a liberal, and not always a literal, construction, it is hardly to be gathered from the quoted words that on removal from the homestead the "intention to reoccupy" it is deducible from a mere lack of present intention to acquire another homestead. The decisions of the Wisconsin Supreme Court do not leave room for doubt as to the construction we must adopt. In Jarvais et al. v. Moe et al., 38 Wis. 440, in an opinion by Ryan, C. J., the cases were reviewed, and it was held that:

"To preserve his home upon removal from it, the temporary purpose, the animus revertendi, must be certain and definite. A vague intention to return perhaps at some future time and reside there again will not preserve his home."

In Moore v. Smead, 89 Wis. 558, 62 N. W. 426, the court, speaking by Cassoday, J., said:

"The precise question for determination, therefore, is whether Baker's removal from his homestead in the summer of 1881 was 'temporary' merely, 'with the intention' of reoccupying the same as a homestead. Certainly he never returned after he moved from the place in the summer of 1881. 'Temporary' means, as defined by the dictionaries, 'lasting for a time only; existing or continuing for a limited time;' 'not of long duration; not permanent; transitory;' 'continuing but a short time.' A 'homestead' means a place of residence, and implies occupancy and possession as such. The words 'temporary removal' manifestly mean a removal for a fixed and temporary purpose, or for a temporary reason. Phillips v. Root, 68 Wis. 128 [31 N. W. 712]; Jarvais v. Moe, 38 Wis. 440; Herrick v. Graves, 16 Wis. 157. In order to prevent an abandonment by such removal, it must be made with the certain and abiding intention of returning to the premises and residing thereon as a homestead."

And in Blackburn v. Lake Shore Traffic Co., 90 Wis. 362, 63 N. W. 289, Winslow, J., delivering the opinion of the court, cited these cases with approval, concluding that:

"The evidence shows very clearly to our minds that when the plaintiff removed from the premises in question he had no positive or certain intention to return, and that he consequently abandoned it as a homestead."

In the instant case, from the findings of fact as well as the evidence on which they are based, we cannot conclude that, when Wasserman left the Sheboygan home, it was with any fixed and definite present intent to reoccupy it. The very most that can be said is that he was of the mind to return to the home if he did not succeed in business elsewhere. But in such a purpose there is nothing definite or fixed or positive, but only a contingency in the event of which he might reoccupy. He moved with his family in 1911 to Marinette, where they resided, and where he invested his money in the broom business. If, as he stated, and was found by the court, the fixedness of his residence elsewhere depended upon his business success there, such condition did in fact come into being, for it was testified and found that his business at Marinette proved successful, though afterwards lost to him through destruction by fire. This very success thus eliminated even the one contingency on the happening of which he intended to reoccupy the homestead, and thereby completed the act of its abandonment, if not already complete through his leaving it without the fixed and definite intent to reoccupy. The abandonment once completed through his

residence and his success in business at Marinette, the homestead right could not be revived through his subsequent business reverses. If thereafter it was his desire again to make the Sheboygan property his homestead, he could only do so by actually reoccupying it as such. His subsequent residence and business at Rhinelander, his voting there, and his failure to again return to Sheboygan to reside, all tend strongly to confirm the already strong inference that his removal from the homestead was not temporary, nor with definite intention to reoccupy it.

From the facts as found by the District Court, as well as from the evidence adduced, under the law of Wisconsin we are forced to the conclusion that Wasserman abandoned the homestead when he removed his family from it, and that the trustee is therefore entitled to have the net proceeds of the sale of the property for the benefit of Wasserman's creditors.

The judgment of the District Court is reversed, with direction to enter a judgment in accordance with the foregoing views.

MARLAND v. PHILADELPHIA & R. RY. CO.

(Circuit Court of Appeals, Third Circuit. November 7, 1917.)

No. 2272.

1. TRIAL ⟸194(19)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action against a railroad company for the death of a freight brakeman, whose head it was contended was crushed by an overhanging bridge, it appeared that the train passed under five bridges, and that of these three were of such a height that deceased could not have been struck by their spans. The court then charged that if deceased, who was walking on the top of the train shortly before the accident, could not have reached the place on the train where he was found dead at the time the train reached the fourth bridge, the jury should find that deceased was not hit by such bridge. The court further charged that, having eliminated four of the bridges in case the reasoning was correct, it was a question whether the last bridge, if any, struck deceased, and that the jury should consider whether the fact that his neck was broken was consistent with his having been struck by a bridge. It was further stated by the charge that, unless the jury were able to find that he was struck by a bridge, then there was no evidence of defendant's negligence. *Held*, that the charge was not objectionable as a binding instruction to find that the brakeman was struck and killed by the last bridge.

2. MASTER AND SERVANT ⟸293(21)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In such case, where it appeared that the middle span of the last or fifth bridge was considerably lower than the two side spans, and because of its blackened condition that fact could not be seen until an observer was very close, an instruction that if the brakeman was struck and killed by such bridge, then the question for determination was whether he was warned by the defendant railroad company of his danger, and that the warning did not have to be in writing, or any formal warning by this or that officer, it being sufficient if he was given all the knowledge that the company could give him, properly submitted the question of warning to the jury.

3. MASTER AND SERVANT ⟸286(30)—INJURIES TO SERVANT—WARNING.

In such case, though the railroad company had provided telltales to warn of the lowness of the bridge, it could not as a matter of law be de-

clared that such safeguards were in themselves sufficient notice and warning, and the question was properly submitted to the jury.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by Catherine Marland, administratrix of the estate of William Edgar Marland, deceased, against the Philadelphia & Reading Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Clarke Mason, of Philadelphia, for plaintiff in error.

George Demming, of Philadelphia, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This suit was brought by virtue of the act of Congress of April 22, 1908 (35 Stat. 65, c. 149), as amended by the act of April 5, 1910 (36 Stat. 291, c. 143 [Comp. St. 1916, §§ 8662, 8665]), by Catherine Marland, administratrix of William Marland, against the Philadelphia & Reading Railway Company, to recover damages for the death of said Marland, an employé, alleged to have been caused by said company's negligence. On trial the plaintiff recovered, but on writ of error to this court the judgment was reversed, and the cause was remanded for a new trial. Reference to this court's opinion, reported at 239 Fed. 1, 152 C. C. A. 51, renders a restatement of the facts needless. On retrial, the plaintiff again recovered, and on entry of judgment this writ was sued out by the railroad.

The evidence tended to show the deceased, who was a freight brakeman, was found dead on the coal heap of the engine of the freight train locomotive, and it was alleged his head had been crushed by an overhanging bridge, five of which the train went under. As to three of them, their height was such that the deceased, who was walking on top of the train shortly before the accident, could not reach them. As to one of the other two, the Wissahickon Street bridge, the court, as we read the charge, very fairly submitted to the jury the question of whether the deceased was struck by it. That bridge was low enough to do so, but Marland was so far back on the train from the place where he was found, and there was such shortness of time and difficulty of access to the front of the train, that these factors were called to the jury's attention with the instruction:

"Now, if that train, you find, would have traversed that distance, and therefore did traverse that distance, in less time than it would have taken Marland to have gone from the place on the train where he was seen to the place on the train where his dead body was found, you do not guess at the result, but you know that the Wissahickon bridge did not hit him, or his body would have been found in another place from where it was."

[1] It is complained, moreover, the court virtually charged the jury that Marland was struck by the fifth or remaining bridge, the Stokley Street one. But, while it is quite apparent from the charge that the judge's opinion was that the Wissahickon Street bridge could not have caused, and the Stokley Street bridge did cause, Marland's death, yet there was no such binding instruction given to the jury; but the ques-

tion whether either of the bridges struck him, and, if so, which one, was fairly submitted to it in the following language:

"You have five bridges, and in that way you have eliminated four, and you are down pretty closely to a mathematical proposition, if your reasoning has been correct, as to the bridge which did strike him, if any bridge struck him. Now, that is a question which you have to determine. You are not to guess at it. You are to be convinced of it, under the facts and circumstances and all the evidence in this case, taking them together, using your reason about them in the same way, and reaching a reasoned conclusion and result. Now, you find his position on the train, the position in which his body was found upon the train. Is that consistent with his having been struck by one of these bridges? You find that his neck was broken. Is that consistent with his having been struck by a bridge? You find this mark upon his forehead, under his hatband. It that consistent with it? You take all those facts and circumstances in the case, and you reach the result which your best judgments approve as to that finding. Let me just recapitulate right there, because it is a possible stopping point in your deliberations: If you are able, under this evidence, to reach the conclusion that he met his death by striking the Stokley Street bridge—it really does not matter, as I can see, whether he was struck by the Stokley Street bridge or the Wissahickon bridge; the blow would have been practically the same, and would have had the same result; but, as we have reasoned it out, he either was struck by the Stokley Street bridge or he was not struck by any bridge, and therefore whether he was struck by the Stokley Street bridge in that sense becomes important—if you are unable to find from the evidence that he was, then I charge you, as a matter of law, that there has been no evidence of negligence shown against the defendant in this case and it is entitled to your verdict. Why? Because the only blame attached to them is that they had not warned him against the bridge, and if the bridge did not hit him, then that absence of warning did not cause his death, and there is nothing before you to show that the defendant company in any way was responsible for it."

[2, 3] As stated in the above extract, the only negligence in issue was the railroad's alleged failure to give notice to the deceased of the danger caused by these bridges. There was evidence that these bridges were of a peculiar and unusual construction, as noted in our previous opinion,[1] and the question of whether the deceased knew of it in any way whatever was submitted to the jury in these words:

"If your judgment is that he did meet his death in that way, then you come to the next question, upon which I have already charged you at sufficient

[1] "This bridge, as it spanned the tracks, was practically in three parts, or, as a witness said, it 'is really three bridges,' linked together, having three clearances. The side elevation of the bridge—that is, the side visible to one approaching it by train—was 19 feet 10 inches, a clearance carrying dangers inconsiderable, if any. Toward the center of the bridge, at a distance of about 12 feet from its side and running its entire length, the under part abruptly dipped down 2 feet or more, reducing the clearance to 15 feet 10 inches. This central hanging structure extended to within 12 feet of the other side, where it as abruptly ascended an equal distance and made the clearance for the third part of the bridge the same as that of the first. The entire under part of the bridge was blackened by smoke and gases from engines. In approaching the structure from a distance, the under portion of the bridge appeared to be one dark plane, as the central hanging part was in shadow. When within 'about 30 feet, or perhaps two car lengths, of the structure,' by careful looking, this part was discernible. As this central depending structure, dark in itself, was in the shadow of its lateral elevations, there was a question, vigorously controverted, whether its dangers, manifestly considerable, were obvious, and therefore whether they were risks assumed by the intestate as incidents to his employment."

length, and that is, was he warned by the defendant company of that danger, so that he might look out and take care of himself? And when I say warned, I mean warned so as to get that idea into his head fairly and squarely; and it also means this, as I told you before: It did not have to be any warning in writing, or any formal warning by this officer or that officer or the other officer, but we get right down to the common sense of it. Did he have all the knowledge which the railroad company could have given him? Because, if he had it, as your common sense will tell you, it would be a futile thing to require the company to tell him something which he already knew. But if, under all the facts and circumstances in this case, you reach the judgment and conclusion that he did not have that fact in his mind, then I charge you, as a matter of law, that it was the duty of the defendant company to have put it into his mind, and there is evidence from which you can find the negligence of the defendant in this case, and make your finding in favor of the plaintiff."

This question of notice, we think, was one especially for the jury. The bridge was, as we have said, of so peculiar and unique a character as to create latent and unlooked-for dangers to trainmen. It is true the railroad had provided telltales; but for the court to have instructed the jury that these recognized standard safeguards in and of themselves were a complete fulfillment of the duty of notice would have been error. The questions of notice given by the defendant and of knowledge acquired in any way by the deceased of such dangers was submitted to the consideration of the jury, as we have said, in proper terms. When the real atmosphere of the trial is sensed, the case was tried and determined upon the two questions of fact: First, whether the deceased was struck by an overhanging bridge which had a latent and unusual danger; and, second, was the deceased carried under such bridge without notice or knowledge of its latent dangers?

Without entering upon a discussion of the several assignments of error seriatim, we may say that we have duly considered them all, and in substance dispose of them in what we have said above.

Finding, therefore, no error in the trial below, the judgment is affirmed.

MOY KONG CHIU v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1917.)

No. 2425.

1. ALIENS ⇐28—IMMIGRATION—CERTIFICATE.
A certificate of identity, issued pursuant to Act May 6, 1882, c. 126, § 6, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 (Comp. St. 1916, § 4293), to a Chinese person entering the United States as a student, while declared to be prima facie evidence of the right of the person to whom issued to enter the country, may be overcome by competent evidence that it was fraudulently obtained.

2. ALIENS ⇐28—CHINESE EXCLUSION—IMMIGRATION—CERTIFICATE.
Evidence that a Chinese person admitted as a student upon a certificate issued pursuant to Act May 6, 1882, § 6, as amended by Act July 5, 1884, immediately upon his arrival engages in and continues in employment as a laborer, justifies the conclusion that the certificate was obtained by fraudulent representations.

3. ALIENS ⟸24—CHINESE EXCLUSION—IMMIGRATION—CERTIFICATE.

Defendant, a Chinese person, was in 1912 admitted into the United States as a student, and the usual certificate of identity was issued to him, pursuant to Act May 6, 1882, § 6, as amended by Act July 5, 1884. Defendant was then about 18 years old. Two years later he was arrested in Chicago while engaged in manual labor in a laundry belonging to his father. It appeared that defendant was out of school during his first year's residence in San Francisco, his port of entry, for about 20 days, and that on his arrival in Chicago he took up his studies at a private school, where he continued until the date of his arrest, although he worked 5 or 6 weeks in his father's laundry. *Held* that, as a Chinese person who lawfully enters the United States as a student may not be deported because he temporarily engages in manual labor while attending school, defendant could not be deported on the ground that he had procured a certificate through fraud, notwithstanding a letter, written by his father, stating that he did not have him come to this country to attend school, but to make money; such letter not showing defendant's abandonment of his avowed purpose.

4. ALIENS ⟸28—CHINESE PERSONS—DEPORTATION CERTIFICATE.

A certificate issued to a Chinese person, pursuant to Act May 6, 1882, § 6, as amended by Act July 5, 1884, who was admitted as a student, cannot be annulled on mere suspicion or conjecture that the Chinese person fraudulently procured it, but the government has the burden of proving that fact.

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

Deportation proceeding by the United States against Moy Kong Chiu, begun before a commissioner. From an order of deportation, entered by the commissioner, defendant appealed to the District Court, and from a judgment on trial de novo, directing deportation, defendant appeals. Reversed.

This is an appeal from an order of deportation. The appellant, a Chinese person, arrived at the port of San Francisco in June, 1912, then about 18 years of age. Having satisfied the immigration authorities that he was of the exempt classes, namely, a student, he was duly admitted and the usual certificate of identity issued to him. In January, 1914, he was arrested in Chicago by an immigrant inspector, while engaged in manual labor in a laundry. A trial before a commissioner resulted in a finding that appellant was unlawfully in the United States, and an order of deportation. An appeal was taken to the District Court, where a trial de novo was had, on April 16, 1916.

To sustain the charge that appellant was unlawfully in this country, the government introduced evidence to the effect that after attending school in San Francisco for 4 or 5 months after his arrival, appellant was arrested, after he had been out of school about 3 weeks, on a charge of being a laborer; that he was discharged without trial upon promise being made that deportation would not be resisted if he was again found away from school and engaged in labor; that about 5 or 6 months later, in the summer of 1913, he came to Chicago, where, in January, 1914, he was arrested, while engaged in manual labor in the laundry of his father, Nie Pang; that he continued to work in the laundry for a month after his arrest; that at the time of his arrest he stated to the immigration authorities that his father was still in China and sent appellant such funds as he needed; that prior to making such sworn statement he told the inspector that he was born in San Francisco, and disowned the certificate of identity found in his possession. The government also introduced in evidence two letters, written by Nie Pang, at Chicago, which were received by appellant at San Francisco, shortly before he came to Chicago,

and were found in his possession at the time of his arrest. They read as follows:

"Yesterday I received your letter and noted what you say about coming to the city and that you have to have some one sign for you to go to school. I have consulted with Jung Quon and it cannot be done. The guarantor had stated to me recently that after two or three months in school one can come out and work independently and now they want some one to guarantee you come here to attend school. I have not even a dollar on hand; it is difficult for me to do. All the brothers knows that I cannot borrow even one dollar from any one. I always have some sickness. Although I have a mouth it is difficult for me to speak. If you consult with Yu Mun uncle and Wing as to what way so you can come out to work independently then write and inform me and have him write a letter in English guaranteeing that you come here to attend school. I did not [have you] come here to attend school but come to make money. If you come here without any paper or evidence you cannot be independent for the inspector will put his hand on you and look into the matter and it will make things difficult. The guarantor at Hong Kong will get back the money. Be sure to have things fixed in a safe way, get your certificate of identity. Jung Hoy and Jung Quon cannot do anything. From the time of Qwong Chiu's arrival I have not been in the state of tranquillity or happy even one day. I have been worrying about things every moment."

"I will state that I received your letter and noted what you stated in the letter about coming to the city and that you have to sign up before you can come to the city and that you have to attend school. It is not the fact that you come to attend school. You are to come to work and make money. Up to the present date the guarantor order you to get bond to go to school. I have consulted with Jung Quon but it cannot be done. If it is settled get a certificate for evidence before you come to the city and if you cannot do any work it will be extremely difficult. I beg a thousand times that you consult with Mun Goong Wing uncle and do whatever he think the best. If Kwong Chon comes to the city be sure write to Yu Ngin uncle have him send you the railroad fare. I have already spoken to him about it and it can be done. If there is any hindrance after you come there the guaranteed money will have to be obtained at Hong Kong. I beg a thousand times that you have the matter settled safely before you come."

At the conclusion of the evidence the District Court affirmed the order of deportation and remanded appellant to the custody of the marshal. Upon this judgment error is assigned, and also because of the admission and exclusion of evidence.

John Elliott Byrne, of Chicago, Ill., for appellant.

Charles F. Clyne and Benjamin P. Epstein, both of Chicago, Ill., for the United States.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Appellant was admitted to the United States upon a certificate issued to him in accordance with section 6 of the act of May 6, 1882 (22 Stat. 60), as amended by Act July 5, 1884 (23 Stat. 117), and by virtue of the provision of article 2 of the treaty between the United States and China concerning immigration, dated November 17, 1880 (22 Stat. 827), and article 3 of the convention of December 8, 1894 (28 Stat. 1211). Said section 6 as amended provides that the certificates issued thereunder shall be prima facie evidence of the right of the persons to whom issued to enter this country, and also provides that such certificates may be controverted and the facts therein stated disproved by the United States authorities. The prima facie character of such a certificate may be overcome by competent evidence that it was fraudulently obtained.

Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888.

[2-4] Appellant's certificate, being in conformity with the statute, was presumptively valid, and constituted prima facie evidence of his right to be here. Whether, therefore, it should be annulled, and he be deported, depends upon whether the evidence warrants the finding that he obtained his certificate by fraud or deception, intending to evade the exclusion laws and become a laborer.

Evidence that a person, admitted upon a certificate issued under said section 6, immediately after his arrival engages in and continues in employment as a laborer, justifies the conclusion that the certificate, though correct in form and substance, was obtained by fraudulent representations. United States v. Yong Yew (D. C.) 83 Fed. 832; United States v. Ng Park Tan (D. C.) 86 Fed. 605; United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204; Chain Chio Fong v. United States, 133 Fed. 154, 66 C. C. A. 220; Cheung Him Nin v. United States, 133 Fed. 391, 66 C. C. A. 453; Ong Seen v. Burnett, 232 Fed. 850, 147 C. C. A. 44; Lo Pong v. Dunn, 235 Fed. 510, 149 C. C. A. 56; Lui Hip Chin v. Plummer, 238 Fed. 763, 151 C. C. A. 613. On the other hand, it is well settled that a Chinese person, who lawfully enters this country as a student, may not be deported because he temporarily engages in manual labor while attending school. See In re Tam Chung (D. C.) 223 Fed. 801, and cases cited at page 803.

The evidence produced by the government shows that appellant worked during a period of about 5 weeks. At the time of his arrest he stated that he had been employed in the laundry about a week, and a government witness testified that he had seen him working in the same laundry on several occasions during the month following his arrest. The record shows that he was out of school during his first year's residence, at San Francisco, about 20 days, but not that he engaged in manual labor there. Upon his coming to Chicago he immediately took up his studies at a private school, where he continued to the date of his arrest. There is no evidence that he ever ceased going to school after he came to Chicago. At the time of his trial he had been in the United States nearly 4 years. There was no proof that he worked in the laundry until some 6 months after his arrival in Chicago, or that he worked more than 4 or 5 weeks in all. His employment was not inconsistent with the claim that he came to attend school. Under the circumstances, the statements contained in the vague and unintelligible letters of Nie Pang to the effect that he was not to come to Chicago to attend school, or, as one sentence is translated, "I did not [have you] come here to attend school but come to make money," cannot be held to establish that appellant came to the United States with the unlawful intent of becoming a laborer. The evidence does not show that he in fact abandoned the avowed purpose for which he came. The inference drawn from these letters, in the government's brief, that Nie Pang fraudulently procured the issuance of appellant's certificate, is based on conjecture, rather than on any clear evidence. Fraud in procuring the same cannot, on the facts stated, be imputed to appellant. It was incumbent upon the government to overcome the legal effect of appel-

lant's certificate by evidence and not by presumption. It ought not to be annulled on suspicion and conjecture. See Lui Hip Chin v. Plummer, 238 Fed. 763, 151 C. C. A. 613; Wong Yee Toon v. Stump, 233 Fed. 194, 147 C. C. A. 200. In the latter case it is said:

"After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted. * * * It is the privilege of the immigration authorities to prove, if they can, that the certificate is invalid, and that its issue was procured by fraud; but they are not permitted to treat it as a nullity upon mere suspicion and conjecture."

Notwithstanding appellant's false and inconsistent testimony, we fail to find evidence justifying the government's contention that he obtained his admission through fraud.

The judgment of the District Court is reversed.

STONEBERG et al. v. MORGAN, Warden of United States Penitentiary.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1917.)

No. 4925.

1. STATUTES ⊜225½—CONSTRUCTION WITH REFERENCE TO OTHER STATUTES—GENERAL AND SPECIFIC STATUTES.

Where an earlier act prescribes the punishment for a specific class of offenses, or otherwise treats of a specific subject, that act is not affected by a subsequent general law which prescribes the punishment for many classes of offenses, including that class treated by the earlier special law, or treats of many subjects, including that treated by the earlier special law; but, unless a contrary intent is clearly expressed or undubitably inferable from the acts, they must stand and be read and construed together as a single act; the act regarding the specific class or subject as the law of that class or subject, and the later more comprehensive act as the general law of the classes or subjects not treated by the earlier act.

2. ALIENS ⊜35—EXCLUSION OF CHINESE—BRINGING IN UNQUALIFIED CHINESE—PENALTY.

Chinese Exclusion Act May 6, 1882, c. 126, § 11, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 117 (Comp. St. 1916, § 4298), provides that "any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, * * * any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof be fined in a sum not exceeding $1,000, and imprisoned for a term not exceeding one year." Immigration Act Feb. 20, 1907, c. 1134, § 8, 34 Stat. 900 (Comp. St. 1916, § 4253), makes it a misdemeanor, punishable by a fine of not exceeding $1,000, or by imprisonment, to "bring into or land in the United States, * * * or * * * attempt * * * to bring into or land in the United States." Section 43 of such act (section 4289) provides that it "shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons." *Held*, that such act did not apply to the offenses of bringing in, or aiding or abetting the bringing in, of unqualified Chinese aliens, but that such offenses were governed by the Exclusion Act, and that the limit of punishment therefor was a fine of $1,000 and imprisonment for one year.

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3. HABEAS CORPUS ⇐28—GROUNDS OF REMEDY—PRISONER HELD UNDER EXCESSIVE SENTENCE.

The excess of a sentence beyond the jurisdiction of the court which imposes it, in a case in which it has ample jurisdiction of the subject-matter of the case and of the parties, is void, and a prisoner held under such excess alone is entitled to his release by habeas corpus.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Habeas corpus by Lorne Stoneberg and Edward Hack against Thomas W. Morgan, Warden of the United States Penitentiary at Leavenworth, Kan. Order dismissing petition, and petitioners appeal. Reversed.

M. N. McNaughton, of Leavenworth, Kan. (Lee Bond, of Leavenworth, Kan., on the brief), for appellants.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for appellee.

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

SANBORN, Circuit Judge. This is an appeal from an order of dismissal of a petition for a writ of habeas corpus. The claim of the petitioners is that they are serving a term of imprisonment for two years in the penitentiary under a sentence thereto which the court had no jurisdiction to impose upon them because there was no act of Congress which empowered that court to inflict a sentence of imprisonment for more than one year for the offense with which they were charged. The United States asserts the existence of the court's power to impose the sentence of two years under section 8 of the Immigration Act which was approved February 20, 1907. 34 Stat. c. 1134, p. 900 (Comp. St. 1916, § 4253).

By the Chinese Exclusion Act which was approved July 5, 1884 (23 Stat. c. 220, p. 117 [Comp. St. 1916, § 4298]), Congress enacted:

"That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, * * * any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding $1,000, and imprisoned for a term not exceeding one year."

By section 8 of the Immigration Act approved February 20, 1907, Congress enacted:

"That any person, * * * who shall bring into or land in the United States, * * * or who shall attempt, * * * to bring into or land in the United States, * * * any alien * * * not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding $1,000, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment for each and every alien so landed or brought in or attempted to be landed or brought in."

It will be noticed that the limit of punishment denounced by the Chinese Exclusion Act for bringing in a Chinese person is a fine of $1,000 and imprisonment for one year, while the limit of the punish-

ment denounced by the Immigration Act for bringing in an alien is a fine of $1,000 and imprisonment for two years. The petitioners were indicted in two counts—in count 1 for bringing into the United States "one Mah Chong, alias Mah Gwon Wy, who was then and there an alien, * * * and who was not then and there lawfully entitled to enter the United States, said Mah Chong, alias Mah Gwon Wy, being then and there a Chinese person of Chinese descent, * * * and being then and there of the class of aliens excluded from the United States under the provisions of the Chinese Exclusion Act and of the Immigration Act of February 20, 1907," and in count 2 for attempting to bring the same Chinese laborer into the United States at the same time and place that the petitioners were charged in the first count with bringing him in. The petitioners were tried, convicted, each of them was sentenced to pay a fine of $1,000 and be imprisoned in the penitentiary for two years, they were committed to the penitentiary at Leavenworth, and have been serving their sentences ever since July 25, 1916.

The indictment charged the offense denounced by the Chinese Exclusion Act, for which the authorized punishment was imprisonment for one year, and also the offense under the Immigration Act, for which the authorized punishment, if that act applies to the bringing in of a Chinese laborer, was two years, and the court inflicted imprisonment for two years under the latter act. The Chinese Exclusion Act in the year 1884 created the offenses of bringing into the United States a specific class of aliens, Chinese persons not lawfully entitled to enter the United States, and of aiding and abetting such an act, and fixed the punishment for each offense at a fine of not exceeding $1,000 and imprisonment for not exceeding one year. The Immigration Act by its terms created the offense of bringing into the United States any alien not lawfully entitled to enter the United States, and of attempting so to do, and fixed the punishment for each offense at a fine not exceeding $1,000 and imprisonment for not exceeding two years, and then expressly provided "that this act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent." Section 43, 34 Stat. p. 911 (Comp. St. 1916, § 4289). There were, therefore, when the offenses of the petitioners were committed, two laws in force; one denouncing the bringing of a specific class of aliens, unqualified Chinese, into the United States, under a penalty of a possible imprisonment of one year, and one denouncing the bringing in of unqualified aliens of all classes, under a penalty of a possible imprisonment of two years. It certainly was not the intention of Congress, or the effect of these laws, to authorize the court to punish one who brought in a Chinese person by an imprisonment of three years—one year because the defendant brought in a Chinese person, and two years because he brought in the same Chinese person an alien.

[1] What, then, is the true construction and effect of two laws, the earlier of which treats of a specific class or subject, and the latter of which treats generally of many classes or subjects, including that treated in the earlier act, without repealing that act. The answer is: Where an earlier act prescribes the punishment for a specific

class of offenses, or otherwise treats of a specific subject, that act is not affected by a subsequent general law which prescribes the punishment for many classes of offenses, including that class treated by the earlier special law, or treats of many subjects including that treated by the earlier special law; but, unless a contrary intent is clearly expressed or indubitably inferable from the acts, they must stand and be read and construed together as a single act, the act regarding the specific class or subject as the law of that class or subject, and the later more comprehensive act as the general law of the classes or subjects not treated by the earlier act. Cook County National Bank v. United States, 107 U. S. 445, 450, 451, 2 Sup. Ct. 561, 27 L. Ed. 537; Frost v. Wenie, 157 U. S. 46, 48, 15 Sup. Ct. 532, 39 L. Ed. 614; State v. Stoll, 17 Wall. 425, 430, 431, 436, 21 L. Ed. 650; Board of Commissioners v. Ætna Life Insurance Co., 90 Fed. 222, 227, 32 C. C. A. 585, 590; Christie-Street Commission Co. v. United States, 136 Fed. 326, 333, 69 C. C. A. 464, 471; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 965, 72 C. C. A. 9, 13, 2 L. R. A. (N. S.) 185; City Realty Co. v. S. R. H. Robinson Contracting Co. (C. C.) 183 Fed. 176, 181; Hemmer v. United States, 204 Fed. 898, 906, 908, 123 C. C. A. 194, 202, 204; Priddy v. Thompson, 204 Fed. 955, 959, 123 C. C. A. 277, 281; Sweet v. United States, 228 Fed. 421, 426, 143 C. C. A. 3, 8; Soliss v. General Electric Co., 213 Fed. 204, 208, 129 C. C. A. 548, 552; King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216; United States v. Healey, 160 U. S. 136, 147, 16 Sup. Ct. 247, 40 L. Ed. 369; United States v. Greathouse, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130; Townsend v. Little, 109 U. S. 504, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; Petri v. Creelman Lumber Co., 199 U. S. 487, 496, 499, 26 Sup. Ct. 133, 50 L. Ed. 281; Ex parte United States, 226 U. S. 420, 424, 33 Sup. Ct. 170, 57 L. Ed. 281.

In Frost v. Wenie, 157 U. S. 46, 58, 15 Sup. Ct. 532, 536 (39 L. Ed. 614) Congress by the act of May 28, 1880 (21 Stat. 145, c. 108), offered the lands north of the Atchison Railroad in the abandoned Ft. Dodge military reservation to actual settlers having the qualifications of pre-emptor. The subsequent act of December 15, 1880 (21 Stat. 311, c. 1), by its terms offered all the lands in that reservation to actual settlers having the qualifications of homesteaders. The Supreme Court held that the later act had no application to the lands treated by the earlier act. It said:

"It is to be observed that, although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace all the lands within the abandoned Ft. Dodge military reservation north of the Atchison Railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored, and where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible to give effect to both."

In Christie-Street Commission Co. v. United States, 136 Fed. 326, 328, 69 C. C. A. 464, the time within which actions on claims for the repayment by the United States of internal taxes illegally collected which had been presented to and had not been allowed by the Com-

missioner of Internal Revenue, was limited to two years by Act June 6, 1872, c. 315, § 44, 17 Stat. 257 (Revised Stat. § 3227; 2 U. S. Comp. Stat. 1901, page 2089 [Comp. St. 1916, § 5950]). By section 1 of Act March 3, 1887, c. 359, 24 Stat. 505 (1 U. S. Comp. Stat. 1901, pp. 752, 753), the time within which actions might be brought on all claims against the United States founded upon the Constitution of the United States, or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract with the United States, or for damages for tort, was limited to six years. The Commission Company insisted that the later general law applicable to many classes of claims, including by its terms those treated in the earlier act of 1872, repealed or so modified that act that the time within which actions on claims specified therein might be brought within six years, and were not limited to two years after their accrual. But this court overruled that contention and said:

"Specific legislation upon a particular subject is not affected by a general law upon the same subject, unless it clearly appears that the provisions of the two laws are so repugnant that the legislators must have intended by the later to modify or repeal the earlier act. The special act and the general law must stand together, the one as the law of the particular subject, and the other as the general law of the land. Gowen v. Harley, 56 Fed. 973, 978, 979, 6 C. C. A. 190, 196; State v. Stoll, 17 Wall. 425, 436, 21 L. Ed. 650; Board of Commissioners of Seward County v. Ætna Life Ins. Co., 32 C. C. A. 585, 590, 90 Fed. 222, 227; The Distilled Spirits, 11 Wall. 356, 365, 20 L. Ed. 167. * * * 'All statutes in pari materia are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time.' Potter, Dwar. St. 145."

[2] In the case at bar the two acts under consideration are not irreconcilable. The Chinese Exclusion Act may cover and govern the offenses of bringing and aiding or attempting to bring into the United States unqualified Chinese aliens, and the Immigration Act may cover and govern the offenses of bringing and aiding or attempting to bring other unqualified aliens into the United States, and thus both may stand together and each may have effect. No repeal of section 11 of the Chinese Exclusion Act may be implied in this case because (1) the two acts may thus stand together and each may have its legitimate effect, and (2) because section 43 of the Immigration Act expressly provides that that act shall not have the effect to repeal any of the provisions of the Chinese Exclusion Act. The unavoidable conclusion is that the offenses of bringing in, or aiding, abetting, or attempting to bring unqualified Chinese aliens into the United States, are governed by and punishable under the Chinese Exclusion Act only, the Immigration Act is inapplicable thereto, the District Court that sentenced the petitioners was without lawful power or authority to impose upon them a sentence of imprisonment for a longer term than the single year prescribed by the Chinese Exclusion Act, and as they have served that year they are entitled to their discharge upon payment of their fines, or relief from imprisonment on account of such fines, pursuant to sections 1042 and 5296, Revised Statutes (3 U. S. Comp. Stat. 1916, § 1706; 10 U. S. Comp. Stat. 1916, § 10138).

[3] The excess of a sentence beyond the jurisdiction of the court which renders it, in a case in which it has ample jurisdiction of the subject-matter of the case and of the parties, is as void as a judgment in a case in which the court has no jurisdiction, and a prisoner held under such excess alone is entitled to his release by writ of habeas corpus. Ex parte Lange, 18 Wall. 163, 176, 178, 21 L. Ed. 872; Munson v. McClaughry, 198 Fed. 72, 77, 117 C. C. A. 180, 185, 42 L. R. A. (N. S.) 302, and the cases there cited; O'Brien v. McClaughry, 209 Fed. 816, 820, 126 C. C. A. 540, 547.

The order which dismissed the petition for a writ of habeas corpus herein must therefore be reversed, and this case must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

MITCHELL v. LELAND CO. et al.*

(Circuit Court of Appeals, Ninth Circuit. November 19, 1917.)

No. 2932.

1. EXECUTION ⟸29—CORPORATE STOCK—STATUTE.

Rem. & Bal. Code Wash. § 3693, declares that corporate stock shall be deemed personal property, that no transfers shall be valid, except between the parties, until the same shall have been entered on the books of the company in a manner designated. Section 518 declares that all property, real and personal, shall be liable to execution; while section 578 provides that property shall be levied on in like manner and with like effect as similar property is attached. Section 659 declares that personal property capable of manual delivery shall be attached by taking into custody, and corporate stock or shares by leaving with the president or other head of the corporation a copy of the writ, and a notice stating that such stock is attached. *Held*, that such statutes are applicable only to local corporations, and do not provide any means for reaching shares of stock in foreign corporations.

2. EXECUTION ⟸29—CORPORATE STOCK.

Certificates of stock in a foreign corporation are personal property within the above statutes on execution and attachment, and if physically within the state may be levied upon and sold pursuant to such statutes.

3. CORPORATIONS ⟸133—TRANSFER OF STOCK—COMPELLING REGISTRATION—CLEAN HANDS.

Defendant, a resident of Montana and the owner of corporate stock, having disposed of it to M., entered into a contract providing for the return of the stock. While defendant and M. were closing up their settlement, and after M. had delivered to defendant the certificate, he snatched the certificate from defendant, and thereafter assured defendant it had been lost. M. assigned the contract with defendant to his brother, who instituted suit thereon in the state of Washington. Judgment was assigned to another and the certificate of stock was sold under execution, being bought in by plaintiff for the benefit of the assignee of the judgment. After the sale M. assigned his interest in the certificate to the assignee of the judgment. It did not appear in whose possession was the certificate of stock when levied upon by the sheriff. *Held*, in view of the fact that the certificate could have been attached only by garnishment proceedings, if in the hands of any one other than the judgment creditor, that the levy did

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

*Rehearing denied January 7, 1918.

not disclose in whose hands was the certificate, and that M.'s assignment of his interest to the assignee of the judgment came after the sale, the pretended sale must be treated as part of a scheme to divest defendant of his ownership in the stock, and plaintiff, not coming with clean hands, is not entitled to the aid of equity to compel registration of his certificate.

4. EQUITY ⟸65(1)—MAXIMS.

To obtain equitable relief, one must come into court with clean hands.

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

Action by Walter B. Mitchell against the Leland Company, a corporation, and others. From a decree for defendants, plaintiff appeals. Affirmed.

This case was tried in the court below as an equitable action. The simple facts are these: S. O. Leland was, on March 6, 1912, the owner of 50 shares of the capital stock of the Leland Company, a Montana corporation, having its principal place of business at Gardiner, Mont., evidenced by certificate of stock No. 1 of the corporation. On that day Leland transferred the stock to one E. C. Murphy, by executing an assignment indorsed on the back of the certificate, in exchange for some real and personal property. Thereafter, on May 1, 1912, Leland and Murphy entered into a written contract for the full adjustment and settlement of all differences between them, whereby Murphy agreed to transfer and deliver to Leland a certain piano for $100, also the 50 shares of stock, and Leland agreed to convey to Murphy by quitclaim certain real estate, being the same as formerly conveyed by Murphy to Leland for the stock in the first instance, and each covenanted to release the other from all claims of every kind and nature, and acknowledged full satisfaction of all such claims. Subsequently this contract was assigned to one John E. Murphy, and action was instituted by him against Leland and wife upon the contract, in the superior court of the state of Washington for Spokane county, evidently to recover the $100, the stipulated consideration for the piano, for it was alleged that the contract had been carried out, except the payment of said $100. The case went by default, and a judgment was made and rendered against the defendants in that action for $105.50 and costs. The judgment was assigned to one A. Coolin, and execution issued. The sheriff's return shows that he levied on certificate No. 1 for 50 shares of the capital stock of the Leland Company, and noticed the same for sale, and sold it to A. Coolin, and gave the purchaser a certificate of sale.

Walter B. Mitchell, the plaintiff and appellant herein, claiming to be the owner and holder of the stock, acquired from Coolin, instituted the present action against the Leland Company to require the company to transfer the stock to plaintiff on its books. The complaint was amended so as to sound in conversion. The amended complaint was eventually ignored by all parties and the court, and the trial proceeded as in equity upon the original complaint. Leland testified touching the execution of the contract as follows: "That he had completed his contract with Murphy, deeded certain realty to Murphy and delivered Murphy a check for $100. Thereupon Murphy delivered the share certificate in question to him without any written assignment. Immediately however, Murphy demanded other money from me, and, upon my refusing to pay, Murphy wrested the share certificate from my hands, and thereafter, on my repeated demand for it, he assured me that it was lost." Mitchell, testifying in his own behalf, produced the certificate, and related that it was delivered to him at the sale of the same conducted by the sheriff, as he bid in the stock in the name of Coolin.

Walter B. Mitchell, of Spokane, Wash., in pro. per.

Fred L. Gibson, of Livingston, Mont., and C. B. Nolan, of Helena, Mont., for appellees.

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

WOLVERTON, District Judge (after stating the facts as above). The plaintiff claims title to the stock, which he avers he acquired through sheriff's sale on execution issued in the case instituted in the Washington state court. Whether he has a good title depends upon two things, namely, the regularity of the alleged levy and the good faith exercised in closing the contract between Leland and E. C. Murphy whereby the stock was to be restored to Leland in exchange for certain real estate which Leland was to reconvey to Murphy.

[1] It is earnestly insisted by plaintiff that the certificate of stock is personal property within the purview of the laws of the state of Washington, and that it was subject to levy and sale under execution, although the certificate was physically within a state other than that in which the corporation issuing the stock was organized and had its principal place of business. It is declared by the statutes of Washington (chapter on Corporations and Organization Thereof) that the stock of the company shall be deemed personal estate, but that no transfer thereof shall be valid, except between the parties thereto, until the same shall have been entered upon the books of the company in a manner designated. Section 3693 (4261) Rem. & Bal. Ann. Codes and Statutes of Washington. All property, real and personal, is made liable to execution (section 518 [5200]), and it is provided that:

"Property shall be levied on in like manner and with like effect as similar property is attached." Section 578 (5269), Id.

It is further provided that personal property capable of manual delivery shall be attached by taking into custody, and stock or shares, or interest in stock or shares, of any corporation, by leaving with the president or other head of the same, etc., a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ. Section 659 (5362), Id. Garnishment is provided for, the proceeding for which is practically through an auxiliary action against the garnishee. Section 680 (5390) et seq.

It is hardly necessary to observe that the regulations relating to corporate stock, and the manner of its levy and sale on execution, are local to the state, and have no reference to corporate stock generally. "We," says the Supreme Court of Washington, "have no law authorizing the sale of the stock of a foreign corporation." Daniel v. Gold Hill Mining Co., 28 Wash. 411, 426, 68 Pac. 884, 890. The court was there speaking of a sale on execution. In the same case a broader assertion is made by the court, as follows:

"Stock in a corporation cannot be seized on execution and sold unless authorized by an express statute, and, where such sale is authorized, the authority extends only to the stock of corporations existing in that state, and not to that of corporations in other states."

[2] This would seem to preclude plaintiff's contention, but he argues that certificates of stock may nevertheless be subject to levy and sale. Some authorities elsewhere support his view. See Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796;

Puget Sound Nat. Bk. of Everett v. Mather et al., 60 Minn. 362, 62 N. W. 396. By these cases garnishment of certificates of stock in the hands of pledgees was upheld, and the basis of the holding is the affirmation that certificates of stock are personal property, and that they are so treated in business relations and by common acceptation, as well as in the eye of the law; that they are sold in the market, are transferred as collateral security, and are used in various ways as property; they pass by delivery from hand to hand, and are the subject of larceny. The contrary doctrine is concisely stated in Clark and Marshall on Private Corporations, § 378h, as follows:

"Shares of stock cannot be taken on execution or attachment by levying upon or seizing the certificate only, and a court can acquire no jurisdiction over stock by virtue of an attachment merely because the certificate of stock is within its jurisdiction."

We incline to the view that corporate stock is personal property within the intendment of the Washington statutes on execution and attachment, and is subject to levy and sale, if regularly and properly made and executed. This means that the certificates of stock must be physically within the state, and the levy and sale made in pursuance of the provisions of the local statutes dealing with the subject. If A., being in a state other than the residence of a corporation, has in his possession certificates of stock of such corporation belonging to B., and C. sues B. on a legitimate demand, there seems to be no good reason why C. may not garnishee the stock in the hands of A., under general statutes providing for the attachment by garnishment proceedings of personal property, unless inhibited by express declaration.

[3, 4] But that is not the present case. The evidence shows that, when Leland and E. C. Murphy were closing up their settlement, and after Murphy had delivered the certificate of stock to Leland and matters had been adjusted according to agreement, Murphy snatched the certificate away from Leland. Subsequently the contract between Leland and E. C. Murphy was assigned by the latter to John E. Murphy. This assignment was on June 20, 1912. The action by John E. Murphy against Leland and wife in the state court was filed April 8, 1913. Judgment was entered the same day. John E. Murphy assigned the judgment to A. Coolin April 30, 1913. Execution issued May 1, the supposed levy was made on the same day, and the pretended sale took place May 12, 1913. The record shows, further, that later, to wit, on May 21, 1913, E. C. Murphy assigned all his right, title, and interest in the certificate to A. Coolin.

The query is: Where was the certificate of stock at the time of the pretended levy? Presumably it was in the hands of Coolin, who was then the judgment creditor by assignment of the judgment; E. C. Murphy having, previous to the institution of the action, assigned the contract of John E. Murphy, which would carry all interest in the certificate with it. True, E. C. Murphy assigned to Coolin; but this assignment was after the alleged sale, and was only of his interest in the certificate. He pretended to Leland that the certificate was lost. Now, if the certificate was in the hands of a person other than the judgment creditor, it could be attached only through gar-

nishment process, and there is no pretense that it was so attached. The only other way that the sheriff could attach the certificate was by taking the same into his possession. The return declares that he levied upon it. But this is only a conclusion. It should have stated the manner of the levy. Mitchell says that the certificate was delivered to him at the sale, as he bid it in for Coolin. As to whether it was delivered to him by the sheriff, there is only a bare inference. If so delivered to him, the inquiry is: How and from whom did the sheriff get it? Did Coolin hand it to him?

It is unnecessary to pursue the discussion further. It is manifest, along with the manifold irregularities attending the pretended levy and sale, that the procedure adopted was devised for divesting Leland of the title to his stock, after Murphy had, by violence and trespass and without right, snatched the possession of it from him, and must be considered and held to be a part of a concerted attempt to despoil Leland of property rightfully his. Parties must not expect relief in equity, unless they come into court with clean hands.

Decree affirmed.

UNITED STATES v. DELANO et al.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1917.)

No. 2424.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—CONSTRUCTION.

The proviso of Hours of Service Act March 4, 1907, c. 2939, § 3, 34 Stat. 1416 (Comp. St. 1916, § 8679), declaring that its provisions shall not apply in case of casualty or unavoidable accident, or act of God, extends to all employés, including telegraph operators or train dispatchers, whose hours are prescribed and affected by the act.

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—OPERATION OF RAILROAD.

Hours of Service Act, § 2 (Comp. St. 1916, § 8678), declares that it shall be unlawful for any common carrier to permit or require any operator, train dispatcher, or other employé who by the use of telegraph or telephone dispatches delivers orders affecting train movements, to be or remain on duty for longer than 9 hours in all offices and stations continuously operating, nor for longer than 13 hours in offices and stations, etc., operated only in the daytime, except in case of emergency, when the employés may be permitted to remain on duty for 4 additional hours. A railroad company maintained a night and day telegraph station at a small village, employing three operators; each operator working eight hours. On her way to work to relieve an operator who had been on duty nearly eight hours, one of the operators became violently ill and fainted, and was unable to discharge her duty; the one then on duty remaining. He then communicated with the chief operator, who sent a relief operator, who could not arrive, if the trains were on schedule, until after such operator had been on duty for 15 hours continuously. The third operator, though within 10 minutes' walk of the station, was not called to relieve the operator then on duty, who remained on duty for more than 15 hours. *Held* that, as such operator was kept on duty 15 hours, the carrier could not escape under the proviso in section 2, if the sudden sickness of the operator coming on duty was an emergency.

3. MASTER AND SERVANT ⟸13—OPERATION OF RAILROAD—HOURS OF SERVICE ACT—OPERATION.

In such case, if the sickness of the operator coming on duty be treated as an unavoidable casualty, within Hours of Service Act, § 3, relieving the carrier from penalties where violations occur because of casualty or unavoidable accident, or act of God, the carrier cannot escape, for it might have called the third operator, instead of keeping the one then on duty continuously in service until the arrival of the relief operator, and in that way avoided exceeding the 13-hour limit prescribed by section 2.

4. MASTER AND SERVANT ⟸13—OPERATION OF RAILROAD—HOURS OF SERVICE ACT—OPERATION.

For a railroad company to excuse a violation of the Hours of Service Act on the ground that it resulted from a casualty or act of God, within the exception prescribed by section 3, it must appear that the company, after the casualty became known, exercised a high degree of diligence to avoid violation.

In Error to the District Court of the United States for the District of Indiana.

Action by the United States against Frederick Delano and others, receivers of the Wabash Railroad Company. There was a judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

L. Ert Slack, of Indianapolis, Ind., and Philip J. Doherty, of Washington, D. C., for the United States.

Allison E. Stuart, of La Fayette, Ind., for defendants in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. This action is brought by the government to enforce the Hours of Service Act, enacted March 4, 1907, entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon" (sections 8678, 8679, U. S. Comp. Stat. 1916), and was tried by the court without a jury upon stipulation of the parties and upon an agreed statement of facts. The material facts agreed upon are as follows:

Defendant on June 18, 1913, maintained a night and day telegraph station at Ashley-Hudson, Ind., a small village, and employed three operators, Edson, Shepard, and Butler; the former going on duty at 1 p. m., and each operator working eight hours. On this day Operator Shepard, while on her way to work at about 8:30 p. m., became "violently ill and fainted," and "thereby became and was unable to assume and discharge her duties as such operator." Edson continued his service, and notified the chief operator at Montpelier, Ohio, at 9:30 p. m. of the illness of Shepard. There were no relief operators obtainable at Ashley-Hudson, but Operator Butler lived within 10 minutes' walk of the station. He was not called to relieve Edson.

The nearest relief operator was one Smith, located and employed at the city of Montpelier, Ohio. Immediately upon receiving notice of Shepard's illness, the chief dispatcher sent Smith to Ashley-Hudson on the first available train, which left at 2 a. m. on June 19th, and

arrived at Ashley-Hudson at 4 a. m. Smith assumed his duties immediately upon his arrival.

Two questions are submitted: (a) Does the proviso of section 3 of this act relate to telegraph operators? (b) If so, does the evidence establish a defense under the emergency clause of section 2, or the casualty or unavoidable accident proviso of section 3?

[1] The government's contention that the proviso of section 3 does not apply to telegraph operators or train dispatchers must be overruled upon the authority of United States v. Missouri Pacific R. R., 213 Fed. 169, 130 C. C. A. 5; San Pedro, L. A. & S. L. R. R. v. United States, 220 Fed. 737, 136 C. C. A. 343; United States v. Atlantic Coast Line Co. (D. C.) 224 Fed. 160; United States v. N. Y., O. & W. Ry. (D. C.) 216 Fed. 702. We think it was the intention of Congress to make the proviso appearing in section 3 of the act apply to all employés affected by the act.

[2-4] But defendant's contention that the evidence fully justified the excess service on the part of Edson cannot be accepted. Whether we deem the sudden illness of the operator as "a case of emergency," within the proviso of section 2, or "a case of casualty, unavoidable accident or the act of God," within the provision of section 3, the result must be the same. If the sickness was such "an emergency" as is specified in the proviso of section 2, still the carrier is not excused in the present case, for the operator was kept on duty 15 continuous hours, or 2 hours more than the maximum period allowed in "a case of emergency" by section 2.

If it be admitted that the sudden and unexpected illness of Operator Shepard was "a casualty," within the language of the proviso in section 3, then it appears in this case that the carrier failed to exercise that high degree of diligence required of it under such circumstances. The degree of diligence required of the carrier under such circumstances has been announced in the following cases: Atchison, Topeka & S. F. R. R. Co. v. United States, 220 Fed. 748, 136 C. C. A. 354; San Pedro, L. A. & S. L. R. R. v. United States, 220 Fed. 737, 136 C. C. A. 343; United States v. Atchison, Topeka & S. F. R. R. Co. (D. C.) 236 Fed. 154; Northern Pacific R. R. v. United States, 213 Fed. 577, 130 C. C. A. 157; Chicago & N. W. R. R. v. United States, 234 Fed. 268, 148 C. C. A. 170; Baltimore & Ohio R. R. v. United States, 242 Fed. 1, —— C. C. A. ——. See, also, Indiana Harbor Belt Ry. v. United States, 244 Fed. 943, —— C. C. A. ——, decided by this court July 24, 1917.

In the present case the carrier knew that the relief operator, Smith, could not reach Ashley-Hudson until 4 a. m., or until after Edson had been on continuous duty for 15 hours. Any delay in the train service would have increased this period. On the other hand, Operator Butler was within 10 minutes' walk of the station and was available for the relief of Edson. He could have gone on duty at 12 o'clock, and his service thereafter, until Smith arrived, or even for a longer period, would not have been violative of the statute, and would have been consistent with the purpose and object of the act, which was to secure greater safety to passengers and employés through the shortening of

the continuous hours of service of railway employés. Upon the stipulated statement of facts we conclude the carrier failed to establish diligence in not calling Butler after it learned of the sickness of Shepard.

Judgment is reversed, and the cause remanded to the District Court, with directions to enter judgment in plaintiff's favor.

YOUNG TI v. UNITED STATES.

SOO KAN v. SAME.

(Circuit Court of Appeals, Third Circuit. November 1, 1917.)

Nos. 2255, 2256.

1. CITIZENS ⟸3—CHINESE BORN IN UNITED STATES.
   Children born in the United States of Chinese parents domiciled therein are citizens.
2. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION.
   In a suit for deportation of Chinese laborers, who under Act May 5, 1892, c. 60, 27 Stat. 25 (Comp. St. 1916, §§ 4315–4323), had the burden of establishing their right to remain, evidence *held* insufficient to establish the right of such persons to remain in the United States, not establishing that they were children born in the United States of Chinese parents.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Deportation proceedings by the United States against Young Ti, alias Yok Ti, alias Lee Yok Ti, ascertained to be Lee Yung Dye, and against Soo Kan, alias Lee Soo Kan. From orders of deportation, separately entered after a joint hearing, defendants appeal. Affirmed.

John W. Dunkle and N. S. Williams, both of Pittsburgh, Pa., for appellants.

E. Lowry Humes, U. S. Atty., and Daniel S. Horne, Asst. U. S. Atty., both of Pittsburgh, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. These are appeals from two orders of deportation separately entered by the District Court after a joint hearing. Chinese Exclusion Acts (Act Oct. 1, 1888, c. 1064, 25 Stat. 504 [Comp. St. 1916, §§ 4303–4305]; Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1916, §§ 4315–4323]; Act Nov. 3, 1893, c. 14, 28 Stat. 7 [Comp. St. 1916, §§ 4320–4324]). The cases raise no questions of law, the one issue being the place of the defendants' nativity.

[1, 2] The defendants were Chinese laborers charged upon arrest with being unlawfully within the United States. 25 Stat. 504. They met the charge by the claim that they were born in the United States of parents domiciled here and are therefore citizens of the United States. Louie Lit v. United States, 238 Fed. 75, 151 C. C. A. 151. The statute having placed upon them the burden of establishing by affirmative

evidence, to the satisfaction of the judge, their lawful right to remain in the United States (27 Stat. 25; Louie Dai v. United States, 238 Fed. 68, 151 C. C. A. 144; Woo Vey v. United States, 242 Fed. 838, —— C. C. A. ——), they proceeded to prove their birth in this country substantially as follows:

They represented themselves to be brothers of the ages of twenty-six and twenty-eight years respectively, and showed by the testimony of a number of witnesses that they had been in this country for twelve years immediately preceding their arrest.

This testimony proves satisfactorily the defendants' presence in this country during the later years of their lives, but unlike testimony in Louie Lit v. United States, 238 Fed. 78, 151 C. C. A. 151, it does not go back sufficiently close to the date of their birth to raise an inference of their birth in this country. This testimony, therefore, does not support the issue.

Their evidence bearing directly upon their claimed birth in this country was not, we think, of the kind required by statute to establish that fact to the "satisfaction" of the judge. Louie Dai v. United States, 238 Fed. 68, 151 C. C. A. 144. They produced two birth certificates procured for them from the records of the Vital Statistics Department of Chicago by one Dr. Jin Fuey May, to whom they paid $275 for this service. These certificates are copies of birth reports duly filed in the appropriate bureau of that city, and show among other things the birth of a male child on February 4, 1887, and of another male child on June 7, 1889; places of birth; name of father, Lee Wung, a Chinese; name of mother, Dora Johnas Wung, a German; name of midwife, etc. The defendants attempted to identify themselves with all things shown in these birth reports, claiming that they are the children there reported to have been born on the dates shown, and that the parents there named are their parents. Lee Sing, an alleged brother of Lee Wung, the alleged father of the defendants, testified in accord with the birth certificates.

Opposed to this, the government produced two witnesses, representing themselves to be children of the same Lee Wung and his German wife, Dora Johnas Wung. One of these witnesses, a daughter, testified to the birth in Chicago of two male children of her parents, Lee and Dora Wung, upon the precise dates named in the certificates, and the other, a son, testified that he is the male child born upon the date mentioned in the earlier certificate, February 4, 1887. Both testified that Lee and Dora Wung, the parents named in the birth certificates, were their parents, that the defendants were not children of these parents, and that the defendants were wholly unknown to them. The failure of the mother to testify was explained upon the ground of illness. The testimony of the children claiming to be the real children of Lee and Dora Wung was not controverted. On the contrary, it was corroborated by testimony of another witness. Aside from the force of this testimony, we cannot close our eyes to the opportunity which the trial judge had of observing both sets of children, nor are we inclined to treat lightly his conclusion that the two defendants showed no

indication of mixed blood, while the two witnesses, children of a Chinese father and a German mother, showed plainly the admixture of blood of the two races.

We believe that the trial judge committed no error in disregarding the birth certificates. As the testimony of the defendants and of Lee Sing was built upon these certificates, it stood only so long as they stood, and fell with them.

The discretion exercised by the trial judge in affirming the Commissioner's orders of deportation in these cases should not be disturbed. Louie Dai v. United States, 238 Fed. 68, 74, 151 C. C. A. 144; Woo Vey v. United States, 242 Fed. 838, 840, —— C. C. A. ——.

The decrees below are affirmed.

UNITED STATES v. SNOHOMISH RIVER BOOM CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917.)

No. 2962.

1. INDIANS ⊂⊃12—RESERVATIONS—BOUNDARIES.

The government by treaty acquired Indian lands in the northwest portion of what is now the state of Washington. By the treaty one section was reserved for an agricultural and industrial school. The boundaries of the reservation were fixed by executive order of December 23, 1873, as beginning at low-water mark on the north shore of Steamboat slough, thence west, etc., to low-water mark on the shore of Port Susan, thence southeasterly along the shores of Tulalip Bay and Port Gardner, and across the mouth of Ebey slough to the place of beginning. The latter slough is really the mouth of a river. *Held*, that the mouth of Ebey slough could not be treated as continuing far enough south to include tidelands separated from other parts of the reservation by a deep water channel.

2. INDIANS ⊂⊃12—RESERVATIONS—TIDELANDS—UPLANDS.

Tidelands are no part of an Indian reservation, unless expressly included, where not attached to the upland.

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 the United States of America against the Snohomish River Boom Company and another. There was a judgment for defendants (234 Fed. 95), and plaintiff brings error. Affirmed.

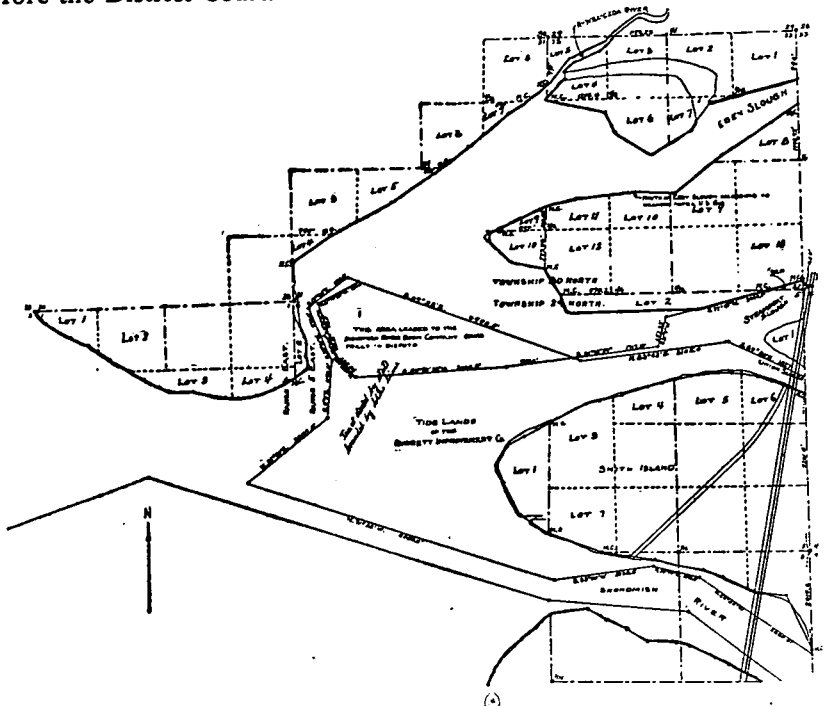
Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash.

J. A. Coleman, of Everett, Wash., for defendants in error.

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

HUNT, Circuit Judge. This controversy arises over the right to a triangular tract of tideland situate near the mouth of Ebey slough, near the confluence of Ebey and Steamboat sloughs, in waters adjacent to a part of the Tulalip Indian reservation in Snohomish coun-

ty, Wash. The case was tried to the court, and at the conclusion of the evidence of plaintiffs, judgment was ordered in defendants' favor. For convenience we use a map, which was introduced at the trial before the District Court.



[1] By treaty, proclaimed April 11, 1859, between the United States and certain Indian tribes, the Indians ceded to the United States all their interest in a large part of the northwest portion of what is now the state of Washington, and by article 3 of the treaty there was reserved from out of the lands ceded 36 sections or one township of land on the northwestern shore of Port Gardner and north of the mouth of the Snohomish river and Tulalip Bay and Kwilt Ceda creek (platted as K-Will-Ceda), for the purpose of establishing thereon an agricultural and industrial school. 12 U. S. Stat. at Large, p. 927. On December 23, 1873, President Grant, by executive order, fixed the boundaries of the Tulalip reservation as follows:

"Beginning at low-water mark on the north shore of Steamboat slough at a point where the section line between sections 32 and 33 of township 30 north, range 5 east, intersects the same; thence north on the line between section 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5, to the township line between townships 30 and 31; thence west on said township line to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Ebey slough to the place of beginning."

A survey of the reservation was made between August, 1873 and May 22, 1874, and thereafter an official map was made. This map was put in evidence, as were the field notes of the survey, together with a map upon which the field notes were platted. The latter map shows the tideland area deeded by the state of Washington to the predecessors in interest of the defendants, and what is called Smith Island and the tidelands attached to Smith Island, and part of the tidelands which have become the subject of this litigation appear.

The contention of the United States is that Ebey slough continues south far enough to include the triangular piece of tideland, and that the court erred in deciding that the mouth of Ebey slough was at a point which it is insisted is inside the slough and opposite the mouth of Kwilt Ceda creek. It is also argued that the southeastern boundary of the Indian reservation is not as fixed by the court, but follows in a straight line to the point of beginning across the mouth of Ebey slough, from the most southern tip, called Priest Point, of the reservation. Defendants' position is that the mouth of Ebey slough is as indicated in the government field notes, and that the southerly boundary of the Tulalip reservation is approximately a mile north of the north boundary of the tidelands in dispute. No controversy arises over the east or north or west boundaries of the reservation; the decision depends upon what is the true southern bound. The sketch and maps introduced show that Ebey slough is one of several mouths of the Snohomish river. Steamboat slough, Union slough, and Ebey slough, and the Snohomish river, all empty into Port Gardner, and north of the tidelands involved; Ebey slough being the most northerly and approximately a mile north of Steamboat slough. The meander notes specifically fix the mouth of Ebey slough as approximately a mile north of the line which counsel for the United States would have determined to be the southerly boundary of the reserve, a straight line from the point of low water at the southernmost point of the reservation to the southeast corner of the reservation.

It is true that the language of the executive order names a course of the western boundary of the reservation as southeasterly, but the boundary line must run along the shore of Port Susan, and along the shores of Tulalip Bay and Port Gardner, "with all the meanders thereof, and across the mouth of Ebey's slough, to the place of beginning." But, as Ebey's slough empties into Port Gardner, meanderings thereof would be practically impossible before the point of beginning could be reached. It was therefore necessary apparently to aid the description in the executive order by inserting the words, "and across the mouth of Ebey's slough." We cannot depart from the requirement that the line of the water boundary of the reservation shall run coincident with the line of low-water mark along the shores of Port Susan, Port Gardner, and Tulalip Bay, "with all the meanderings thereof." These calls are definite. The maps prove that Port Gardner extends considerably north of the tidelands involved, and that the mouth of Ebey slough is a mile northward of them. The lands are separated from the reservation by a deep water channel on the north and west, and as no waters except Tulalip Bay and Kwilt Ceda creek are specifically granted by the terms of the treaty with the Indians, we think the true inter-

pretation is that, inasmuch as Port Gardner extends north of the tidelands in dispute, the use of the words "and across the mouth of Ebey slough" is explanatory, rather than conclusively definitive.

Our conclusion is that the United States meant to grant to the Indians lands, with such accretions as might naturally belong thereto, but that there was no purpose on the part of the President to include tidelands which were wholly separated from the land of the reservation, and we think the District Court was correct in its view that the mere fact that the executive order reads "southeasterly with the line of low-water mark along the shore of and across the mouth of Ebey slough to the place of beginning," should not be held as fixing a line which extends across the waters of Port Gardner, but must be carried to the mouth of Ebey slough, notwithstanding the fact that such a course is not directly southeasterly to the point of commencement.

[2] It is contended by counsel for the United States that, even if it should be held that the tidelands in dispute are not within the boundaries of the Tulalip Indian reservation, nevertheless they belong to the reservation, because they are part of the reservation tidelands. It is admitted that the lands in dispute do not attach to any uplands of the reservation; and, this being so, such lands cannot be a part of the reservation tidelands, unless they are within the boundaries of the reservation. Furthermore, these particular tidelands do not constitute an island, but are attached to Smith Island, which is no part of the reservation. They have formed by accretion, but the accretion has been to Smith Island, and not to the Indian reservation lands.

The judgment is affirmed.

ST. LOUIS-SAN FRANCISCO RY. CO. v. MAYNORD et al.

(Circuit Court of Appeals, Fifth Circuit. November 7, 1917.)

No. 3145.

1. MASTER AND SERVANT ⟸278(18)—INJURIES TO SERVANT—JURY QUESTION.
In an action against a railroad company for the death of a flagman run down by an engine, evidence *held* to warrant a finding by the jury that at the time he was struck the flagman was waving that flag, which meant that travelers could, with safety, use the crossing, and that the crossing was closed to engines and trains, despite a conflict in the testimony as to the color of the flag waved and that of the flag used to announce to travelers that the crossing was safe.

2. MASTER AND SERVANT ⟸238(3)—INJURIES TO SERVANT—"NEGLIGENCE PER SE."
Where a flagman at a railroad crossing on a much-used street, after a long train followed by an engine passed the crossing, waved a flag, showing that the crossing was open to travel by the public, and continued to wave the same, it was not negligence per se for him to step on the track without looking to see whether the engine which last crossed was backing down the track, for one's doing or omitting to do what he has good and sufficient reason for believing he can safely do is not negligence, and the flagman had good reason to infer that an engine or train would not move over the crossing while he was waving the flag announcing that it was open to the public.

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

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3. MASTER AND SERVANT ⟸289(30)—JURY QUESTION—CONFLICTING EVIDENCE. Where the evidence, in an action for the death of a railway flagman, as to his contributory negligence was conflicting, the question was for the jury.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Action by Mrs. Alice Maynord and E. R. Maynord, administrators of the estate of A. B. Maynord, deceased, against the St. Louis-San Francisco Railway Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Forney Johnston and W. R. C. Cocke, both of Birmingham, Ala., for plaintiff in error.

George P. Bondurant, of Birmingham, Ala., for defendants in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. This was an action under the Alabama Employers' Liability Statute (Code of Alabama of 1907, § 3910) by the administrators of the estate of A. B. Maynord, deceased, to recover damages for his death, which resulted from his being struck by the tender of an engine which was being backed along a railroad track, where it and several other tracks crossed a much-used part of a street in the city of Birmingham, Ala. The deceased was a flagman at this crossing. The waving of a red flag by him was a signal that an engine or train could go over the crossing, and was a warning to travelers on the street of danger at the crossing. The use by him of a flag of another color (one witness saying that the color was blue and others describing the flag as a green one) meant that it was safe for travelers on the street to go over the crossing.

Not long before the deceased was killed the engine the tender of which struck him had passed over the crossing while the red flag was being waved, headed in the direction opposite to the one in which it was backing when the deceased was struck. In going over the crossing it followed a long train, which continued to move beyond the crossing. After the engine got over the crossing, it was switched to another track, upon which it was backing over the crossing when the tender struck the deceased. There was evidence tending to prove that this backing movement was made while the deceased was waving the green or red flag, and while the crossing was being used by many travelers along the street.

[1] Some contentions made in the argument of counsel for the plaintiff in error (the defendant below) are based upon the suggestion that there was an irreconcilable conflict between the testimony of the witness who described the flag which he said the deceased was waving just before he was struck as a blue one and the testimony of the witnesses who said that the two flags which the deceased made use of were the red one and a green one. We are of opinion that it was open to the jury to find from the evidence as a whole that the flag the waving of which meant that travelers in the street could with safety use

the crossing, and that it was closed to engines and trains, was a green flag, and that it was that flag which was seen by the witness who described it as blue. It well might be inferred that a witness of such an occurrence as the one in question in this case might get the impression that the color of a flag he saw used by the flagman was blue, though the fact was that it was green, and yet at the same time clearly distinguish that flag from a red one.

[2, 3] It is insisted in behalf of the plaintiff in error that the undisputed evidence showed that the deceased was guilty of contributory negligence, and that the court erred in refusing to give a requested instruction "that Maynord was guilty of contributory negligence in stepping or standing or remaining on or in dangerous proximity to the track on or near which he was injured, whether he was waving a green flag or a red flag or not." There was evidence to support a finding that prior to and at the time the deceased got on or very near to the track on which the engine and tender which struck him were backing he was waving the flag which meant that the crossing was closed to engines and trains and was safe for the use of travelers along the street, and that people and vehicles were moving over the crossing in both directions. If it was under such circumstances that the deceased approached the place at which he was struck, we are not of opinion that it was negligence per se for him to do so without first looking in the direction from which the engine and tender were backing. One's doing or omitting to do what he has good and sufficient reason for believing he can safely do or omit to do is not negligence. If the deceased had good reason to infer that an engine or train would not move over the crossing at the time he approached or got to the place at which he was struck, his going to or being at that place without looking for an approaching engine or train properly might be regarded as no more negligent than the conduct of a traveler along the street who went over the crossing in reliance on the invitation given by the signal of safety. The evidence on the issue of the deceased's contributory negligence was conflicting. The question was one for the jury. It follows that the quoted request for an instruction was properly refused. Birmingham Railway Light & Power Co. v. Hayes, 153 Ala. 178, 44 South. 1032; Louisville & Nashville R. Co. v. Webb, 90 Ala. 185, 199, 8 South. 518, 11 L. R. A. 674.

In the trial issues were raised by the pleadings and the evidence as to the alleged negligence of the defendant's employés, as to contributory negligence of the deceased, and as to negligence of his coemployés after his peril was discovered by them. Complaint is made of sundry rulings of the court in submitting these issues to the jury. Our conclusion is that no reversible error was committed in any ruling complained of. The questions presented are not deemed to be such as to call for further discussion or comment.

The judgment is affirmed.

PETERSON v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. October 26, 1917.)

No. 1544.

CRIMINAL LAW ⇐1147—SENTENCE—ABUSE OF DISCRETION.

Where accused was convicted of stealing from a post office a rubber stamp, the property of the United States, the act of the presiding judge in sentencing him to three years' imprisonment, which was maximum imprisonment provided by Penal Code (Act March 4, 1909, c. 321) § 190, 35 Stat. 1124 (Comp. St. 1916, § 10360), cannot be reviewed as an abuse of discretion, on the theory that the punishment was excessive, even though the judge, in assessing the punishment, took into consideration the fact that the theft of the stamp was committed for an ulterior and decidedly criminal purpose, and that accused was guilty of subornation of perjury of the most glaring character.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

Alfred T. Peterson was convicted under Penal Code, § 190, of stealing from the post office a money order stamp, property of the United States; and brings error. Affirmed.

Bond & Bruce, of Wise, Va., and W. S. Cox, of Gate City, Va., for plaintiff in error.

R. E. Byrd, U. S. Atty., of Richmond, Va.

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

KNAPP, Circuit Judge. Peterson was convicted of stealing from the post office at Duffield, Va., a money order stamp, the property of the United States. The punishment prescribed for such an offense is a fine of not more than $200, or imprisonment for not more than three years, or both. Penal Code, § 190. Peterson was sentenced to the penitentiary for three years, but was not required to pay a fine. On the trial the government gave proof which warranted the jury in finding him guilty of the larceny charged in the indictment, and likewise introduced testimony tending to show that he was also guilty of subornation of perjury, an offense for which he had not been indicted. Because of this testimony, which the presiding judge evidently believed, and because the stamp was stolen for an unlawful, if not criminal, purpose, the maximum term of imprisonment was imposed. That these considerations induced a sentence of three years does not appear from anything contained in the record, but from a letter written by the District Judge some four months after the trial and printed in the brief of defendant's counsel, as follows:

"Concerning the sentence in the A. T. Peterson case I see no impropriety in my stating to you the fact that the offense for which the defendant was formally found guilty by the jury was and is in my opinion rather trifling, and for it a moderate punishment would have been amply sufficient. However, I became firmly convinced during the trial and believe now that Peterson was guilty of subornation of perjury of the most glaring character, and I further took into consideration the fact that the theft of the post office stamp

was committed for an ulterior and decidedly criminal purpose. The main reason for the severe sentence imposed, however, was the subornation of perjury."

The contention here made, and the only reviewable question raised by the assignments of error, is that the severity of the sentence manifests an abuse of judicial discretion, and that in effect Peterson has been convicted of one crime and punished mainly for another. We cannot see our way to sustain this contention. Granted that a much milder sentence would be adequate for the mere theft of this 40-cent stamp, it does not follow, and the letter does not show, that any part of the punishment imposed was for the subornation of perjury, or for the fraudulent use of the stamp which Peterson intended, but rather and simply that those facts were taken into account by the learned judge in determining what sentence should be passed upon Peterson for the larceny of which the jury had found him guilty. The conduct of defendant to which the letter refers, and which more or less clearly appears from the record, was directly connected with the theft for which he was indicted, and that conduct disclosed a criminal inclination, to say the least, which was rightly and properly considered in fixing a penalty suited to the offense. As the case is here presented, the sentence of three years' imprisonment seems oversevere; but it is within the limits prescribed by the Code, and we have no warrant for saying that it is excessive in a legal sense, much less that it evidences an abuse of judicial discretion. Abundant authority supports this conclusion. In Freeman v. United States, 243 Fed. 353, — C. C. A. —, the Ninth Circuit Court of Appeals has recently held:

"That the question of the nature of the sentence was one which rested in the discretion of the court below, a discretion which will not be reviewed in this court in any case where the punishment assessed is within the statutory limits."

And peculiarly applicable to the case at bar is the following excerpt from the opinion of the Seventh Circuit Court of Appeals in Wallace v. United States (lately decided) 243 Fed. 300, 310, — C. C. A. —:

"Respecting the assignment of error challenging the sentence upon the ground that it is excessive, while it seems that a smaller fine and briefer term of imprisonment might sufficiently have penalized the transgression and vindicated the law, we may not substitute our own discretion for that of the District Court; and under all the circumstances we cannot find there was abuse of that court's discretion in this regard."

If Peterson has been punished with undue severity, relief should be sought in appeal to executive clemency, and not to a court whose authority in a case like this is confined to the correction of legal errors.

Affirmed.

COYNE v. UNITED STATES.

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

No. 3054.

WITNESSES ⇐359—EVIDENCE—CREDIBILITY.

In a prosecution for one crime, evidence that accused was indicted for another distinct offense is inadmissible on the question of his credibility as a witness, for an indictment is a mere accusation, and raises no presumption of guilt; the indicted person being presumed innocent until his guilt is established beyond reasonable doubt.

In Error to the District Court of the United States for the Western District of Texas; Gordon Russell, Judge.

Lee F. Coyne was convicted of violating Act June 25, 1910, commonly known as the White Slave Traffic Act, and he brings error. Reversed.

Harry C. Miller, of El Paso, Tex., for plaintiff in error.

R. E. Crawford, Asst. U. S. Atty., of El Paso, Tex.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. The plaintiff in error was convicted of a violation of Act Cong. June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1916, §§ 8812–8819), commonly known as the White Slave Traffic Act. He testified as a witness in his own behalf. On his cross-examination he was required, over objection duly interposed by his counsel, to answer the question: "You are under indictment up there in the federal court in Seattle for blackmail?" His answer to the question was: "I don't know. I deny that I am under indictment in Seattle. I have no knowledge of any other indictment, only right here in El Paso." After the defendant rested, the prosecution offered in evidence an indictment which, as was agreed by a stipulation of the counsel for the respective parties, which was made a part of the bill of exceptions, was in effect as stated by the court in the following statement made in overruling the defendant's objection to the introduction of the indictment, on the grounds, among others, that the evidence of the indictment was irrelevant and immaterial:

"This bill of indictment is certified to by the clerk of the United States District Court for the Western District of the State of Washington, and contains 33 pages of allegations. It contains what is commonly known as a number of counts, there being in this bill of indictment eight counts, and these counts charge this defendant, Lee F. Coyne, and John W. Roberts, with conspiracy to extract money from a man by the name of Yarbrough by accusing him of violating the White Slave Traffic Act. The bill of indictment alleges that by means of inducement they induced Yarbrough to surrender certain money to them, I believe the allegation is as much as $2,000. It also contains a count in which it alleges that in furtherance of a conspiracy Lee F. Coyne and John W. Roberts represented themselves to be agents and officers of the United States government charged with the execution and enforcement of the White Slave Traffic Act. Now, that indictment has been objected to by the defendant; the court has overruled the objection of the defendant and

permitted the indictment to go in evidence. I desire to state to the jury here now the only purpose for which the indictment is admitted, and the only purpose for which you can consider it, is to enable you to pass upon the credibility of the defendant, Lee F. Coyne, as a witness; the defendant having testified as a witness in this case. This indictment may be considered by you for the purpose of enabling you to pass upon and determine the amount of credit and belief you give him as a witness. It must not be considered by you as any evidence of the truth of the allegations in the indictment for which the defendant is on trial in this court, nor must it be considered by you as evidence of the truth of the allegations contained in this bill of indictment offered in evidence; but I am simply permitting the fact to go to the jury that the defendant was indicted in this case in the state of Washington, as I stated to you, for the sole purpose of enabling you to pass upon his credibility as a witness. You must not consider it for any other purpose so far as this case is concerned; but you may consider it for the purpose of enabling you, among other circumstances in the case, to pass upon his credibility as a witness."

Exceptions were reserved to the above-stated rulings of the court. We are of opinion that those rulings were prejudicially erroneous. The fact that an unproven charge has been made against one has no logical tendency to prove that he has been guilty of any offense, or to impair the credibility of his testimony. An indictment is a mere accusation, and raises no presumption of guilt. On the contrary, the indicted person is presumed to be innocent until his guilt is established, by legal evidence beyond a reasonable doubt, in a court of competent jurisdiction. It does not seem to be fairly open to question that he is deprived of the benefit of this presumption by the admission against him of evidence of the fact that a charge, based upon ex parte evidence, which, when combated on a trial, may turn out to be utterly untrustworthy, has been made against him. It is not uncommon for entirely innocent persons to be indicted. It would be a gross injustice to permit the fact of such a making of a charge to be used to the prejudice of the person against whom the unproved charge is made. The evidence admitted over the objections made did not any more shed light on the question of the credibility of the defendant's testimony than it did upon the question of his guilt or innocence of the offense for which he was on trial. Glover v. United States, 147 Fed. 426, 77 C. C. A. 450, 8 Ann. Cas. 1184; People v. Morrison, 195 N. Y. 116, 88 N. E. 21, 133 Am. St. Rep. 780, 16 Ann. Cas. 871; Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496; Slater v. United States, 1 Okl. Cr. 275, 98 Pac. 110; 5 Jones on Evidence, § 838.

Because of the errors above mentioned the judgment is reversed.

STEPHEN PUTNEY SHOE CO. v. DASHIELL.

In re BOWDEN.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1917.)

No. 1538.

BANKRUPTCY ⇐467—REVIEW—FINDINGS OF REFEREE.

A finding of fact by a referee, when confirmed by the lower court, will not be reversed on appeal, unless plain error is made to appear.

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

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

In the matter of the bankruptcy of George A. Bowden. Petition by R. Grayson Dashiell, trustee, against the Stephen Putney Shoe Company, for return of a payment as a preference. An order of the referee was confirmed by the District Court, and the creditor appeals. Affirmed.

Allen G. Collins, of Richmond, Va., for appellant.

R. L. Montague, of Richmond, Va. (Daniel Grinnan, of Richmond, Va., on the brief), for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. Within four months prior to his adjudication, in a voluntary proceeding, the bankrupt made payments to appellant, his principal creditor, to the amount of $971.76, in excess of the value of merchandise furnished to him during the same period. Upon petition of the trustee, and after full hearing, the referee ordered a return of this balance on the ground that it was a voidable preference under section 60, subsection "b," of the Bankruptcy Act (Comp. St. 1916, § 9644). The order was confirmed by the District Court, and the creditor appeals.

The evidence of record shows beyond serious doubt that Bowden was hopelessly insolvent throughout the four months preceding his bankruptcy, and that the net amount paid to appellant during that time gave it a much larger percentage of its debt than other creditors of the same class could then or can now obtain. Indeed, the only debatable question is whether the appellant, when it received this money, "had reasonable cause to believe" that its retention would "effect a preference." But this was a question of fact to be determined from all the circumstances attending the transaction and the relations existing between the parties thereto. In a careful and exhaustive report the referee has reviewed the evidence in detail and set forth at some length the reasons for his conclusion upon this issue. It has long been the established rule in such cases that the findings of a referee, especially when confirmed by the lower court, will not be reversed on appeal, unless plain error is made to appear.

A careful study of the record here presented, not only fails to disclose any such error, but, on the contrary, satisfies us that the decree below was correct, and should be affirmed.

ALEXANDRIA PAPER CO. v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 11, 1917.)

No. 2469.

1. COURTS ⇐406(2)—CIRCUIT COURT OF APPEALS—REVIEW—JURISDICTION.
Though the record on appeal to the Circuit Court of Appeals discloses no facts to support federal jurisdiction, yet, where the judgment on the merits is valid, it will be upheld, pending inquiry into the jurisdictional

facts, or judgment may be reversed, with directions to the trial court, on finding jurisdictional facts, to enter final judgment, or, in event of failure, to dismiss without prejudice.

2. COURTS ⟸406(2)—CIRCUIT COURT OF APPEALS—JURISDICTION—ADMISSIONS.
Where counsel for plaintiff in error upon oral argument in open court admitted facts supporting federal jurisdiction, the judgment, being otherwise valid, cannot be reversed because the record failed to show facts supporting federal jurisdiction.

In Error to the District Court of the United States for the District of Indiana.

Action by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, against the Alexandria Paper Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

L. E. Ritchey, of Franklin, Ind., for plaintiff in error.

Charles P. Stewart and Frank L. Littleton, both of Indianapolis, Ind., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. The action and judgment were for demurrage charges on a large number of cars of defendant in error. No bill of exceptions appears, and the judgment on its merits is not assailed. But it is insisted that a new trial should be granted because the record fails to show the existence of facts to support federal jurisdiction of this action—the fact that the alleged demurrage charges arose with respect to interstate shipments. If it be conceded that the record discloses no facts to support federal jurisdiction, must (as plaintiff in error insists) a new trial be granted?

[1, 2] This court has had occasion to pass upon the practice to be followed where the judgment on the merits is found valid, but the record fails to disclose facts giving the federal court jurisdiction of the action. In Grand Trunk Western Ry. Co. v. Reddick, 160 Fed. 898, 88 C. C. A. 80, we held that a just verdict will stand, pending inquiry by the trial court into the fact of diversity of citizenship. In Parker Washington Co. v. Cramer, 201 Fed. 878, 120 C. C. A. 216, we followed the same course in a case where there had been recovery of a judgment, and where the record did not disclose the facts to support federal jurisdiction. The judgment was there reversed, with direction to the trial court to permit the parties to make an issue respecting the jurisdictional facts, and to try such issue, and, if found favorable to the jurisdiction, to enter final judgment, and, if found otherwise, to dismiss the action without prejudice. We reaffirm the propriety of this practice; and such would be the disposition of the instant case, but for the fact that upon oral argument counsel for plaintiff in error in open court admitted opposite counsel's assertion that demurrage charges on which the judgment was rendered were in respect to interstate shipments. Such admission obviates the necessity of remanding the cause to the District Court for the purpose of ascertaining that fact, as it would be an idle formality to have the court

try and pass upon an issue of fact as to which the parties in open court have agreed.

The jurisdictional facts thus appearing to exist, the judgment of the District Court is affirmed.

ULLMAN, STERN & KRAUSSE v. COPPARD.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1917.)

No. 3077.

BANKRUPTCY ⊂⊃303(2), 341—PREFERENCES—ADJUDICATION—WHAT CONSTITUTES.

A judgment of a referee in bankruptcy, disallowing, on objections by the trustee, a claim against the bankrupt's estate, on the ground that the claimant had received a preference, is res judicata on the question of preference, and admissible in evidence in a subsequent suit by the trustee to recover the preference.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Suit by M. Coppard, trustee in bankruptcy of the estate of the Ainsworth Mercantile Company, against Ullman, Stern & Krausse. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Henry A. Hirshberg and W. H. Kennon, both of San Antonio, Tex., for plaintiff in error.

Jas. D. Crenshaw, of San Antonio, Tex., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER, District Judge.

FOSTER, District Judge. The only question presented in this case is whether the judgment of the referee, disallowing, on the objections interposed by the trustee in bankruptcy, a claim against the bankrupt estate by plaintiff in error, on the ground that the creditor had received a preference, constituted res adjudicata on the question of preference, and was admissible in evidence in a subsequent suit by the trustee to recover the preference. The District Court affirmatively so ruled, and with this we concur.

Affirmed.

MUTUAL COAL CO. v. ANGELO.

(Circuit Court of Appeals, Eighth Circuit. September 17, 1917.)

No. 4739.

APPEAL AND ERROR ⊂⊃870(6)—MATTERS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.

The ruling on a motion for new trial is not reviewable on error in the federal courts.

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

Action at law by John Angelo against the Mutual Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. A. Williams, of Denver, Colo., for plaintiff in error.
George Allan Smith, of Denver, Colo., for defendant in error.

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

PER CURIAM. The assignments of error in this case are directed to the ruling of the trial court on motion for a new trial. The sufficiency of the evidence to justify the verdict is raised in no other manner. It is apparent, therefore, that there is nothing presented to us for review.

The judgment below is affirmed. Motion for damages for delay under the rule denied.

GENERAL MANIFOLD & PRINTING CO. v. SIMPLE ACCOUNT SALES BOOK CO.

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

Nos. 2992, 2993.

1. PATENTS ⟸328—INVENTION—ANTICIPATION.
The Weeks patent, No. 665,622, for a manifold paper, provided with a surface of hardened carbon or similar coloring material, *held*, it being contended the invention was for a paper with three layers, first the paper to be written on, next a soft carbon composition on the back thereof, and a mechanically hardened surface, not to show invention, having been anticipated.

2. PATENTS ⟸328—INVENTION—WHAT CONSTITUTES—ANTICIPATION.
The Lewis patent, No. 704,844, for a manifolding device, consisting of a package provided with a series of separate stubs in combination with a series of writing and copying sheets, each sheet composed of two leaves, one leaf provided with a writing surface on one side and a transfer surface on the other, and the other leaf provided with a transfer receiving surface, the leaves being separately and detachably secured at one end to the stubs along a weakened line, and to each other at their opposite ends by a similar joint, *held* not to show invention, amounting, in view of the prior art, to no more than an existing combination, in which had been substituted for one element a known equivalent.

Appeals from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Bills by the General Manifold & Printing Company against the Simple Account Sales Book Company. From decrees dismissing the bills, complainant appeals; the causes being consolidated. Affirmed in each case.

Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill. (Harry E. King, of Toledo, Ohio, of counsel), for appellant.

Almon Hall, of Toledo, Ohio, J. B. Hull, of Cleveland, Ohio, and W. R. Lane, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. These are two infringement suits: The first, upon the Weeks patent, No. 665,622, January 8, 1901, for a manifold pa-

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

per; the second, on the Lewis patent, No. 704,844, July 15, 1902, on a manifolding pad. The nature of the patents is shown by the claims in suit, quoted in the margin.[1] The court below dismissed both bills.

[1] *The Weeks Patent.*—We are not clear that the specification and claim support appellant's present theory, viz. that the invention was of a paper with three layers: (1) The paper to be written upon; (2) a soft carbon composition washed on the back thereof; (3) a mechanically-produced hardened surface or skin on the carbon; but, if this is the true theory, the patent is anticipated by the British patent to Brumby, of November 3, 1888. While Brumby does not refer to a "hardened" surface or layer in so many words, it is not disputed that his calendering rolls will necessarily produce this hardened surface, to at least as great extent as will the apparatus of Weeks. Brumby's disclosure left nothing to be discovered or to be done.

[2] *The Lewis Patent.*—The British patent to Morton, of 1892, is not satisfactory as a complete anticipation. Morton showed two forms of pad. In one, the duplicate sheet was, at its top, separably attached to the stub, and, at its bottom, similarly attached to the original, which was then folded back upon the duplicate, leaving the top of the original adjacent to, but free from, the stub. In the other, original and duplicate were separably stubbed, but were (probably) free from each other at their lower ends. In both, the carbon was washed upon the back of the original. Stettinius (United States patent No. 344,061, June 22, 1886) had his original and duplicate attached to their respective stubs at their inner sides and to each other at their outer edges. Between them, he employed interposed and removable carbon sheets (as well as a triplicate transfer sheet). The carbon coating upon the reverse of the original and the separately-inserted carbon sheet were already well-known equivalents; and it was then familiar practice to stub either an original or duplicate or both at pleasure. Lewis took Morton's first form and added a stub for the original, just as Morton had done in his second form; or, perhaps, he took Stettinius' form and substituted a carbon backing for the carbon sheet. From neither point of view did he do more than to take an existing combination and substitute for one element thereof a known equivalent. This is not invention. Keene v. New Idea Co. (C. C. A. 6) 231 Fed. 701, 145 C. C. A. 587; Fare Register Co. v. Ohmer Co. (C. C. A. 6) 238 Fed. 182, 151 C. C. A. 258; Budd Co. v. New England Co. (C. C. A. 6) 240 Fed. 415, 153 C. C. A. 341, and cases cited in each.

The decree in each case is affirmed.

1 *Weeks' Claim 1.*—As a new article of manufacture, a manifold paper provided with a surface of hardened carbon or similar coloring material, substantially as described.

Lewis' Claim 1.—A manifolding device consisting of a package provided with a series of separate stubs in combination with a series of writing and copying sheets, each sheet composed of two leaves, one leaf provided with a writing surface on one side and a transfer-surface on the opposite side, and the other leaf provided with a transfer-receiving surface, said leaves separately and detachably secured at one end to the stubs along a weakened line and to each other at their opposite ends by a similar joint, substantially as described.

CONSOLIDATED RY. ELECTRIC LIGHTING & EQUIPMENT CO. v. UNITED STATES LIGHT & HEAT CORP.

(District Court, W. D. New York. June 13, 1917.)

1. PATENTS ⊂⊃185—VALIDITY—OPERATION.
   Where a device is operative to a limited extent only, a patent therefor is valid, but should be given a narrow construction, excluding a later device for accomplishing the result by an essentially different mode of operation.
2. PATENTS ⊂⊃66—"ANTICIPATION"—WHAT CONSTITUTES.
   Patents granted subsequent to that of complainant, though applications were first filed, are not anticipatory, and can be considered only to prove prior inventions.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Anticipation.]
3. PATENTS ⊂⊃328—CONSTRUCTION—ANTICIPATION.
   The Kennedy patent, No. 1,019,482, for an improved method of charging storage batteries used in car-lighting systems wherein the generator is driven by car axle, *held* not anticipated.
4. PATENTS ⊂⊃328—INVENTION—INFRINGEMENT.
   The Kennedy patent, No. 1,019,482, for an improved method of charging storage batteries used in car lighting wherein the generator is driven by the car axle, having means for maintaining its output constant, and being provided with a predetermined voltage relay to control the regulator for automatically charging the battery to its full capacity, and then protecting it from excessive overcharge, construed, and *held* to show invention only in so far as providing a method for measuring the time during which the current passed to the battery, as distinguished from the amount of the current, and so not to be infringed by defendant's devices.
5. PATENTS ⊂⊃328—INFRINGEMENT—WHAT CONSTITUTES.
   The Bliss patent, No. 773,917, for improvements in electrical distribution, consisting of a primary generator, means for driving it, a storage battery, a translating device, and means under the control of the storage battery for automatically reducing the charging of the storage battery when the battery is charged to a predetermined point, *held* not anticipated and not infringed by devices manufactured by complainant.

In Equity. Bill by the Consolidated Railway Electric Lighting & Equipment Company against the United States Light & Heat Corporation, which counterclaimed. Decree construing complainant's patent claims in issue, and adjudging them not infringed by defendant, and dismissing the counterclaim.

Pennie, Davis, Marvin & Edmonds, of New York City (William H. Davis, of New York City, and Dean S. Edmonds, of Chicago, Ill., of counsel), for plaintiff.

Jones, Addington, Ames & Seibold, of Chicago, Ill. (W. Clyde Jones, Arthur B. Seibold, and Raymond H. Van Nest, all of Chicago, Ill., of counsel), for defendant.

HAZEL, District Judge. The bill alleges infringement of letters patent No. 1,019,482, granted March 5, 1912, to Patrick Kennedy, on application filed March 17, 1908, for an improved method of charging storage batteries used in car-lighting systems wherein the generator is driven by the car axle, having means for maintaining its output con-

stant, and being provided with a predetermined voltage relay to control the regulator for automatically charging the battery to its full capacity and then protecting it from excessive overcharge.

The predetermined voltage relay F^1, to which reference is hereinafter made, is asserted by defendant to function substantially like that described in the prior patent to Creveling, which was heretofore considered by this court and held valid. Safety Car Heating & Lighting Co. v. U. S. Light & Heating Co., 222 Fed. 310. And it is also asserted that the Kennedy patent in suit was intended as an improvement thereon.

Before Creveling, the car-lighting art had adapted means for regulating the generator current, either for constant potential or constant current, and the existence of such different systems was recognized by the patentee. Creveling's invention was the addition to the constant current system of a battery protective device consisting of a potential stop charge relay placed across the battery terminals, so as to make it responsive to back voltage of the battery during the charging. When the battery voltage rose to a predetermined maximum, say 42 volts on a 16-cell battery, the relay, which until then had been inert, became energized, and the circuit was closed by a regulating coil, and owing to resistances in the circuit the dynamo output was decreased, the electromotive force of the battery was opposed, and overcharging prevented. Referring to the object of the invention and to prior lighting systems generally, the specification states:

"In railway car lighting, various means have been proposed to prevent an overcharge of the storage battery. These systems which have been most widely used in practice are (a) the system in which the generator is regulated to produce an electromotive force of constant value, so that the battery is charged at constant potential, and as the electromotive force of the battery rises it opposes that of the generator, thereby preventing an overcharge; (b) the system in which there is inserted between the generator and the battery a circuit breaker which is operated to cut off the charging current whenever the potential across the battery terminals reaches a predetermined maximum."

There were numerous objections to the prior devices which were adjustable for regulating the generator to a constant potential or a constant current, arising, principally, from variations in potential or resistances originating within the storage batteries from the back voltage, which made it difficult to apply the usual tests for determining at any time the condition of the battery charge. These difficulties were of serious import, and the patentee designed to surmount them by adding to the system a meter device which in the early part of the charge delayed the action of the predetermined voltage relay and in the latter part of the charge, or after a slight overcharge—after charging to its full capacity regardless of internal variations—functioned automatically to prevent a long-continued overcharge of the battery. The object of the meter or time-measuring device was to ascertain and record the condition of the battery charge.

In describing the details for operating the device the specification refers to a plurality of small magnets, each controlling a star wheel and separately connected in series with one of the solenoid coils (Figs. B', C', D, and E') comprising part of the meter and functioning to

increase the dynamo output to permit an uncounted quantity to go to the battery. Such uncounted or additional charge, complainant contends, was a corrective factor, to make up for battery losses from leakage or other causes; but whether it did so in fact is questioned by the defendant. When the system is in operation, the lighting of the lamps closes the lamp switch, and thereupon the circuit of the small magnets also closes, with the exception of one, which becomes excited and brings into position its star wheel together with another star wheel —one star wheel indicating battery charge and the other battery discharge. To insure clearness of description, I quote from complainant's brief:

"The lamps are divided into banks which, in the particular instance chosen, are assumed to be of 10 amperes' consumption in each bank, so that, when any bank switch is closed, thereby drawing 10 amperes of current for the lamps, the corresponding magnet *5*, *6*, *7*, or *8* is energized and its star wheel is given one reverse actuation in each unit of time. The effect is, of course, to indicate a discharge of 10 amperes. It is thus apparent that the construction of the meter is such that, for each unit of time during which the generator is acting to charge the battery at the normal rate of 30 amperes, the meter will indicate a charge of 30 amperes going into the battery, and for each unit of time during which any bank of lamps is burning, the meter will indicate a discharge of 10 amperes. If the generator is charging the battery when no lamps are lighted, the indication of charge will properly be 30 amperes. If lamps are lighted when the generator is not running, the indication of discharge will properly be 10 amperes for each lamp bank."

The star wheels are connected with the magnets to comprise four separate lamp banks; each bank taking an equal quantity of current. When the lamps are lighted the dynamo supplies unmeasured current to the storage battery to equalize for losses, and the pointer travels forward three steps, indicating a charge of 30 amperes to the battery and each reverse step a discharge of 10 amperes.

The corrective factor interferes, no doubt, with determining the precise condition of the battery charge, and in this respect complainant asserts its device is not dissimilar to defendant's; but, however that may be, the principal object of the inventor was to provide a device for ascertaining at least the approximate state of the battery at any time. Did he succeed in producing a meritorious invention? Has he solved the problem of easily determining the condition of the battery charge—a difficulty due to varying load conditions?. And has he devised means for preserving the maximum efficiency of the battery?

The defenses are limitation of claims, inoperativeness, and noninfringement as to both systems marketed by defendant, viz. the so-called standard and double relay systems.

The claims relied on are 1, 2, 3, 4, 7, and 8, but it will suffice to set forth the first and third, representing the method and apparatus claims respectively:

"1. The method of charging storage batteries which consists in supplying a charging current to the storage battery for a predetermined number of ampere hours regardless of the electromotive force of the battery, and thereafter causing a predetermined maximum potential difference across the battery terminals to discontinue the charging current, substantially as described."

"3. In a train-lighting system, a generator driven from the car axle, a stor-

age battery connected to said generator to be charged thereby, and mechanism for regulating the generator to a constant current output, in combination with a controlling device in said circuit which discontinues the charging current when the potential thereof reaches a predetermined limit, and mechanism for rendering the controlling device inoperative until the battery had been charged to a predetermined number of ampere hours, substantially as described."

In claim 1 two definite steps for practicing the invention are set forth, namely: (1) Charging the battery for a predetermined time, regardless of the amount of current flowing thereto; and (2) stopping the charging current to cause a predetermined maximum to flow across the battery terminals. The first step provides for regulation of current supply to the battery by a meter device, the voltage relay F^1 being dormant; while the second step requires that switch F be closed when the charge is nearly completed, to permit relay F^1 to come into activity when the back voltage of the battery rises to the stage for which the relay has been set, namely, "the predetermined maximum potential difference." There was evidence showing that when F^1 was set at a high voltage, and the battery was not co-operating with the meter, the action of coil F^2 was delayed until switch F became excited, but the charge then was quicker than if the relay F^1 had been set at a lower voltage.

There was divergent discussion among the experts as to the meaning of the method claims; that is, as to whether relay F^1 acted like the voltage coil in Creveling's patent for shutting off the charge to the battery or whether coil F^2 necessarily performed that function. I think that, after the meter contacts were closed in Kennedy's structure, the charge was indebted to the effectiveness of coil F^2, which, as said, remained inactive until the charge was brought up to a predetermined quantity. Any limitations of the claims in controversy must find justification in the evidence relating to the inoperativeness of complainant's device. Whether or not such testimony complies with the standard of proof required to overcome the prima facie presumptions arising from the grant will receive consideration hereinafter.

Claim 3, relating to the apparatus, includes the combination for driving the dynamo, the storage battery, means for regulating the generator to a constant current output, a stop charge relay or controlling device, and means for making the controlling device inoperative until a predetermined number of ampere hours have been let into the battery. Claim 4 is substantially the same as claim 3, except that it refers to a movable indicator; while claim 3 refers to the meter as a controlling device. Claim 7 is limited to traveling mechanism and a specific relay having a "second circuit controlling a device responsive to the difference of potential across the battery terminals" for stopping the charge.

Complainant contends that the principal claims herein are entitled to a broad construction, and that, when so construed or interpreted, the standard and double relay devices employed in defendant's structures are wrongful appropriations; that an analysis of the evidence unmistakably discloses that the Kennedy meter actually measured the battery charge, and not merely the energy required for completing

the charge; and that corrective allowance is made for inherent battery deficiencies. Defendant rejoins that the claims broadly include a lighting system and improvements which were not invented by the patentee; that, if their wording is descriptive of its structures, the invention was nevertheless incomplete and inoperative when the patent application was filed.

[1] Although the inventor had in mind overcoming serious difficulties to which the earlier battery protective devices were subject, still I think his idea related more specifically to the constant current regulator of Creveling, in which the back voltage of the battery was responsible for actuating the predetermined voltage relay, rather than to the constant voltage regulator wherein the back voltage was not regarded as a material factor in discontinuing battery charge. In discussing the inoperativeness of the Kennedy meter, it is well to have in mind the law succinctly stated by Judge Hough in Engineer Co. v. Hotel Astor (D. C.) 226 Fed. 779, to wit, that a patented device need not be perfect in order to escape the charge of being inoperative and incomplete, even though the later structure is the better of the two. In this case, however, it is necessary to ascertain whether the patented device was incapable of accomplishing the object of the inventor. If the patentee designed to construct an ampere hour meter, and it is evident that an operative one cannot be constructed from the teachings of his patent, its utility is negatived; but, as I understand the law, the patent will escape invalidity if the device is operative to a limited extent only, and will be entitled to a narrow construction, excluding a later device for accomplishing the result by an essentially different mode of operation. Herzog v. N. Y. Telephone Co. (C. C.) 172 Fed. 425, affirmed 176 Fed. 349, 99 C. C. A. 623; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. In Lovell v. Seybold Match Co., 169 Fed. 288, 94 C. C. A. 578, Judge Coxe clearly states the rule which in my view may be applied herein. He says:

"The claims must be construed in the light of the contribution which the patentees made to the art. They should hold whatever of value they have added provided it involved invention to make the addition. It would, however, be grossly unfair to compel the builder of a practical working machine to pay tribute to one who has added nothing of substantial value to the art, simply because the language of his claims is broad enought to include the successful structure. Claims should cover what the patentee has invented and not what he imagines he has invented."

Defendant's witnesses Lanphier, Robinson, and Sheldon, concededly having wide experience in the car-lighting art, have positively sworn that the Kennedy meter could not possibly indicate the state of battery charge, owing to the absence of an element responsive to the current flowing into and from the battery; that an automatic indication was impossible owing to the necessity for manually setting switches for co-operation with variations in lamp conditions; that in an ampere hour meter for car lighting it was important that there should be embodied in the structure an element responsive to current changes in the circuit and means for instantaneously multiplying the current by time; that the Kennedy device was inoperative and impracticable,

and could not record ampere hours to the battery or indicate approximately battery conditions. Lanphier, however, on cross-examination, seemed to agree that it would register correctly during regulation at 30 amperes as long as the current consumed amounted to 10 amperes per lamp bank. Mr. Lunn, chief electrician for the Pullman Sleeping Car Company, admitted that the device would operate when applied to cars having center lights in banks.

There was testimony of a highly technical character relating to the corrective factor. Charts were introduced in evidence of curves showing the percentage of error based upon actual amperes to the battery, which were then contrasted with the indicated input to the battery. It is unnecessary for me to treat at length of the charts. Those upon which defendant relied were criticized because they did not consider the proportional quantity of unmeasured current required by the lamps to compensate for battery leakage and other causes. The club car chart disclosed a closure of the meter contact F^2 (Elkhart stop to Toledo and Harmon stop to New York) closing the relay F^1 and controlling it by the potential of the battery; the charge meanwhile continuing. But it is not improbable that this condition was due to failure to properly set the principal relay, which if it had been set to close circuit F^2 of the regulator would have resulted in stopping the charge. Although counsel for defendant point with confidence to the charts as corroborating the testimony relating to inoperativeness of complainant's patent, I think the testimony relating thereto is open to the construction that the Kennedy method and apparatus, when contrasted with the modern ampere hour meters, are not as practical or useful.

[2-4] There were cited by defendant the prior patents to Wray and Taylor to show that the Kennedy method, viewed broadly, was invalid for lack of novelty; but these patents were granted subsequent to the Kennedy patent, and, though the applications were filed first, they are not anticipatory, and can be considered only to prove prior inventions. Sundh Electric Co. v. Interborough Rapid Transit Co. (C. C.) 222 Fed. 334. As to these devices, however, it is enough to state that Wray lacked the combination of the claims in suit, while Taylor's device was not in the train-lighting art. It is true that means in the form of ampere hour meters for controlling storage batteries in connection with stationary regulators were old; but the devices in which they were applied indicated battery charge only, without preventing overcharge. Kennedy took steps towards completely solving the problem of battery protection, but his construction did not go far enough, and its deficiencies and limitations were at once perceived. It was incapable of indicating the number of ampere hours mainly because of the inclusion in his system of lamp banks having a plurality of magnets, star wheels, and supplementary coils on the regulator. He also failed to provide a suitable element for bringing together parts for measuring the current and creating responsiveness to battery variations. He applied for and obtained a second patent embodying a single magnet for operating a plunger in lieu of a number of magnets; but, though such device was used experimentally for about a year, its use was discontinued. To remedy the defects of his system and apparatus something more was required than mere mechanical

engineering skill; nor did the later inventions inure to his benefit. Computing Scale Co. v. Standard Computing Scale Co., 195 Fed. 508, 115 C. C. A. 418. The Kennedy device was not entirely useless, in the sense that it would not work at all; but its principle of operation was clearly divorced from that of defendant's standard and double relay systems and apparatuses.

As in my opinion the patentee had in mind a method for measuring the time during which current passed to the battery, as distinguished from the amount of current, and an apparatus requiring a predetermined voltage, I have reached the conclusion that the claims in issue must be limited to such a method and device, regardless of their broad phraseology.

Defendant contended that in 1911 one Bliss invented the battery protective device in question which eventuated in the modern Sangamo Exhibit meter. The Bliss application for patent embodied a motor supplied with current through a commutator to indicate the charge through the battery. Complainant points to the testimony of Robinson and other witnesses to prove the inoperativeness of the Bliss device; but in my view of the controversy it is immaterial whether Bliss or Lanphier & Fits solved the problem, bringing into existence defendant's ampere hour meters. Defendant's devices do not embody the voltage relay F^1 of the Kennedy patent, or any relay set to operate at a predetermined voltage, nor the particular meter—nothing that responds to back voltage of the battery as an initial factor. Its regulation is for constant voltage in the main circuit during battery charge, with gradual reduction of the charging current. Each system has a main coil *13* connected between the main leads, which is the principal element in the regulation, with battery coil *11*, in the main circuit transmitting current to the battery; the meter, upon becoming effective, initiating the rotatable element at a rate of speed proportional to the strength of the current, and thus getting the ampere hours uninfluenced by back voltage of the battery. The double relay shown in Exhibit A does not, like complainant's relay F^1, remain out of action awaiting the back voltage of the battery before becoming active and then stopping the charge. Its operation is due to voltage in the supply mains, but in no sense does it operate only when the battery reaches a prearranged voltage, as in the Kennedy device. This, it seems to me, makes the two systems radically different; one, as heretofore stated, relying on a modified predetermined voltage relay due to the back voltage of the battery, and the other avoiding such characteristics and arranging the elements in combination to make the meter the factor for acting upon the regulator. When the claims in suit are thus construed defendant's systems are not infringements of the Kennedy patent in suit.

[5] As to the counterclaim: Defendant claims that complainant's commercial lighting systems, type L and type L^3 in evidence, were infringements of the prior Bliss patent, No. 773,917, dated November 1, 1904, for improvement in electrical distribution, and acquired by defendant by assignment before this action was brought. Reliance is placed on claim 8, which reads as follows:

"8. In a system of electrical distribution, a primary generator, means for driving it, a storage battery, a translating device, means under the control of the storage battery for automatically reducing the charging of the storage battery by the generator when the battery is charged to a predetermined point, and means also under the control of the generator-driving mechanism for restoring the generator to its normal operative condition, when the speed of the generator-driving mechanism reaches a predetermined point, substantially as set forth."

And it is asserted that complainant's lighting systems embody in combination the stop charge relay described by Bliss, which was brought into activity by the low voltage of the battery after partial discharge. The object of the patentee was no doubt to arrange his apparatus (of the axle-driven type), so that, after the stop charge relay was connected, it would automatically drop back or reset whenever the train stopped, to permit the dynamo to resume charging the battery when the train started. Such is the arrangement of the mechanism.

The patentee did not describe or illustrate a current regulator, and the operativeness of the invention is challenged on that ground. Invalidity of the patent because of inutility depends upon whether more than mechanical skill was required to connect a dynamo regulator to the system in order to make it useful. The expert witness Bentley substantially testified on cross-examination that a constant current regulator, such as he had located in the Bliss system in his sketch on direct examination, would perhaps not operate successfully; that it would tend to cut out the added resistance *12* in the shunt field circuit upon its coming in, with the result that the charging current to the battery would be resumed at normal quantity, regardless of the action of the stop charge relay *F*, which concededly was across the battery when in circuit.

When defendant rested with its testimony, complainant moved to dismiss the counterclaim because of obvious inoperativeness; but the motion is now denied. I doubt, however, whether at the date of the invention a current regulator could have been added to the combination of the patent without the exercise of invention. The evidence on this point is not convincing. But the question of the validity of the patent is unimportant, in view of my finding, as hereinafter stated, that the Bliss patent is not infringed by complainant.

It is contended that the Bliss patent in suit is anticipated by the Brush patent, No. 281,176, of July 10, 1883; but this has not been proven. The claims of the Brush and Bliss patents, it is true, read very much alike; but the former were applicable to a stationary lighting system—one in which the dynamo was not intended to be stopped and then started again, as in Bliss's car-lighting system. The Brush specification, it is true, describes short circuiting magnet *C* when the battery charge is completed by raising the armature lever, and later dropping it to open the short circuit around the said magnet, thus leaving it ready to act upon the starting of the charging current, regardless of the battery charge. But Bliss' device was nevertheless different from that of Brush in important particulars. For example, the latter does not relate to a variable speed-driving mechanism for the dynamo, and it has the potential relay differently arranged—that

is, located permanently across the battery terminals and continuously kept under battery control; while in the former the prearranged voltage relay not only controls the output of the dynamo, but it is also automatically transferable during the charge from battery control to dynamo regulation. These were essential differences, and accordingly the Brush patent was not anticipatory.

However, it has not been proven by a fair preponderance of the evidence that complainant's structures were infringements of claim 8 in question. In its systems the dynamo was self-excited, as distinguished from battery-excited, by the action of a potential relay or stop charge device; while in Bliss the said relay operated to change over from so-called self-excitation to battery-excitation because of the action of the relay. Hence, in my opinion, the proof relating to infringement is insufficient. The respective relays did not, I think, function in substantially the same way to produce substantially the same result.

A decree in accordance with this opinion may be entered, viz. decreeing the Kennedy claims in issue not infringed by the defendant company, and dismissing the counterclaim alleging infringement by complainant of the Bliss patent. No costs to either party.

BUFFALO FORGE CO. v. CITY OF BUFFALO (THOMAS & SMITH, Inc., Intervener).

(District Court, W. D. New York. July 10, 1917.)

No. 158-B.

1. PATENTS ⟸7—VALIDITY—METHOD.
A patent for a method cannot be sustained, when it appears that the result achieved is due to the operation of a machine; but when the new result comes from certain acts, or a series of steps, irrespective of mechanism or the mechanical assemblage, then the steps taken, or the acts performed, or the mode of treatment, involve patentable invention.

2. PATENTS ⟸175—CLAIMS—CONSTRUCTION.
Where a patentee's invention for humidifying air was a departure from prior processes, the claims of his patent are entitled to a fairly reasonable construction, which will not permit another, by changes of form only, to appropriate the substance of his invention.

3. PATENTS ⟸328—INVENTION—INFRINGEMENT.
The Carrier patent, No. 854,270, for a method of heating and humidifying air, consisting in causing an intimate contact of the air with water heated to a temperature above that of the air and below the boiling point, and automatically regulating the temperature of the water by a thermostatic device, *held* to show invention and to be infringed.

4. PATENTS ⟸328—VALIDITY—ANTICIPATION.
Carrier patent, No. 854,270, for a method for heating and humidifying air, *held* not to have been anticipated.

In Equity. Suit by the Buffalo Forge Company against the City of Buffalo, in which Thomas & Smith, Incorporated, intervened. Decree for plaintiff.

Wilhelm & Parker, of Buffalo, N. Y. (Arthur E. Parsons, of Syracuse, N. Y., of counsel), for plaintiff.

William N. Cromwell, of Chicago, Ill., and William Macomber, of Buffalo, N. Y. (Frederick C. Rupp, of Buffalo, N. Y., and John Taylor Booz, and Cromwell, Greist & Warden, all of Chicago, Ill., of counsel), for defendants.

HAZEL, District Judge. Plaintiff brings this action in equity for injunction and accounting, alleging infringement of patent No. 854,270, granted to Willis H. Carrier, May 21, 1907, for a method of heating and humidifying air. The invention relates to a process for supplying fresh air of a definite absolute humidity to the interior of buildings, so as to keep the temperature and humidity within prescribed limits, regardless of external atmospheric conditions within limits "and without the use of direct radiation, by introducing into the air water at properly regulated temperature below the boiling point."

The claims relied upon are the first, third, fifth, sixth, and seventh, reading as follows:

"1. The herein described method of humidifying air, consisting in causing an intimate contact of the air with water heated to a temperature above that of the air and below the boiling point, and automatically regulating the temperature of the water to maintain a practically constant temperature of the air, substantially as set forth."

"3. The herein described method of heating and humidifying air, consisting in causing an intimate contact of the air with water heated to a temperature above that of the air and below the boiling point, and automatically varying the temperature of the water to maintain a practically constant temperature of the air by means controlled by the temperature of the air, substantially as set forth."

"5. The herein described method of regulating the absolute humidity of air, consisting of spraying into the air water heated to a temperature above that of the air and below the boiling point, separating the free water from the air and regulating the temperature of the water by means controlled by the temperature of the humidified air, substantially as set forth.

"6. The herein described method of regulating the absolute humidity of air, consisting in spraying into the air water heated to a temperature above that of the air and below the boiling point, separating the free water from the air and regulating the temperature of the water by a thermostatic device influenced by the humidified air, substantially as set forth.

"7. The herein described method of regulating the relative humidity of air, consisting of saturating the air with vapor by causing an intimate contact of the air with water heated to a temperature above that of the air and below the boiling point, regulating the temperature of the water by a thermostatic device influenced by the humidified air, and then changing the temperature of the air, substantially as set forth."

The principal features of the first claim, which is broad, are automatic regulation of the temperature of the water to maintain a constancy of temperature of the air, and intimate contact of the air with water heated above the boiling point. Claim 3 particularizes the steps for varying the temperature of the water, and means controlled by the temperature of the air. Claim 5 refers specifically to regulating the absolute humidity, spraying heated water into the air at a temperature higher than the air and below the boiling point, separat-

ing the free water from the air, and regulating the temperature of the water by means controlled by the temperature of the humidified air. Claim 6 is substantially the same as claim 5, including, however, a thermostat controlled by the temperature of the humidified air for regulating the temperature of the water; while claim 7 refers specifically to regulating the relative humidity of the air by vaporal saturization, a thermostatic regulation of the water influenced by the humidified air, and to changing the temperature of the air. The apparatus for practicing the process consists of a heater or tank having a number of pipes connected to a steam system, to cause steam to circulate through the pipes in a closed tank, a fan blower, a thermostat *K* located in the heater or chamber, where it comes under the influence of the warmed and humidified air, a spray nozzle, and other detailed instrumentalities.

[1] The defenses are mainly noninfringement and invalidity; the latter defense being predicated upon the assertion that the claims in issue set forth a purely mechanical process, the function of the apparatus. It is settled law that a patent for a method cannot be sustained when it appears that the result achieved is due to the operation of a machine; but when the new result comes from certain acts, or a series of steps, irrespective of mechanism or the mechanical assemblage of parts, then the steps taken, or the acts performed; or the mode of treatment, involve patentable invention. Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 139. In such circumstances the resultant, if new and useful, would be as patentable as a mechanical combination, inasmuch as the means, acts, or steps performed in order are generally classified in the patent law as an art; the implements, machinery, or apparatus by which the process is actually performed being inconsequential. Indeed, in successfully performing a process it is often necessary to use mechanical contrivances as auxiliaries, and in such cases the protection of the patent laws will not be denied to an inventor, unless his accomplishment was solely due to mechanical adaptation or to the function of the machine. Risdon Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899.

In a later case (Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034), the United States Supreme Court, reaffirming former decisions relating to process patents, stated substantially that a process involving mechanical operations may nevertheless be valid, if a new result is produced "independently of particular mechanism for performing it." Accordingly, the first question here is whether the result produced by the patent in suit is solely due to the apparatus described in the specification. Plaintiff's expert witness, Prof. Carpenter, expressed the view that in performing the process certain chemical changes were made in the air treated, but patentability is not asserted upon that ground alone; greater reliance apparently being placed on the evidence showing that notwithstanding the use of an old apparatus, or material parts thereof, the method or process including their use was novel in the specified treatment of humidity and temperature of the air. This aspect of the evidence is believed not without merit.

[2-4] The patent in question is, I think, valid, irrespective of any automatic regulation of the temperature and humidity of the air by the aid of a thermostat or other mechanical instrumentality, inasmuch as the process was not entirely dependent upon the use of a thermostat; the performance of its function being due to the use of water at a temperature higher than that of the air and below the boiling point, which was first caused to contact intimately with a current of air into which the heated water was sprayed. Such steps increased the temperature of the air, which then vaporized or assimilated the moisture; the relative humidity of the air depending upon the temperature of the air. The thermostat was arranged to come within the influence of the heated and humidified air, and while in that condition operated to maintain the water at a proper temperature to increase the temperature of the air to the point of saturation, or to what is known as dew point, meaning a degree of temperature having a certain amount of humidity below which it cannot be reduced without first condensing the moisture content from the air.

In explanation of this Prof. Carpenter testified:

"The air comes in contact with a series of water sprays; the water being introduced at a regulating temperature, so as to maintain a constant temperature saturation just previous to the point of discharge to the apparatus. The point of saturation is such a point as, corresponding to the temperature, the air holds all the water that it can possibly carry, which is a definite amount for each temperature; and if the temperature is maintained automatically at a certain regulated or predetermined condition, and the vapor of water is introduced in sufficient amount, we have the conditions favorable for producing saturation. Now, normally the air exists in contact with some water vapor, but not sufficient for saturation. Usually the percentage of saturation is from 20 to 40 or 50 per cent. for outside air; 20 per cent. being a very dry condition, and 60 per cent. rather higher than the average, occasionally running up to even higher percentages. Now, when the moisture is spoken of as constituting a certain percentage, then we refer to its condition for sustaining or holding moisture, and we call that its relative condition to any apparatus which we have, so far as the steps of the process set forth in claim 1 is concerned; it ends up with nearly this saturated condition."

The intimate contact of the air with the water is brought about by the action of a pump, which draws the warm water after circulation through the apparatus into a well, the warm water then flowing through a by-pass piping for regulation by the thermostat placed in the room in which the humidity is to be controlled.

Plaintiff claims, and the evidence fairly supports the claim, that Carrier, the patentee, was the first to conceive that air saturated at a definite temperature contains only a certain percentage of moisture per cubic foot, and in such condition of saturation is usable for keeping and controlling humidity.

The prior art discloses a number of apparatuses for keeping temperature and humidifying air; the patents to Carrier, No. 808,897, Cramer, No. 821,989, Bradford, No. 222,234, and to Cramer, No. 813,083, for example, being good specimens. But they are not anticipatory, I believe, as they operated upon a different principle from that of the Carrier patent under consideration. They were operable in each instance in response to variations in humidity and to changes in temperature. Nor do they disclose a control of the dew point or tem-

perature of saturation, and they are consequently unresponsive to fluctuations in temperature. The involved patent made a patentable departure in this respect by inventing means for controlling the humidity of air for heating and ventilating by the utilization of moisture in the air at its saturation temperature; such means depending upon two steps for performance, to wit, the production of a desired relative humidity by saturation of the air "with an amount of vapor sufficient to give the desired absolute humidity to the air when raised to the temperature at which it is to be utilized," and thermostatic regulation of the water controlled in turn by the temperature of the saturated air which was raised or lowered to secure the relative humidity desired. The desired relative humidity at a predetermined temperature was obtained, according to the proofs, by the initial production of absolute humidity of the air, and afterwards changing the temperature of the air as specified in claim 7, this producing a meritoriously different result from prior processes, which I think were limited to humidity regulation only.

It is proven that the patentee herein ascertained by experimentation that by saturation control and by performance of said steps in combination he could attain new and beneficial results, to wit, the regulation of humidity; the device employed being located away from the compartment to which the air was transmitted, by transmitting air to separate compartments and varying the same at the option of the occupants in respect to humidity, while antecedent patents show simply a regulation of a hygrostatic character, depending entirely upon modifications in humidity, as distinguished from modifications in temperature.

But defendants contend that the prior Carrier patent, No. 808,897, differs only in the use of the thermostat, the heater, pumps, pipes, and valves, and that it operated in practically the same way in relation to washing the air of impurities as the patent under consideration, and that the added features—the means for heating and humidifying the air—were old, being disclosed in the prior patents to Bradford and Cramer. I find, however, that the earlier Carrier construction, not only failed to disclose the control of humidity of the patent in suit, but was also without means for altering the temperature of the air; and to include therein a regulating device of hygrometer or dry bulb thermometer characteristics, controllable by relative humidity changes only, would not have resulted in changes of the temperature of saturation or dew point, as in complainant's patent. Prof. Carpenter expressed the expert opinion that Carrier's thermostatic arrangement determining a saturated condition related to a different principle from prior apparatus—

"because in that structure, instead of taking the air in the room as we find it, using an instrument which is sensitive to moisture conditions of the air in the room and having that instrument turn on or off moisture, we produce a constant new condition as to the moisture in so far as the room itself is concerned, any external air which is passing through such apparatus as that inclosed in the casing, and maintained at such a degree of temperature by means of an automatic or temperature regulating device that such temperature air, after being properly mixed and saturated, when transferred into the room

where it is to be used, will have any desired relative humidity; that is, it will be 50 per cent. or 60 per cent. of the total moisture that the air in the room had contained."

The Cramer patent, No. 821,989, was for a device located in a room for discharging moistened air into it. It had no automatic regulation or control, nor does the patentee claim that he obtained a definite humidity. Therefore such patent is not anticipatory. Indeed, none of the prior disclosures suggests means for regulating humidity in which the air was first saturated at a definite temperature, or in which a definite dew point was utilized for accomplishing the result, or wherein a thermostat or equivalent instrumentality indicated temperature changes. The patentee having succeeded in controlling humidity in apparatus of the kind described in his patent, and having made, I think, a departure from prior processes in this relation, his involved claims are entitled to a fairly reasonable construction, and one that will not permit another, by changes of form only, to appropriate the substance of his invention.

The defendants contend that their process was essentially different from complainant's, in that the water in their apparatus was not "heated to a temperature above that of the air and below the boiling point," to which they say the Carrier patent in suit, if valid, must be limited. The witness Thomas, who designed defendants' apparatus, testified that the water in the overhead trough in the heater above the spray chamber was at all times kept at the boiling point or over; that the water injected into the air is ordinarily at the minimum boiling point; that the humidity control was chiefly due to regulating the volume, and not the temperature, of the water coming in contact with the air treatment. His testimony on this point, however, is not assented to by several witnesses for plaintiff, who corroborated the latter's contention of similarity of function and operation. With regard to the installation at Masten Park High School, it is fairly shown that when the air enters the spray chamber it comes in contact with the first two rows of spray; the moisture then being absorbed by the air, owing to the high temperature at which it comes into the apparatus.

Thomas also testified that the heating coils in defendants' apparatus impart from 55° to 70° of heat to the incoming air thus allowing the air to absorb a large volume of water; but I do not think that the water, when contacting the air, is at the minimum boiling point. The assertion that the water in defendants' apparatus is uniformly of a fixed degree, boiling, or nearly so, is not sufficiently corroborated. It was testified in contradiction of this view that a plate attached to the defendants' device bears the inscription, "'The air leaving the tempering coils should be regulated at a temperature not exceeding 52° F., minimum 43° F.;" and it also appears that the air leaving all the tempering coils was tested, showing a temperature of from 40° to 45°. Long, engineer at the Masten Park High School, testified that he generally kept the air leaving the coils at a temperature between 40° and 45°, and that the water coming through the sprays was not boiling; while Smith testified that on one occasion he put his hand

in the water in the tank and ascertained that it was not at the boiling point.

Defendants' apparatus (Exhibit 3) I find discloses means for intimately mixing a current of air with water heated to a temperature above that of the air and below the boiling point by spraying the water, and includes a thermostat located so as to be influenced by the heated and humidified air regulating the temperature of the water to maintain a proper temperature of the air; that is, to raise the temperature of the air to a point of saturation, so as to secure absolute humidity. The defendants utilize a pump for mixing the air with the heated water taken from the tank, and then discharge it through nozzled pipes into the air; also a pipe extending to the open tank or heater, and connecting with other pipes for the circulation of steam. While such apparatus is a little different from plaintiff's, which is provided with a closed heater containing the steam pipes, yet the resultant operation is the same. Exhibit 5 shows a similar apparatus installed in the Technical High School, having a similar arrangement of instrumentalities for performing the acts and steps specified in the Carrier patent in suit for heating and humidifying air and accomplishing the same result.

As to prior use: Several witnesses testified that the defendant Thomas & Smith, Incorporated, in the year 1901 installed an apparatus at the Chicago Edison Building not unlike the invention in suit; but, as such testimony as to the appearance of the apparatus and details of construction depends mainly upon their recollection, I am disinclined to credit it completely. Drawings or sketches were introduced indicating its character; but they were made from memory 15 years after the installation, and their probity is rightly challenged. Moreover, the descriptions of such prior use structure with reference to a thermostat, claimed to have been used for regulating temperature and humidity, and its location, were at variance with the description in the bill of particulars filed by defendants under order of the court, and as the location was material in determining identity, the testimony relating thereto falls short of establishing its presence and location beyond a reasonable doubt.

A decree may be entered, with costs, holding the claims in suit valid and infringed by the defendant.

THE SAHARA.

(District Court, D. Maryland. May 9, 1917.)

SALVAGE ⊂=30—AMOUNT—STRANDED VESSEL.

A vessel stranded on a dangerous coast near Ship Shoal Inlet. The life service station sent work to Norfolk, and a powerful wrecking tug started at once to the scene. The ship accepted its aid. After two attempts, several hours apart, the second of which lasted for about a half hour, the tug got the ship clear. The weather was good and the ship in no imminent danger. The ship was worth at least $400,000, and the tug

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

more than $100,000. The tug was exposed to no danger, and not called upon to do much hard work, and no great exercise of skill was called for. *Held*, that an award of $12,500 would be reasonable.

In Admiralty. Libel by the Merritt & Chapman Derrick & Wrecking Company against the steamship Sahara for salvage services. Award of $12,500 made.

Hughes, Little & Seawell, of Norfolk, Va., and Milton Roberts, of Baltimore, Md., for libelant.

Hughes & Vandeventer, of Norfolk, Va., and John Henry Skeen and Arthur D. Foster, both of Baltimore, Md., for respondent.

ROSE, District Judge. This is a salvage case. In a fog in the early morning of the 16th of February, 1917, a little after midnight, the British steamship Sahara, on a voyage from Cadiz to Baltimore, in ballast, stranded upon the Atlantic coast of Virginia, near Ship Shoal Inlet. The vessel went ashore about an hour and a half before high water. The ship started to pump the water ballast out of its tanks, and by high tide at 2 o'clock in the afternoon of the 16th had reduced the amount of such ballast from 1,000 tons to about 600; but the effort to get off on that tide failed. The fact that the ship had gone aground was observed from the life-saving station, and word was sent to Norfolk, whereupon the Merritt & Chapman Derrick & Wrecking Company at once started their wrecking tug Rescue to the aid of the stranded ship. The Rescue arrived about 4 o'clock in the afternoon of the 16th. The master of the Sahara thought he could probably get off at the next high tide, by which time his tanks would be nearly empty; but he very properly accepted the assistance tendered by the Rescue. The latter at once put a towing line aboard the Sahara, and at a quarter after 5 o'clock began pulling on it; but it soon became evident that nothing could be accomplished until the Sahara was further lightened by the pumping out of the remainder of the water ballast, and until a nearer approach to high water. At a quarter before 11 o'clock the Rescue began pulling again, and in half an hour, or a little more, the Sahara came off, without using her own engines. During all the time the weather was good, and the ship was in no imminent danger. The coast, however, is very dangerous, and no ship can wisely take chances with it.

The Sahara was worth a great deal of money. How much in such times as these, it is difficult or impossible to say. Her value at the time can be taken, however, as not less than $400,000, and perhaps more. The Rescue, a powerful tug worth a good deal more than $100,000 equipped with all necessary wrecking appliances, is kept ready for such service. The public interest requires the maintenance of such vessels, and to maintain them it is necessary that they shall be liberally compensated when they do successful salvage work. In this case the ship's engines might have gotten her off, or she might have been pulled off by some passing vessel; but the service was actually performed by this wrecking tug. The latter was exposed to no danger, and was not called on to do much hard work. No great exercise of skill was called

for, although those on board the tug doubtless had it, had there been occasion to use it.

Under all the circumstances, I think an award of $12,500 will be reasonable.

THE KIA ORA.

(District Court, E. D. Virginia. September 18, 1917.)

1. SALVAGE ⇐30—RESCUE OF VESSEL STRANDED AT SEA—AMOUNT OF COMPENSATION.

The British steamship Kia Ora, on a voyage from Australia to London, while going at full speed, fast grounded on a coral reef in the Bahamas in February. She was a large vessel, comparatively new, and worth from $1,800,000 to $3,000,000, and her cargo was valued at $2,500,000. In response to her wireless signals for help, libelant's wrecking steamer Relief, with a crew of 70 men, was sent to her assistance from Kingston, 360 miles distant. The Relief was specially built and equipped at a cost of $450,000, and was maintained at Kingston expressly for such service. She reached the steamship in 2½ days, and after 5 days' work succeeded in freeing her in such condition that she proceeded on her voyage unaided. Cargo of the value of about $428,000, consisting mostly of frozen meat, which could not be kept after its removal from the storage rooms, was jettisoned.. The Relief was the only vessel available which could have rendered the service, which was performed very promptly and efficiently. The steamship was in great danger from gales, which at that season were to be anticipated. *Held* that, under all the circumstances and in view of the large salved value, libelant was entitled to an award of $100,000.

2. SALVAGE ⇐26—COMPENSATION—BASIS OF AWARD.

While a salvage award should not be made entirely on a percentage basis where the values are large, it is proper to take the salved value into consideration in fixing a fair and just compensation.

3. SALVAGE ⇐27—SUCCESS OF VENTURE—COMPENSATION.

The completeness of success of venture should not militate against libelant in fixing award. Respondents should not complain of their own good fortune, or have their benefactor suffer on that account.

In Admiralty. Suit for salvage by the Merritt & Chapman Derrick & Wrecking Company against the steamship Kia Ora. Decree for libelant.

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 respondent.

WADDILL, District Judge. On Saturday evening, the 24th of February, 1917, about 6 o'clock, the British steamship Kia Ora, en route from Melbourne, Australia, to London, via the Panama Canal, stranded on the south end of Castle Island, at the Crooked Island Passage, in the Bahamas, West Indies, at a point offshore of the lighthouse. The ship was proceeding at her full speed of about 12½ knots an hour, and struck head on on an uneven coral reef, grounding

her from about amidship to her stem. She at once sent out wireless calls for assistance, which were promptly responded to by the Merritt & Chapman Derrick & Wrecking Company, the libelant herein, from their Kingston, Jamaica, station, about 360 miles distant from the steamer; that being the nearest possible place from which assistance could be procured.

Libelant immediately put aboard the necessary appliances for the expedition, left Kingston early on Sunday morning, and reached the grounded vessel about 6:30 on Tuesday morning, February 27th, and at once took control of the stranded vessel, and rendered every assistance to relieve and float her, which she succeeded in doing late on the following Saturday, March 3d. On the next day, Sunday evening, the 4th, the Kia Ora proceeded on her voyage unaided. Upon reaching Newport News, where the Kia Ora stopped for bunker coal, the libel to recover for the salvage services performed was filed, and process duly served; the parties not having been able to agree upon the amount of the same.

[1] The Kia Ora was a large passenger, freight, and mail steamship, of 6,557 tons gross, 4,168 net, 448 feet long, 57 feet beam, 34 feet deep, and a cargo capacity of 11,800 tons. She was classed A1 at Lloyds, and built in 1907 at a cost of about $700,000. Her value at the time of stranding, under requisition for war purposes, was $1,772,620; if not under requisition, at existing rates, her value would be about $3,000,000. At the time of the stranding the ship was heavily loaded with a large and valuable cargo, consisting of 10,000 bales of wool, 50,000 carcasses of mutton, 3,000 carcasses of lamb, 2,320 quarters of beef, and 15,000 crates of cheese, of the total value of $2,565,863.

The libelant's steamer Relief was a large and valuable wrecking steamer, 200 feet long, 30 feet beam, 20 feet deep, built and equipped with a large and costly outfit especially for relieving vessels in distress, carrying a crew of 70 men, including officers; the value of the ship and outfit in the enterprise being the sum of $450,000. The libelant claims, for its services in salving the vessel, the sum of $600,000. The respondent, not denying the right of the libelant to recover as salvor, and for a substantial amount, admits that the services rendered were salvage services, but of a low order of merit, and that the sum claimed is grossly excessive.

The question of the character of the services, and how performed, frequently a subject of much dispute in cases of this sort, is eliminated here, since the parties themselves entered into a written agreement at the time of commencing the work for salving the vessel, and that such services should be paid for upon agreement by the salvors and owners respectively; and on the 4th day of March, 1917, at the conclusion of the work, the Kia Ora's master, writing from his ship, gave the libelant the following certificate:

"This is to certify that in getting the above ship off Castle Island that Capt. Davis worked hard, under great difficulties, having strong winds and current and very nasty swell to contend with in laying his anchorage. He spared neither time nor energy, and he worked in a most satisfactory and expeditious manner. [Signed] A. C. Read, Master."

There is little or no conflict in the testimony as to any material fact in the case. Counsel for respondent did not so much as cross-examine Capt. Davis, the wrecking master and chief witness of the libelant, who gave a most complete, intelligent, and graphic account of the entire salving adventure.

Respondent insists that the salvage services were of a low order of merit, which is only true in that they may not contain elements of the very highest order; that is to say, the court is inclined to think, from the testimony, that the lives of the salvors were not seriously imperiled, nor was the salving property placed in great jeopardy in connection with the service. But, nevertheless, the services rendered cannot be said to be of a mean order, and, on the contrary, they were of a peculiar and highly meritorious character, in view of all the circumstances surrounding the same, having regard especially to the manner of their rendition, the persons and property rendering the same, the fact that no other assistance was available, the serious condition in which the ship was found, the danger in which she then was, the character of the weather, wind, and sea, the danger of storms reasonably to be anticipated, and the very large values at stake, including the precarious character of the cargo salved, all of which enter into the ascertainment of the proper amount to be awarded, and which will be considered in the order named.

First. The persons rendering the service, and the location of the vessel, should be taken into account. The vessel stranded upon a coral reef, and those doing the work were professional salvors, equipped to render aid to stranded vessels all over the world, and especially in the waters where this accident happened. They had had experience in saving ships from wrecks on coral reefs, which, coupled with their knowledge and experience generally of the wrecking business, should be taken into account, as it most probably—indeed, almost certainly—largely entered into the dexterous manner in which the ship was relieved not only from peril, but without harm to herself.

Second. The fact that no other assistance was available is a most important factor in the case, and should count for much in the making of a proper salvage award. The stranding was of a most dangerous character, by reason of the reef on which it occurred, and the size and weight of the ship. It was on a lonely sea, well away from the course or lane of vessels of the size of the one in distress, and was of such a nature that no ordinary ship, should one chance to pass, would have been of material assistance. Only professional wreckers equipped for the longest and most difficult service, such as libelant, would be of assistance, and they were 360 miles away, none other nearer than Norfolk or New York that could be gotten under about a week.

Third. The services were rendered most promptly and efficiently. On the night of the accident, upon receipt of the wireless call, the equipment was all gotten together, including the full crew of 70 men, and in a few hours the journey to the stranded ship was entered upon, and, though 360 miles had to be covered, early on Tuesday morn-

ing, the second day after starting, the Relief was alongside the Kia Ora. The wrecking crew at once took control of the steamship, proper cables were laid, and anchors cast, to hold the same in position, and every effort immediately made for the Kia Ora's release from the reef on which she had been driven. Work proceeded from 6 in the morning until 10 at night, sufficient men not being obtainable to work the entire 24 hours a day. In this effort, it became necessary to remove much of the cargo from the ship, so as to lighten the bow, and to jettison portions, of which a large part came from the refrigerating rooms. Libelant had to hire and pay the crew of the Kia Ora to aid in this service, with a view of expediting the work, and because they were more inured to the cold than the natives of that section, who were apprehensive of danger from exposure to the refrigerating rooms, and it was a portion of the cargo thus removed from the refrigerator that had to be jettisoned. The labor was most arduous and difficult, during all of this time, and continued from Tuesday morning until Friday night, when the vessel first showed a little life. During the late night of that day, and on the next morning, she moved slightly, and as the day progressed this condition improved. She was finally gotten off at 3:50 p. m. of Saturday, March 3d, and moved under the lee of the land, and late on the next day, Sunday, March 4th, she proceeded on her voyage, her bottom, keel, etc., having been thoroughly examined by divers of the libelant in the meantime, and her machinery overhauled, to ascertain the possibility of danger in her so doing.

Fourth. The condition in which the ship was found, and whether she was in serious peril in her stranded position, should be especially considered. This was a large ship, 448 feet long, heavily laden, which had been driven hard and fast upon a coral reef when going full speed ahead of 12½ knots an hour. The evidence of the wrecking master on this point is as follows:

"Q. What did the soundings disclose as to the location and condition of the vessel? A. She was 13 feet canted forward; her bow had run out 10 feet, so that, where she had drawn 23 feet of water when she went there, the water mark was 10 feet as she lay on the reef, and the sounding showed 10 feet at her bow at that time. Q. You lifted the bow up 13 feet? A. Yes, sir. Q. What did you find as to where she was aground? A. She was hard on the ground from about amidships to the bow, or to nearly the bow; the bow curls up, so it seemed she was not actually touching for about 30 feet abaft of her stem right amidship. Q. And from there on? A. She was afloat, with 30 feet of water at her stern. Q. Please state to the court the nature of the place upon which she was aground? A. Coral limestone bottom, from 10 feet at her bow, the bottom shelved off to 31 feet at her stern, and was uneven to the extent of 18 inches or 2 feet, seemed to run in shelves, and there were coral rocks lying around. Q. Any exposed rocks in the immediate vicinity? A. On her starboard side, and 100 feet away, abreast of the foremast, there was a ledge, and from there up on the starboard side, there were rocks showing their heads between the sea. Q. And you say the bottom was coral rock? A. Coral limestone formation; dead coral, which eventually becomes limestone. Q. Can you say whether or not there was any sand overlying the coral rock? A. A few barrels of sand in the headlands, but the surface of the rock was swept absolutely clean by the sea and current. The water was clear, and the bottom could be distinctly seen. Q. Did you see it? A. I did."

It was not until with the aid of wrecking appliances of the most powerful character, working four days and nights continuously, and the removal of a large part of her cargo, that she made any perceptible move, and it took 24 hours more to extricate her from the reef. The court is satisfied, from these facts, that the ship was in a position of great peril.

Fifth. The kind of weather, wind, and sea during the stranding, as well as the dangers from storms reasonably to be expected in that latitude, should not be lost sight of in reckoning the danger in which the ship was, or to which the salvor vessel and crew were exposed in rendering the service, all of which should be kept in view in estimating the proper salvage award to be made. The testimony establishes that the wind at the commencement of the service, on Tuesday morning, was moderate; that it sprung up that night, and blew from 25 to 30 miles an hour, and thus continued during the remainder of the service, reducing a little as night came on—the minimum being 25 and the maximum 35 miles an hour. The prevailing direction of the wind was about east, with strong currents striking the ship square on the starboard side, and with the swell on her port. The Kia Ora's master properly certified under those conditions, that the salvor "worked hard, under great difficulties, having strong winds and current and a very nasty swell to contend with, in laying his anchorage."

The court is convinced that, with the existence of these weather conditions, both ship and cargo would have sustained a serious loss, had not relief been afforded promptly. Nor can it be said that the ship was not in danger from storms reasonably to have been anticipated. The testimony shows that in these waters northeast gales are liable to occur every 10 days or 2 weeks, between the months of November and April. Such a storm would probably have resulted in the total loss of the ship and most of the cargo.

Sixth. The values of the salved vessel and cargo are unusually large, much of the cargo being of a precarious kind, when subjected to removal from the refrigerator in order to lighten the ship. The ship's value is variously estimated from $1,772,620 to $3,000,000; the former figure being her estimated worth at this time under requisition, and the latter what she would now be worth, if free from governmental control. For the purpose of reaching a just award, the court thinks the value may be treated as of the first amount, viz. $1,772,620, though there is much force in libelant's contention as respects its greater value. The cargo was valued at $2,556,863, from which should be deducted, in arriving at the salvage value, $428,310, the value of the portion lost when jettisoned, after removal from cold storage, leaving the value of the cargo salved $2,128,553, and the total salved value of the ship requisitioned and cargo $3,901,173. This is the lowest value given of the salved ship, and is $1,227,380 less than claimed by libelant.

The libelant's salving outfit, used in this enterprise, is admitted to be of the present value of $450,000, which does not include the value of its plant at Kingston, maintained and kept up especially for wrecking purposes in that territory, at a cost of $36,000 per year. The testimony is that the ship Relief and her equipment, in connection with

the maintenance of that plant, are of incalculable benefit to shipping in that section and of great value to her owners.

Having considered the testimony as bearing upon the elements entering into the allowance of salvage, we are brought to the consideration of what would be a proper award to make, which is always a difficult question to determine, as so many and such varying circumstances and conditions have to be taken into account.

Counsel have cited quite an array of authorities, which have been carefully examined, but need not be referred to generally, as they are largely governed by the facts of the particular cases, and the court will content itself with citing and discussing only a few of them, as illustrative of the principles on which salvage is awarded, and as throwing light upon what should be a proper allowance in this case. The Ocean Belle, Fed. Cas. No. 10,961; The Alamo, 75 Fed. 602, 21 C. C. A. 451; The Alexandria (D. C.) 104 Fed. 904, 911, 912; The Sandringham (D. C.) 10 Fed. 556; The Haxby, 83 Fed. 720, 28 C. C. A. 38; The Lamington (D. C.) 80 Fed. 159, on appeal, 86 Fed. 675, 30 C. C. A. 271, and note thereto; The St. Paul, 86 Fed. 340, 30 C. C. A. 70; Hughes on Admiralty (1st Ed.) § 66, pp. 125, 140.

The first three of the above-named cases each involve salvage services rendered stranded vessels upon coral reefs off the coast of Florida, and are entitled to much consideration in arriving at a just conclusion under the facts of this case. In the Ocean Belle Case, a decision by District Judge Marvin, of the district of Florida, rendered in 1861, an award of $17,000 was made upon values aggregating $165,000; in the Alamo Case, a decision of Judge Locke, of the said district, affirmed by the Circuit Court of Appeals of that circuit, an award of $15,000 was made upon values of $500,000; and in the Alexandria Case, a decision of Judge Brawley, of this circuit, an award of $11,500 on values of $200,000 to $225,000 was made. In neither of these three cases were the values either of the properties salved or that of the salvors, at all comparable to those here; nor were the dangers to which they were exposed, taking into account the remoteness of this stranding from a place of possible assistance, anything like so great as here.

The cases of The St. Paul and The Lamington, supra, are referred to as bearing upon the proper basis for allowance of salvage. The St. Paul (D. C.) 82 Fed. 104, is a decision of Judge Addison Brown, of the Southern district of New York, and The Lamington, of Judge Benedict, of the Eastern district of New York; and in each case the action of the lower court was reviewed by the Circuit Court of Appeals of that circuit, presided over by Judges Wallace, Lacombe, and Shipman. Judge Brown's decision in The St. Paul case was affirmed by the appellate court, and will be considered in detail, as the values involved and the services rendered more nearly correspond to those in this case. There the salved value was $4,016,041, with freight money of $16,092 for 11 days' services, with a large number of salving vessels, valued at $400,000, aiding, their crews aggregating 205 men, and an outlay in cash of about $10,000. The sum of $160,000 was awarded; the court apportioning against the ship, valued at $2,000,000, the sum of $131,012.48. This stranding occurred in a fog, and the court commented on the fact of the promptness with which the serv-

ice was rendered, and the efficiency of the same, and stated that a larger award would have been made, but for the shortness of the time taken and the lack of danger to the enterprise, on account of smooth water and good weather; and the appellate court especially noted the fact that the values involved were the largest in any reported admiralty case up to that time. It is manifest that the values in this case are quite as great as those involved there. In the St. Paul case it will be noted that the stranding occurred on the Jersey coast, only a short distance outside of Sandy Hook, where the opportunity of assistance was near at hand.

The Sandringham, supra, 10 Fed. 556, a decision of the late Judge Hughes, of this district, will be found to contain an able and interesting discussion of salvage awards, and the principles governing and controlling the same. There an allowance of one-fourth of the value of $200,000 was made, and from that decision no appeal was taken.

The Haxby, 83 Fed. 720, 28 C. C. A. 38, supra, the Circuit Court of Appeals of this circuit, presided over by Judges Goff, Simonton, and Brawley, in a decision by Judge Goff, reduced an allowance of the District Court to $16,666.66, or one-sixth of the value of the property salved, viz. $100,000, and the salving property engaged in the service was $117,000, the time taken 3½ days, and 24 men employed, and, though the ship was in a place of danger, the service was accomplished with but little risk.

In the recent case of Merritt & Chapman Derrick & Wrecking Co. v. The Sahara, 246 Fed. 141, a decision by Judge Rose, of the Maryland district, during the present year, the sum of $12,500 was awarded upon the value salved of $400,000 and the salving property $100,000. The vessel grounded on the Atlantic coast of Virginia, near Ship Shoal Inlet, was not in a position of much danger, was relieved at high water by a few hours work of the wrecking tug Rescue after reaching the scene of the accident, without assistance from the ship's engines, and neither the crew nor the Rescue encountered serious risk.

[2] Counsel for the respondent insists that, in fixing the allowance of salvage, the court should not undertake to base the same upon a percentage of the value of the property salved; that that method is antiquated, and should be no longer followed. The court is inclined to concur in this view, that that is not the proper, nor certainly the practical, rule of arriving at a fair and just compensation, where values are large, as in the present case. The following authorities sustain this view: Hughes on Admiralty, supra, p. 138; The Suliote (C. C.) 5 Fed. 99; The Baker (C. C.) 25 Fed. 771; The Gambetta, 74 Fed. 259, 20 C. C. A. 417; Guffey Petroleum Co. v. Borison, 211 Fed. 594, 128 C. C. A. 194.

While ordinarily the percentage rule, merely as fixing the basis of allowance, should not be adopted, particularly in cases of large salved values, as here, the amount of the allowance, as thus arrived at, cannot be lost sight of in fixing compensation, nor that such percentage ran as shown by adjudged cases (note to In re Lamington, 86 Fed. 685, 30 C. C. A. 271) from 3 to 85 per cent. of the value of the property salved, depending upon the special circumstances; the cases, however,

in which a greater award than 50 per cent. was made, being rare. The real end sought to be reached, regardless of the method of ascertainment adopted, is: What would be a fair and reasonable allowance for the services rendered, having in view all the circumstances of the same, together with such a sum as would be necessary to give encouragement and stimulus to salvage operations, in order that the most effective assistance to shipping overtaken by distress at sea may be secured? An award in the nature of a bounty to the salvor, in the interest of the public and commerce, is well recognized, in order that encouragement may be given to those engaged in maritime commerce, to look out for those in distress; and the fact that those, like the libelant, who make the saving of ships a business, should be taken into consideration in making such awards. The St. Paul (D. C.) 82 Fed. 108, and cases cited. They expend large sums of money in maintaining plants with valuable wrecking vessels with expensive outfits, manned and operated by most experienced and competent crews, and as a consequence are enabled to render prompt, efficient, and peculiar services, that would be impossible for ordinary vessels, not thus equipped, to do.

[3] Every element calling for a reasonably liberal salvage award exists in this case, other than the presence of extreme peril and danger to the salvors and their property in rendering the same. The values salved were most unusual in amount, the largest, perhaps, of any reported case; the amount as found by the court being approximately $4,000,000 and as claimed by the respondent over $5,500,000. The value of the salving outfit was likewise very large, nearly $500,000. No other assistance was at hand, or could have been secured; the service was promptly and efficiently rendered by a professional wrecking concern that maintained in the West Indies a large and expensive plant and outfit, with no assurance of continuous employment. Relief could only have been afforded by those thus equipped and experienced; a distance of 360 miles had to be covered to reach the place of stranding. The undertaking was entirely successful, both as respects the saving of the ship and cargo, less a comparatively small portion of the cargo which had to be jettisoned, and the ship was released and relieved without injury. The portion of the cargo lost was on account of its precarious character when removed from cold storage, in order to lighten the ship, and was not due to any negligence or omission of the salvor. Indeed, well nigh every element for the allowance of a substantial salvage award exists, unless the fact of the complete success of the venture should be said to militate against the libelant, which view the court should not for a moment entertain. The respondent in good faith and fair dealing ought not to be heard to complain of their own good fortune, and seek to have their benefactor lose or suffer on that account.

Considering the case in all of its peculiar facts and circumstances, the court considers that the amount claimed of $600,000 is grossly excessive, and that an award of $100,000 will be a fair and reasonable allowance to be made, which would be upon a percentage basis of the values of the property salved, as adopted by the court, approximately

2½ per cent., and upon the values as claimed by the libelant less than 2 per cent.

A decree may be entered in favor of the libelant for the amount thus specified, with costs.

THE ELLEN LITTLE.

(District Court, D. Massachusetts. September 13, 1916.)

No. 1443.

SEAMEN ⇐21—WAGES—FORFEITURE FOR MISCONDUCT.

Libelant, who was mate of an American schooner, on a return voyage from Brazil learned that there was a stowaway on board. He did not inform the master, and on arrival at a United States port the stowaway, who was an alien, was smuggled on shore by members of the crew at night, for which, on its discovery by the authorities, proceedings were taken against the vessel, causing delay and expense. Libelant was not a party to the landing, and did not know of it, but took no measures to prevent it. The master also suspected the presence of a stowaway, but asked no questions. Libelant was not discharged, nor charged in the log at the time with any offense, as required by Rev. St. § 4597 (Comp. St. 1916, § 8381). *Held*, that he was not chargeable with disobedience of orders, or any other offense under Rev. St. § 4596 (Comp. St. 1916, § 8380), which worked a forfeiture of his wages, but that he should be required to pay a part of the expenses caused the vessel.

In Admiralty. Suit by William W. Humphrey against the Schooner Ellen Little. Decree for libelant.

Berry & Buckman, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

MORTON, District Judge. This is a libel brought by the first mate of the respondent vessel to recover his wages. He shipped at Providence for voyage to Pernambuco, Brazil, and return, at $55 per month. The parties agree that the amount of the unpaid wages is as stated in the libel. The defense is that the libelant is not entitled to recover by reason of his own misconduct.

The vessel arrived safely at Pernambuco and discharged her cargo. From that point she was bound to Apalachicola, Fla. She left Pernambuco on or about September 28, 1915. Owing to conditions created by the European war, there were in Pernambuco many Germans who were desirous of getting to this country. The probability of stowaways was recognized by the master of the Ellen Little, and he directed the libelant to make a careful search of the vessel for them before sailing. The search was made by the libelant, and by the boatswain under his orders. Two of the Little's crew were Germans, and, unknown to the master or to the libelant, they managed to secrete one of their fellow countrymen on the vessel. The libelant had no knowledge of this until the schooner was several days at sea, when he discovered that there was a stowaway on board. He did not report the fact to the master. This failure constitutes the first of the alleged breaches of duty. There

is no evidence that the libelant received any money on account of the stowaway, or that there was anything corrupt in his action, which, I infer, was prompted chiefly by good nature.

The crew of the Little consisted of eight men and the master. It seems unlikely that in a voyage lasting two months the presence of the stowaway was not known to everybody on board; and there are some things in the testimony which suggest that the master himself, while he did not absolutely know that there was a stowaway, turned a shut eye towards facts strongly indicating it. He admits that he became suspicious; but he ordered no further search of the vessel.

When the Little arrived at Carabelle, Fla., the master went ashore, leaving the libelant in charge. He let the small boat lie in the water alongside that night, and it was used by the two Germans to land the stowaway. This action of the libelant is charged as assistance in landing the alien and as neglect of duty towards the vessel. Humphrey testifies that the boat was not left out for any such purpose, that the work of mooring the schooner was completed late, and, as the night was calm, he saw no necessity for taking the boat aboard. There is nothing in conflict with this explanation, except the admitted fact that the boat was usually not left in the water overnight, and certain alleged admissions by Humphrey, testified to by Capt. Holden and denied by Humphrey. A charge of active assistance in a crime ought not to be sustained on mere suspicion, nor without adequate proof. That the libelant did not intend to do anything to prevent the landing of the stowaway is clear, but it is not established that he intentionally assisted therein.

The fact that a man had been surreptitiously landed from the vessel was discovered by the federal officers at the port. Proceedings were instituted, which resulted in the arrest of two of the crew and in holding another as a witness. The schooner was delayed a few days, and was put to expense on account of the affair.

All facts in reference to this matter became known to the master at Apalachicola. He did not discharge or disrate the libelant, but allowed him to continue in service until the voyage was completed. No entry was made in the Little's log at the time of the occurrences, nor until she had cleared from Apalachicola and was on her way up the coast, when a statement was written in the log by the master, charging the libelant with "willful neglect of duty" in not reporting the stowaway, and with "assisting to land an alien in the United States." The entry was not made "on the day on which the offense was committed" (R. S. § 4597 [Comp. St. 1916, § 8381]), nor "as soon as possible after the occurrence to which it relates" (R. S. § 4291 [Comp. St. 1916, § 8037]). On the completion of the voyage, at Boston, the managing owner of the vessel charged the libelant with one-third of her loss, on account of the stowaway, except demurrage, on the theory that he and the two Germans caused it, and $124.16 was held back from his pay, about one-third of it for the voyage.

No misconduct by the libelant, of any kind defined in R. S. § 4596 (Comp. St. 1916, § 8380), was charged or is established. The facts do not show a "willful disobedience to any lawful command at sea." Section 4596, cl. 4. There is no evidence that the libelant was ordered

to report stowaways; and it is not shown that he intentionally disobeyed orders in respect to searching the vessel at Pernambuco. The libelant is not charged on the log with disobedience. No deduction from the wages can be claimed as a penalty under the section referred to.

The alleged deduction rests, therefore, upon a right asserted under the general maritime law to deduct from the wages of an officer damages caused to the vessel by his failure to serve faithfully. See Willard v. Dorr, Fed. Cas. No. 17,680; Scott v. Russell, Fed. Cas. No. 12,546; The T. F. Whiton, Fed. Cas. No. 13,849; The Marjory Brown (D. C.) 134 Fed. 999. Such claims to deductions are to be received with caution.

"The court expressly recognized the general principle that after service for the stipulated period, and more particularly in the case of service on board a coasting vessel, refusal to pay full wages because of alleged incompetence or negligence should be discouraged. I do not think the inconvenience and expense of supplying the libelant's place at Apalachicola, which is assigned as the reason for permitting the libelant to complete the voyage as he had begun it, are sufficient to take this case out of the general rule." Dodge, J., in The Sadie C. Sumner (D. C.) 142 Fed. 611, 613.

The real cause of the trouble to the vessel was not the presence of the stowaway on board, but the discovery by the United States officers that he had been surreptitiously landed. I doubt whether either Capt. Holden or Mr. Humphrey had in mind what a substantial offense that would be, nor how it might involve the vessel. Humphrey did not intend to participate in such landing, nor to assist in it; but he did not adequately realize the necessity of taking active steps to prevent it. For similar reasons, Capt. Holden did not follow up his suspicions about a stowaway and ascertain, as he easily could have done, that there was one on board. The mate's silence to the master was partly because he and Capt. Holden were not on speaking terms. This hostility led the master, when the affair had become serious, to throw as much of the blame as possible on the mate. Humphrey was undoubtedly negligent in failing to prevent the landing, but his fault was not sufficient to warrant charging him equally with the two active lawbreakers in the crew. He was but little more to blame than the master himself. At the same time, considering that, as he knew, a substantial crime involving his vessel was likely to be committed, and that he did nothing to prevent it, I do not think his neglect can be passed over.

It is further urged for the vessel that the libelant agreed to the reduction made by the managing owner, and that there was an accord and satisfaction at that time. The libelant's position in that interview evidently was that all hands were more or less to blame for helping the stowaway. He testifies that he said he would stand his share of the loss if the rest did, that he did not agree to stand one-third of it, aside from demurrage, nor agree to a final settlement on that basis. Upon all the evidence, I do not think that the accord and satisfaction is made out.

Of the loss which the vessel sustained, $50 may be charged against the libelant and deducted from his wages; and he may have a decree for the balance, with costs.

CENTRAL TRUST CO. OF NEW YORK v. MISSOURI, K. & T. RY. CO. et al.

(District Court, E. D. Missouri, E. D. October 13, 1917.)

No. 4564.

1. RAILROADS ⊂=206—RECEIVERS—APPOINTMENT OF ADDITIONAL RECEIVER.
That a receiver of a railroad had expressed his views to those undertaking to formulate a plan of reorganization was not sufficient ground for appointing an additional receiver, where he had not exceeded the limitations or proprieties of his position or intended to impress his views upon those engaged on the plan of reorganization and had done little more than give his opinion when it was sought, especially where those at work upon the plan of reorganization stated that its terms were not based on anything the receiver had said, and the opinions expressed by him related to future conditions about which skilled and competent men might widely differ.

2. RAILROADS ⊂=196—REORGANIZATION ON FORECLOSURE.
The court will not approve a plan of reorganization of a railroad having no adequate provision for future capital requirements or in which the refinancing is so close to probabilities that earnings are likely to be absorbed in a lean year or a succession of them by fixed charges, though to avoid such a plan it is necessary to make the interest on junior securities contingent rather than fixed, especially as the public has an interest in every railroad reorganization accomplished by foreclosure; and in practice, when the margin between net income and fixed charges becomes small or disappears under adverse conditions, the insistent demands of contract obligations are always met at the expense of those of a more general, less definite, character.

In Equity. Suit by the Central Trust Company of New York against the Missouri, Kansas & Texas Railway Company and others. On motion by Speyer & Company for leave to file a petition, or to intervene, for the appointment of an additional receiver. Motion denied.

Morton Jourdan, of St. Louis, Mo. (Henry W. Taft and William Lloyd Kitchel, both of New York City, of counsel), for petitioners.

Joseph M. Bryson, of St. Louis, Mo., and A. C. Rearick, of New York City, for receiver and for railway company.

Hornblower, Miller, Garrison & Potter, of New York City (Lindley M. Garrison, of New York City, of counsel), for New York Trust Co., trustee.

Edward Cornell and Charles E. Hotchkiss, both of New York City, for Central Trust Co. of New York, trustee.

Wollman & Wollman, of New York City, for committee of bondholders of first mortgage 5 per cent. gold bonds of Missouri, K. & T. Ry. Co. of Texas.

George L. Shearer, of New York City, for United States Trust Co. of New York, trustee, and for first mortgage bondholders' committee.

Geller, Rolston & Horan, of New York City (Edward H. Blanc, of New York City, of counsel), for Farmers' Loan & Trust Co., trustee.

Byrne, Cutcheon & Taylor, of New York City (W. R. Begg, of

of New York City, of counsel), for Dutch first mortgage bondholders' committee.

White & Case, of New York City (P. H. Noyes, of New York City, of counsel), for Bankers' Trust Co., trustee.

William Greenough, of New York City, for protective committee of holders of first mortgage 5 per cent. bonds.

Alfred A. Cook, of New York City, for bondholders of Sherman, S. & S. Ry.

Albert Rathbone and E. C. Henderson, both of New York City, for reorganization managers.

Murray, Prentice & Howland, of New York City (George W. Murray, of New York City, of counsel), for protective committee of stockholders.

Delafield, Howe, Thorne & Rogers, of New York City (John S. Rogers, of New York City, of counsel), for Franklin Trust Co., trustee, and for protective committee of bondholders under Kansas City & Pac. R. Co. mortgage.

HOOK, Circuit Judge. This is a motion by Speyer & Co. for leave to file a petition, or to intervene, for the appointment of an additional receiver of the Missouri, Kansas & Texas Railway Company. Speyer & Co. are not parties to the suit, but they aver that their interest in it arises from their sale as bankers of certain of the junior securities of the railway company and the present ownership of a large part thereof by themselves and their customers. The trustees in the mortgage instruments covering the securities of the classes in question and the protective committee of holders of them have not joined in the motion. The motion will be disposed of on its merits without considering the standing of Speyer & Co. to make it.

The grounds of the motion may be grouped under two heads:

[1] First. Criticisms of the management of the property by the present receiver. These, the court finds, have not been sustained by the proof and arguments presented. Second. That the attitude of the receiver towards the future of the property is too conservative; that he is not in accord with expert estimates of future earnings and costs and economies of operation, etc.; that he has wrongfully assumed the function of an expert adviser of those who have undertaken to formulate a plan of reorganization, and has impressed upon them his insufficient views of the earning capacity of the railroad, with the result that a proposed plan, based on estimated lower earnings, makes the interest on the new securities to be issued for the junior securities mentioned contingent instead of fixed or absolute. But it does not appear that in expressing his views the receiver has exceeded the limitations or proprieties of his position, or that he intended to impress them upon those engaged on the plan of reorganization. He appears to have done little more than to give his opinion when it was sought. Furthermore, counsel for those at work upon the plan of reorganization says its terms so far as formulated are not based on anything the receiver has said or on any estimate he has given. But aside from all this, most of the objections made relate to future conditions

about which skilled and competent men may widely differ. They are generally too conjectural to afford a fair basis for personal condemnation. The motion should be denied.

[2] But lest the position of the court upon the general subject discussed at the hearing be misconstrued, it should be said that so far as it can legally do so, it will favor a plan of reorganization based on a conservative estimate of the future and so soundly framed as to withstand the dangers of financial and commercial stress. It will not encourage a plan of reorganization having no adequate provision for future capital requirements, or one in which the refinancing is so close to probabilities that earnings are likely to be absorbed in a lean year or a succession of them by fixed charges. The last reorganization of this company is an example of insufficient provision for necessary new capital, and it is one of the efficient causes of the present receivership. While a particular class of bond or note holders should not be denied the intrinsic value of their pledged security in its proper relation to the property as a whole, whether they should continue to have interest as a fixed and absolute charge or whether it should be contingent upon the proved prosperity of the railroad is a question of broad business policy in which they are not alone concerned. The very worth of the reorganization may be affected by it. Moreover, the public, though not a party to the record, has an interest in every railroad reorganization, accomplished by foreclosure, of which the court should take notice. The ability of a railroad fully and promptly to discharge its duties to the public, and that is of primary concern, depends in great measure upon the free margin between net income and fixed charges. In practice, when the margin becomes small or disappears under adverse conditions that are rarely appraised sufficiently, the insistent demands of contract obligations are always met at the expense of those of a more general, less definite, character.

Order.

The motion of Speyer & Co. for leave to file a petition, or to intervene, for the appointment of an additional receiver of defendant the Missouri, Kansas & Texas Railway Company is denied

THE ALEX. Y. HANNA.

(District Court, D. Delaware. October 3, 1917.)

No. 926.

1. COUNTIES ⟸208—ACTIONS—TORTS.
No action of tort lies against a Delaware county, or its levy court, for recovery of damages.

2. COUNTIES ⟸208—ACTION AGAINST LEVY COURT—ADMIRALTY.
Despite the uniformity of admiralty jurisdiction and the injunctive power of a court of equity, which extends to members of a county levy court to restrain them from acting beyond the scope of their jurisdiction or otherwise unlawfully, a libel in admiralty against the members of a Delaware county levy court, to recover for injuries to a vessel resulting from negligence in opening and operating a drawbridge across a navigable river, which was under control of the levy court, cannot be maintained; neither the county nor the levy court being subject to tort actions.

In Admiralty. Libel by George W. Bush & Sons Company, owner of Barge No. 9, against the steam-tug Alex. Y. Hanna and the members of the Levy Court of New Castle County, Delaware. Libel dismissed as to the members of the Levy Court.

Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.
Willard M. Harris, of Philadelphia, Pa., for the Alex. Y. Hanna.
Frank L. Speakman and Percy Warren Green, both of Wilmington, Del., for levy court commissioners.

BRADFORD, District Judge. Geo. W. Bush & Sons Company, as owner of barge "No. 9," filed a libel against the steam-tug "Alex. Y. Hanna," and also against the individuals composing the levy court of New Castle county, Delaware, at the time of the collision therein alleged, and the individuals composing the levy court at the time of the filing of the libel, praying for the sale of the steam-tug to pay damages, interest and costs. The libel sets forth, among other things, that it was, under the laws of Delaware and the acts of Congress, the duty of the levy court to properly maintain, operate, and open a drawbridge crossing the Christiana river in the city of Wilmington, being navigable water, so that vessels navigating the same might pass through the draws of the bridge in safety; that through the fault and negligence of the steam-tug and of the levy court, its agents, servants and employés, including the bridge-tender, the draws of the bridge were not properly operated and opened August 18, 1916, the date of the collision, although due signal had been given, whereby without any fault and negligence on the part of barge No. 9 it was injured and received damage on account of which this suit was instituted. The libel, aside from the relief in rem prayed against the steam-tug, also contains a prayer as follows:

"That a citation, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said Samuel L. Burris, William T. Purks, Everett B. Hollingsworth, Martin E. Smith, Benjamin A. Groves, Thomas S. Foreacre, and William A. Scott, composing the

said Levy Court of New Castle County at the time of the happening of the disaster aforesaid, and against William T. Purks, Benjamin A. Groves, Thomas S. Foreacre, Robert M. Burns, Isaac C. Elliott, James G. Shaw and James A. Buckson, comprising the said Levy Court as now constituted, citing them to appear and answer all and singular the matters aforesaid, and further that your libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive."

The libel, aside from the relief prayed against the steam-tug, is purely in personam, whether considered with respect to New Castle county, its levy court or the individuals composing it. But while the libelant asks that the individuals composing the levy court be cited to appear and answer, it does not pray for any definite, substantive relief against either the levy court, or its members, or the county. It is evident that no relief is sought against the present or former members of the levy court in their individual capacity. It is not charged that there was or is any individual liability on their part for malfeasance, misfeasance or nonfeasance. Further, Shaw, Elliott, Buckson and Burns were not members of the levy court at the time of the happening of the collision, and it would be an absurdity to impute to them in their individual and private capacity fault or liability on account of negligence of a bridge-tender occurring prior to their assumption of official duty.

[1, 2] The injunctive power of a court of equity extends to the members of the levy court, as it does to other officials, to restrain them from acting beyond the scope of their authority or otherwise unlawfully to the irreparable damage of those interested in the due discharge by the levy court of its functions, and as public officers they may be compelled by mandamus to perform a plain statutory duty. This appears from numerous cases in the courts of Delaware. The controversy now before the court is restricted to the point whether a proceeding in personam for damages for a maritime tort can be sustained in this court sitting in admiralty against a county of Delaware or the levy court or its members as representing the county. The law is settled in Delaware that no action of tort lies against a county or its levy court for the recovery of damages. Carter v. Levy Court, 8 Houst. (Del.) 14, 31 Atl. 715; Duncan v. Willits, 4 Pennewill (Del.) 493, 57 Atl. 369; Mayor & Council v. Ewing, 2 Pennewill (Del.) 66, 105, 43 Atl. 305. This is not disputed by the libelant. On the contrary, in its brief it is stated that:

"Under the decisions of the state of Delaware. no action of tort can be maintained against the Levy Court Commissioners of a county, * * * upon the theory that counties or other political subdivisions of the state are under no liability in respect to torts, especially to recover damages suffered in consequence of neglect to repair county roads or bridges, except as imposed or declared by statute."

The libelant, however, relying upon Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, and O'Keefe v. Staples Coal Co. (D. C.) 201 Fed. 131, contends that this rule "has no application in the courts of the United States, sitting in admiralty, for the recovery of damages against a county or other political subdivision of a state, where the cause of action relates to a maritime wrong committed upon

navigable waters of the United States." This proposition is, I think, too broad.

A municipal corporation or other organized political district of a state having a general capacity to sue and be sued may be held liable in a court of admiralty in an action in personam for damages resulting from negligence or other tort on the part of its officers or agents while acting in their representative character, where the principles of maritime law as recognized by the Constitution and laws of the United States justify the granting of such relief. The circumstance that at the time of the commission of the tort such corporation or district was engaged in the discharge of a governmental or sovereign rather than a subordinate or local function is immaterial. And where such corporation or organized district possesses such general capacity to sue and be sued it is not competent for the state to provide that such corporation or district shall enjoy immunity from accountability in a proceeding in personam in a court of admiralty for the recovery of damages for a maritime tort committed by it through its officers or agents. In such case it is beyond the power of the state to defeat or render nugatory rights and liabilities created and recognized by the paramount authority of the Constitution and laws of the United States. But where a board of public officers, such as the levy court in Delaware, is by the law of its being incapable, owing to its lack of corporate organization, of being sued in any action of tort in a state court, I am not aware of any principle on which proceedings in personam against it for a tort can be sustained in a federal court sitting in admiralty. Neither Workman v. New York nor O'Keefe v. Staples Coal Co. goes to that extent. In the former case the Supreme Court sustained a libel in personam against New York City for the recovery of damages for injuries to a barkentine from a steam fire-boat owned by the city and under the control and management of its fire department. It was contended in behalf of the city that in the operation of its fire department it was acting in a governmental and sovereign capacity and hence, under the local law, it was not liable to suit. But it was held that the city having the general capacity to sue and be sued could not successfully interpose as a shield for its protection from the consequences of the negligence of one of its departments and agencies such claim of sovereign immunity. The court through Chief Justice White said:

"The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not because, by the rule prevailing in the state, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted. The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when

it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * * The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on; since the maritime law which would survive would have imbedded in it a denial of justice. This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor. * * * It is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations. * * * As a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of a court of admiralty, as such courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment. * * * The contention, is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon."

The fire department of the city had been joined as a respondent. The libel was dismissed as to that department by the lower courts, and the Supreme Court said:

"The courts below concurred in dismissing the libel as against the fire department of the city of New York, upon the contention made in the answer of the department that under the provisions of a named statute of the state of New York, the fire department of the city of New York was neither a corporation nor a quasi-corporation, but was merely a department of the city. As no controversy is made respecting the correctness of the decree in this particular, we dismiss this subject from view."

It is manifest from the opinion that the liability of the city was predicated upon the fact, as one of the essentials to a recovery, that the city was "subject to suit and amenable to process,"—that it had "the capacity to sue and be sued,"—that it had "a general capacity to stand in judgment."

The decision in O'Keefe v. Staples Coal Co. (D. C.) 201 Fed. 131, followed Workman v. New York, and held that the county of Bristol in Massachusetts might be held liable in admiralty for a maritime tort brought about by the negligence of its employés in the operation of a draw-bridge, although they were in the performance of a public duty and under the law of the state the county is exempted from liability in such case. Section 1, c. 20, Rev. Laws Mass., provides:

"Each county shall continue a body politic and corporate for the following purposes: To sue and be sued, to purchase and hold, for the use of the county, personal estate and land lying within its limits, and to make necessary contracts and do necessary acts relative to its property and affairs."

It was urged by way of defense that:

"By the law of Massachusetts a municipal corporation or similar body charged with a public duty imposed by statute, is not liable for the negligence of its agents or servants engaged in the actual performance of that duty."

But the court, referring to Workman v. New York, said:

"This decision is conclusive against the excepting parties on the present question. The county, as is not disputed, is a body amenable to the process of this court, and having a general capacity to stand in judgment."

At common law no action of tort would lie against a county for damages resulting from negligence. In Thomas v. Sorrell, Vaughn, 330, 340, it is said:

"If a man have particular damage by a foundrous way, he is generally without remedy, although the nusance is to be punisht by the King. The reason is, because a foundrous way, a decayed bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate, and therefore no action lyes against them for a particular damage, but their neglects are to be presented, and they punisht by fine to the King. But if a particular person, or body corporate, be to repair a certain highway, or portion of it, or a bridge, and a man is endamaged particularly by the foundrousness of the way, or decay of the bridge, he may have his action against the person or body corporate who ought to repair for his damage, because he can bring his action against them; but where there is no person against whom to bring his action, it is as if a man be damaged by one that cannot be known."

In Russell v. Men of Devon, 2 Term, *661, it was held that no action would lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair. It was argued that "the county were bound to repair this bridge; they omitted to do so; and the plaintiffs received a particular injury by that omission." Lord Kenyon, C. J., among other things, said:

"Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for any injury which he has sustained against any other individual who is bound to repair. But the question here is, whether this body of men, who are sued in the present action, are a corporation, or quasi a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose. But it has been said that the action ought to be maintained by borrowing the rules of analogy from the statutes of hue and cry; but I think those statutes prove the very reverse. The reason of the statute of Winton was this; as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have

happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction, till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore when the case called for a remedy, the legislature interposed; but they only gave the remedy in that particular case and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals. And when they gave the action they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose; but it does not follow that, in this case where the legislature has not given the remedy, this action can be maintained."

In Delaware the county, with its inhabitants, considered apart from the machinery by which its affairs are regulated, is merely a political division of the state and the levy court is a board of officers charged by law with the performance of certain duties pertaining to the welfare of those inhabiting, holding property or otherwise interested in the political division represented by it. The government of a state as a whole or of a county as part thereof necessarily requires agencies or instrumentalities by which such government is to be effected. But such agencies or instrumentalities must not be confounded with or mistaken for the state or the county. The levy court is composed of commissioners who represent it and the county, but not for the purpose of being sued by way of substitution for the court or county. State officers represent the state, but could not be substituted for the state in the prosecution of claims against it. On an assumption that the county or the levy court in its representative capacity might be sued in an action of tort for damages, it might well be that service of the summons directed to it might be made upon the commissioners or one or more of them. But this, as has been shown, is an unwarranted assumption. It appears from the Delaware cases that the doctrine of non-liability of a county or its levy court as representing it in an action of tort for damages is not based solely upon its unincorporate character. In Carter v. Levy Court, 8 Houst. (Del.) 14, 31 Atl. 715, where it was held that no action of tort will lie against a county in Delaware or its levy court, Comegys, C. J., said:

"The overwhelming weight of authority seemed to be in favor of the proposition that no action of tort will lie against such a public division of the state as the county, or such a body as the levy court."

In Duncan v. Willits, 4 Pennewill (Del.) 493, 57 Atl. 369, Spruance, J., said:

"It was the rule of the common law that counties could not be sued, and that their capacity in that regard depended upon statutory enactment: for the reason that the several counties of a state are political divisions exercising a part of the sovereign power of the state."

In Mayor & Council v. Ewing, 2 Pennewill (Del.) 66, 105, 43 Atl. 305, 308, the Supreme Court of Delaware said:

"It is well settled that an action of tort for injuries from defective highways will not lie against a county, in the absence of a statute giving such action. Carter v. Wilds et al., Commissioners of the Levy Court of Kent County, 8 Houst. 14 [31 Atl. 715]; Hill v. Boston, 122 Mass. 344 [23 Am. Rep. 332]; Templeton v. Linn County, 22 Or. 313 [29 Pac. 795, 15 L. R. A. 730]. Nor could such an action against the state be maintained."

There are two separate and distinct reasons why in the courts of Delaware neither the levy court nor the county can be held liable in damages in an action of tort. One is that such an action does not lie against the county, or the levy court as representing the county, as a political division of the state, and as such immune by reason of the state sovereignty from an adverse action for damages, unless authorized by the state. The other and wholly independent reason is that, unlike public school districts, neither the levy court nor the county possesses corporate or quasi corporate organization of such a nature as to render it capable of being sued for or held in damages. Neither has a corporate seal nor, expressly or by implication, the capacity to sue and be sued.

This is not, aside from the steam-tug, a suit in rem, but purely in personam. Nor is it a suit to hold the bridge-tender or the members of the levy court individually and personally liable in damages, but to subject the levy court in its representative capacity to such liability. It may be, though it is unnecessary to express an opinion on the point, that the bridge-tender and such of the individual members of the levy court, if any, as may have been guilty of negligence either personally or through persons acting for them, resulting in the injury complained of, could be held in damages in a proper proceeding in admiralty. But this is not such a proceeding.

For the reasons expressed in this opinion the exceptions must be sustained and the libel dismissed so far as relief against New Castle county, its levy court, or the present or former members thereof, is concerned.

FIRST NAT. BANK OF CINCINNATI, OHIO, v. DURR, County Auditor, et al.

(District Court, S. D. Ohio, W. D. October 16, 1917.)

No. 86.

1. EQUITY ⊜363—PRACTICE—MOTION TO DISMISS.
A motion to dismiss a bill operates as a demurrer, admitting the averments therein.

2. TAXATION ⊜11—NATIONAL BANKS—"CAPITAL STOCK."
Rev. St. § 5219 (Act June 3, 1864, c. 106, § 41, 13 Stat. 111, as amended by Act Feb. 10, 1868, c. 7, 15 Stat. 34 [Comp. St. 1916, § 9784]), empowers states to tax shares of stock of national banks by including them in the valuation of the personal property of the owners, subject to the restriction that shares owned by nonresidents shall be fixed in the city or town where the bank is located. Act Dec. 23, 1913, c. 6, 38 Stat. 251, providing for Federal Reserve Banks, by section 2 (Comp. St. 1916, § 9786), requires national banks to accept its provisions under penalty of forfeiture of franchise, and provides the percentage of subscriptions to the stock of Federal Reserve Banks, while section 7 (section 9791) declares that Federal Reserve Banks, including the capital stock and surplus therein, shall be exempt from taxation. *Held* that, as the "capital stock" of a corporation differs from the shares of stock and is the property or funds contributed by stockholders as a basis for the business, section 5219 was not modified by Act Dec. 23, 1913, and taxes assessed against an Ohio Na-

tional bank under Gen. Code, Ohio, §§ 5408, 5410, 5411, 5412, 5672, on account of the bank's ownership of shares of stock in a Federal Reserve Bank, are collectible, and no exemption can be allowed because the capital stock of the Reserve Bank is exempt.

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

In Equity. Bill by the First National Bank of Cincinnati, Ohio, against Peter W. Durr, Auditor of Hamilton County, Ohio, and another. On motion to dismiss. Motion sustained.

Healy, Ferris & McAvoy and Frank J. Dorger, all of Cincinnati, Ohio, for plaintiff.

John V. Campbell, Pros. Atty., and Smith Hickenlooper, Henry G. Hauck, and Louis H. Capelle, Asst. Pros. Attys., all of Cincinnati, Ohio, for defendants.

SATER, District Judge. [1] The motion to dismiss the bill operates as a demurrer. It admits that, after the plaintiff's cashier had made the return for taxation purposes of plaintiff's resources and liabilities, with a statement of the names and residences of its stockholders, the number of shares held by each and the par value of each share, the defendant auditor delivered to his codefendant as county treasurer the tax duplicate authorizing him to collect, as in the Ohio statutes provided, the taxes charged against the owners of the shares of stock in the plaintiff bank, which taxes so charged include the sum of $3,339.36, assessed for the state, county, and municipal purposes claimed to be due on account of the plaintiff's ownership of 4,320 shares of stock held and owned by it in the Federal Reserve Bank of the district within which Cincinnati is located.

[2] The plaintiff claims that the provisions of section 5219, R. S. U. S. (Act June 3, 1864, c. 106, § 41, 13 Stat. 111, as amended February 10, 1868 [15 Stat. 34, c. 7]), are so far repealed by section 26 of the Federal Reserve Act (Act Dec. 23, 1913, c. 6, 38 Stat. 25 [Comp. St. 1916, § 9803]), that the shareholders in the plaintiff bank are exempt from taxation by virtue of section 7 of the last-named act (Comp. St. 1916, § 9791) on so much of its capital and surplus as is invested in stock of the Federal Reserve Bank. A temporary injunction issued when the bill was filed.

Under section 5219, the states are empowered to tax the shares of stock of national banks by including them in the valuation of the personal property of the owners in the assessment of taxes. The only restriction on this power of taxation is that taxation thereon shall not be any greater than is assessed on other moneyed capital in the hands of individual citizens of the state imposing the tax, and that the shares of any national bank owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Real property of national banks is by the same section made subject to local taxation to the same extent as other real property.

The Legislature of Ohio, in pursuance of the authority conferred by section 5219, has declared that all the shares of stockholders in an incorporated state or national bank shall be listed at their true value in money and shall be taxed only in the city, ward or village within

which the bank is located. Section 5408, G. C. Ohio. A national bank is required to keep at its place of business a full and correct list of the names and residences of its stockholders and the number of shares held by each, which list shall at all times during business hours be open to the inspection of local taxing officers. Section 5410. The cashier of such bank is required to make a return to the county auditor of the bank's resources and liabilities, with a full statement of the names and residences of its stockholders, the number of shares held by each and the par value of each share. Section 5411. The auditor then determines the value of the shares of such bank. Section 5412. The taxes assessed on the shares or their value are made a lien thereon from the first Monday of May in each year until they are paid. The duty is imposed on the bank to collect the taxes due upon its shares of stock from the several owners of the shares and to pay the same to the county treasurer. Failure to do so is attended with a penalty. Section 5672. The bank, having paid the tax assessed upon the shares held by its stockholders, is authorized to deduct the amount so paid from the dividends that are due or that may become due on such shares, and is given a lien upon the same and on all funds in its possession belonging to its shareholders or which may at any time come into its possession, for its reimbursement for the taxes so paid on account of its several shareholders, with legal interest, which lien may be enforced in an appropriate manner.

Section 2 of the Federal Reserve Act (Comp. St. 1916, § 9786) required every national bank to signify in writing within 60 days after the passage of the act its acceptance of the terms and provisions of such act. Any bank failing for one year to become a member of the Federal Reserve Bank forfeited all of its rights, privileges, and franchises. The amount of each national bank's subscription to the capital stock of the Federal Reserve Bank in the district in which such national bank is situated must be 6 per cent. of its paid-up capital stock and surplus. For the subscription thus made, the national bank becomes a shareholder or stockholder in the Federal Reserve Bank, but may not transfer or hypothecate its shares, each of which is of the face value of $100. Subsection 3 of section 7 provides that:

"Federal Reserve Banks, including the capital stock and surplus therein, and the income derived therefrom, shall be exempt from federal, state, and local taxation, except taxes upon real estate."

In Tennessee v. Whitworth, 117 U. S. 129, 136, 6 Sup. Ct. 645, 647 (29 L. Ed. 830), Mr. Chief Justice Waite, in speaking of taxable corporate elements, said:

"In corporations four elements of taxable value are sometimes found: (1) Franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) the shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation."

By the unambiguous provisions of section 5219 the power of the states to tax national banks is confined to a taxation of the fourth of the above elements—i. e., the shares of stock in the names of the shareholders, and to an assessment of the real estate of such banks. Owens-

boro Nat. Bank v. Owensboro, 173 U. S. 664, 669, 19 Sup. Ct. 537, 43 L. Ed. 850; People v. Weaver, 100 U. S. 539, 549, 25 L. Ed. 705; State, Northward Nat. Bank, v. City of Newark, 39 N. J. Law, 380, 383; Flint v. Board of Aldermen, 99 Mass. 141, 145, 96 Am. Dec. 713; First Nat. Bank of Richmond v. City of Richmond (C. C.) 39 Fed. 309.

When the plaintiff subscribed to the capital stock of the Federal Reserve Bank, it permanently invested a portion of its capital, and, it would seem, of its surplus also. Capital is thus defined in Bailey v. Clark, 21 Wall. (88 U. S.) 284, 286, 22 L. Ed. 651:

"When used with respect to the property of a corporation or association, the term has a settled meaning; it applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed."

Capital or capital stock (the terms being often used synonymously) is not the same thing as the shares of capital stock. In Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558, quoted with approval in Powers v. Detroit & Grand Haven Ry., 201 U. S. 543, 560, 26 Sup. Ct. 556, 559 (50 L. Ed. 860), it is said:

"The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. * * * The capital stock and the shares may both be taxed, and it is not double taxation." The bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends.

The Federal Reserve Act recognizes and maintains the distinction between capital stock and the shares of capital stock. See sections 5 to 8, both inclusive (Comp. St. 1916, §§ 9789–9791, 9694). It will be further noted that the term "capital stock," when used in referring to a national bank, has the same meaning as when applied to a Federal Reserve Bank. The exemption from federal, state, and local taxation, given by section 7 of such act, by express language extends only to the banks organized under that act, "including the capital stock (capital) and surplus therein, and the income derived therefrom." The correct interpretation of such an exempting clause is gathered from Railroad Cos. v. Gaines, 97 U. S. 697, 707, 24 L. Ed. 1091, in which it was said:

"In general, an exemption of capital stock, without more, may with great propriety be considered, under ordinary circumstances, as exempting that which, in the legitimate operation of the corporation, comes to represent the capital."

The exemption provided in section 7 does not extend to national banks organized under the National Banking Law. Had Congress intended that their capital stock should be relieved from taxation, it would have said so.

The stock purchased by the plaintiff in the Federal Reserve Bank is but a nontaxable investment of a part of its capital and surplus. As said in First Nat. Bank v. Albright, 208 U. S. 548, 553, 28 Sup. Ct. 349, 350 (52 L. Ed. 614):

"The law does not consider the nature of a bank's investments not taxed in fixing the value of its stock. Palmer v. McMahon, 133 U. S. 660 [10 Sup. Ct. 324, 33 L. Ed. 772]."

Whatever value the shares issued by the plaintiff national bank possess, they are to that extent taxable in the hands of their owners and holders. Rosenblatt v. Johnston, 104 U. S. 462, 26 L. Ed. 832; City, etc., of San Francisco v. Crocker-Woolworth Nat. Bank (C. C.) 92 Fed. 273. The courts have repeatedly ruled that, in fixing the value of the shares of stock of national banks for taxing purposes, the value due to the bank's ownership of nontaxable United States bonds as a part of its assets must be included. See, for instance, Cleveland Trust Co. v. Lander, 184 U. S. 111, 22 Sup. Ct. 394, 46 L. Ed. 456; Hager v. American Nat. Bank, 159 Fed. 396, 401, 86 C. C. A. 334 (C. C. A. 6); Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229; People v. Commissioners, 4 Wall. at page 258, 18 L. Ed. 344; Nat. Bank v. Commonwealth, 9 Wall. at page 359, 19 L. Ed. 701; Home Savings Bank v. Des Moines, 205 U. S. at pages 518, 519, 27 Sup. Ct. 571, 51 L. Ed. 901. The same rule applies as to nontaxable stock held by the plaintiff in the Federal Reserve Bank.

The declaration, in section 26 of the Federal Reserve Act, that all provisions of law inconsistent with or superseded by any of the provisions of such act are to that extent repealed, has no application to such a situation as is presented by the bill, for the reason that the exempting clause found in section 7 does not relieve or purport to relieve national banks, their capital and surplus from the taxation authorized by section 5219, and is therefore not inconsistent with and does not supersede the provisions, or any of them, of that section.

The temporary injunction is dissolved, and the motion to dismiss the bill is sustained. The same ruling may be taken in cases Nos. 87, 88, and 89, if the issues involved in those respective cases are the same as in this, which I understand to be the fact.

Other questions have been raised by the defense, but their consideration is not deemed necessary.

In re NAJOUR.

(District Court, N. D. Georgia. September 25, 1917.)

No. 5776.

1. BANKRUPTCY ⟸399(1)—HOMESTEAD EXEMPTION—CHANGE OF FINANCIAL CONDITION.

The mere fact that the bankrupt's financial condition, as shown by a statement made 14 months before bankruptcy for the purpose of obtaining credit, greatly changed during that period, will not alone warrant denial of a homestead exemption.

2. BANKRUPTCY ⟸228—REFEREE—DETERMINATION.

The decision of a referee, based on a hearing where witnesses were personally examined by him, should not be interfered with unless clearly wrong.

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3. BANKRUPTCY ⊂=399(1)—EXEMPTIONS—HOMESTEAD—FORFEITURE.
A bankrupt should not be denied his homestead exemption, because of his transfer of his homestead to another person, where it was retransferred to him, and the transfer was not made with intent to prefer creditors.

In Bankruptcy. In the matter of the bankruptcy of Costa G. Najour. Application by the bankrupt for the setting aside of a homestead exemption, to which John Silvey & Co. and other creditors filed objections. Objections overruled by the referee, and the creditors petition to review. Petition denied, and referee's report confirmed.

Dorsy, Shelton & Dorsey, of Atlanta, Ga., for objecting creditors.
McCallum & Sims, of Atlanta, Ga., for bankrupt.

NEWMAN, District Judge. This is an application for homestead exemption by the bankrupt, Costa G. Najour, and $920, a part of the amount realized from the sale of the bankrupt's merchandise, was set apart by the trustee to the bankrupt as an exemption. This was referred to N. L. Hutchins, referee, for determination, and his report and opinion on the subject is as follows:

"On April 11, 1917, the trustee, R. C. Patterson, filed his report setting apart the bankrupt's exemption to the amount of $920, same being cash derived from the sale of stock and fixtures of the bankrupt. On April 14, 1917, John Silvey & Co. and others filed objections.

"The first ground of objection insisted upon was because said bankrupt, in January, 1916, made a written statement to R. G. Dun & Co., for the purpose of obtaining credit, in which he represented at that time that his assets were $11,500 and his total liabilities $4,000, showing a surplus of assets over liabilities in 1916 of $7,500. Fourteen months later, when he admitted in writing his willingness to be adjudicated a bankrupt upon the filing of an involuntary petition against him, he scheduled liabilities of approximately $10,000, and his only live asset was a stock of goods and fixtures which inventoried approximately $4,000; that the only other assets scheduled were accounts receivable for goods sold, having a face value of approximately $6,500, whereas, in truth and in fact his ledger and books showed that he had at the time of bankruptcy accounts receivable of only $5,400, and that these are all practically worthless. There therefore has been a shrinkage of assets in 14 months from a solvent condition of $7,500 to an insolvent condition of approximately $7,500, or showing a shrinkage in assets in 14 months of approximately $15,000.

"The second ground of objection insisted upon by objecting creditors was that in November, 1916, the bankrupt purchased the property where he lives at 417 East Fair street, paying with his own check the sum of $500 cash payment thereon; that shortly thereafter he transferred said property to his wife for love and affection, and that at that time the bankrupt was totally and wholly insolvent; and that said transfer was fraudulent, and made for the purpose of hindering, delaying, and defrauding his creditors, and amounts to a concealment of his property, and for that reason the bankrupt is not entitled to his homestead exemption.

"Third. That creditors' further objection is because during the three months immediately preceding said bankruptcy, to wit, in December, 1916, and January and February, 1917, the bankrupt purchased and received in his store approximately $7,000 in new merchandise; that during the period of three months immediately preceding bankruptcy said bankrupt sold or otherwise disposed of approximately $10,000 worth of merchandise; and that he has made no satisfactory explanation of what has become of said merchandise or the proceeds thereof.

"Fourth. That during the three-months period aforesaid his books showed that he turned over a large portion of merchandise to friendly Syrian peddlers, and he admits that some of it was practically at cost, and if he received the cash he has not satisfactorily accounted for it, and he turned over to a friendly Syrian peddler $600 in new merchandise as credit on an alleged loan, which he admits having been owing by him for over a year, and that the delivery of said merchandise amounted to a transfer of his property for the purpose of hindering, delaying, and defrauding his creditors; that during the month of February, 1917, preceding bankruptcy, he paid bona fide merchandise creditors the sum of $138.33, while during said month he paid to relatives and friends the sum of $1,553.75, and that the payment to friends and relatives was on alleged loans of long standing; that the bankrupt on the one hand was purchasing from the objecting creditors new merchandise, and with the other hand concealing said merchandise, or else selling it to his friends and relatives, all the while in contemplation of bankruptcy proceedings, for the purpose of defrauding his bona fide merchandise creditors.

"Fifth. Said objecting creditors further insist that, although the report of the trustee setting apart the homestead exemption was not filed until April 11, 1917, said bankrupt undertook on April 5, 1917, to transfer, sell, and convey all of his right, title, and interest in the homestead to be set apart to him to another, with instructions to the trustee to pay over to said party any amount which might be allowed him as a homestead exemption.

"The above matter came on for hearing before the referee under special reference on May 14, 1917, at Atlanta, Ga., in the Federal Building, beginning at 9 o'clock a. m. and being concluded at 3:30 p. m. of the same date. A lengthy investigation was then had, and many witnesses were sworn and testified. It appears that Costa G. Najour, the bankrupt, was a Syrian merchant on Decatur street, in the city of Atlanta, Ga.; that his business consisted of selling, principally at wholesale, supplies to Syrian peddlers. These peddlers seem to have been his principal customers. On January 13, 1916, the bankrupt made a statement to R. G. Dun & Co., in which it appears that he had on hand at that time merchandise to the value of $7,000, outstanding accounts at a realizable value $3,400, and cash in bank $900, fixtures, furniture, etc., $200, making a total of $11,500; that at that time his liabilities amounted to $4,000; that he owed his merchandise creditors on open account $2,400, he owed the bank for loans $500, and he owed friends and relatives $1,100, making his surplus $7,500 at that date.

"It appears from the testimony, from an examination of bankrupt's books, journals, and ledger, his passbook at the bank, paid checks, etc., goods bought, good sold, etc., that, starting with a stock of goods in January, 1916, at a value, as shown by his books, of $6,711.67, and accounts receivable at substantially $3,500, between that time and the 1st of March, 1917, the bankrupt had purchased in his business goods to the amount of $22,355.26, making a total amount of goods handled from January 13, 1916, to bankruptcy, of a little over $29,000; that a careful inventory made by the receiver, after bankruptcy, showed on hand stock of goods of the value of $3,172.97. It appears that during said period of a little over a year that the bankrupt, as shown by his checks, had paid to his merchandise creditors, as far as can be ascertained, the sum of $25,954.77. The best information obtainable from the evidence shows the bankrupt's current expenses at his store amounted to around $1,800 a year; that he paid out, in addition to amounts shown by his checks, for merchandise for which he paid cash, amounting to about $1,800; that he paid certain debts owing to friends with goods out of the store, about $700, to say nothing of his living expenses, which cannot be determined from the evidence. It therefore appears that during the year preceding bankruptcy the bankrupt had handled practically $25,000 worth of goods, and has paid out during the same period, in connection with his business, practically the sum of $30,000. At the time of bankruptcy, therefore, with stock of goods inventorying $3,172.97, fixtures $840.00, accounts receivable, actual, $5,481.63, making his assets about $9,494.60; from his list of creditors, and claims proven, it appears that at the time of bankruptcy he owed merchandise creditors $9,433.98. While it is true that bankrupt appeared to have received an unusual amount

of goods during the early part of 1917, his explanation was to the effect that while he had purchased most of those goods several months previous, for delivery in October and November, 1916, the mills from whom he purchased delayed deliveries until January, 1917; that his stock of goods had been reduced down to about $2,000 to $2,400, during the month of December, 1916; that his customers, being principally peddlers, then came in for their spring supplies; that shortly thereafter it began raining and rained for a long period, thereby preventing peddlers from going out on the road and selling the goods purchased from him, and they being unable to pay for them before bankruptcy, placed him in such position that he could not collect and therefore could not pay his general creditors; that his business had fallen off quite materially during the year 1916, on account of business conditions on Decatur street. From a careful review and examination of all the books, papers, etc., connected with the testimony taken at the hearing, I fail to find the evidence of such fraud as is contemplated by the statute sufficient to deprive the bankrupt of his exemption in connection with objection 1 of objecting creditors.

"Concerning the second objection, as insisted upon by creditors, the evidence furnishes what would seem to be the truth of the transaction in reference to the purchase of property at 417 East Fair street, from the bankrupt, his wife, the real estate dealer, and others, showing to the court that the money thus paid out was the separate property of his wife, and was not paid out of funds derived from his business.

"Objection numbered 3 is disposed of in what has been said in connection with objection 1.

"In connection with objection numbered 4, the bankrupt appears to have made a satisfactory explanation of the goods turned over to a friendly Syrian creditor of $600 in new merchandise, on what appeared to be a bona fide loan made by a friendly Syrian to the bankrupt, and did not amount to a transfer for the purpose of hindering, delaying, and defrauding his creditors. While it appears that during the month of February, 1917, the bankrupt paid to his Gentile merchant creditors only the sum of $138.33, and that during said month he paid relatives and friends the sum of $1,553.75, or thereabouts, and that the same were made in payment of loans of several months standing, yet it appears from the testimony of the bankrupt, checks exhibited, bank books, etc., in connection with the testimony of friends to whom moneys were paid, that said sum of $1,500, or about that amount paid to friends and relatives, was for money previously borrowed which he had used in paying on his indebtedness to his general creditors; that $300 of this $1,500 was money held at the request of a Syrian preacher, who was making charitable collections along from time to time, and that amount was paid after the Christmas holidays when called for by said preacher. The referee is of the opinion that this ground is insufficient to deprive the bankrupt of his right to exemption.

"In connection with objection numbered 5, whatever may have been bankrupt's intention in making transfer of his homestead, he has since obtained a transfer of the same back to himself. This condition seems to have been reported since the hearing to the District Judge, and by said judge ordered filed and to become a part of the record in this proceeding. So the referee is of the opinion that this ground is insufficient to deprive the bankrupt of his right to exemption.

"Conclusion.

"The referee, therefore, from books, papers, records, two examinations of the bankrupt, both at the first meeting of creditors and the hearing before this referee, and the briefs and arguments of counsel, is unable to determine that the debtor has been guilty of such 'willful fraud in the concealment of a part of his property from his creditors of which he is possessed when he seeks the benefit of exemption,' or failed to make that full and fair disclosure as would be sufficient to deprive him of his claim to exemption. So, having arrived at this conclusion, it appears that the trustee's report of exempted property should be confirmed and the bankrupt's right to exemption claimed determined accordingly."

[1] The petition to review the action of the referee and the argument before me were directed mainly to what is shown here as to the bankrupt's statement, early in 1916, to R. G. Dun & Co., of considerable assets and small liabilities and the fact that when put into bankruptcy, in 1917, about 14 months after this statement, his indebtedness was large and his assets small; and the cases of In re Dobbs (D. C.) 172 Fed. 682, and (D. C.) 175 Fed. 319, were cited as authority. The decision in the Dobbs Case speaks for itself, and I was satisfied in that case that the evidence did not sufficiently account for the discrepancy in the assets from the one period to another. In this case the referee says:

"The referee, therefore, from books, papers, records, and examinations of the bankrupt, finds," etc.

Thus it shows that the referee had before him the books and papers of the bankrupt, from which he was able to ascertain that there had been no such willful fraud in his business and as against creditors as would defeat his exemption. In the Dobbs Case I said, speaking of the bankrupt:

"He appears to have kept no satisfactory books of account from which the facts as to what he had done with his property and how there had been such a remarkable change in his business could be ascertained."

In the present case the referee finds a different situation and that the showing made by the bankrupt is satisfactory, and thinks it satisfactorily shows that he made a full and fair disclosure of his property when he claims his homestead exemption.

[2] The decision of a master or referee, based on a hearing like this, should not be interfered with unless it is clearly and manifestly erroneous, and another rule that is applicable here, and to which I have always adhered, is that where a referee or master hears the witnesses in person, sees them examined and cross-examined, and notes their bearing and manner, he is better able to judge whether they should be believed or not than one who takes such testimony on paper, as I have to do here; that is to say, the general rule is that one who sees the witnesses and hears them is better able to judge of their credibility than one who reviews their testimony as it appears only after having been reduced to writing.

[3] There is another objection to the allowance of homestead here, and that is based on the fact that the bankrupt had sold his homestead. The real facts about this are rather difficult to ascertain, but it seems to me that, while the bankrupt did transfer his exemption to another party, it was transferred back to him, and he now has it, and will receive it if his exemption is approved. Of course, if it could be fairly gathered from this evidence, or if there was a reasonably necessary inference that he was trying to prefer one creditor over another, it ought to defeat the exemption; but it does not so appear.

I do not think a case is made here, in which I am justified, or would be justified, in differing with the referee about the conclusion reached by him. Consequently the report of the referee must be confirmed, and judgment rendered that the bankrupt is entitled to have his exemption; and it is so ordered.

Ex parte RUSH.

(District Court, M. D. Alabama, N. D., at Montgomery. November 13, 1917.)

No. 5363.

1. ARMY AND NAVY ⊂=19—ENLISTMENT—MINORS.
National Defense Act June 3, 1916, c. 134, § 27, 39 Stat. 186 (Comp. St. 1916, § 1885a), declaring that no person under the age of 18 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has parents or guardians entitled to his custody and control, is intended for the benefit of the parent or guardian, and gives no rights to a minor under 18 years of age, who enlisted without the consent of his parents or guardian.

2. ARMY AND NAVY ⊂=44(3)—ENLISTMENT—PROCEEDINGS BY PARENT AND GUARDIAN.
A parent or guardian, seeking under National Defense Act June 3, 1916, § 27, declaring that no person under the age of 18 years shall be enlisted into the military service of the United States without the written consent of his parents or guardians, the discharge of a minor son or ward under 18 who enlisted without such written consent, must act seasonably, and cannot unduly delay, and hence, having made no objection to the enlistment for over a year, is not entitled to secure the minor's discharge, after he deserted and was arrested to await trial by court-martial for that offense.

3. ARMY AND NAVY ⊂=44(3)—ENLISTMENT—EFFECT.
As National Defense Act June 3, 1916, permits the enlistment of minors over 16, a minor 17 years old, who, misstating his age, was enlisted without the consent of his guardian, becomes, despite section 27, forbidding enlistment of minors under 18 without written consent of parents or guardians, a de facto and de jure soldier, subject to military jurisdiction, and cannot, having committed an offense against military law, as desertion, be discharged on the petition of his guardian until expiation of his offense.

In the matter of the petition of Mrs. Henrietta Rush, on behalf of Thomas F. Caldwell, a minor, for writ of habeas corpus, directed to William R. Smith, Brigadier General, N. A. Petition dismissed without prejudice.

D. W. Crawford, of Dadeville, Ala., for petitioner.
Hubert J. Turney, of Cleveland, Ohio, for respondent.

HENRY D. CLAYTON, District Judge. This application for habeas corpus is filed by Mrs. Henrietta Rush, on behalf of her minor grandson, Thomas F. Caldwell, her natural ward, whose custody and control she has had, his parents being dead, alleging that he is illegally restrained of his liberty under and by color of the authority of the United States, and in violation of the laws of the United States, by William R. Smith, Brigadier General, N. A., commanding 37th Division in training at Camp Sheridan, Montgomery, and seeks Caldwell's discharge from the custody of the military authorities.

The facts in the case are not disputed, and from them it is established that Caldwell was born September 28, 1899; that on October 13, 1916, while a little over 17 years of age, but under 18 years of age,

and without the consent of his grandmother, his natural guardian, he enlisted in the Alabama National Guard, which, prior to that time, had been mustered into and was then in the service of the United States; that Caldwell went with his company to the Mexican border, received the pay and allowances, and performed all the duties of a soldier for nearly a year, and that with the knowledge of his guardian; that he accompanied his company to Camp Mills, N. Y., the point of embarkation for France, and that while at Camp Mills, and on September 15, 1917, he voluntarily left his company without permission of his commanding officers and returned to his home. Upon his arrival in Alabama, he was apprehended by the military authorities, and the return of General Smith to the writ shows, and it is not disputed, that Caldwell is being held by him as a soldier of the United States, that formal charges alleging the crime of desertion have been preferred against him, and that Caldwell awaits trial by a court-martial.

[1] At the time of Caldwell's enlistment, section 27 of the National Defense Act (Act of Congress approved June 3, 1916, 39 Stat. L. 186 [Comp. St. 1916, § 1885a]), contained the following proviso:

"That no person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

It is insisted by petitioner's counsel that this provision quoted renders Caldwell's enlistment void, and that, although he is held by proper military authority on a charge of desertion, nevertheless the court should discharge him and award his custody to his grandmother, his guardian. While it is true that for a time the decisions of the courts varied as to whether the enlistment of a minor in the army or navy without the written consent of his parent or guardian, and in view of the statutes of the United States prohibiting the same, was void, or only voidable, the question was settled more than 25 years ago by the decision of the Supreme Court of the United States (In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644) construing a provision identical with section 27 of the National Defense Act, except the age then was 21 years, and not 18 years, as at present, and holding that such provision is for the benefit of the parent or guardian, and gives no privilege to the minor.

[2] The law is equally well settled that a parent or guardian, seeking the discharge of a minor son or ward, must act seasonably; he cannot unduly delay. As was said in Ex parte Dostal (D. C.) 243 Fed. 664, 669:

"He may be released from the service by a timely application of the parent or guardian having a superior right to his custody or control. But this application must be made with reasonable diligence, after the parent has acquired knowledge of the actual enlistment, and before an offense has been committed by him."

[3] As between the United States and the minor, the enlistment of a minor over 16 and under 18 years of age is valid, and the minor becomes de jure and de facto a soldier, subject to military jurisdiction. He cannot himself seek his discharge by habeas corpus, and where the

parent or guardian of the minor seeks his discharge, the guardian or parent must make application with reasonable diligence and before the minor has committed any offense against the military law. He is not entitled to the minor's custody prior to the expiation of his military offense. Ex parte Dunakin (D. C.) 202 Fed. 290. This rule has been announced in many cases, and the reason is well stated by Goff, J., in Dillingham v. Booker, 163 Fed. 696, 698, 90 C. C. A. 280, 282 (18 L. R. A. [N. S.] 956, 16 Ann. Cas. 127), where it is said:

"To hold otherwise will make enlistment a farce, will destroy discipline, and offer a premium for desertion. It will not do to hold that he cannot be punished by a court-martial for crimes committed when he was in the naval service, simply because his parents did not consent to his enlistment."

In Ex parte Dostal, supra, one of the late cases on the subject, this same question was presented, and the court there held that:

"After an offense has been committed by the minor against the military law, and especially after he has been placed under arrest and charges have been preferred against him, it is too late for the parent or guardian to oust the jurisdiction of the military authorities by an application to the civil courts for a writ of habeas corpus"—citing many cases.

See, also, Ex parte Foley (D. C.) 243 Fed. 470, where the same rule is laid down.

The question is not new in this (the Fifth) circuit. It arose in the case of In re Miller, 114 Fed. 838, 52 C. C. A. 476, and was ably discussed by Shelby, J. The court held there that a minor who had enlisted without the consent of his parents, having falsely represented that he was of age, became a soldier, amenable to military jurisdiction for military offenses, and subject to release only on application of his parent or guardian, who cannot prevent his court-martial for past military offenses. Judge Shelby, speaking for the court, said:

"His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the military law, just as the citizen who is a minor is amenable to the civil law. The parents cannot prevent the law's enforcement in either case. It is not reasonable that a minor, of age to enlist, who secures the honorable and responsible position of a soldier in the United States army, could abandon his colors in the face of the enemy and on the eve of battle, and avoid trial and punishment for desertion by the intervention of his parents, who had not consented to his enlistment, but who had taken no step to avoid it before the soldier's arrest for desertion, or that he could endanger the army by betraying its secrets to the enemy, and not be amenable to military jurisdiction, his parents objecting. We cannot approve a view that leads to such results."

The question again came before our Court of Appeals in the case of United States v. Reaves, 126 Fed. 127, 60 C. C. A. 675, where a minor had enlisted without the consent of his parent and afterwards deserted from the navy, and the ruling in Re Miller, supra, was upheld and confirmed.

The court is familiar with the recent case of Hoskins v. Pell, 239 Fed. 279, 152 C. C. A. 267, L. R. A. 1917D, 1053 (decided February 5, 1917), where this same question again received the consideration of the court. While the minor in that case was discharged from the custody of the military authorities, it was because he was under the age of 16 years, and the court took the view that the statute (Rev. Stat.

U. S. § 1118 [Comp. St. 1916, § 1886]) declared him incapable of changing his status by enlistment, and that, his contract of enlistment being void, the government acquired no right to his services. In this case Caldwell was over 16 years of age at the time of his enlistment, and, as was said by the Court of Appeals in this same case (Hoskins v. Pell, supra):

"It is settled that the age of one who, when he is over 16 and under 18 years of age, enlists in the army without the consent of his parents or guardians * * * entitled to his custody and control, does not render his enlistment void, and that he is subject to the jurisdiction of the military authorities for an offense committed prior to the exercise by his parent or guardian of the right to avoid his enlistment." 239 Fed. 282, 152 C. C. A. 270, L. R. A. 1917D, 1053.

These three decisions by the Circuit Court of Appeals for the Fifth Circuit are not only sound in principle and correct expositions of the law, but they control here, and no useful purpose would be secured by citing other cases in other circuits, though it may be remarked that, with one or two exceptions, they follow the same ruling as our Circuit Court of Appeals.

An order will therefore be made refusing to discharge Caldwell, and dismissing the petition filed in his behalf; but, following the practice in United States v. Reaves, supra, the dismissal will be without prejudice.

ADAMS v. THOMAS, Insurance Com'r of Kentucky.

(District Court, E. D. Kentucky. April 21, 1917.)

No. 3087.

CONSTITUTIONAL LAW ⟸207(2)—PRIVILEGES OR IMMUNITIES—STATUTE REGULATING INSURANCE AGENTS.

Acts Ky. 1916, c. 19, §§ 14, 16, which prohibit a licensee to act as agent in the state for any stock fire insurance company doing business therein of any person who is not a bona fide resident of the commonwealth, as applied to agents for foreign companies, in effect impose a condition on such companies for the privilege of doing business in the state, and are within the powers of the state, and not in violation of the federal Constitution, as abridging the privileges or immunities of citizens of the United States or of the several states.

In Equity. Suit by Ben A. Adams against C. F. Thomas, as Insurance Commissioner of the Commonwealth of Kentucky. On motion for preliminary injunction. Denied.

S. D. Rouse, of Covington, Ky., for complainant.

H. H. Huffaker, of Louisville, Ky., and M. M. Logan, Atty. Gen., of Frankfort, Ky., for defendant.

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

PER CURIAM. This is a three-judge case, and is before us on a motion for an interlocutory injunction. The injunction which plain-

tiff seeks is against the enforcement as to him of sections 14 and 16 of chapter 19 of the Acts of the General Assembly of Kentucky, passed at its 1916 session. He is a citizen of Ohio, and resides in Hamilton county therein. His business is that of an insurance agent. As such he represents in this state divers stock fire insurance companies doing business therein, and to this end maintains an office in Covington. By those provisions of that act the defendant is prohibited from issuing or renewing a license to act as agent in this state for any stock fire insurance company doing business therein to any person who is not a "bona fide resident of this commonwealth." At the time this suit was brought plaintiff had a license to act as agent aforesaid, duly issued by the defendant before the enactment of that statute, which was about to expire, and which because thereof the defendant would not renew. The plaintiff bases his right to the relief sought on the position that those provisions are invalid, as in violation of section 2, subsection 1, of article 4 of the federal Constitution and of section 1 of article 14 of the Amendments, in that they abridge his privileges and immunities as a citizen of the United States and deny him a privilege and immunity of a citizen of this state.

The question which we have here was directly involved in the case of Cook v. Howland, 74 Vt. 393, 52 Atl. 973, 59 L. R. A. 338, 93 Am. St. Rep. 912, and it was decided adversely to plaintiff's contention. By the statutes of Vermont it is provided that a foreign insurance company shall not transact business in that state unless it first obtains license of the insurance commissioners authorizing the company so to do, and that the license shall authorize it "to do insurance business by lawfully constituted and licensed resident agents only." P. S. Vt. 4764. They further provide that no person shall act as agent of a foreign insurance company until he has filed with the secretary of the state a certificate from the company or its general agent, authorizing him to act as such agent, and obtained a license from the commissioners, and that upon the filing of the certificate the commissioners shall issue a license to such person to act as an insurance agent in the state, provided the company for which he is acting is authorized to do insurance business therein. The application for the license provided for is by the agent, and not by the company. A New York life insurance company had been duly licensed to carry on its business in Vermont by lawfully constituted and resident agents only, and was transacting business under the license. It constituted the petitioner, who was a resident and citizen of New York, one of its agents, and requested the commissioners to issue a license to him authorizing him to act for it in the state, and he made a like request on his own behalf. This the commissioners refused to do, and he thereupon petitioned for a writ of mandamus to compel them to grant him a license, which was denied him. The reasoning upon which the conclusion reached was based was that the state had the power absolutely to exclude foreign insurance corporations from doing business therein, and, having such power, it necessarily followed that it had the power to grant them only a qualified right to do business therein; i. e., through "resident agents only." Such an exclusion or quali-

fied admission was not in violation of the provisions of the federal Constitution relied on herein, so far as the foreign corporations were concerned, because they were not citizens. The court, through Judge Watson, said:

"A corporation has legal existence only in the state of its creation. It may be permitted to do business in another sovereignty, or it may be entirely excluded therefrom. The question whether such permission shall be given rests wholly with the state which the corporation seeks to enter for that purpose; and if permission is granted it may be under such conditions and regulations as the state shall impose, providing matters of a federal nature are not affected thereby, without invading the rights and privileges guaranteed by the provisions of the Constitution above referred to, for it is settled beyond question that a corporation is not a citizen within the meaning thereof."

As illustrations of what followed from the power to exclude in the case of insurance corporations, the decisions of the Supreme Court of the United States in the cases of Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, and Noble v. Mitchell, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472, were cited.

An illustration of the qualification on the power of exclusion of foreign corporations, where matters of a federal nature are affected, referred to by Judge Watson, may be found in the case of Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, where it was held that the rule that a state may exclude foreign corporations from its limits, or impose such terms and conditions on their doing business therein as it deems consistent with its public policy, does not apply to foreign corporations engaged in interstate commerce. That insurance is not commerce, and hence the power of exclusion as to insurance corporations is absolute, is recognized in the late cases of New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495, 502, 505, 34 Sup. Ct. 167, 58 L. Ed. 332, and Thames & Mersey M. Ins. Co. v. U. S., 237 U. S. 19, 25, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. Viewing the question from the standpoint of the agent, the petitioner in Cook v. Howland, supra, the court said (74 Vt. at 397, 52 Atl. at 974 [59 L. R. A. 338, 93 Am. St. Rep. 912]):

"But it is urged by the petitioner that the United States Life Insurance Company has received its license to do business in this jurisdiction, that the petitioner is seeking relief in his personal capacity alone, and that a refusal to grant him a license, as requested, because he is not a resident of this state, when the law provides for issuing such license to a resident, is an abridgment of his rights and privileges as a citizen of one of the states within the inhibitions of the Constitution. As has already been seen, the condition whereby the corporation is licensed to conduct business by resident agents only is valid and binding on the company in its corporate entity. It cannot be less so as to the agents of the company. People v. Farmosa, 131 N. Y. 478 [30 N. E. 492, 27 Am. St. Rep. 612]. To license an agent who is a resident of another state to conduct the business of a foreign insurance corporation in this state would be to give him a right to manage the business of his agency in a way prohibited to his principal—a position incompatible with the governing principles of the law of agency. Such a license to a nonresident agent would render ineffective the condition in the license to the company requiring it to do its business by resident agents."

And after quoting from the opinion in Noble v. Mitchell, supra, it said (74 Vt. 399, 52 Atl. 974 [59 L. R. A. 338, 93 Am. St. Rep. 912]):

"Since a state has the right thus to punish or regulate the doing of acts contrary to the force of the conditions imposed, it must follow, logically, that it may refuse to license all such agents to transact business in the state for such corporation as are not within the purview of the conditions, without depriving them of any rights under the constitutional provisions named."

The decision thus made, and the reasoning upon which it is based, seems to us to be sound, and we cannot but concur in it. The legislation in this state, in some details, differs from that in Vermont; but there is nothing in such difference to lead to a different conclusion. Here the application for the license to the agent is made by the corporation, and not by the agent. The prohibition is not limited to agents of foreign corporations, but takes in those of domestic as well, but is limited to stock fire insurance companies. Possibly it is limited to agents of foreign stock fire insurance companies, on the ground that licenses are required of such agents only. It is not entirely clear that licenses are required for agents of domestic insurance companies of any kind. Sections 633, 634, and 694, Kentucky Statutes, make express mention of licenses to agents of foreign companies only; but we think it is to be gathered from the concluding clause of section 633 and from section 761 that agents of domestic companies must also have licenses. Possibly in effect the prohibition is so limited on the ground that there are only foreign stock fire insurance companies doing business in the state. We gathered from the argument that plaintiff represents such companies only. But, however this may be, assuming that the prohibition applies to agents of domestic stock fire insurance companies as well as to those of foreign companies, inasmuch as domestic corporations are creatures of the state, the right to make such a prohibition as to their agents is as unquestioned as to agents of foreign companies. Construing sections 14 and 16 of the 1916 act, together with the provisions of the Kentucky Statutes relating to insurance corporations, it must be held that the admission thereby provided for of foreign stock fire insurance companies to do business in this state is a qualified one, the same as is provided by the Vermont statutes as to all foreign insurance corporations; i. e., through bona fide residents of the commonwealth only. Having the right to exclude the companies which the plaintiff represents absolutely from the state, the Legislature had the power to provide for their admission to do business in the state through bona fide resident agents only; this, as put in argument by defendant's counsel, on the principle that the greater includes the less. If plaintiff is unable further to represent his companies in the state, it arises indirectly only; i. e., because the Legislature of the state, as it had a right to do, has provided that they can only do business in the state through bona fide resident agents.

The insurance cases of State ex rel. Hoadley v. Board of Insurance Com'rs, 37 Fla. 564, 20 South. 772, 33 L. R. A. 288, and Barnes v. People, 168 Ill. 425, 48 N. E. 91, relied on by plaintiff, are not in

point. They dealt with legislation imposing upon individuals of other states burdens as to doing insurance business on their own account in the state, not imposed upon the citizens of the state. Such individuals were so burdened, not because the legislation in question curtailed the privileges of foreign insurance corporations doing business in the state, and therefore indirectly affected them, but because it curtailed their privileges only, and that directly.

We are constrained, therefore, to deny the motion.

UNITED STATES v. LEON RHEIMS CO. et al.

(District Court, S. D. New York. November 7, 1917.)

1. STATUTES ⟸241(1)—CONSTRUCTION—PENAL STATUTES.
Penal statutes should be strictly construed.

2. CUSTOMS DUTIES ⟸129—EVASION—ACTIONS—COMPLAINT.
A complaint by the United States, brought under Tariff Act Oct. 3, 1913, c. 16, § III, par. H, 38 Stat. 183 (Comp. St. 1916, § 5526), providing that, if any person or persons shall enter or introduce or attempt to enter or introduce into the commerce of the United States any imported merchandise by means of any fraudulent invoice, or by means of any false statement whereof the United States shall be deprived of the lawful duties accruing on the merchandise, such merchandise or the value thereof, to be recovered from such person or persons, shall be forfeited, sought recovery of a sum of money from three defendants as the forfeiture value of merchandise introduced into the United States by means of false invoices and declarations. The three defendants were the corporate seller, the buyer, and the president of the corporate seller. Only the seller was served. The complaint further alleged the sale in France, and that all three of the defendants caused to be presented to a United States consul there a false invoice, in which the cost of the merchandise, the price actually paid or to be paid, was stated at less than the actual cost or price, and a false declaration upon written entry by the buyer. *Held*, in view of prior legislation, that the complaint was not subject to demurrer as misjoining several causes of action, for while only one penalty, which was the value of the merchandise, could be recovered, the participants in the wrong might be sued jointly or severally until such satisfaction should be recovered.

At Law. Action by the United States against the Leon Rheims Company and others. On demurrer of defendant named to complaint. Demurrer overruled.

Addison S. Pratt, of New York City, for demurrant.

Francis G. Caffey, U. S. Atty., and Harold Harper, Asst. U. S. Atty., both of New York City, opposed.

MAYER, District Judge. This action was brought under paragraph H of section III of the Tariff Act of October 3, 1913, to recover $1,665.64 alleged to be the forfeiture value of certain merchandise entered and introduced into the commerce of the United States by means of a false invoice, a false declaration thereon, a false declaration upon the written entry, certain false and fraudulent practices, to wit,

willfully omitting to state and declare to the collector at the time of the entry the true cost of the merchandise, the price paid, or to be paid therefor, and certain willful acts and omissions, to wit, willfully omitting at the time of entry, and at all times subsequent thereto, to inform the collector of the true actual cost of the merchandise, whereby the United States was deprived of a portion of the revenue accruing upon the said merchandise, to wit, $242.16.

The defendant Leon Rheims Company is the only defendant served with the summons and complaint, and it has demurred on the ground that causes of action have been improperly united upon the face of the complaint, upon the ground that it appears upon the face thereof that causes of action have been improperly united, in that:

"The complaint purports to allege a cause of action against the defendant Leon Rheims Company for the forfeiture or true value of the merchandise referred to therein based upon its alleged fraud, and a second cause of action against the defendant George L. Rheims for the forfeiture or true value of the merchandise referred to therein based upon his alleged fraud, and a third cause of action against the defendant Emily Swiggett for the forfeiture or true value of the merchandise referred to therein based upon her alleged fraud."

The complaint deals with only one transaction, viz. the importation of two cases of merchandise which arrived at the port of New York upon the steamship Olympic, on or about August 5, 1914. The complaint alleges that defendant Leon Rheims Company sold and delivered the merchandise to defendant Swiggett, at Paris, on or about July 28, 1914; that defendant George L. Rheims was the president of defendant Leon Rheims Company, and that defendant Swiggett was the purchaser of the merchandise, and the person who made entry thereof with the collector of the port of New York. The complaint also alleges that all three defendants, and each of them, presented and caused to be presented to the United States consul, at Paris, a false invoice, in which the cost of the merchandise, the price actually paid or to be paid therefor, was stated at less than the actual cost or price, and that defendant George L. Rheims made a false declaration upon the said invoice, in which he likewise understated the actual cost or price, and also stated that no different invoice had been or would be furnished by the Leon Rheims Company to any one, and that the defendant Swiggett made a false declaration upon the written entry, in which she also understated the cost of the merchandise, and that by means of the aforesaid false invoices and declarations and false practices and willful omissions the three defendants, and each of them, knowingly, willfully, and with intent to defraud the revenue, entered and introduced and caused to be entered and introduced into the commerce of the United States the said merchandise.

The defendants are sued as joint wrongdoers for their joint fraud, but there is only one allegation in the complaint of joint action on the part of the defendants, viz. the presentation to the consul of the false invoice; all the other acts, which it is alleged defendants did, are alleged to have been done by them individually and at different times and places.

[1, 2] The statute under which the action is brought (paragraph H, section III, act of October 3, 1913 [Comp. St. 1916, § 5526]) provides as follows:

"That if any consignor, seller, owner, importer, consignee, agent, or other person or persons shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties or any portion thereof, accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates."

The contention of counsel for defendant is stated thus:

"While the statute may permit the recovery of a joint penalty against all those who are guilty of an attempt to introduce merchandise into the commerce of the United States by means of fraudulent acts committed in a foreign country, i. e., consignor, seller, or other person or persons, and while it may likewise permit the recovery of a joint penalty against those engaged in either an attempt to introduce or an actual introduction of merchandise into the commerce of the United States through fraud in this country, i. e., owner, importer, consignee, agent, or other person or persons, yet both classes of persons cannot be sued to recover a joint penalty if the offenses of the two classes are several as between themselves, even though they may be joint as between the members of each class."

In support of this contention, many English and American cases are cited, notably Lord Mansfield's opinion in Rex v. Clarke, 2 Cowp. 610, and Marsh v. Shute, 1 Denio (N. Y.) 230.

In Rex v. Clarke, supra, the statute (8 Geo. I, c. 18, § 25) provided:

"If any person or persons shall assault, resist, oppose, molest, obstruct, or hinder any officer or officers of the customs or excise, in the due seizing or securing any brandy, etc., or shall by force or violence rescue any brandy, etc., after the same shall have been seized by such officer or officers, or shall attempt or endeavor so to do, or shall, at or after such seizure, stave, break, etc., any cask, etc., containing such brandy, etc., the party or parties so offending shall for every such offense forfeit and lose the sum of £40."

An information was filed against three persons under the statute for assaulting and resisting custom house officers in the execution of their duty and rescuing from their custody certain liquor. They were found severally guilty, and each was adjudged to pay £40, the amount of the penalty, which was affirmed upon appeal. Obviously each offending person under the wording of the statute was subject to penalty.

In Marsh v. Shute, supra, the statute read:

"Every trustee who shall refuse or neglect to render such account, or to pay over any balance so found in his hands, shall, for each offense, forfeit the sum of $25.00."

Here, again, the wording of the statute clearly shows the legislative intent that each delinquent trustee must respond. As to these and other cases it is well to remember Lord Mansfield's admonition:

"There is no cause of greater ambiguity than arguing from cases without distinguishing accurately the grounds upon which they were determined." Rex v. Clarke, supra.

The statute here under consideration provides:

"Such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited."

Manifestly, if the goods had not passed into consumption and had been seized by the government, there could only be one forfeiture, and there would have been no further liability upon the part of the various persons assisting in the commission of the offense. Where the goods have passed into consumption, and the res is beyond the reach of the government, then "the value thereof" is recoverable. Such statutes, being penal, are, in accordance with familiar principles, strictly construed. If the United States sought to recover the penalty (viz. the value of the merchandise) from each defendant separately, or in other words the penalty three times, the defendants would at once point out that the statute contemplated only a single penalty.

There is nothing in the history of this legislation to negative this view. In the Revised Statutes the subject was contained in two sections, viz. 2839 and 2864. Section 2839 was originally part of section 66 of chapter 22 of the Act of March 2, 1799 (1 Stat. 677), and provided:

"If any merchandise, of which entry has been made in the office of a collector, is not invoiced according to the actual cost thereof at the place of exportation, with design to evade payment of duty, all such merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited."

Section 2864 was originally part of section 1 of chapter 76 of the Act of March 3, 1863 (12 Stat. 738), and provided:

"If any owner, consignee, or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise or the value thereof shall be forfeited."

These two sections were impliedly repealed by section 12 of chapter 391 of the Act of June 22, 1874 (18 Stat. 188), but in effect re-enacted. This section provided as follows:

"That any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall, for each offence, be fined in any sum not exceeding five

thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited, which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates; and anything contained in any act which provides for the forfeiture or confiscation of any entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby, repealed."

This section, it will be noted, did not make any provision for the forfeiture of the value of the merchandise, but authorized only the forfeiture of the merchandise itself. This omission, however, was undoubtedly inadvertent; for by the Act of February 18, 1875 (18 Stat. 316), entitled "An act to correct errors and supply omissions in the Revised Statutes of the United States," the words "or value thereof" were restored.

Act June 10, 1890, c. 407, § 9 (26 Stat. 135), provided that the value should be recovered from the person making the entry:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

This section continued in force until it was superseded by subsection 9 of section 28 of the Act of August 5, 1909, c. 6 (36 Stat. 97). This act made the following changes in section 9 of the Act of June 10, 1890. The words "consignor, seller," were inserted before the word "owner," and the words "or persons" were inserted after the word "person," so that it read, "that if any consignor, seller, owner, importer, consignee, agent, or other person or persons." In place of the words "shall make or attempt to make any entry of imported merchandise" the language used was, "shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States." And the words "such person or persons" were inserted in place of the words "from the person making the entry," so that the statute provided that "such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited."

The result of these changes was to add new classes of punishable persons and new causes of forfeiture. Under the Act of June 10, 1890, it had been held that the merchandise could not be forfeited for the fraud of the consignor, or for the fraud of any person, if such act preceded the making of the formal entry of the merchandise. U. S. v. Six Hundred Forty-Six and One-Half Boxes of Figs (D. C.)

164 Fed. 778; U. S. v. One Trunk (D. C.) 171 Fed. 772. The effect of the changes made by the Act of August 5, 1909, is discussed in U. S. v. Twenty-Five Packages of Panama Hats, 231 U. S. 358, 359–362, 34 Sup. Ct. 63, 58 L. Ed. 267.

The Act of August 5, 1909, was superseded by paragraphs G and H of section III of the Act of October 3, 1913 (Comp. St. 1916, §§ 5524, 5526), which, however, are in the same language, with the exception of the addition of the word "declaration" to the words "invoice, affidavit, letter, paper," etc., and also with the exception that the following clause of forfeiture was added:

"Or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement."

From the foregoing (the statutes having been quoted for convenience), it will appear that for well over a century the forfeiture is confined to the merchandise, or, if the merchandise cannot be found or seized, then to the value thereof. As new persons were added to the list of those from whom the value might be recovered, it was not intended to increase the penalty.

The distinction under the existing statute is not between the fraud of the consignor and the fraud of the consignee, but between a consummated entry of the merchandise by fraudulent means and an attempted entry of the merchandise, consisting of acts done by any of the persons within the category of the statute not amounting to an entry and introduction into the commerce of the United States. It may be that, if the action is predicated solely upon the presentation of a false invoice to the United States consul and the arrival of the goods in this country, as in the Panama Hat Case, 231 U. S. 358, 34 Sup. Ct. 63, 58 L. Ed. 267, it would be improper to join the American purchaser as party defendant.

Where, however, as here, the complaint alleges a consummated entry of merchandise upon the fraudulent invoice, the foreign seller is as much a party defendant as is the purchaser in this country who files the entry. The complaint sets forth the series of steps undertaken by each of the defendants which ultimately resulted in the consummated entry. The case then clearly falls within the principle of Palmer v. Conly, 4 Denio (N. Y.) 374, affirming Conley v. Palmer, 2 N. Y. 182. See also Hall v. McKechnie, 22 Barb. 248, and United States v. Chicago, P. & S. L. Railway Co. (D. C.) 143 Fed. 353.

The principle of Palmer v. Conly, supra, is that, where a statute imposes a single penalty, there can be but one satisfaction, but the participants in the wrong may be sued jointly or severally until the satisfaction is obtained. The phraseology of the statute here under consideration, the purpose for which it was enacted, and the application of the principle of law just above stated, render necessary that the demurrer should be overruled.

Motion overruled.

UNITED STATES v. PREMISES IN BUTTE, MONT. (two cases).

(District Court, D. Montana. October 17, 1917.)

Nos. 926, 927.

1. SEARCHES AND SEIZURES ⟸7—UNREASONABLE—SUSPICION.
   Under Const. Amend. 4, declaring that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, mere suspicion that one of German nativity is a spy of Germany, with which country the United States is at war, and that a search of his premises would disclose that fact, will not warrant a search and seizure of the premises to discover evidence of that fact in his effects and papers; this being particularly true where the property or papers sought for were not described in the application.
2. SEARCHES AND SEIZURES ⟸7—"UNREASONABLE"—CONSTITUTION.
   Search and seizure of an individual's private books and papers to secure evidence of his criminality is "unreasonable," within Const. Amend. 4, prohibiting unreasonable searches and seizures.
3. SEARCHES AND SEIZURES ⟸7—AUTHORITY OF CITY—WITNESS TESTIFYING AGAINST SELF.
   Under Const. Amend. 5, declaring that no person shall be compelled in any criminal case to be a witness against himself, search warrants for the search and seizure of a person's private papers for the purpose of obtaining evidence of his criminality cannot be issued, though it is asserted such person is a spy of a foreign power with which the United States is at war, for that would compel the alleged spy to be a witness against himself by means of his writings and records.

Petitions by the United States for search warrant to search premises 619 West Iron Street, Butte, Mont., and Rooms 308 and 309, Phœnix Building, of the same city, occupied by one Carl Pohl. Warrants refused.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and H. G. Murphy, Asst. U. S. Atty., of Helena, Mont., for petitioner.

BOURQUIN, District Judge. The district attorney presents affidavits "that he has good reason to believe and does verily believe" that in certain described premises in Butte is "certain property, to wit, account books, letter press, copying books, carbon copies of letters and telegrams, maps, models, * * * typewriters," which have been unlawfully used to cause or attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States in the war, and kindred offenses, and warrants are sought to search and seize. In support are filed reports of government officers and depositions, from which it appears one Carl Pohl, now of Butte, is suspicioned of being a German spy, engaged in German service, and the warrants are expected to find evidence thereof amongst his effects.

It seems Pohl is of German nativity, now a citizen of Canada, who entered the United States irregularly more than two years ago, but which irregularity has been cured, and with his family resides in Butte, ostensibly in realty and insurance business. For some months he has been and now is in the employ of a local mining company, to create

sentiment favorable to the company and adverse to antagonistic labor unions and so-called I. W. W., and therein has given satisfactory service. Amongst other things he warned his employer against certain German influence, and they procured the departure of persons they suspected of German service; Pohl insisting prosecution would render his life worth nothing. His duties brought him in association with the foreign element thought of German sympathies; he also being of like sympathy. His employer deposes he was told his informant believed Pohl and others were writing and mailing reports, and the employer wondered if to German agencies. Accordingly he consulted Byrn, of the Department of Justice, and the latter concluded that in any event Pohl was of less harm than good. And Byrn deposes he has investigated Pohl for some months, but, although "many suspicious circumstances have been developed," he does not feel a sufficient amount of evidence is at hand "to warrant Pohl's prosecution under any federal statute."

[1, 2] The conclusion of Byrn, an experienced and skillful investigator, accords with the facts laid before the judge. Hence, as it does not appear probable that Pohl has committed any of the offenses charged against the United States, nor that he has any of the property or papers described and that are designed or intended as means to such offense, the warrants must be refused. The Fourth Amendment to the Constitution declares:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

It originated in old English law that "every man's house is his castle." Mere belief and suspicion are not enough; "probable cause" within the meaning of the Constitution arising only from facts and circumstances sufficient to create in the minds of men of average prudence a reasonable belief that a crime has been committed and that the guilty person or the instruments or fruits of the crime are in certain premises. Then only can a warrant to search and seize issue. In the instant case is no more than suspicion. Furthermore, the search and seizure is for and of Pohl's private books and papers, and that is forbidden by said amendment, in that it is "unreasonable." Boyd v. U. S., 116 U. S. 635, 6 Sup. Ct. 524, 29 L. Ed. 746.

[3] And the warrants must be refused for another reason. The Fifth Amendment to the Constitution declares no person "shall be compelled in any criminal case to be a witness against himself." This amendment forbids search and seizure of private books and papers; for in legal contemplation such search and seizure does compel the owner "to be a witness against himself" by the most potent evidence—his writings and records. See Boyd v. U. S., 116 U. S. 634, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks v. U. S., 232 U. S. 392, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Ballmann v. Fagin, 200 U. S. 193, 26 Sup. Ct. 212, 50 L. Ed. 433.

These constitutional provisions were designed to check great evils, well known to the founders of this republic. They are as valuable and

necessary in war as in peace and to be respected in both. They are "principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle." The duty of giving them—

"force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures * * * should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." Weeks v. U. S., 232 U. S. 392, 34 Sup. Ct. 344, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

"Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection." A law permitting their seizure "would be subversive of all the comforts of society. * * * Our law has provided no paper search to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust, and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." Lord Camden's decision in a celebrated case of seditious libel (1765), cited and followed in Boyd v. U. S., 116 U. S. 626, 6 Sup. Ct. 524, 29 L. Ed. 746.

The warrants are refused.

THE ETHELSTAN.

THE MORGAN.

(District Court, S. D. Florida. September 12, 1917.)

1. SHIPPING ⟸209(2)—LIMITATION OF LIABILITY—PROCEDURE.
   The statutory right of a shipowner to limitation of liability for collision is not waived by a failure to assert it before decree is entered against him, nor is his failure to pursue strictly the procedure outlined in the statute and admiralty rules cause for dismissal of his petition.

2. SHIPPING ⟸209(1)—LIMITATION OF LIABILITY—PROCEDURE.
   In proceedings for limitation of liability, the value of the vessel to be surrendered is usually ascertained by appraisal; but that method is not exclusive, and on the filing of the libel the court has jurisdiction to determine such value by any procedure proper under the circumstances of the particular case.

3. COLLISION ⟸25—LIMITATION OF LIABILITY—VALUATION OF VESSEL.
   The value of the vessel in such proceedings is to be taken at the end of the voyage on which the collision occurred, and where the vessel has been moved by the owner without appraisal to another port and there sold, there is no presumption that the price realized was greater than her value at the port where the voyage ended, which justifies the allowance to the owner of the cost of towage.

In Admiralty. Suit for collision by H. B. Thompson, master of the steamship Morgan, against the Steamship Ethelstan, with cross-libel; also petition of the Van Steamship Company, owner of the Morgan,

for limitation of liability. On motion to dismiss and exceptions to petition. Motion to dismiss denied. Exceptions sustained in part.

George C. Bedell, of Jacksonville, Fla., for petitioner.

John C. Cooper & Son, of Jacksonville, Fla., for respondent and cross-libelant.

CALL, District Judge. During the month of April, 1913, the steamship Morgan, bound on a voyage from Jacksonville, Fla., to Miami, Fla., came into collision with the steamship Ethelstan, in the St. Johns river, bound from the bar to Jacksonville. Libel was filed by the Morgan and the Ethelstan attached, whereupon the master of the Ethelstan attached the Morgan. Stipulations were filed on behalf of each of the vessels and they were released. After the collision the Morgan was towed to Jacksonville, being too badly damaged to proceed upon her voyage. Proceedings were had which resulted in a decree in favor of the Ethelstan against the Morgan for some $4,000 and costs, on April 27, 1917. On June 8, 1917, the owners of the Morgan filed a libel and petition for limitation of their liability, under section 4283 of the Revised Statutes, and the amendments thereto (Comp. St. 1916, § 8021). The petition alleges, among other things, that after the Morgan had been towed to Jacksonville an examination was made, and it was decided that repairs could not be made without the expenditure of an amount disproportionate to the value of the repaired vessel, and that then the vessel was towed to New York, and after a similar investigation and determination the vessel was sold at her fair valuation for $1,850; that the reasonable expense of towing to New York, and expense of sale, amounted to $1,296.53, leaving $553.47 a net yield, and the sum of $305.69 is the interest of the owners in the freight then pending.

Upon this petition an order was made requiring the payment of these amounts into the registry of the court, and enjoining the further prosecution of the libel by the master of the Ethelstan and monition issued. The proctor for the Ethelstan moved to dismiss the libel for limitation of liability and for the issue of execution on decree. He also on the same day filed exceptions to the libel and petition.

[1] The grounds of the motion to dismiss may be stated as: (1) That the act of Congress has not been complied with by claimant; (2) the libel was not seasonably filed; and (3) claimants waived the right to such limitation of liability.

As I understand the contention of the movant, it is that the claimant, having failed to have the Morgan appraised by the court and pay the appraised value into the registry, or given stipulation therefor, or surrender the vessel to a trustee, but in lieu of either such proceedings took her to New York and there sold her, and paid into the registry of this court the amount of said sale, towage and expenses of sale deducted, and having waited until decree entered before filing the libel, thereby forfeits the right to such limitation and the relief prayed.

I have not only examined the authorities referred to in the briefs of proctors, but also the authorities referred to in the note to the section in the Federal Statutes Annotated, vol. 4, page 839 et seq., and I

am of opinion that the right secured to the shipowner by the section is not waived by failure to assert it before decree is entered. Nor do I think that his failure to pursue strictly the procedure outlined in the sections bearing upon said right, and Rule in Admiralty 54 et seq., cause for dismissal of the libel. The motion to dismiss will therefore be denied.

[2] The exceptions filed in some instances raise the same questions raised in the motion to dismiss, and attack the sufficiency of the libel on various other grounds. As I understand the statute and authorities, the provision for limiting the liability of the shipowner to the value of the vessel and the freight then earned was intended to encourage the investment of capital in such ventures. The American rule is that this value is to be determined at the end of the voyage on which the collision occurred and damage was done; that the methods pointed out in the statute and rules are not exclusive, but that, the libel having been filed, the admiralty court has jurisdiction to proceed to ascertain this value by procedure proper under the circumstances of the particular case, preferably, if possible, by appraisement or sale under order of the court. The principal object of the statute is to change the common-law liability, and restrict the liability of the shipowner to the value of the vessel at the termination of the voyage and the earned freight.

[3] The exceptions filed are 32 in number, and to discuss each one would consume more time than could be reasonably given to them. The sixteenth and eighteenth exceptions, it seems to me, are well taken. These exceptions raise the question whether the towage charges to New York can be deducted from the gross amount of sale, and the claimant be relieved from liability by the payment of the balance into court. As said before, the value is to be determined as of the termination of the voyage. The voyage was terminated at Jacksonville, in April, 1913, and that is the time at which the value is to be determined. The owners saw fit to have the vessel towed to New York, and there sold her at what is alleged as a fair and reasonable value. It does not appear that her value in New York was other than or different from her value in Jacksonville. Under these circumstances it appears to me that under the allegations of the libel the court, in the absence of any other showing, would be justified in finding her value at the amount she was sold for, to wit, $1,850. If her value was more, it could be ascertained under the usual proceeding in admiralty on proper pleading.

It is my judgment, therefore, that the claimant should within a short day deposit in the registry of this court a sum sufficient with that already deposited to make up the amount of $1,850, in addition to the freight. The said sixteenth and eighteenth exceptions will therefore be sustained. The other exceptions will be overruled.

As to the motion that execution issue upon the stipulation, it seems to me that said motion should be denied, at least until the question of the limitation of liability is disposed of. Said motion will therefore be denied. Norwich Co. v. Wright, 13 Wall. 128, 20 L. Ed. 585.

CHICAGO TRANSP. CO. et al. v. PENNSYLVANIA CO. et al.

(District Court, N. D. Illinois, E. D. September 22, 1917.)

No. 32145.

1. NAVIGABLE WATERS ⟸20(2)—BRIDGES—AUTHORITY TO CONSTRUCT.
Where Congress has not already legislated to the contrary, the power of a state to authorize the construction of bridges over navigable streams wholly within the state, and incidentally to determine what structures will interfere with navigation, is supreme.

2. NAVIGABLE WATERS ⟸20(2)—BRIDGES—AUTHORITY TO CONSTRUCT—CHICAGO RIVER.
Congress having in 1890 assumed jurisdiction over the Chicago river for purposes of commerce and navigation under Act March 3, 1899, c. 425, § 9, 30 Stat. 1151 (Comp. St. 1916, § 9971), which provides that bridges may be built over navigable rivers wholly within one state under authority of the Legislature of that state and with the approval of the Chief Engineer and Secretary of War, a bridge built over the Chicago river, under authority obtained in accordance with the laws of the state of Illinois and according to plans approved by the Secretary of War, is a lawful structure.

In Admiralty. Suit by the Chicago Transportation Company and others against the Pennsylvania Company and the Chicago & Alton Railroad Company. Decree for respondents.

Charles E. Kremer, of Chicago, Ill., for libelants.

Loesch, Scofield, Loesch & Richards, of Chicago, Ill., for respondent Pennsylvania Co.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., for respondent Chicago & A. R. Co.

CARPENTER, District Judge. Libelants are owners of the schooner Cora A., a sailing vessel of 370 tons burthen, with an extreme length of 148 feet, and 31 foot beam; at light draft her masts were 140 feet above the surface of the water. Defendants are the owners of a railroad bridge across the South branch of the Chicago river in the vicinity of West Sixteenth street in the city of Chicago, the draw of which may be raised to a height of 120 feet only above the surface of the water.

Libelants claim that in the fall of 1913 the Cora A. was laid up for the winter in the South branch of the Chicago river above the railroad bridge, and that on the 24th day of April, 1914, she attempted to pass down the river and into Lake Michigan, but on account of the bridge, which had been constructed during the winter, was obliged to lower her topmasts and rigging and raise them after passing through the bridge, and was damaged accordingly. Subsequently, on the 14th day of July, 1914, the Cora A. arrived in Chicago with a cargo of lumber from Michigan consigned to a point in the South branch of the Chicago river above the bridge in question. The schooner was a second time obliged to lower her masts in order to proceed up the river and unload her cargo, and after passing down through the draw had to set her masts and rigging, thereby being damaged a second time. Libelants claim

that the bridge is an obstruction to and an unreasonable interference with the free navigation of the river by vessels with masts more than 120 feet high, and is therefore an unlawful structure.

Authority to bridge the Chicago river was granted to the Pittsburgh, Ft. Wayne & Chicago Railway Company by the charter issued to it by the state of Illinois in 1853. The Legislature of Illinois conferred authority upon the city of Chicago to bridge or to permit others to bridge the Chicago river and its branches. By act of Congress the permit of the city to bridge the river is subject to approval or rejection by the Secretary of War.

The Pennsylvania Company, successor of the Pittsburgh, Ft. Wayne & Chicago Railroad Company, and the Chicago & Alton Company, which companies own the bridge, caused plans and specifications to be prepared for a new bridge. Application was made to the city of Chicago for permission to build such bridge, and the permit was issued. The Sanitary District of Chicago, claiming a limited jurisdiction over the river, assented to the construction of the bridge. Thus the railroad companies were authorized by the state of Illinois to build such a bridge. The location proposed and the plans were submitted to the Secretary of War, and after due deliberation were approved by him. Thus the railroad companies were authorized by the United States to erect the bridge with a clearance of 120 feet.

Section 9 of the River and Harbor Appropriation Act of March 3, 1899, 30 Stat. at Large, 1151, is as follows:

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, that such structures may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: And provided further, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

Libelants claim that the right to use the navigable waters within the United States is paramount and cannot be abridged or denied, that libelants always had used the Chicago river with their schooners, and that by reason of the railroad structure were prevented from so using it without considerable damage and expense.

[1] Respondents claim that the statute above quoted confers upon the Secretary of War original authority to authorize the building of bridges in the navigable waters of the United States, and that, inasmuch as the railroad companies had secured a permit from the Secretary of War, their right to build the bridge cannot be questioned. This contention is settled against the respondents by Lake Shore & Michigan Railway v. Ohio, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747. The

statute in question does not deprive the several states of the Union of their right to determine what structures interfere with navigation when the navigable waters are located wholly within the borders of the state. The power of the states to legislate with reference to navigable streams wholly within their jurisdictions, where Congress has not already legislated to the contrary, is supreme. The respondents, however, must succeed in this case.

[2] The Chicago river is wholly within the state of Illinois. In 1890 Congress assumed jurisdiction and control over the Chicago river for the purposes of commerce and navigation. The power to permit the construction of a bridge over the river still remains in the state of Illinois, or its municipal agents, but under Act Sept. 19, 1890, c. 907, § 7, 26 Stat. 454, Congress having assumed control over the river, a bridge could not be constructed until the proposed location and the plans therefor were first submitted to and approved by the Secretary of War in the interest of commerce and navigation. If the Secretary of War found that either the place or the plan of construction would unnecessarily obstruct commerce and navigation, he was in duty bound to withhold his approval, and the bridge could not be constructed notwithstanding the permit from the state. The state has the power to authorize the construction of the bridge; the Secretary of War had the power to permit or refuse to permit the bridge to be built, his discretion being controlled by the effect the proposed bridge would have upon commerce and navigation. It follows that two permits are essential to the construction of such bridges, one by the state, or its authorized agent, and the other by the United States government through the Secretary of War. The respondents have secured both. The bridge was therefore duly authorized, and was a lawful structure. Miller v. Mayor of the City of New York, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Monongahela Bridge Co. v. United States, 216 U. S. 176, 30 Sup. Ct. 356, 54 L. Ed. 435; Lake Shore & Michigan Railway v. Ohio, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747.

The libel will be dismissed, without costs.

McCLINTIC-MARSHALL CONST. CO. v. FORGY.

(Circuit Court of Appeals, Eighth Circuit. September 29, 1917. Rehearing Denied December 10, 1917.)

No. 4685.

1. MASTER AND SERVANT ⟸286(22)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.

Defendant as contractor was building a large railroad bridge over the Missouri river in which it constructed and used a number of service tracks for moving material and supplies. It also used two crane cars, each consisting of a revolving crane mounted on a flat car with a boiler and engine which propelled the car and also operated the crane. The boiler on one of the cars became out of repair, and it was moved with the cars in its train upon a little-used service track where plaintiff's intestate, who was its engineer, and another, worked the greater part of a day in removing the boiler tubes. While deceased was so at work standing at the end of the car, between that and the others which had been moved to a little distance to make room, such other cars were pushed up by the other crane car, and he was crushed between them. No flag or other warning signal was placed on the standing cars, as is the rule with railroad companies, and the evidence was conflicting as to whether any notice was given deceased of the approach of the moving cars. *Held*, that the nature of the work being done on the track made it in effect a repair track, and the duty of defendant in the exercise of reasonable care to see that such warning was given to the workmen, and that whether or not it performed such duty was a question of fact for the jury.

2. MASTER AND SERVANT ⟸201(7)—MASTER'S LIABILITY FOR INJURY TO SERVANT—FELLOW SERVANTS.

A master is liable for the injury or death of a servant of which its own negligence is a proximate cause, although the negligence of fellow servants was a concurring cause.

3. LIMITATION OF ACTIONS ⟸130(3)—SUIT FOR WRONGFUL DEATH—NONSUIT IN PRIOR ACTION.

A second action for the wrongful death of a person, brought after a nonsuit in the first action, is upon the same cause of action within the Missouri statute of limitations, although the allegations specifying the negligence charged may vary.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by Elnora Forgy against the McClintic-Marshall Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Langworthy, of Kansas City, Mo. (O. H. Dean and W. D. McLeod, both of Kansas City, Mo., on the brief), for plaintiff in error.

C. W. Prince, of Kansas City, Mo. (E. A. Harris, J. N. Beery, and J. E. Westfall, all of Kansas City, Mo., on the brief), for defendant in error.

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

AMIDON, District Judge. This is an action to recover damages for death by wrongful act. The plaintiff below, Elnora Forgy, widow of decedent, prevailed, and the defendant, the McClintic-Marshall Construction Company, brings error.

[1] These are the facts: The defendant was engaged in constructing a bridge across the Missouri river at Kansas City, for the Burlington Railroad and Armour & Co. It was a large enterprise requiring several years for its completion. To aid in the work, defendant built two sets of double tracks; one running north and south parallel with the approach to the bridge, the other two east and west crossing the first tracks at right angles. The latter were known as service tracks. At the west end they were connected with the yards of the Burlington and Wabash railroads so that cars loaded with materials could be brought in over them by means either of switch engines or the crane cars owned by defendant. These tracks terminated at their eastern end in what was known as storage and assembling yards, where material for the bridge was unloaded, and some work done assembling different parts.

For the purpose of handling the bridge material, defendant had two locomotive crane cars, to each of which were attached three ordinary flat cars upon which material could be loaded. The cranes were themselves mounted on an ordinary eight-wheel railroad flat car. They each weighed 86 tons, and had a capacity of 30 tons. The cars were propelled by the same engine that operated the cranes. The cranes, together with the boiler, engine, and machinery, were mounted upon a frame which rested upon small wheels arranged in a circle. These in turn ran on a circular track on the surface of the flat car. In swinging, the crane did not have an independent motion, but the entire framework revolved about on the circular track. In other words, the crane is what is known as a "whirly."

The boiler was upright. At the bottom was the ash pan, next the grate and fire box, above this were the flues, and at the top were the hood and smokestack. The boiler was inclosed in a cab. It and some of the machinery was covered by a semicircular roof. The cab was nearly flush with the end of the car when the crane was pointing in the same direction as the car.

The flues are fitted into an upper and lower flue sheet. They are not only expanded so as to fit tightly into the sheets, but extend about one-eighth of an inch beyond them, and are then beaded against the sheet at each end.

These locomotive cranes were known as Nos. 15 and 17. Forgy, the decedent, was engineer on No. 15. For some time prior to the accident, the flues on his engine had been leaking. On the morning of March 28, 1911, he and another workman were directed to take out the leaking flues preparatory to installing new ones. In doing this he was directed by the superintendent to place his crane car, and the cars usually attached to it, on one of the service tracks at a point little used. The crane and the cars were run in on this track by their own power. The crane car was then uncoupled and removed about 3 or 4 feet from the flat cars, leaving the latter standing on the track to the west, the

direction from which they had come in and from which they would have to be taken out.

We pause here to call attention to the fact that the flat cars were separated from the crane car at the time they were set in on the service track, thus clearly indicating that in the judgment of the men it was necessary for the workmen engaged in removing the flues to get in on the track between the flat cars and the crane car.

The removal of the flues was commenced at about 9 o'clock in the morning by Forgy and the assistant master mechanic, a man by the name of Marshall. The hood and smokestack were removed so that one workman could get down to the upper flue sheet and by means of a hammer and cold-chisel cut off the beading. There is conflict in the evidence as to how the other workmen reached the beading at the other end of the flues. On the east side of the boiler as it stood at the time, there was a door inside the cab leading to the fire box. Some of the evidence tends to show that the bottom of the flues was reached through this door. There was another door leading to the ash pan, opening on the west side of the boiler and cab. It was 18 inches long and 7 or 8 inches high. In our judgment the weight of the evidence shows that the lower beading could be most conveniently reached through this door. The ash pan and the grate had been removed, and this also confirms the evidence that at least part of the work was done through this opening. That is the usual method of reaching the bottom flue sheet of such a boiler for the purpose of removing the flues. The light is better than through the door inside the cab. All the evidence shows that the flues were driven out from below and removed through the opening left at the top by taking off the hood and smokestack.

At about 4 o'clock in the afternoon Forgy was standing on the ground at the west end of his crane car, between it and the flat cars, looking up through the ash pan door into the boiler, with his hammer and chisel in his hands. At that time crane No. 17, with its three freight cars attached, by direction of the superintendent ran in on the siding for the purpose of removing the other crane and cars to a point in the yard where the flue chambers could be cleaned out with a hose. No immediate warning was given to Forgy. No. 17, with its loaded cars, struck the three flat cars that were standing on the track, and pushed them against the other crane car. Forgy was caught between the two drawheads and killed.

Did defendant owe deceased the duty to warn him before disturbing the car on which he was working? Defendant answers that question in the negative. It offered evidence to the effect that it was not customary on jobs of this character to warn workmen of the movement of the cranes or cars; that it was the practice and duty for men to look out for themselves. This evidence was not directed to workmen engaged on the class of work that Forgy was doing. We are of the opinion that when the nature of his work is considered the company owed him the duty of reasonable care for his protection. It was impossible for him to do his work and keep watch of the movements of engines. For all practical purposes the situation is identical with that of a workman engaged in repairing a railroad car. The rule in force

on nearly all railroads in the United States for many years requires that such a car (1) be protected by a blue flag by day and a blue light at night; (2) that only the workmen repairing the car can remove the warning. There was no direct evidence in the trial court in relation to this rule, but it has been quoted in text-books and in countless judicial opinions, and may properly be referred to in determining whether the judgment below should be reversed. The trial court, in order to avoid the danger that the jury would give plaintiff the benefit of the fellow-servant law of Missouri (which is applicable only to railroads proper), excluded evidence as to this rule. We think the situations were so nearly identical that the evidence might well have been received. But be that as it may, we think it may at least be considered by this court in determining whether the trial court properly left to the jury to say whether defendant exercised reasonable care with respect to Forgy. In our judgment that question was one of fact and not of law. The rule which has been stated with increasing emphasis by the Supreme Court is expressed in the following language in Kreigh v. Westinghouse, 214 U. S. 249, 256, 29 Sup. Ct. 619, 622 (53 L. Ed. 984):

"Where workmen are engaged in a business more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employés, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employé should be exposed to dangers unnecessary to the proper operation of the business of his employer."

That rule is based upon the simplest considerations of humanity as well as justice. The courts would be false to their trust if they did not enforce it. The duty which it imposes cannot be met by renunciation or by shifting the entire responsibility upon workmen to avoid injury. We are of the opinion therefore that the learned trial judge exercised a sound discretion when he left this question to the jury.

Did the defendant warn Forgy before disturbing the car? Upon that question the evidence is in hopeless conflict. It may be considered under two headings: First, there was evidence that the man in charge of crane No. 17, as he passed within about 75 yards of Forgy, called out to him, "Look out, Big Jack, we are coming in there after you," and that Forgy said nothing, "just turned around and grinned at me." Springer, the man who says he gave this warning, was standing on the rear end of the flat cars attached to No. 17. On the opposite side of the car, and between him and Forgy, another witness was standing. He says he heard no such call. Another witness standing on the ground between Forgy and No. 17 says he did not hear it. It must be presumed from Forgy's subsequent conduct that he did not hear the warning. The wind was blowing at the time 38 miles an hour from Forgy towards Springer. We are therefore forced to the conclusion, either that the warning was not given, or that Forgy did not hear it. Second, Master Mechanic Gallinot testified that he visited crane No. 15 at about 3 o'clock and found that the work of removing the flues had been completed. He says he then told Forgy that he would go down at once and send up Springer with No. 17 to get No. 15 and take it to a

point where its flue chamber could be cleaned out with a hose. His testimony on that subject is as follows:

"I told Mr. Forgy that I would go right down and have Springer come up and get the crane and to watch out for crane No. 17; that he was coming in there after it to take it down to the river and wash the boiler out, and the three of us were standing right together on top of this boiler, and he says, 'All right.' And I says to Mr. Marshall, 'You go down and get the hose coupled up.' After I had given Mr. Forgy and Mr. Marshall their instructions, I stepped off the crane and walked down to the track, and then told Mr. Springer that I wanted that crane gotten and brought down to the river where I could wash it, as I was to put those tubes in that night and I wanted to get that crane finished up that night."

He further testifies that Springer promptly left to carry out his instructions.

These are some of the features in which the evidence is in conflict:

(a) Reed, a witness for the plaintiff, testified as follows in regard to Gallinot:

"Q. And did you see him around any place around No. 15 crane during the progress of repairs that Mr. Forgy was making on the day of his death? A. No, sir."

(b) Springer testified that Childers, the superintendent in charge of the work, rather than Gallinot, gave the directions to him to go after crane No. 15; that he had given the instruction repeatedly, and both he and Springer testified that considerable feeling had been developed because of Springer's failure to obey these instructions. Childers was afterwards fully examined as a witness, and did not explain this conflict.

(c) Another feature of the conflict is that Marshall, a witness much relied on by the defense, testified that Gallinot worked with him and Forgy in taking out the flues; that Gallinot did the work at the bottom end of the flues. Gallinot's testimony, on the other hand, clearly indicates that he had nothing to do with the removal of the flues. After a most careful reading of Gallinot's testimony, we are compelled to say that he was not a candid witness.

(d) Gallinot and Marshall testified that the work of taking out the flues had been fully completed something like an hour before the accident. Reed, on the contrary, testifies that Forgy, at the time of his death, was actually working on the flues, and all the circumstances go to support Reed's testimony.

During the day No. 17 had been passing back and forth at frequent intervals upon the same track upon which it passed prior to the accident. A considerable time had elapsed after the alleged conversation between Forgy and Gallinot, and the passing of No. 17. For this reason Forgy might have supposed that No. 17, on the occasion in question, instead of coming after 15, was going into the yards to get material as it had been doing on its previous trips.

In view of the conflicting state of the evidence, we think the question of the credibility of the entire body of witnesses was one for the jury, and that the trial court properly left to them the question of what, if any, warning was given to Forgy, and, if it was given, whether it was sufficient to constitute reasonable care.

[2] As a third defense the company urges that the negligence, if any, which caused Forgy's death, was the negligence of fellow servants. The men in charge of crane No. 17 were without doubt fellow servants of Forgy. If his death was caused by their negligence alone, the plaintiff cannot recover. On the other hand, if the death was caused by the joint negligence of the company and of these fellow servants, the company is liable. Kreigh v. Westinghouse Co., 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984; Standard Oil Co. v. Brown, 218 U. S. 78, 85, 30 Sup. Ct. 669, 54 L. Ed. 939. We think there was evidence tending to show that the company failed to perform its duty. It took no measures whatever for Forgy's protection. We do not say that it was bound to adopt printed rules for the guidance of its employés, but we do say that it was bound to give specific directions that the car upon which Forgy was working should not be disturbed without warning him, and that it should have placed some warning upon the car to draw the attention of workmen clearly to the fact that it was undergoing repair. The danger was too great to leave the entire operation to the uncontrolled discretion of workmen.

We do not think the situation was one to which the rules developed by this court in American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041, and Kreigh v. Westinghouse, Church, Kerr & Co., 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684, are applicable. The facts of those cases were identical, and the latter case was reversed by the Supreme Court in 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984. Just how far their authority on the question of when a risk is one of "operation and not of construction" is impaired by the decision of the Supreme Court, is not now involved. That rule, however, is one which cannot be pressed too far without entirely exonerating the master from his duty to exercise reasonable care to furnish a safe place and safe methods of conducting his business. It is instructive that the rule was first developed in connection with scaffolding cases, and has had its most frequent application to actions of that character. It was first announced in New York, and was worked out by the courts of that state in great detail. What has happened to it there? As the result of many and appalling accidents, the Legislature has abrogated the rule, and in its place made the master not only liable civilly, but also made him liable as for a felony, whenever a scaffolding or other like structure gives way as the result of imperfect material or construction. The reports of commissions which led to this legislation point out the many accidents, and also show that the construction of scaffolding and other falsework in modern building operations often involves engineering judgment, and that the risks are so great that they cannot properly be left to the judgment of carpenters concerned only with particular features of the work. Certainly a master engaged on a great enterprise like that here involved, using agencies that are imminently dangerous to workmen, cannot say to its employés, "Here are safe railroads, safe cars, safe cranes, etc., now you use them so as not to injure each other," and thus absolve itself from all liability. To lay down any such a doctrine is to completely exonerate the employer from the

primary duty to exercise reasonable care to furnish workmen a reasonably safe place, and also exercise reasonable care as to methods of doing the work so as to safeguard workmen from unnecessary injury. Those duties are inalienable and continuous. B. & O. Ry. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Kreigh v. Westinghouse Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984.

[3] Is the action barred by limitation? The statute in Missouri limits actions of this character to three years from the time the cause of action arose. The accident occurred in March, 1911. An action was begun in May, 1911, in the circuit court of Jackson county, Mo. The plaintiff was nonsuited in June, 1913, and then brought the present action in May, 1914. That was within one year from the termination of the first suit, which is the time fixed by the local statute for renewing the litigation for the same cause after a dismissal or nonsuit. It is claimed that the first complaint was not upon the same cause of action upon which recovery is now sought; that in the first action there was no averment of a failure of the company in the performance of its duty as to a safe working place, or safe methods, but that the complaint proceeded exclusively upon the negligence of the company's employés in the operation of its cars; and that, as more than three years had elapsed when the present action was brought, the statute had run. The cause of action set up in both complaints is the death of Forgy by the wrongful act of the defendant. A mere amplification of the wrongful act, or a specification of the negligence with varying aspects, does not constitute a new cause of action, but simply an amplification of the same cause of action which would have been permitted by way of amendment of the original complaint upon application to the court. That being the case, the original action tolled the running of the statute. See Seaboard Air Line Ry. Co. v. Koennecke, 239 U. S. 352, 354, 36 Sup. Ct. 126, 60 L. Ed. 324; Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006; Crotty v. Chicago Great Western Ry. Co., 95 C. C. A. 91, 169 Fed. 593; First State Bank v. Haswell, 174 Fed. 209, 211, 98 C. C. A. 217.

The judgment is affirmed.

HOOK, Circuit Judge. I concur in the affirmance of the judgment, but desire to emphasize a feature of the case. The building of the bridge across the Missouri river was an undertaking of considerable magnitude that naturally required different gangs of men in different, and at times conflicting, activities. The work was even more hazardous to the employés than ordinary railroading. The place where Forgy was working was in all practical respects a repair track where men are not ordinarily expected to be on the lookout for violent entrance of other cars. Otherwise the duties put upon them could not well be performed. That an enterprise of such a character may be conducted by an employer without system, orders, or rules for the protection of his workmen, particularly those like Forgy, but that care for their safety may be left wholly to the judgment and discretion of their fellows in each emergency as it arises, does not commend itself to my judgment. It is customary in established hazard-

ous businesses for the employer to adopt and direct precautionary methods for that purpose, and there was no reason in the duration and character of the work why it should not have been done in this case.

Whether Forgy was notified is a question of fact that should not be affirmatively answered by us merely upon the testimony of a witness that happens to be without categorical contradiction. The truthfulness of his testimony should be weighed with the reasonable inferences from other facts and circumstances. The trial court with the witnesses before it thought the proofs made the question debatable, and the jury found Forgy was not notified. From the bare record here I think the finding probably right.

SANBORN, Circuit Judge (dissenting). It is conceded, and is indisputable, that the injury and death of Forgy was no evidence of the causal negligence of the construction company. It is conceded, and is indisputable, that Boone, the foreman, Forgy, the engineer, Reed and Jeffress, who worked with crane No. 15, Springer, the foreman, Lewis, the engineer, and Knowland and Garzee, who worked with crane No. 17, were fellow servants, and that the company is not liable on account of any negligence of any of them which caused or contributed to the injury or death of Forgy.

The burden was therefore upon the plaintiff below to prove by substantial evidence that the defendant was guilty of negligence which contributed to cause the injury and that such contributing negligence of the company was the proximate cause of the injury and death. The concurring negligence of others cannot transform a remote cause, or no cause, into a proximate cause. And where, at the close of the trial, there is no substantial evidence that the negligence of the defendant was the proximate cause of the injury, it is the duty of the court to instruct the jury to return a verdict for the defendant notwithstanding the fact that the negligence of others contributed to cause it. Cole v. German Savings & Loan Society, 124 Fed. 113, 116, 117, 59 C. C. A. 593, 596, 597, 63 L. R. A. 416; Atchison, Topeka & S. F. R. Co. v. Calhoun, 213 U. S. 1, 9, 10, 29 Sup. Ct. 321, 53 L. Ed. 671.

The only negligence of which it is claimed that the construction company was guilty was that it failed to give Forgy suitable warning that Springer was immediately coming with crane No. 17 to take crane No. 15 from the house track to the river, a distance of one-eighth to one-fourth of a mile, to enable the workmen to wash out the boiler. In the opinion of the majority this negligence consisted in a failure (1) "to give specific directions that the car upon which Forgy was working should not be disturbed without warning him," and a failure (2) "to have placed some warning upon the car to draw the attention of workmen clearly to the fact that it was undergoing repairs." As careful a perusal and analysis of the evidence in this case as it is possible for me to make has forced my mind to the conclusion that there was no substantial evidence of any causal negligence of the construction company before the jury at the close of the trial, and that the evidence is conclusive that if there was any causal negligence proved it was that of the deceased or his fellow servants.

1. The uncontradicted evidence, as I read the record, is that between 3 and 4 o'clock in the afternoon after Forgy and Marshall had completed the removal of the flues from the boiler and had done all the repair work intrusted to them which they could do at the place where the car stood, and immediately before Springer came up with crane No. 17 to take Forgy and crane No. 15 to the river, the master mechanic, Gallinot, and the assistant master mechanic, Marshall, notified Forgy that Springer would come up at once with crane No. 17 to take crane No. 15 to the river, Springer was immediately ordered to come and immediately came up with his crane and backed into crane No. 15 and the injury was inflicted. Springer and his crew knew that crane No. 15 was placed on the house track for repairs that morning, that Forgy was repairing it that day, and that Springer was to take it out from the house track to the river that the boiler might be washed out.

It is indisputable that, if these facts were established without substantial evidence to the contrary, the failure "to give specific directions that the car upon which Forgy was working should not be disturbed without warning him" could not have caused or directly contributed to cause his injury, because the warning actually given him superseded and made ineffective and immaterial instructions to warn and the absence of such instruction alike. He could not have been injured by a failure to warn him of what he had just been told and knew. And it is equally evident that the failure to place "some warning upon the car to draw the attention of workmen clearly to the fact that it was undergoing repair" could not have caused or directly contributed to cause the injury, because the testimony is positive and uncontradicted that Springer and the men on crane No. 17 knew that crane No. 15 and the three cars near it were placed on the house track in the morning of the day of the accident in order that crane No. 15 might be repaired, that they knew Forgy was repairing it there that day, that they knew as they went up there in the afternoon that they were going to take crane No. 15 from the track on which it was stationed, down to the river, and that as they went north, past the switch track which led into the house track in order to back in for the cars at No. 15, Springer and one of his crew saw Forgy sitting on the top of his cab with his feet down in the place whence the smokestack had been removed, and he turned, saw them, and grinned. This knowledge of Springer, and the men on No. 17 who backed into the three dead cars and pushed them against Forgy and No. 15, superseded and made ineffective and immaterial the presence or absence of "some warning upon the car to draw the attention of the workmen clearly to the fact that it was undergoing repairs." No such warning could have given them more complete knowledge of the material facts than they already had, and Forgy had just received through his notice of their coming.

Therefore the determining question is: Was the fact that Forgy was clearly notified of the coming of Springer and crane No. 17 to take his crane from the house track established by uncontradicted evidence, or was there substantial evidence that such notice was not given? To appreciate the testimony on this subject the nature and chronological order of the work which was being done that day must be in mind.

These facts were established without dispute. The job in hand was the construction of a bridge over the Missouri river. Childers was the superintendent, Gallinot was the master mechanic, Marshall was the assistant master mechanic, Boone was the foreman, and Forgy the engineer with crane No. 15. It was Forgy's duty to operate and repair the engine and crane. Boone, Reed, and Jeffress, who also worked with crane No. 15, took no part in the removal of the flues from the boiler, but discharged other duties including the removal of the headblock. The job of the day of the accident which concerns us was the repair of crane car No. 15. The work to be done in this repair in its order was: (1) To place No. 15 on the house track which extended west from the north and south tracks and was connected to them by a curved switch track. This house track was not in use for the passage of trains, engines, or cars generally and No. 15 was placed upon it for that reason. (2) To remove from the west end of No. 15 its broken headblock which weighed 4,500 pounds so that a new headblock could be put onto it. This work was among the duties of Boone, Reed, and Jeffress, and Forgy and Marshall took no part in it. (3) To cut out and remove the leaky flues in the boiler of crane No. 15 so that new flues could be inserted in it. (4) To take No. 15 from the house track to the river as soon as the old flues were removed from the boiler, a distance of an eighth to a quarter of a mile, and wash out its boiler before the new flues were inserted. (5) To insert the new flues, and (6) to put on the new headblock. Crane No. 15 was placed on the house track in the morning between 9 and 11 o'clock. Boone, Reed, and Jeffress then took the headblock from the crane car and finished that work a short time after dinner. They then left the crane and house track and spent the afternoon down to the river doing something, and were not there again until about five minutes before the accident, when Forgy was sitting on the top of the cab with his feet down in the place whence the smokestack was removed, and Springer and his crane and cars were going up north to back in to get the three dead cars and crane No. 15. Meanwhile Forgy and Marshall had been cutting the tubes out and had completed their work so that they had nothing more to do repairing the crane until the car was taken to the river where the boiler could be washed out. When they had completed the work of removing the tubes, they notified Gallinot, the master mechanic, and he examined the sheets of the boiler to see that they were not injured. Mr. Gallinot and Mr. Marshall testified that the removal of the flues and all the repair work that could be done by Forgy and Marshall before the crane car was moved to the river was then completed, and that thereupon they and Mr. Forgy were together on top of the boiler of No. 15. Mr. Gallinot testified that while they were there together he "told Mr. Forgy that he would go right down and have Springer come up and get that crane, to watch out for crane No. 17, that he was coming in there after him to take it down to the river to wash the boiler out," and that Forgy said, "All right," and Gallinot said to Marshall, "You go down and get the hose coupled up," that Gallinot then stepped off of the crane, walked down to the track, and told Springer he wanted crane No. 15 taken where he could wash it, that Springer said, "All right," and went up to get

it right away. Marshall, the assistant master mechanic, testified that he and Forgy cut the tubes out of the boiler that day, that he was sent up there after the steam and water had been taken out, about 11 or 11:30 in the forenoon, that they completed the work of cutting out the tubes about 3 in the afternoon, and then there was no more work they could do with the crane standing at that place, that thereafter Gallinot examined the sheets of the boiler where they cut the tubes out to see that they had not cut them up with the chisel, and when he had completed that examination he told Forgy that he would send Springer right up, to get him, and told Marshall to go down and get the hose ready and get it to the water plug, that he (Marshall) stayed there until Springer started up after the crane, that when he saw that Springer was at the north end of the switch that was down by the water plug coming up towards the north, he said to Forgy, "There comes Springer, I will go and get my hose out," and he jumped off the crane, that, when he left, Forgy was sitting on the top of the locomotive with his feet down in the smokestack and none of the other workmen were there, that the accident happened when he had walked about a quarter of a mile from crane No. 15. Three witnesses testify that one standing on the ground a step from the side of the crane car could have seen the cars attached to crane No. 17 with unobstructed vision when they came in on the house track to get the three dead cars and crane 15. Here then was the positive testimony of two witnesses that Forgy was notified immediately before the accident that Springer and his crane were coming in on the house track to get him and to watch for them. Was there any substantial evidence that this notice was not given?

It is said in the opinion of the majority that Reed testified that he did not see Gallinot any place around No. 15 crane during the progress of repairs that Forgy was making that day. But Reed also testified that he was not at or near the crane from shortly after dinner when he, Jeffress, and Boone finished removing the headblock until about five minutes before the accident, that they had been doing something down to the river during that time, and Gallinot and Marshall testified that it was during that time that they were at the crane with Forgy and notified him that Springer was coming with his crane to get crane No. 15 and that he (Forgy) must watch out for him. There was therefore nothing in the testimony of Reed in conflict or inconsistent with the testimony of Gallinot and Marshall that they gave Forgy notice of Springer's coming just before he started to get crane No. 15.

It is said in the opinion of the majority that Springer testified that Childers, the superintendent in charge of the work, rather than Gallinot, gave the directions to him to go after crane No. 15, that Childers had given the instructions repeatedly, and both he and Springer testified that considerable feeling had been developed because of Springer's failure to obey these instructions, and it is also said in the opinion that Childers was afterwards fully examined as a witness and "did not explain this conflict." But there was no conflict. Gallinot testified that he directed Springer to take his crane No. 17 and go up and get crane No. 15 and take it down to the river. Springer testified that Gallinot and Childers both directed him to do so at the same time,

at about 4 o'cock in the afternoon. Here are extracts from his testimony that were nowhere contradicted:

"Q. What did Mr. Gallinot tell you when he was talking to you about it? A. He told me to get it down there so he could wash the boiler and put the flues in that night and we could work it the next day. * * * Q. And it was about 4 o'clock when Mr. Childers and Mr. Gallinot told you to go right down and get that crane and bring it down? A. Yes sir."

Thus it appears that there was no feature of conflict between the testimony of Gallinot and Springer, and that there was nothing there inconsistent with the uncontradicted testimony of Gallinot and Marshall that they notified Forgy just before the accident that Springer was coming to take his crane and that he must watch for him.

In the opinion of the majority it is said that:

"Another feature of conflict is that Marshall, a witness much relied on by the defense, testified that Gallinot worked with him and Forgy in taking out the flues; that Gallinot did the work at the bottom end of the flues. Gallinot's testimony, on the other hand, clearly indicates that he had nothing to do with the removal of the flues."

But (1) the fact that Gallinot did or did not have anything to do with the removal of the flues in no manner tends to conflict with the testimony of Gallinot and Marshall that they notified Forgy that Springer was coming with crane No. 17 to take him and No. 15 to the river just before Springer started and just after he started, and therefore it is immaterial; and (2) when all the testimony of Marshall and Gallinot on the subject of the latter's work is considered there is no conflict between them. Marshall testified, as we have seen, that he and Forgy worked under the direction of Gallinot, that after he and Forgy finished removing the flues Gallinot examined the sheets, one of which was at the top and the other at the bottom of the boiler, to see whether they had cut them with their chisels, and that he then notified Forgy that he would go and send Springer and No. 17 to come and get No. 15, that he immediately did so, and Springer came right up and attached his crane to the three dead cars. The only other testimony of Marshall on the subject of the doing of the work of repair was that Gallinot sent him up to help Forgy remove the tubes, about 11:30, and:

"Q. About what part of the crane did you go? A. On top of the cab. To get to the boiler you have to go in where the smokestack sets. Q. Either on top of the boiler or inside? A. That is where Mr. Forgy and I worked. Mr. Gallinot had to come through the fire box to get inside. Q. The work you and Mr. Forgy were doing required you to be, as I understand it, either in the cab or on top of the cab? A. Yes, sir. * * * Q. Go ahead and tell what you heard Mr. Gallinot say to Mr. Forgy. A. Mr. Gallinot when we finished down in the boiler came up on top where we fellows was working, just after we finished. * * * Q. Now you were working there with Jack on this crane, you say? A. Yes, sir. Q. Helping him take out these flues, is that right? A. Jack and I were both taking them out; yes, sir. Q. And you were assistant master mechanic? A. Yes, sir. Q. And you were there doing the work of a laborer, is that right? A. No, sir. Q. That is not right? A. No, sir; I didn't say that. Q. Well, I understood you to say you were helping him take these flues out. A. Jack and I were taking out flues together. * * * Q. Well, what tools—where were the tools, where did you put them after you got through with them? A. The tools Mr. Gallinot had—Mr.

Gallinot worked in the bottom of the boiler. Q. Yes. A. And the tools he had, he left them in the ash pan."

This is all the testimony of Marshall as to the work Gallinot did on the crane. Gallinot testified:

"Q. Then after you got the crane up there on the track there under the bridge, the one we have called here the house track, who helped about that repair work? A. On the tubes Mr. Marshall, Tom Marshall helped Mr. Forgy. Q. Two of them worked on it, did they, that day? A. Two of them; both of them worked on the boiler or on the tubes, taking the tubes out. * * * Q. What did Mr. Forgy and Mr. Marshall do on that crane that day in the way of repairs? A. They cut these tubes out, cut them out and took the number of tubes that there was to be taken out, and then got this crane ready to go down to the river to have this boiler washed out before we put the new ones in."

This is all the testimony of Gallinot as to the work he did on the crane, except that he testified, as we have seen, that after Marshall and Forgy had finished their work of removing the tubes he examined the boiler to see that the sheets were not cut. Gallinot's testimony discloses his presence at the crane during the progress of the work and at and after its conclusion. In examining the sheets of the boiler it was necessary for him to go to and to examine the bottom sheet, and both witnesses testify that he made the examination. There is nothing in Marshall's testimony inconsistent with the theory that this was all he did at the bottom of the boiler, and there is nothing in Gallinot's testimony inconsistent with the theory that he also worked at the bottom of the boiler in taking out the tubes, the ash pan, the grates, or other parts it was necessary to remove. And so it is that when all their testimony is considered there is no conflict in the evidence of these witnesses upon this subject.

It is said in the opinion of the majority that:

"Gallinot and Marshall testified that the work of taking out the flues had been fully completed, something like an hour before the accident. Reed, on the contrary, testified that Forgy, at the time of his death, was actually working on the flues, and all the circumstances go to support Reed's testimony."

It is true that, after testifying that at the time of the accident he was about 15 feet south of the east end of crane 15, Reed testified on his direct examination in this way:

"Q. What was Mr. Forgy doing? A. He was taking flues out of No. 15 boiler. Q. How do you know he was taking flues out of the boiler? A. Because I saw him taking them out, working there with a hammer and chisel, and I was talking to him. Q. Now, how long before his death were you talking to him? A. About five minutes."

But upon further examination he testified:

"Q. You were standing 15 feet south of the east end of the crane? A. About 15 feet. Q. Of the east end of the crane that Jack Forgy had been working on that morning? A. Yes, sir. Q. What was Forgy doing on that crane? A. He had been taking out flues, he told me. Q. Taking out flues? And he had gotten those flues all out, hadn't he? A. I don't know whether he had or not. Q. Well, do you know whether he had or hadn't? A. No, sir. Q. Well, to the best of your knowledge he had them all out, hadn't he? The last hour before the time this accident happened, he hadn't taken any flues out, had he? A. I don't know, because I was not there. * * * Q. Then

where did you last see Jack Forgy just before the accident occurred? A. Sitting on top the cab with his feet down in the stack and I was talking to him. Q. And that is the last time you saw him, isn't it? A. That is the last time until I saw him in between the cars. Q. You didn't see him come down from the crane? A. No. Q. You didn't see him move from that position at all? A. No, sir; I turned and went after a piece of cable."

Thus Reed's testimony that when he talked with Forgy five minutes before his death the latter was taking flues out of No. 15 with a hammer and chisel was proved by his own testimony to be untrue. For he subsequently testified that he did not know whether or not the flues had all been taken out before that time, because he had not been there since just after dinner, and if he did not know that there were any flues in the boiler to be taken out he could not have known that Forgy was working taking them out. Moreover, Reed subsequently testified, not that Forgy was taking out tubes, when he last talked with him five minutes before the accident, but that he was sitting on the top of the cab with his feet down in the place for the smokestack, where, Marshall testified, he was sitting in idleness when he left him a few moments before to go after the hose, and where, Springer testified, he was sitting when he went north to back into the house track to get him. Reed also subsequently testified that, although there was a hammer and chisel by the ash pan, Forgy did not have them in his hands at the time of the accident, and he did not know whether or not Forgy took them down there, and Marshall testified that Gallinot's hammer and chisel were left in the ash pan. So it is that this testimony of Reed, when it is all taken together, is far from sufficient to create a conflict with the positive testimony of Gallinot and Marshall that the removal of the tubes, and all repair work that Forgy and Marshall had to do before the crane was taken to the river, was completed before the notice and the accident, and that they gave Forgy notice of the coming of Springer after the completion and just before the accident.

Nor do all the circumstances, or any of them, appear to me to support the first and mistaken statement of Reed that Forgy was taking out the tubes when he was injured, or five minutes before. Gallinot and Marshall testify that the tubes that were to be removed had all been removed before Gallinot notified Forgy of Springer's coming and left Forgy to go to tell Springer to come. The object of placing No. 15 on the house track was to have these tubes removed there before the boiler was taken to the river to be washed out. Gallinot ordered Springer to remove it to the river to enable him to wash the boiler out, and Springer had started to do so when the accident happened, and it is not probable that any such action would have been taken before the removal of the leaky flues was completed. Marshall testified that the tubes were removed, the notice given Forgy, and the latter was sitting on the top of the cab in idleness with his feet down in the place for the smokestack when he left him, which must have been a few moments before Reed, Boone, and Jeffress came back from their work down by the river, and Springer and Reed testified that he was still sitting there on the top of the cab five minutes before the accident when Reed last talked to him, and that Springer was going north to back in for him at that time. And Jeffress, who worked with Reed and Boone, tes-

tified that they sent him after a wrench shortly before the accident, that he found Forgy "standing in the crane, in the door, inside of the crane," and asked him for a wrench, that Forgy told him it was up on the front of the crane, that he went there to hunt for it, and while he was on the crane, and within a short time, a minute or two, after he had spoken to Forgy as he stood in the cab within the door, the accident happened.

A careful reading of all the testimony, and this review of all the evidence in the record relative to timely notice to Forgy that Springer was coming forthwith to take out his crane and to watch for him, seem to me to demonstrate the fact that there was no substantial evidence in conflict with the testimony of Gallinot and Marshall that all the work of removing the tubes and all the repairs of crane No. 15 that Forgy had to do on the house track had been completed before he (Gallinot) gave him the notice, that thereupon Gallinot notified him, in the presence of Marshall, that he would go down where Springer was, a distance of an eighth to a quarter of a mile, and direct him to come right up with his crane and take Forgy and his crane to the river, that he (Forgy) should watch out for Springer, that Gallinot immediately went to Springer and asked him to go up and get Forgy and his crane, and he (Springer) went forthwith, coupled onto the three dead cars east of No. 15, and the accident occurred. And because the uncontradicted evidence proved that Forgy was warned and knew of the immediate coming of Springer and his crane, and Springer and his crew knew that Forgy was on crane No. 15, and in this state of the case no alleged negligence of the company in failing to give warnings of that which these men knew could have been the proximate cause of Forgy's injury, I am unable to resist the conclusion that the court below should have directed a verdict for the company.

2. There is another reason why such a verdict should have been directed. The uncontradicted evidence is, as it seems to me, that Forgy was notified and knew of the coming of Springer when the latter started from his place by the river, that he was sitting on the top of his cab with his feet in the place of the smokestack when Marshall left him there alone and told him Springer had started after him, that a few minutes later, five minutes before the accident, as Springer came up past the curve, he was still sitting there as Reed and Springer testified, that he turned towards Springer and grinned, that three minutes later, within a short time, one or two minutes before the accident, Jeffress found him inside the cab in the door, that from one step to the side of the crane car his vision of Springer's train coming in on his track was unobstructed, and yet he went down upon the track between the cars and was injured. In my opinion this evidence conclusively proves contributory negligence on his part, and for that reason the company was entitled to a peremptory instruction in its favor.

3. If either of the conclusions which have been stated are correct, they dispose of this case, and the discussion and decision of other questions of fact or law herein are and will be obiter dicta, as I think they must be. But I do not wish by silence to seem to assent to the views concerning them expressed by the majority. They hold that "the rule in force on nearly all railroads in the United States for many years re-

quires that such a car (1) be protected by a blue flag by day and a blue light by night, (2) that only the workmen repairing the car can remove the warning," that the trial court "excluded evidence as to this rule," that the situation in this case was so nearly identical with that of a workman repairing a railroad car that such evidence might well have been received, and that this court may refer to and consider that rule of railroad companies in determining the question whether or not there was any substantial evidence of causal negligence of the defendant in this case at the close of the trial. I cannot bring myself to concur in any of these views. The majority concede that "there was no direct evidence in the trial court in relation to this rule," but assert that "it has been quoted in text-books and in countless judicial opinions." But text-books and countless judicial opinions were not offered in evidence in the court below to prove the rule, and if they had been they would have been incompetent for that purpose, would have been the mere hearsay statements of text-book writers of what they had read or heard, and the statements of judges of the substance of what witnesses had testified in the cases before them. Those witnesses were not before the court below, and no such rule was proved before or brought to the attention of the trial court, or to the attention of the defendant, and the defendant was given no opportunity to produce evidence to disprove its existence or its application. The record upon this subject is this: The plaintiff offered to show "that there was a general custom in vogue among railroad companies, and among employers whose business necessitated the use of cars and locomotives and heavy vehicles, to place a signal consisting of a blue flag either on the car that was being repaired, or about to be repaired, in order to protect workmen engaged in said repair." The defendant objected to the offer as immaterial. The court ruled that the plaintiff might prove such a custom among construction companies engaged in work similar to that of the defendant, but sustained the objection as to such custom among railroad companies. The plaintiff excepted, asked her witness if there was such a custom among construction companies, her witness answered, "No, sir," that testimony was corroborated by other witnesses, was never contradicted, and the foregoing is the only evidence or ruling relating to the rule on which the majority rely, or to this subject which the record contains.

Now, the question here is, not whether or not there can be found in the text-books or judicial opinions statements of facts which, if they had been proved in the court below, would have established the negligence of the defendant, but it is whether or not at the close of the trial when no one connected with the trial had proved such a rule, and the proof was plenary and undisputed that no such custom existed among construction companies, there was substantial evidence of the defendant's negligence. In view of the state of the record at the close of the trial, I cannot agree with the view that it is permissible for this court to import from text-books and opinions in other cases where other witnesses testified a rule prevailing among railroad companies not presented or proved in this case, and which the defendant had no chance to disprove, and then convict it of negligence for violating that rule. Moreover, if such a rule did in fact exist on railroads,

it is in my opinion immaterial in this case for two reasons: First, because the state of facts here proved was so radically different from that which ordinarily exists where a railroad car of a company engaged in general transportation is set upon one of its tracks in one of its railroad yards for repair. The defendant was not a railroad company. It was not engaged in the general transportation of freight or of passengers. It did not own or operate long lines of railroad over which transportation business was conducted through the yard in which this car was repaired. On the other hand, it was engaged in a local undertaking, in constructing a single bridge at a single place across the Missouri river. The track on which the crane car was placed was never in use for transportation of freight or passengers through the yard, but was used only for repairing cars and storing them. The employés of the defendant were few compared to those of a railroad company conducting general transportation. They were all working at and about the bridge and were familiar with every track the construction company had and the use of that track. They knew that the track on which the crane car was repaired was used, not for transportation, but for repairs and storage. On the other hand, a railroad company engaged in general transportation of freight and passengers has many employés who pass through one of its general yards, who come from distant places with engines and trains when they know little or nothing of the special uses of many tracks in the yards through which they pass, so that the rules or customs in such yards constitute no proper criterion of the reasonableness of rules or customs in a local construction yard; and, second, because the only usefulness such a rule could have had would have been to warn those who did not know the fact that they were approaching cars set on a track for repairs, or to warn those on the cars set for repairs of the approach of other cars or engines that might disturb those set for repairs, and where, as in this case, all the parties approaching and being approached had full notice and knowledge of the facts relative to the instant movements of the cars and engines, such a rule must have been useless and futile, and its existence or absence could not have been the cause of an injury or death which resulted, as the evidence conclusively proves this did, from the acts of fellow servants in operating their trains and doing their work after they had full notice and knowledge of the approach of the crane.

For the reason last stated, it was, in my opinion, likewise immaterial whether or not general rules or undisclosed precautionary methods, such as are referred to in the concurring opinion of Judge Hook, were adopted by the defendant. Their absence could not have been the cause of the injury or the death, because all the employés related to it had full notice and knowledge of everything such rules and methods could have brought to their attention.

Again, "The principle invoked, however, extends only to services of a complicated and dangerous character, requiring skill or experience. The details, even of dangerous business, and simple tasks as a whole, may be rightfully left to the common sense of the workmen." Wood v. Potlatch Lumber Co., 213 Fed. 591, 594, 130 C. C. A. 171, 174.

The duty intrusted to the employés in this case was a simple and obvious one, such as their common sense would naturally induce them to discharge in safety. It was the simple duty of removing a car that had been under repair from a track in use for no other purpose than holding that car. No general rules or undisclosed precautionary methods could have better protected the employés than their own common sense and their full knowledge of their proposed movements. The simple business of constructing this bridge was not of such a complex and dangerous character as to require that it should be conducted on a system or scheme evidenced by a long list of general rules and specific methods prescribing such details as the ceremonies that must accompany the notice or warning the fellow servants should give each other of their proposed movements of cars repaired, especially where, as in this case, notice was fully and clearly given to each of them of the proposed movements of the cranes. "Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keeping it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do." Deye v. Lodge & Shipley Mach. Tool Co., 137 Fed. 480, 482, 70 C. C. A. 64, 66; Gulf Transit Co. v. Grande, 222 Fed. 817, 820, 138 C. C. A. 243, 246.

Finally, I am of the opinion that the rule that the duty of the employer is one of construction and provision, and the duty of the employés is one of operation and protection from negligent use, is applicable to this case, and that under it the negligence which caused the injury was conclusively proved to have been that of Forgy and his fellow servants, that it was negligence in operation and in protection against negligent use and not in construction or provision for which the construction company was not liable. The gist of this rule was early stated by Judge, afterwards Mr. Justice, Brewer in these words:

> "The true idea is that the place and the instrument * * * must be safe, for this is what the master's duty * * * compels, and not that the master must see that no negligent handling by an employé shall create danger." Howard v. Denver & Rio Grande R. R. Co. (C. C.) 26 Fed. 837.

And it has been later stated and illustrated by the Supreme Court in Kreigh v. Westinghouse & Co., 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984, and by this court in American Bridge Co. v. Seeds, 144 Fed. 605, 606, 611, 612, 75 C. C. A. 407, 408, 413, 414, 11 L. R. A. (N. S.) 1041, and many other cases.

In my opinion the case of Bridge Co. v. Seeds was not, as the majority seem to think, identical with Kreigh v. Westinghouse & Co. The former was a case of an injury whose sole proximate cause was the negligence of a superior fellow servant in giving a fatal signal in the doing of the work of the employés, and this court held that his act was a negligence of operation for which the employer was not liable and that there was no substantial evidence that the employer

was guilty of any negligence in the construction or equipment of the place or appliances that concurred with the negligence of the fellow servant. In Kreigh v. Westinghouse & Co. there were two charges of negligence, one of provision, the failure of the employer to provide a boom "with two ropes, one attached on either side of the end of the boom, to be used to haul it back and forth, and for the purpose of steadying its operation; or by the attachment of a lever to the mast in such a way that a man operating the lever could control the swing of the boom" (214 U. S. 254, 29 Sup. Ct. 621, 53 L. Ed. 984), which the Supreme Court held to be a negligence of provision for which the master might be liable (214 U. S. 257, 29 Sup. Ct. 619, 53 L. Ed. 984), and one of operation, the negligence of the servant in violently swinging the bucket against the plaintiff without signal or warning, which the Supreme Court held to be a negligence of operation, a negligence of the fellow servants of the plaintiff, for which the employer was not liable (214 U. S. 255, 257, 258, 29 Sup. Ct. 619, 53 L. Ed. 984). This court had held that the defendant was not liable for either act of negligence because the injury was not the natural or probable result of either and could not have been reasonably anticipated, because neither act of negligence was causal. Kreigh v. Westinghouse & Co., 152 Fed. 120, 122, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684. The Supreme Court reversed the judgment solely because "the plaintiff's witnesses, experts in this field of operation, testified that the proper construction and management of such a derrick required that its boom should be rigged with two guy ropes instead of one, or that the mast should be provided with a lever by means of which the men in control could safely operate the boom," and it held that the failure to furnish the boom rigged with two ropes was a defect of construction and equipment. 214 U. S. 257, 29 Sup. Ct. 622, 53 L. Ed. 984. Answering the contention of the defendant that the injury was caused solely by the negligence of the employés in pushing the bucket violently against the plaintiff without warning or signal, it conceded that these acts were acts of negligent operation for which the employer was not liable, held that if these acts of negligence were the sole cause of the injury the plaintiff was not liable, but held that it was a question for the jury whether or not, under the particular evidence in that case, the defective construction and equipment of the boom directly contributed to the injury and concurred with that of the fellow servants. In the declaration of the law applicable to the case the Supreme Court was sedulous to distinguish liability for negligence of construction and provision for which the employer is liable, from liability for negligence of operation and for the negligent use of place and appliances by the fellow servants of the plaintiff. It said:

"The employé is not obliged to examine into the employer's methods of transacting his business, and he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business. Choctaw, Oklahoma, etc., R. Co. v. McDade, 191 U. S. 64, 68 [24 Sup. Ct. 24, 48 L. Ed. 96]. But while this duty is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he (the master) has

discharged his primary duty of providing a reasonably safe appliance and place for his employés to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen. Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; Perry v. Rogers, 157 N. Y. 251 [51 N. E. 1021]."

And it was after this declaration and in reference to this duty of construction and provision of reasonably safe appliances and place, and not with reference to liability for the operation of the work and the negligent use of this place and these appliances which might make the place, originally safe, dangerous, that this declaration cited in the opinion of the majority was made. "Where workmen are engaged in a business more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employés, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employé should be exposed to dangers unnecessary to the proper operation of the business of his employer. Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 66 [24 Sup. Ct. 24, 48 L. Ed. 96], and cases there cited."

As there was no negligence of the construction company in this case in the provision of a safe place and safe appliances to enable Forgy to do his work, and as the only causal negligence of which there is any evidence was negligence of Forgy and his fellow servants in the use and operation of this place and these appliances, it seems to me that under the established rule of liability for negligence in provision and liability for negligence in the use or operation of place and appliances, and the plain declaration and illustration of this rule in Kreigh's Case, the defendant should not have been held liable here, and the judgment ought to be reversed.

WEST SIDE IRR. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917.)

No. 2866.

1. WATERS AND WATER COURSES ⟸158½(1)—APPROPRIATION—DIVERSION—CONTRACTS.

In a suit by the United States to enforce the terms of a contract entered into by defendant, which provided that it should not divert more than 80 cubic feet of water per second from a stream, evidence *held* insufficient to sustain defendant's contention that its officers and stockholders did not understand the terms of the contract and executed it through mistake.

2. WATERS AND WATER COURSES ⟸158½(2)—CAUSE OF ACTION.

The Reclamation Service of the United States, having promulgated a scheme to increase largely the supply of water of a river for irrigation purposes by constructing storage works for the purpose of impounding surplus water in the winter months and distributing it during the irrigation season, induced rival appropriators of water, one of whom was de-

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

fendant, to specify the amounts of water which they diverted, it appearing that all of the natural flow of the stream had been appropriated so the amount of the surplus could be determined. After the construction of reservoirs defendant appropriated water in excess of the amount specified in the contract, whereupon the United States filed a complaint, alleging that the excessive diversion by defendant during the low-water season directly contributed to the shortage in the natural flow available and unlawfully diminished the amount of stored water which plaintiff had contracted to deliver to persons and corporations, and, further, that there were vast areas of semiarid land which would be rendered permanently useless, or of far less value unless plaintiff could carry out its plan of disposing of the natural flow of the stream in conjunction with the stored waters. *Held*, that the complaint was sufficient to state a cause of action.

3. WATERS AND WATER COURSES ⟸158½(2)—ACTIONS TO RESTRAIN DIVERSION —RIGHT TO MAINTAIN.
In such case, the United States, having constructed large irrigation works, pursuant to Reclamation Act June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1916, §§ 4700–4708), and having become an appropriator of water and purchaser of other appropriations, has sufficient interest to maintain the suit.

4. WATERS AND WATER COURSES ⟸158½(1)—RECLAMATION—AGREEMENTS.
Where the Reclamation Service of the United States, being desirous of reclaiming a large area of semiarid lands by increasing the waters of a stream available for irrigation by storing the same during the winter months for use in the irrigation season, induced prior appropriators, all of the waters of the stream having been appropriated, to execute agreements stating the amount to which they were entitled, defendant, one of the appropriators, cannot, the United States, in reliance on such agreements, which were necessary to determine the flow of water to which the appropriators were entitled, having constructed vast reclamation works, avoid compliance with the contract on the theory that it was not an agreement and had not been executed.

5. CONTRACTS ⟸346(1)—DEFENSES—PLEADING.
Defendant, in suit to enforce contract, cannot set up a defense not pleaded.

6. CORPORATIONS ⟸426(2)—STOCKHOLDERS—RATIFICATION.
Stockholders can ratify any act of a corporation which they might have authorized in the first instance, including acts done by the directors outside the scope of their powers.

7. CORPORATIONS ⟸426(7)—"RATIFICATION"—ACQUIESCENCE.
Acquiescence by stockholders after such a length of time and in such circumstances that knowledge of acts done by the directors beyond their authority, is to be inferred will operate as a "ratification."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ratification.]

8. CORPORATIONS ⟸426(7)—AUTHORITY OF OFFICERS—"RATIFICATION."
The adjustment of conflicting claims of appropriators of water from a river being a necessary condition to the consummation of a reclamation project of the United States, defendant, a mutual irrigation company, which diverted water from such river, under resolution of its directorate, which was authorized to contract for the sale of water and had executed mortgages without authority from the stockholders, executed an agreement, limiting its claim to specified quantities. Though all of its stockholders knew of the contract, they did not then disavow the authority of the directors, but remained silent while the government proceeded with the work, making vast outlays of money, in the belief that all disputes had been settled. Thereafter the stockholders, by resolution after a dispute with the Reclamation Service, asserted their right to a greater quantity

of water than that specified in the contract, and authorized suit to enforce their rights, but none was brought. *Held*, that by failure of the stockholders to disavow the unauthorized acts of the corporate officers and give notice of the disavowal to the government, they and the corporation were precluded from questioning the authority of the officers, or the validity of the contract; the acquiescence of the stockholders amounting to a ratification of the contract.

9. WATERS AND WATER COURSES ⟸158(1)—DIVERSION—APPROPRIATION—CONTRACTS.

Where defendant, a mutual irrigation company, executed a contract with the government limiting its appropriation of water, and the government proceeded with a reclamation project based on such contract, defendant cannot defeat the contract on the theory that it should not be construed as an abandonment of rights of its stockholders, because to constitute abandonment of a water right there must be an intent to abandon and actual relinquishment.

10. WATERS AND WATER COURSES ⟸137—APPROPRIATION—ADVERSE USE.

Defendant's appropriations of water in excess of amounts to which it was entitled under contract with the government, having continued for less than 10 years before suit, defendant acquired no adverse rights to water so taken.

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

Bill by the United States against the West Side Irrigation Company, filed September 26, 1913. From a decree for the United States (230 Fed. 284), defendant appeals. Affirmed.

The appellant is a corporation organized in the year 1889, under the laws of the territory of Washington, to construct and maintain a canal for the purpose of conveying water from the Yakima river and distributing the same for the use and benefit of its stockholders, who are farmers. It appeals from a decree of the court below which enjoined it from diverting by means of its canal more than 80 cubic feet per second of the water of the river. The suit was brought to enforce the terms of a contract executed by the appellant on October 21, 1905, which provides as follows:

"Whereas, the Reclamation Service of the United States has been requested to investigate the water resources of the Yakima watershed with a view to the further development and increase of irrigation therein, under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, and whereas the officers of the Reclamation Service in preliminary investigation have found that in all the low-water flow of the Yakima river and its tributaries has been appropriated and is now being diverted by the various canals within said watershed and that in order to irrigate additional lands within said watershed it will be necessary to store the surplus waters of the flood season, and whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima river and its tributaries is entitled be first definitely ascertained and agreed to; and whereas, the undersigned claim certain quantities of water from the Yakima river and its tributaries and are willing to limit their claim to the said waters to the quantities of water designated in the following schedule:

"Schedule. Cubic Feet per Second. April to August, inclusive, 80. September, 80. October, 34.

"Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through federal enterprise, each subscriber to this agree-

ment or to a copy thereof, differing only as to the quantities of water specified, agreed to limit and does limit its respective rights of appropriation from said Yakima river and its tributaries to the above-specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to and shall not bind any party hereto in any event, unless the determination to construct storage and irrigation works by the United States under the Reclamation Act shall be announced by the Secretary of the Interior within two years from the date upon which he is furnished with properly authenticated copies of the agreements of this form duly executed by or on behalf of such proportion of the claimants of the waters of the Yakima river and its tributaries as shall be satisfactory to the Secretary of the Interior. In witness whereof, the undersigned has caused these presents to be executed in its corporate name, by its president, and attested by its secretary, and its corporate seal to be affixed, by authority of its board of directors, heretofore duly made and entered this 21st day of October, 1905.

"The West Side Irrigation Company,
"By Mitchell Stevens, Vice President."

The appellant answered, admitting the execution of the contract, but alleging that it was not intended to be, and was not, a relinquishment of any of the rights of the appellant's stockholders, and was not executed for the purpose of prejudicing the right to water which was being beneficially applied to the irrigation of the lands of the shareholders; that it was the intention of the officers of the appellant in making the agreement to place the amount of water claimed by the shareholders in the amount which the lands of the shareholders required for successful irrigation, and it was not the intention that they should be deprived of that right; that the agreement was signed with the understanding that the rule which the appellant had theretofore employed in measuring and delivering water to its stockholders should apply, and that the appellant then had no knowledge as to the amount of water which was necessary to divert from the river in order to supply the full amount of water to which its shareholders were entitled at the point of use; but the sole knowledge they had was their custom of measuring and delivering the water at the points of use; that according to their custom the water which was necessary to supply the stockholders was one inch of water per second of time per acre, measured under a five-inch pressure at the point of delivery to the land.

H. J. Snively, of North Yakima, Wash., for appellant.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and E. W. Burr, Sp. Asst. U. S. Atty., of North Yakima, Wash.

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

GILBERT, Circuit Judge (after stating the facts as above). The appellant was one of a large number of the users and appropriators of the waters of the Yakima river who executed like contracts at the same time, and under similar circumstances. At the time when the Reclamation Service promulgated a scheme to increase largely the supply of water of the Yakima river for irrigation purposes, more than all the natural flow of the river during the irrigation season had been covered by appropriations. It was not the purpose of the Reclamation Service to use any of the natural flow of the river. It was the intention to construct storage works for the purpose of impounding the surplus water of the winter months and distribute it during the irrigation season. To do this it was necessary to know the amount of the natural flow and to determine and specify just what proportion

each appropriator had the right to use. At that time litigation was pending between rival appropriators. The Reclamation Service sought to adjust all differences and induce all appropriators to enter into an agreement whereby the amount of water that each should divert from the river should be definitely determined and recorded. Public meetings were called for that purpose, and the agreements were finally entered into. By the terms of the contracts all water was measured at the intakes and in cubic feet per second instead of in miners' inches. The appellant was called upon to state the quantity of water which it was using. It placed it at 4,000 miners' inches, a quantity which was taken by all parties to be the equivalent of 80 cubic feet per second. With that understanding the agreements were executed.

[1] The appellant now contends that 80 cubic feet per second diverted from the river is not the equivalent of the 4,000 miners' inches which its stockholders had been accustomed to use, and as they had measured it; that they had measured it at the points of delivery and not at the intake, and under a pressure which in fact delivered to them 90.4 cubic feet per second, and that by seepage from the canal, which is several miles in length, 14 cubic feet are necessarily lost and returned to the river before delivery to the stockholders, and that therefore they are entitled to take from the river that which they took before the agreement was made, which they say was 104.4 cubic feet per second. To this it is to be said that not only was there lack of pleading, but there is lack of evidence to sustain the contention that the officers of the appellant and its stockholders did not understand and assent to the terms of the contract. Two of the stockholders testified that it was their understanding that the 80 cubic feet was the equivalent of the 4,000 inches of water which they had measured at the places where it was delivered, but there is no evidence that their understanding was made known to the officers of the Reclamation Service before the execution of the contract. There was a resolution of the board of directors of the appellant that the president and secretary be instructed to sign contracts with the government to accept 80 cubic feet of water per second from April 1st to October 1st, and 34 cubic feet from October 1st to November 1st of each year, "as the West Side Irrigation Company's appropriation of waters of the Yakima river, providing that the government completes the Yakima river irrigation project." The plain meaning of that resolution is that the 80 cubic feet per second was the measure of water to be taken from the river, and not the measure of water to be delivered on the farming lands. It is not denied that Noble, the district engineer in charge of the reclamation project, stated at a public meeting preceding the execution of the contract that the ditch owners would have to settle definitely upon a given amount of water which would be diverted by each of their canals, and that would have to be such a figure in each case that the total would not exceed the flow of the river, and he testified that that total amount had been measured by certain gauge stations, one on each canal, placed as near the head thereof as conditions would permit. There was evidence also that the Reclamation Service had taken measurements, covering a period of two years, of the amount flowing into each canal, and that in 1904 the amount diverted by the appellant was

less than 70 cubic feet per second, and that in 1905 it was very close to 75 cubic feet per second.

[2] We find no merit in the contention that the complaint is insufficient to state a cause of action, in that it does not show that the United States, or any one in privity with it, has been deprived of the use of water, or has sustained a present injury. The complaint alleged that excessive diversion by the defendant during the low-water season directly contributes to the shortage in the natural flow available to plaintiff, and unlawfully diminishes the amount of stored water which the plaintiff has contracted for delivery to persons and corporations. The complaint proceeded to specify contracts which it had made, and alleged that:

"There are vast areas in the valley of the Yakima river of arid and semiarid land incapable of producing satisfactory crops which will be rendered either permanently useless or of far less value, unless plaintiff may, in pursuance of its rights as aforesaid, carry out its plan of disposing of the natural flow of the Yakima river in conjunction with waters stored in plaintiff's reservoirs."

There was no demurrer to the complaint, and in addition to the facts alleged therein it was stipulated between the parties that the United States has constructed an irrigation system for the beneficial use of water for 124,500 acres of land.

[3] Also without merit is the contention that the United States has no authority to maintain the suit. The United States, according to the allegations of the complaint, is an appropriator of water, and a purchaser of other appropriations of water from the Yakima river for use in irrigation projects, and it clearly has the right to protect, not only those interests, but also the whole project and scheme of reclamation which it has undertaken under the authority of Congress by the act of June 17, 1902, known as the Reclamation Act. United States v. Union Gap Irr. Co. (D. C.) 209 Fed. 274. The appellant cites In re Celestine (D. C.) 114 Fed. 551, which denies the authority of an Indian agent to sue for the benefit or protection of the Indians under his charge, but the same decision affirms the right and duty of the government to maintain such suits, and that right and duty are affirmed in Heckman v. United States, 224 U. S. 413, 437, 32 Sup. Ct. 424, 56 L. Ed. 820, and Bowling v. United States, 233 U. S. 528, 534, 34 Sup. Ct. 659, 58 L. Ed. 1080.

[4] It is contended that the instrument so executed by the appellant is not binding upon the appellant or its stockholders; that it was not in the nature of an agreement, but at most amounted to a declaration in the nature of an abandonment founded upon mistake, and which was never acted upon by the United States or anybody, to their injury. But the appellant and its stockholders received a consideration for the execution of the agreement. They received the benefit of the adjustment of all conflicting water rights, and the benefit of the expenditure by the United States of a large sum of money in the county in which their lands are situated, and, on the other hand, the United States, relying upon the agreement so made, entered upon the execution of the reclamation scheme and therein, at the time of the commencement of the suit, had expended for construction and reclamation $6,866,500.

[5] The suggestion that the agreement was founded upon mistake cannot avail the appellant. There is no evidence whatever that there was a mutual mistake. And there is no convincing evidence of a mistake on the part of the appellant or its stockholders. And if, indeed, there was a mistake on their part, they waived the right to assert it by their subsequent silence. There is no plea of mistake in the answer to the complaint. The whole defense of the appellant as pleaded rests upon its construction and conception of the terms of the agreement itself.

[6-8] The appellant contends that its officers who signed the agreement of October 21, 1905, had no authority to bind the stockholders thereby, since the appellant was a corporation organized as a distributing agency by farmers to distribute water to themselves without profits other than the use of water, the result being that each shareholder owns a proportionate amount of the water in the canal, of which his shares of stock are merely evidence of title, and the appellant invokes the doctrine that the directors of a mutual water company have no authority to release or surrender any part of the physical property of the company, or to divert from the ditch, or waste any of its appropriated water, citing Stuart v. Davis, 25 Colo. App. 568, 139 Pac. 577, and Caviness v. La Grande Irrigation Co., 60 Or. 410, 119 Pac. 731. The answer to this contention is twofold: First, that no such defense is pleaded in the answer; and, second, that the stockholders gave no notice to any officer of the United States that they repudiated the contract, but, on the contrary, by their silence they ratified the same. The evidence is clear that all of the shareholders of the appellant knew of the contract of October 21, 1905, and of the negotiations which culminated in its execution. No action was taken by the stockholders to challenge the agreement until December 4, 1909, when, owing to a dispute between the Reclamation Service and the appellant as to the amount of water appropriated by the latter, a resolution was adopted, reciting that:

"Whereas the canal has been enlarged until it safely carries 5,000 miners' inches of water, measured under four and one-half inch pressure, said measurement being made at the several points of diversion of the laterals from the main canal; and, whereas, said five thousand inches of water, when economically used are necessary for the profitable irrigation of the lands"

—and authorizing the trustees to bring suits to secure the full legal rights of the stockholders to the water. But no suit was brought. The by-laws of the company authorized the trustees to "enter into contracts for the sale of water." It was shown prior to making the agreement in question, the trustees had executed mortgages upon the canal water rights without authority from the stockholders. Relying upon the agreement of October 21, 1905, the United States expended large sums of money on the reclamation project. To this state of facts the following citation in the appellant's brief is appropriate:

[1] "Ultra vires acts of directors do not bind the corporation or the stockholder unless ratified, or unless circumstances of equitable estoppel exist." 3 Thompson on Corporations, § 3999.

Stockholders can ratify any act of the corporation which they might have authorized in the first instance, including constituent acts done by the directors outside the scope of their powers. 10 Cyc. 1073. And acquiescence by the stockholders after such a length of time, and such condition of circumstances, that knowledge is to be inferred, will operate as ratification. 10 Cyc. 1076; Thompson v. Lambert, 44 Iowa, 239; Merchants' & Farmers' Bank v. Harris Lumber Co., 103 Ark. 283, 146 S. W. 508, Ann. Cas. 1914B, 713; Pollitz v. Wabash R. R. Co., 207 N. Y. 113, 100 N. E. 721; Hill v. Railroad, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337.

[9, 10] The appellant asserts that the agreement should not be construed as an abandonment of any of the rights of its stockholders, that abandonment is a question of fact and intent, and that there was no intention to abandon needed water, and it cites authorities to the proposition that, to constitute abandonment of a water right, there must be a concurrence of the intention to abandon, and an actual relinquishment of use. It adverts to the fact that after the agreement the stockholders continued to use the water as before. But the case presents no question of abandonment. It presents only a written instrument and the meaning of its terms. That instrument is definite, and void of ambiguity. It was made in pursuance of the express authority of a resolution of the appellant's directors, and one of the stockholders testified that it was made for the purpose of giving the government a definite and certain figure which it could rely upon as the appellant's right in the appropriation of the water. The use of the water by the appellant and its stockholders after the agreement was made was not continued for a sufficient period to create any adverse right as against the terms of the agreement. Spring Hill Irr. Co. v. Lake Irr. Co., 42 Wash. 379, 383, 85 Pac. 6; Barnes v. Belsaas, 73 Wash. 205, 131 Pac. 817.

The decree is affirmed.

THE TEASER.

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

No. 2210.

1. COLLISION ⊂=65—PRESUMPTION OF FAULT—VIOLATION OF STATUTE.
   A tug which at the time of a collision was towing seagoing barges, one of which was in the collision, in inland waters, with hawsers longer than those prescribed by the regulations promulgated under authority of Act May 28, 1908, c. 212, § 14, 35 Stat. 428 (Comp. St. 1916, § 7969), which have the force of law, was presumptively in fault, and the presumption can be overcome only by proof that such violation of the law could not have contributed to the collision.
2. COLLISION ⊂=62—LIABILITY—CONCURRING FAULT.
   Where the fault of a tug was a concurring cause of a collision between a vessel in her tow and another, she cannot escape liability therefor to all the vessels injured, including the one in her tow, although that was also in fault.

3. TOWAGE ⟸12(1)—LIABILITY OF TUG FOR INJURY TO TOW—ESTOPPEL.
The rule that a vessel in tow cannot recover damages against the tug for an injury resulting from the manner of towing where it was adopted by her request or with her acquiescence does not apply when such manner is in direct violation of law.

4. TOWAGE ⟸11(1)—NAVIGATION OF TOW—LIABILITY OF TUG.
A towing tug is responsible for the proper and lawful navigation of the tow, which the master of the tow has no power to control.

5. ADMIRALTY ⟸39—DISMISSAL AS TO ONE RESPONDENT.
A motion by the libelant in a collision suit against a tug and her tow to dismiss as to the tug with leave to proceed against the tow alone *held* properly denied, where it was made after all the parties were before the court, and, if granted, the tow could have again brought in the tug under the fifty-ninth rule (29 Sup. Ct. xlvii).

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suits in admiralty for collision by Elliott C. Gardner, master of the Schooner Addie M. Lawrence, against the tug Teaser and the barge Powel, the barge Horace A. Allyn and tug Juno, impleaded, and by the Powel against all the other vessels. Decree against the Powel and the Teaser, and the latter appeals. Affirmed.

For opinion below, see 229 Fed. 476.

Lewis, Adler & Laws, of Philadelphia, Pa., for appellant.

Harrington, Bigham & Englar, of New York City, and Conlen, Brinton & Acker, of Philadelphia, Pa., for appellee Baker Transp. Co.

T. Catesby Jones, of New York City, for appellee tug Powel.

H. Alan Dawson, of Philadelphia, Pa. (Biddle, Paul & Jayne, of Philadelphia, Pa., of counsel), for appellee tug Juno.

Henry R. Edmunds, of Philadelphia, Pa., for appellee schooner Lawrence.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree in an admiralty cause of collision. All craft proximately and remotely connected with the collision were brought into court by two libels, one being filed by the schooner Lawrence against the tug Teaser and the barge Powel, the latter bringing in by petition the barge Allyn and the tug Juno; the other being filed by the barge Powel against the schooner Lawrence, the tug Juno, the barge Allyn and the tug Teaser.

For a cause in admiralty this case is unique, in that the facts as to the collision are not in dispute. Briefly stated, they are as follows:

The Teaser with the barges Powel and Allyn in tow tandem in the order named was in the Delaware Bay, outward bound. The Powel and Allyn were large sea-going barges heavily laden with coal. When taken in tow at Philadelphia, the length of the hawsers from tug to barge and from barge to barge was about 75 fathoms. When off Bombay Hook, the master of the Powel requested the master of the Teaser to lengthen the hawsers, whereupon the hawser between the Teaser and the Powel was paid out from the Teaser to 150 fathoms, and the

hawser between the Powel and the Allyn was paid out from the Allyn to about 140 fathoms.

Between Ship John Light and Cross Ledge Light the Teaser with her tow moving down the bay on the westerly or right side of the channel sighted the tug Juno with the schooner Lawrence in tow bound up on the easterly side of the channel. The night was dark, but clear; the wind was moderate; all lights were properly set, brightly burning and plainly visible. When within regulation whistling distance the tugs exchanged signals, and passed port to port at a safe distance of about 600 feet. Suddenly the "Powel" sheered out of her course, crossed the channel and came into right angle collision with the Lawrence, inflicting injuries to both the Lawrence and herself.

The District Court found the Lawrence, the Juno and the Allyn in no way chargeable with fault, and dismissed the libels as to them. The fault therefore lay with the Powel or the Teaser or with both.

The fault of the Powel was so glaring that it scarcely admits of discussion. The District Court found upon testimony free from dispute that the "Powel" was insufficiently manned and improperly steered, and that the collision was due primarily to the act of an inexperienced helmsman steering her out of her course directly into the Lawrence.

The court found the Teaser also in fault, because in towing within inland waters of the United States with a hawser greater in length than prescribed by regulations effective February 1, 1909, promulgated by the Secretary of Commerce and Labor, December 7, 1908, pursuant to section 14 of the Act of May 28, 1908, limiting the length of hawsers to tows of sea-going barges when within inland waters to 75 fathoms, the Teaser was violating that law of navigation.

Having found both the Powel and the Teaser in fault, the District Court further found that the injuries sustained by the Lawrence were caused by the combined faults of the two, and accordingly entered a decree against both on the libel of the Lawrence, for damages divided equally between them. The court also found that the fault of the Teaser towing with a hawser of unlawful length extended to the Powel and contributed to her injuries, and thereupon entered a decree against the Teaser for one-half the damages sustained by the Powel, the other half to be borne by herself.

The Teaser brought this appeal, and by several assignments of error raises a question of fact as to her fault, and a question of law as to her liability, first to the Lawrence and then to the Powel.

The fault of the Teaser is involved with that of the Powel. The fault of the Powel, though established by the decree from which no appeal has been taken, must therefore be briefly considered.

The fault of the Powel lay in the act of her helmsman steering her out of her course directly into the Lawrence. Though this amazing fault was made possible, perhaps, by the fault of the Teaser in towing with a hawser of unlawful length, it was nevertheless a fault of the Powel, and the fault which primarily caused the collision. The Powel, therefore, cannot escape liability for her fault to any craft which suffer-

ed thereby, even though injury might not have resulted therefrom but for the concurring fault of the Teaser.

But the Teaser contends that the collision was the result solely of the fault of the Powel, and in support of that contention maintains, first, that the hawser pulled off the Powel before the collision, and in consequence the Powel went into collision alone; and second, that the lengthened hawser had no part in causing the collision.

If fault is chargeable to the Teaser for towing with a hawser of unlawful length, the parting of the hawser before collision did not stay its fault or end its liability. Besides, there is a clear conflict as to the time and place the hawser pulled out, the evidence leaning, as we think, strongly to the view that the hawser did not part until impact, when by the great jar, and the continued pull of the Teaser, the bitts ripped out and the hawser went overboard. However this may be, the essence of the Teaser's fault was in her act of towing with a hawser of unlawful length and in the part the hawser of that length played in the collision.

[1] It is not disputed that at the time of collision the Teaser was towing the Powel within inland waters with a hawser greater in length than permitted by the government's formally promulgated regulations for navigation. Statute, supra. Such regulations have the force of law. Belden v. Chase, 150 U. S. 674, 698, 14 Sup. Ct. 264, 37 L. Ed. 1218; The Manhattan (D. C.) 181 Fed. 229, 233. At the time of the collision, therefore, the Teaser was violating the law. The Manhattan (D. C.) 181 Fed. 229; Id., 186 Fed. 329, 108 C. C. A. 407; McWilliams v. D., L. & W. R. R. Co., 207 Fed. 64, 124 C. C. A. 624; D., L. & W. R. R. Co. v. Triton, 246 Fed. 318. As to the legal effect of such violation, the rule was early established, that a positive breach of statute carries with it a presumption of fault. Being a presumption, it is rebuttable; but it is rebuttable only by proof on the part of the offender not merely that the fault probably did not contribute to the disaster, but that it could not have done so. Belden v. Chase, 150 U. S. 674, 699, 14 Sup. Ct. 264, 37 L. Ed. 1218; The Henry O. Barrett, 161 Fed. 481, 88 C. C. A. 423 (3rd Cir.); Yanz-Tsze Ins. Asso. v. Furness, Withy & Co., 215 Fed. 859, 863, 132 C. C. A. 201; Richelieu & Navigation Co. v. Boston Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

The Supreme Court in its latest case upon the subject (Olaf Lie, master of the Norwegian Steamship Selja v. San Francisco & Portland Steamship Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726), followed the decision and quoted from the opinion in its earliest case (The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148), as follows:

"But when, as in this case, his ship at the time of a collision is in actual violation of a statutory rule, intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

Without referring in this discussion to the lack of rebutting evidence, it is sufficient to state our opinion, that the Teaser wholly failed to sustain the burden of overcoming the presumption of her fault

imposed by the rule, by proof that her fault could not or did not contribute to the collision. On the contrary, the evidence tends to show, that, notwithstanding the steering fault of the Powel, the collision probably would not have happened but for the Teaser towing with a hawser of unlawful length, and might have been prevented had short lawful hawsers been used upon the Powel fore and aft, which would have held her in her course or at least snubbed her sheer.

[2] The fault of the Teaser, therefore, was one which permitted the fault of the Powel to become effective, and being a concurring fault, the "Teaser" cannot escape liability therefor to all craft injured thereby.

The first craft injured by the concurring fault of the tug and tow was the Lawrence, and as the Lawrence was wholly without fault, the part of the decree awarding her damages, dividing them between the Powel and the Teaser, must be affirmed.

[3] The Teaser is similarly liable for damage to the Powel, unless, as she contends, the Powel is estopped to enforce that liability, because the fault of the Teaser in lengthening the hawser was committed upon the request of the Powel. This contention is based upon a line of cases which withhold from a tow a claim of damages against a tug for injuries suffered in consequence of an extrahazardous manner of towing or maneuvering in which she acquiesces, or for which she contracts, as towing double instead of tandem; towing during a season of expected ice flow, etc. The Columbia, 109 Fed. 660, 48 C. C. A. 596 (9th Cir.); Stricker v. The Maurice (D. C.) 128 Fed. 652; In re Maling (D. C.) 110 Fed. 227; The C. Van Cott (D. C.) 152 Fed. 1016; The Hercules, 213 Fed. 615, 130 C. C. A. 207; Monk v. Cornell Steamship Co., 198 Fed. 472, 117 C. C. A. 232; Moore v. C. P. Morey, Fed. Cas. No. 9,756. These cases arise either from conduct savoring of contract to which the tow is a party, or from the tow's asquiescence in a matter in which she is capable of acquiescing and of giving a consent that relieves the tug. These cases, therefore, do not rule the case under consideration, where, as we view it, a law of navigation is involved, where the mandate of the law rests upon the tug, and where the tow is without power to make the tug violate the law or relieve her from liability for such violation to all craft (including the tow) suffering thereby.

[4] In navigating a tow, the master of a barge in tow has no voice. The Quickstep, 9 Wall. 665, 19 L. Ed. 767. The tug is the dominant mind and will. The Margaret, 94 U. S. 494, 496, 24 L. Ed. 146; The Fort George, 183 Fed. 731, 106 C. C. A. 169. So far as the proper navigation of the tow is concerned, the law is abundantly settled that the tug leads and commands, while the tow is bound to follow her guidance and conform to her directions. The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494; Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477. This is obviously so. Movement of tug and tow cannot be made under the joint command of the two masters. In such an adventure there can be no divided responsibility. Hence the law imposes upon the tug, not upon the tow, the duty to use a hawser of a length which the law deems essential to safe navigation. This was a duty imposed solely upon the tug. She could not escape that duty, even as it affected

the tow, by yielding to the request of the tow that she break the law. Being in sole charge of the navigation of the tow (The Manhattan, 186 Fed. 329, 331, 108 C. C. A. 407) and being solely charged with the observance of laws of navigation, public policy demands that the tug shall be liable to the tow for the consequences of her violation of those laws.

In this case the hawser was on the deck of the tug and was paid out by her. The physical as well as the legal control of the hawser was with her. Any one acquainted with watermen will appreciate how unlikely it would be for the master of a barge in tow to attempt to control or override the master of the tug in matters of navigation, or that any consideration whatever would be paid to his views. The Manhattan, 186 Fed. 329, 331, 108 C. C. A. 407. As the master of the tow was without power to control or even influence the master of the tug, we find that the act of the master of the tug in lengthening the hawser, even though upon the request of the master of the tow, was the sole and in legal effect the independent act of the master of the tug, which being an act violative of laws of navigation, fastens liability upon the tug for its consequences.

While the fault of the Teaser extended to the Powel, that fault was not excused by the fault of the Powel, nor was the fault of the Powel excused by the fault of the Teaser. They were concurring faults in the sense that they concurrently contributed to the disaster; the fault of either without the fault of the other would not have caused the collision. Therefore, each offending craft is liable to all craft injured in proportion to its contribution to the injury. Among such was the Powel herself. Therefore we affirm that part of the decree of the District Court by which the Teaser was decreed to bear one-half the damage to the Powel.

[5] After all testimony had been taken by deposition for the Lawrence, and the parties were present ready for trial, the proctor for the Lawrence moved to withdraw the libel against the Teaser with leave to proceed against the Powel alone. If this motion had been allowed and the trial proceeded with, the libelant would have been enabled to forgive the Teaser her fault and collect from the Powel the whole of the damages. The motion was naturally opposed by the Powel and eventually denied by the court. The court's action is charged as error.

Before the motion was made, the parties were before the court as fully as though brought there originally on subpœna or later by petition under the 59th Rule in Admiralty (29 Sup. Ct. xlvii). Answers to both libels had been filed by all respondents, and to the Powel's petition, bringing in the Juno and the Allyn, by all her co-respondents, including the Teaser. The denial of the motion did nothing more in effect than hold the parties in the way intended and made possible by the 59th Rule in Admiralty, if employed. It would therefore have been futile to have allowed the motion, continued the hearing, and permitted later the re-establishment of precisely the same party alignment by invoking that rule; and it would have been unjust to have allowed the motion, proceeded with the hearing, and prevented the party representation intended by the rule. We find no error in the court's action.

The decree below is affirmed

CRUMP v. SCHNEIDER et al.

SCHNEIDER et al. v. CRUMP et al.

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

No. 3016.

1. VENDOR AND PURCHASER ⊂=189—CONTRACTS—ESTOPPEL.
A contract, entered into contemporaneously with the execution of a deed and vendors' lien notes for the purchase price, required the purchaser to diligently prosecute a suit to quiet title to the land, the abstract showing that others beside the vendors were interested in the premises. The purchaser did not diligently prosecute the suit, and made no effort to determine whether one intervening and claiming a portion of the premises had title, and, title to one half of the premises being declared to be in such intervener, the purchaser secured judgment, decreeing the other half to him. *Held*, that as the purchaser thereafter executed oil leases on the land and sold timber, he is estopped to question a recovery on the vendors' notes on the theory that he bought the entire tract of land, and that the court could not make a contract for the parties.

2. VENDOR AND PURCHASER ⊂=35—CONTRACT—FRAUD.
Where married men contracted to sell land, title to which was held by their wives, although the evidence indicated they were not the owners, the purchaser, not having been injured, and a deed from the wives having been tendered, cannot defeat the contract on the ground that it was induced by fraudulent representations.

3. VENDOR AND PURCHASER ⊂=308(4)—ACTIONS—RECOVERY.
An agreement, entered into at the time of the execution of a deed to land and of vendor's lien notes in payment, provided that the purchaser should institute suit to quiet title against the unknown heirs of persons whom the vendors' abstract indicated had title to part of the land, that the expenses should be borne by the vendors but that should the purchaser fail to recover judgment clearing the title, then the vendors' lien notes should be surrendered, and the land reconveyed. The purchaser did not diligently prosecute suit as agreed, and one intervening was adjudged to have a half interest in the land, the other half interest being adjudged in the purchaser. *Held*, that as the purchaser was estopped by sale of timber thereafter, etc., to repudiate the contract, and as the vendors did not repudiate it, a recovery by the vendors of one-half of the purchase money cannot be complained of by them on the theory that the purchaser might have recovered judgment for the whole of the land; it appearing that the vendors had title to only one-half.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suit by Mrs. Grace Schneider and another against A. G. Crump. From the decree which granted complainants only partial relief, defendant appeals, and complainants cross-appeal. Affirmed.

J. Q. Mahaffey, of Texarkana, Tex., for appellant Crump.

W. L. Estes, John J. King, and William Hodges, all of Texarkana, Tex., for appellees.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. M. and A. Schneider, acting by M. Schneider, on April 8, 1907, made a contract with A. G. Crump for the sale

to him of the Isaac Lassiter survey in Bowie county, Tex. The consideration for the conveyance was $3,750, evidenced by 30 promissory notes, payable to J. and G. Schneider, all secured by an express lien. Contemporaneously a writing was signed by the parties, reciting the execution of the deed and agreeing, in order to clear the title to the land, that Crump should forthwith institute suit in the district court of Bowie county, Tex., against the unknown heirs of Isaac N. Lassiter and C. McRimmon; that the expenses of the suit should be paid by M. and A. Schneider; that the First National Bank of De Kalb should hold, subject to the termination of the suit, 18 of the notes; that if judgment should be rendered clearing the title, the bank would deliver the 18 notes to M. and A. Schneider, and the conveyance would, in all things, be effective and binding. It was further stipulated:

"Should said suit be prolonged by contest, or should A. G. Crump fail to recover judgment clearing the title, he having duly prosecuted said suit, then the said M. and A. Schneider will return all notes this day executed by said A. G. Crump in payment of said land, and neither of said notes nor the deed this day made by M. and A. Schneider will be of force and effect, and the said bank will deliver said A. G. Crump all of said notes held in escrow, and upon the surrender of all notes this day executed by said A. G. Crump, he will surrender the deed this day made to him as aforesaid, and if necessary reconvey said land to M. and A. Schneider.

"The said A. G. Crump agrees not to sell or remove any timber from said land while said suit is pending, except by subsequent agreement with M. and A. Schneider, or without first obtaining their consent to do so."

The occasion for the execution of the agreement just described was the circumstance that the abstract of title furnished by Schneider to Crump showed a deed in 1855 from Isaac N. Lassiter to C. McRimmon of one-half of the land. Crump instituted in his own name suit for the land against the unknown heirs of Lassiter and McRimmon. Citation was duly published. At the May term, 1908, service was complete. J. E. Garland, who was representing the Schneiders and Crump, who after the institution of the suit had removed to West Texas, returned at that time to try the case. It appears from his testimony that he expected to be able to get judgment, "there being no answer and little evidence being required." Crump indicated to Garland that he did not desire the case tried, and told him that "the panic had hit him pretty hard, and that he didn't care anything about getting title to the land." Crump testified that he wanted to get out of the trade, "mainly because it would cramp me to pay for it." Garland then withdrew from the case on account of the probable antagonism between his clients. The case remained on the docket until June, 1909, without action taken. On June 21, 1909, S. E. Ball filed an intervention, claiming an undivided one-half of the land. To this no answer was filed by Crump, nor was any effort made to contest the claim. The Schneiders were not notified of the intervention. On the day the intervention was filed, and without demanding any legal evidence of title, an agreement was entered into, signed by R. H. Jones, attorney of record for Crump, and F. M. Ball, attorney for intervener, to the effect that plaintiff Crump recover from the intervener Ball title and possession of an undivided one-half of the land; that all costs be adjudged against Crump; that Ball recover an undivided one-

half interest; and that the suit be dismissed as to the other parties.

At that time the notes, to the amount of $2,200, had matured, and the Schneiders were demanding payment. The claim of the intervener was based upon a deed, dated January 22, 1909, purporting to have been executed by one Charles J. McRimmon, who made an affidavit to the effect that he was the sole heir of C. McRimmon. It subsequently developed that Charles J. McRimmon was not the heir of C. McRimmon. Crump had made no effort to ascertain whether Charles J. McRimmon had any right to convey the premises. After the judgment S. E. Ball divided the tract of land into two equal parts, and sold the timber on half of it for more than $500. Thereafter Crump sold the timber on the other half, receiving in cash $2 per acre. Before the judgment Crump had executed oil leases of the land, and had collected 25 cents per acre, and subsequent quarterly payments. The Schneiders had received no notice of the disposition of the suit, of the oil leases, or of the sale of timber. Efforts of the holders of the notes to collect having failed, suit was instituted and judgment had. A new trial was granted, based upon the allegation that it had been discovered after judgment that the title to the land was not at the time of sale in M. and A. Schneider, but in J. and G. Schneider. Upon another trial judgment was rendered against Crump for one-half of the notes, with foreclosure upon one-half of the land. All parties appealed.

[1] Crump insists that no recovery should have been had against him for any part of the amount represented by the notes, for the reason that he did not buy one-half of the Lassiter survey, but all of it; that the court cannot make a new contract between him and the Schneiders; that the Schneiders were not in position to furnish him with title to that which they had agreed to sell; that fraudulent misrepresentations as to title were made at the time of the contract. Crump instituted suit in accordance with his agreement, but did not prosecute it with diligence; and, without notifying Schneider, and, so far as the record shows, without making any effort to determine whether the intervener had any rights, he permitted a judgment to be rendered against him for one half of the land. He at the same time had adjudged to himself the other half. If this is not sufficient confirmation of the sale as to one half of the property, certainly the exercise later by him of ownership over it by selling the timber constituted a confirmation. The oil lease, the judgment, and the timber sale estop the defense based upon any misrepresentation at the time of the making of the contract as to the title, except as to the deed to J. and G. Schneider.

[2] Crump insists that the transaction between himself and M. Schneider was affected with fraud of the latter, in that at the time he made the contract of sale the title to the property was not in M. Schneider and A. Schneider, but in their wives. While a deed had been made to J. and G. Schneider, the wives, the evidence indicates that the title to the land was not really in them, and if it was in fact in them, the circumstances do not indicate an intention to defraud. As soon as it was ascertained that the record title was in J. and G. Schneider, a deed from them was tendered. Crump at no time suffered any

character of loss, injury, or inconvenience by the mistake of the parties. The court properly refused to sustain this charge of fraud.

[3] The appeal of the Schneiders is based upon the proposition that Crump did not carry out his contract, and that, if he had done so, no part of the land would have been lost; that the transaction was an executed sale, and that the purchaser was not entitled to an abatement of price without showing disseisin. The evidence suggests that Crump, in the handling of the case for the Schneiders, showed little solicitude for the interest of his principals; but the facts developed do not warrant a holding that if he had been diligent and faithful the Schneiders would have recovered the entire tract. Upon the face of the record they had title to only one-half, and no evidence was introduced in the suit instituted by Crump, or in this suit, to warrant a finding that the deed from Lassiter to McRimmon was other than what it purported to be. The Schneiders were not primarily in position to give a deed to all of the land, or the transaction would have been closed up at the time. They are not now in position to pass merchantable title to more than one-half of the property.

It is not necessary to determine whether the contract was executed or executory. The parties contemplated possibility of failure of title in part, and, instead of leaving the matter to be adjusted by the ordinary rules of law, made stipulations with reference thereto. Crump has either never been placed in possession, or has been dispossessed. It is quite possible that if he had, in good faith, undertaken to secure judgment for the land, he would have been successful; but, if so, the judgment would have been for all the land, while he had title to one-half only. The Schneiders have not undertaken to repudiate the contract on account of the delinquencies of Crump. The judgment gives them the purchase price of all the land they owned. It is felt that the nearest practicable approach to equity has been accomplished.

The judgment is affirmed, the costs of the appeals being divided.

J. W. OULD CO. v. DAVIS et al.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1917.)

No. 1525.

1. BANKRUPTCY ⇐407(5)—DISCHARGE—REFUSAL—FALSE REPRESENTATIONS AS TO CREDIT.

The original Bankr. Act (Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 did not include, among the grounds for refusing discharge the obtaining of credit by false representations of solvency. The amendment of 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797) inserted a provision for refusing of discharge where the property was obtained on credit upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit. Decisions were conflicting on the question whether the provision covered general statements to commercial agencies not procured at the request of any prospective creditor or made for the purpose of obtaining credit from any particular dealer. In 1910 (Act June 25, 1910, c. 412, § 6, 36 Stat. 839 [Comp. St. 1916, § 9598]), when

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

the section was amended so as to declare that discharge shall be denied, where the bankrupt obtained money or property upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person, the House passed a bill which so amended the section as to make it plain that false statements to a commercial agency would bar discharge, but the Senate, as it appears from its journals, refused to concur, and offered the substitute amendment, which was accepted, the judiciary committee of the Senate specifically stating that the house bill which in effect made the obtaining of property on false written statements to mercantile agencies a ground of opposition to discharge, without the creditor, whose property has thus been obtained, first asking such mercantile agency to procure him the written statement, was not concurred in because merchants are liable to make careless general statements, and any tendency to make the bankruptcy act unduly harsh should be avoided. *Held* that, under the section as amended, a discharge could not be denied because of the bankrupts' false general statement made to a commercial agency, not in response to the request of a prospective creditor, or made for the purpose of obtaining credit from any particular dealer, notwithstanding the printed form used by the agent who obtained the statement recited it was made as a basis of credit, and credit was extended in reliance thereon by a creditor who, before extending credit, asked the agency for a report on the bankrupts.

2. STATUTES ⟸217—BANKRUPTCY ACT—CONSTRUCTION—AMBIGUITY.

Bankr. Act, § 14b(3), providing that a discharge shall be denied where the bankrupt obtained money or property upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person, does not so clearly declare that a discharge shall be denied on account of a false general statement made to a commercial agency not made in response to any inquiry as to the bankrupt's financial condition by a particular creditor or with intent to obtain credit from any particular creditor, that recourse to the journals of Congress showing the intent of the Legislature in enacting the amendment of 1910, which embraced such subdivision, cannot be had to ascertain the legislative intent.

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

In the matter of the bankruptcy of R. E. Davis and C. W. Davis, partners trading as Davis & Davis. The J. W. Ould Company filed objections to the bankrupts' application for a discharge, and from an order granting the application, it appeals. Affirmed.

Amonette & Bailey, of Lynchburg, Va., for appellant.

Whittle & Whittle, of Martinsville, Va., for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The court below granted the bankrupts' application for a discharge, and the objecting creditor appeals. These facts appear: In January, 1915, a representative of R. G. Dun & Co., the well-known commercial agency, called upon the bankrupts at their place of business in Martinsville, Va., and obtained from R. E. Davis, senior member of the firm, a statement of assets and liabilities according to an inventory taken on the 6th of that month. The referee finds that this statement "was made, signed, and delivered by that firm as a basis of credit." In the following April, some three months later, a traveling salesman of appellant, wholesale dealer in

dry goods and notions at Lynchburg, Va., sent in an order of the bankrupts for about $150 worth of merchandise. Doubtful about giving them credit, for they had become "slow," and the salesman had been instructed not to solicit their trade, the credit manager of appellant applied to Dun & Co. for a report on the firm, and was furnished with a copy of their statement to the agency in the previous January. Relying upon this statement, which showed abundant solvency, the order received from the salesman was filled. The goods were not paid for, and in November of that year the concern was adjudicated bankrupt.

In dealing with the case thus outlined it will be assumed that the statement in question, if made directly to appellant for the purpose of getting property on credit, would bar a discharge because of its material falsity. But the statement was not made to appellant, nor was it procured at the request or with the knowledge of appellant or any other creditor. Neither was it made with any apparent purpose of getting goods on credit from appellant or from any particular dealer. Indeed, the finding that it was made "as a basis of credit" rests upon nothing that occurred at the time it was obtained, but only on a recital to that effect in the printed form used by the agent who got the statement, and such inference as may be drawn from the fact that Davis presumably knew the nature of the business carried on by Dun & Co. In short, the record presents the typical case of a statement of financial condition made to a commercial agency, not procured at the request of any prospective creditor, or made for the purpose of obtaining credit from any particular dealer, but which statement is afterwards communicated by the agency to an inquiring subscriber, who in reliance thereon gives credit to the person making the same. If a statement so made be materially false, will it serve to prevent a discharge?

[1] The original bankruptcy law of 1898 (section 14b) did not include among the grounds for refusing discharge the obtaining of credit by false representations of solvency. Such a provision was inserted in 1903 in the following language:

"Or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

Whether this provision covered general statements to commercial agencies, like the one under review, became the subject of dispute, and the decisions were conflicting. In re Kyte (D. C.) 174 Fed. 867; In re Russell, 176 Fed. 253, 100 C. C. A. 77; In re Augspurger (D. C.) 181 Fed. 174; In re Foster (D. C.) 186 Fed. 254. When the law was up for amendment in 1910, the question of allowing false statements to a commercial agency to be available for opposing discharge was specifically considered by the Congress, with full knowledge of the conflict of judicial opinion respecting the 1903 provision. The House passed a bill which so amended section 14b (3) as to make it plain that false statements to a commercial agency, like the one in question, would bar a discharge. 61st Congress, 1st and 2d Sessions, 1909–10, House Rep. vol. 1, Miscellaneous. But the Senate did not concur.

On the contrary, its judiciary committee, in reporting the bill to the Senate, said:

"The third change made by the house bill, that which in effect made the obtaining of property on false written statements to mercantile agencies ground of opposition to discharge, without the creditor whose property has thus been obtained first asking such mercantile agencies to procure him the written statement, is not concurred in by your committee. Any tendency to make the bankrupt act unduly harsh is to be avoided. It is a sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing where that statement was specifically asked for by the creditor or by the creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors, ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your committee. Merchants are likely to make careless general statements where they would be very careful were they making statements to creditors from whom they were at the time asking credit. Your committee proposes a substitute for the house amendment of this ground of opposition to discharge, which is thought to go as far as is proper."

Upon this report the proposed substitute was adopted by the Senate and afterwards concurred in by the House, and thus became the present law, as follows:

"(3) Obtained money or property upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person."

[2] In the light of this legislative history it seems clear, as the Second Circuit Court of Appeals held in the Zoffer Case, 211 Fed. 936, 128 C. C. A. 434, that the amendment of 1910 cannot be construed to cover "general statements to mercantile agencies, not specifically asked for by prospective creditors." Indeed, counsel for appellant frankly concede that the Davises are entitled to a discharge, "if the courts enforce the intention expressed in the words of the committee reports instead of the intention expressed in the words" of the bankruptcy act. The real contention, therefore, is that the language of the amendment is of such plain and unmistakable import that we may not look elsewhere to ascertain its meaning. Caminetti v. United States, 242 U. S. 470, 485, 37 Sup. Ct. 192, 61 L. Ed. 442, Ann. Cas. 1917B, 1168. But do the words themselves disclose a legislative intent so manifest and certain as to preclude resort to any extrinsic aid to their interpretation? We think not. Whom did the Congress intend to include in the phrase, "or his representative"? When and under what circumstances may a creditor claim the benefit of information obtained by a third party? What relationship must there be to make such third party the agent of the creditor? If a mercantile agency, acting on its own initiative and not at the request or even with the knowledge of any subscriber, obtains from a trader a written statement of his financial condition which is materially false, and afterwards furnishes such statement to a dealer who extends credit on the faith of it, is that agency the "representative" of the creditor within the meaning of the amendment? And can it be said ordinarily that a statement so obtained, not at the instance of the person who gives the credit or with his knowledge, is nevertheless made "for the purpose of obtaining credit from such person"?

These and other questions which at once arise under the facts here considered are quite sufficient, in our judgment, to show a degree of ambiguity in the amendment of 1910, which justifies resort for its interpretation to the official proceedings above recited. From these proceedings, to which we are amply warranted in referring, it is evident that the Congress did not intend to make "general statements to mercantile agencies not specifically asked for by prospective creditors" available grounds for opposing a bankrupt's discharge. The language of the enactment is in no wise inconsistent with the declared intent of the lawmaking body, and that intent should control its construction.

Affirmed.

MULLINS LUMBER CO. v. WILLIAMSON & BROWN LAND & LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. October 16, 1917.)

No. 1533.

1. COURTS ⟸328(10)—FEDERAL COURTS—JURISDICTIONAL AMOUNT.
In determining whether an amount within the jurisdiction of the federal court is involved, plaintiff's claim as to the amount of damages fixes purposes of jurisdiction, the amount in controversy, though the complaint shows a defense might be made to a sufficient amount of the claim to reduce it below the jurisdictional amount, unless it appears as a matter of law from an inspection of the complaint that it is not possible for plaintiff to recover the jurisdictional amount, or from the evidence that the value of the property involved or damages claimed has been fraudulently magnified; and hence, where the complaint alleged the damages at a sum beyond $3,000, the jurisdictional amount fixed for the federal court, and it did not appear that it was impossible for plaintiff to recover that amount, and the evidence did not show that the damages had been fraudulently magnified, jurisdiction of the court cannot be questioned because the recovery was less than $3,000.

2. APPEAL AND ERROR ⟸185(2)—JURISDICTION FOR AMOUNT.
Where the contention that plaintiff in an action for damages had fraudulently magnified the damages so as to give the federal court jurisdiction was not raised in the district court, the contention that the district court was without jurisdiction cannot be sustained on error, unless the fraud affirmatively appears beyond doubt.

3. WATERS AND WATER COURSES ⟸98—BOUNDARIES—DESCRIPTION—STREAMS.
Where land was described as bounded by a creek and thence down the creek to a river, it will be presumed that the middle or run of the creek, and not the bank of a swamp between the run of the creek and the upland, was intended, but such presumption is not conclusive, and may be overcome by other expressions in the deed, by artificial marks in a survey accompanying the conveyance showing a different intention, or by immemorial usage to the contrary.

4. CUSTOMS AND USAGES ⟸12(1)—KNOWLEDGE OF PARTIES—CONSTRUCTION.
Where land was described as bounded by a creek, evidence of common usage in the locality that a swamp adjacent to the creek, and not the run of the creek, was intended, cannot affect the presumption to the contrary, unless the local usage is shown to have been known to the grantee, or so generally recognized that the grantee's knowledge can be inferred.

5. CUSTOMS AND USAGES ⟸19(2)—ACTIONS—EVIDENCE.
Land conveyed to plaintiff's predecessor in title was described as bounded by a creek and thence along the creek to a river. Defendant asserted

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that the grant did not extend to the run of the creek, but only to a swamp between the run and the upland. Defendant's question to a witness, whether in the neighborhood it was the custom of speaking of the creek to refer to the creek or to the edge of the swamp, was rejected. *Held*, that the exclusion of the question was error, for by it defendant might have shown a local usage that, by reference to the creek, the swamp was intended, and followed it by evidence that plaintiff's predecessor knew or was charged with knowledge of such usage.

6. VENDOR AND PURCHASER ⟸229(2)—RECORDS—NOTICE.

A grantee of land is not charged with knowledge of a prior unrecorded deed by his grantor.

Dayton, District Judge, dissenting in part.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Florence; Henry A. Middleton Smith, Judge.

Action by the Williamson & Brown Land & Lumber Company against the Mullins Lumber Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

W. F. Stevenson, of Cheraw, S. C., and Hoyt McMillan, of Mullins, S. C., for plaintiff in error.

F. L. Willcox, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. [1] In this action for damages for cutting timber the plaintiff, Williamson & Brown Land & Lumber Company, alleged and claimed $5,000 actual and punitive damages. The verdict was in favor of the plaintiff for $1,256. The defendant raises in this court for the first time the point that the court was without jurisdiction, because the evidence of the plaintiff showed that the value of the timber cut and used by the defendant did not amount to $3,000. It is true that the actual damages according to the testimony most favorable to the plaintiff were above $2,385; and the court instructed the jury that there was no such evidence of willfulness and wantonness as would support a verdict for punitive damages. But all this is not conclusive of a failure of jurisdiction. The rule is that the plaintiff's claim with respect to the value of the property taken or the amount of damages inflicted through the defendant's wrongful act measures for jurisdictional purposes the value of the matter in controversy, even though the complaint shows that a perfect defense might be made to sufficient amount of the claim to reduce it below the jurisdictional amount, unless it appears as a matter of law from inspection of the complaint that it is not possible for the plaintiff to recover the jurisdictional amount, or from the evidence at the trial that the value of the property involved or the damages claimed had been magnified fraudulently in the declaration so as to reach the jurisdictional amount. Smithers v. Smith, 204 U. S. 632, 27 Sup. Ct. 297, 51 L. Ed. 656.

[2] While the evidence in this case fell short of establishing the amount of damages claimed, an inspection of the complaint does not

show that recovery of the amount claimed was not possible, nor does it appear from the evidence that actual and punitive damages to the amount of $5,000 was not claimed in good faith. It would be a great hardship on the plaintiff for an appellate court to hold that, in order to reach the jurisdictional amount, he had fraudulently raised his claim, when the question had not been made in the District Court and he had had no opportunity to meet the charge on the trial. For an appellate court to take such action the fraud should affirmatively appear from the testimony beyond doubt. It follows that the cause cannot be dismissed on jurisdictional grounds.

[3-5] The cutting and appropriation by the defendant of timber from the land described in the complaint not being denied, the real issue at the trial was whether the plaintiff had a title derived from Wilson Lewis, the common source, covering the land in dispute, superior to the defendant's junior title. The last link in the plaintiff's chain of title was a deed of October 28, 1907, from Cape Fear Lumber Company to the plaintiff, which was invalid because not attested by witnesses. On September 9, 1910, the grantor executed and attached to the original deed an instrument under its seal, by which it recited the defect in the original deed and undertook to re-execute it in these words:

"In consideration of the premises, Cape Fear Lumber Company has caused this indenture to be re-executed this day and year above written."

It seems too clear for discussion that this was a valid execution of the original document, in form a conveyance giving it effect at the date of the last execution. 13 Cyc. 553.

The defendant's junior title covered the land in dispute, and an important question of fact was whether this description in the deed from Wilson Lewis to S. W. Morrison, under which plaintiff claimed, embraced the land in dispute:

"All that certain tract of land situated on Little Pee Dee river in county and state aforesaid containing one thousand (1,000) acres, more or less. Bounded as follows: North on lands lately conveyed to A. C. Lewis & Wilson Elliott; east by a line running from the corner of Wilson Elliott's land across Cedar creek to mouth of Sand Hill branch and up said branch to where it emptied into Black creek and thence down said creek to Little Pee Dee river—said line dividing said tract from lands of the said Wilson Lewis; south on lands of Lewis Garald and west on Little Pee Dee river. The same being land deeded to me by Daniel Lewis S. H. D. and dated 15th day of April, 1867.

"For further description see plat made by H. T. Morrison, surveyor."

The surveyors who testified differed as to the true lines in the plat attached to the deed and in the location of the land conveyed by it.

On this description the plaintiff claimed to the run of Black creek. The defendant, on the other hand, in the effort to show that "down said creek to Little Pee Dee river" meant the edge of Black Creek swamp and not the run of the creek, asked the witness Dillon Elliott the question: "In that neighborhood what is the custom in speaking of Black creek? Do they refer to the run of Black creek or to the edge of the swamp?" The question was excluded. When a creek or other stream is called for as a boundary, the presumption is that the middle of the run, and not the bank or the swamp of the stream,

is intended. The presumption, however, is not conclusive. It may be overcome by other expressions of the deed or external facts, such as other natural boundaries and even artificial marks in the survey accompanying the conveyance showing a different intention, or by certain and immemorial usage contrary to the presumption. In Felder v. Bonnett, 2 McMul. (S. C.) 44, 37 Am. Dec. 545, Judge O'Neall thus states the court's view of the point:

"The only difficulty which could arise would be, whether the surveyor called for the swamp or the creek, or the creek itself, by the name of Dean swamp. If there were any artificial marks, which would lead us to conclude that the surveyor stopped at the margin of the swamp, then we would be at liberty to adopt it as the boundary; but, in their absence, what is meant by Dean swamp, must be decided by the known and established understanding in this state. The meaning may be ascertained, by appealing to the usage even of Orangeburgh, in this behalf. Besides Dean swamp, they have many others, such as Bull swamp, and Coccaw swamp. This name is appropriated to the run, and not to the swamp. In large streams, such as the Santee and Edisto, the swamp is spoken of as distinct from the river, but in creeks with a margin of swamp, the usage is universal in this state, to speak of the creek and swamp as one." St. Paul, etc., R. R. Co. v. Schurmeier, 7 Wall. (74 U. S.) 272, 19 L. Ed. 74; Hanlon v. Hobson, 24 Colo. 284, 51 Pac. 433, 42 L. R. A. 502, note page 504.

It is true that the evidence of common usage of the locality must be plain and clear to give a meaning to a word or expression different from its usual signification; and it is also true that even such clear and plain proof will not avail unless the local meaning is proved to have been known to the grantee or to have been so generally recognized that the grantee's knowledge of it may be inferred. Wigmore on Evidence, p. 3489. The defendant's beginning of proof on the subject would be evidence of the usage itself, to be followed with proof that the usage was within the knowledge, actual or presumed, of the grantee. We think, therefore, there was error in excluding testimony that the general local meaning given to Black creek was the edge of the swamp and not the center of the stream.

The charge on the subject of adverse possession is so clearly right that the assignments of error on that subject require no discussion.

[6] Before Wilson Lewis conveyed to Morrison, under whom plaintiff claims, he had in 1867 conveyed all his land on the east side of Black creek to his son, Allen Lewis, under whom defendant claims. The deed of 1867 to Allen Lewis was not recorded, and there was no evidence that Morrison, the subsequent grantee, knew it embraced all the lands on the east side of Black creek. It, therefore, seems obvious that the District Judge was right in charging the jury that Morrison, Wilson Lewis' subsequent grantee, was not bound by the deed to Allen Lewis, and was not charged with notice that he had already embraced in the deed to Allen Lewis all his land on the east side of Black creek.

Other assignments of error are not argued in the brief, and are without merit.

Reversed.

DAYTON, District Judge (dissenting in part). I concur in the conclusion reached in this opinion that the judgment of the court be-

low must be reversed for the reason set forth therein, but I go further and hold that it was the duty of the court below, and will be its duty, to dismiss the case for want of jurisdiction. I recognize fully the general rule that the plaintiff's claim as to the value of the property taken from him, or the amount of damages inflicted upon him, through the defendant's wrongful act, measures, for jurisdictional purposes, the matter in controversy; subject, however, to the limitation that such claim has not been fraudulently made or magnified, as clearly disclosed by the evidence, beyond the jurisdictional amount. It is very clear to my mind that the claim in this declaration was purely colorable and magnified beyond any reasonable hope or expectation of recovery. Upon trial before a jury the plaintiff did not attempt to offer evidence to the effect that the timber cut was of the value of the jurisdictional requirement. It was cut from land, the title to which was in dispute between the plaintiff and defendant, rendering any hope or expectancy of a recovery of punitive damages impossible, and this must have been known to plaintiff when he instituted the suit. The conclusion is therefore irresistible that such claim therefor was solely made to secure jurisdiction. To my mind it is the duty of federal courts to guard carefully these limitations upon their jurisdiction, else the statute's requirements will be practically annulled and made nugatory. This conclusion, I think, is fully sustained and enjoined by such cases as Smith v. Greenhow, 109 U. S. 669, 3 Sup. Ct. 421, 27 L. Ed. 1080, Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, and Smithers v. Smith, 204 U. S. 632, 27 Sup. Ct. 297, 51 L. Ed. 656.

HICKS v. FORDHAM.

(Circuit Court of Appeals, Fifth Circuit. October 22, 1917.)

No. 3091.

1. SPECIFIC PERFORMANCE ⊜43—RIGHT TO—PAYMENT.
   Under Park's Ann. Civ. Code Ga. § 4634. providing that specific performance of a parol contract as to land will be decreed where there has been full payment alone, accepted by the vendor, or partial payment accompanied by possession, or possession alone, with valuable improvements, complainant, who, having entered into possession of land with his mother-in-law, remained after she left under a parol contract to purchase the land from the owner is, having made valuable improvements and paid all, or nearly all, of the purchase price, entitled to specific performance of the contract.

2. QUIETING TITLE ⊜10(3)—ACTION—RECOVERY.
   Complainant, having entered into possession of land with his mother-in-law, remained after she departed, under a parol contract that he should purchase the land on installments and, having paid all taxes, and made valuable improvements, as well as paying all the installments of the purchase price, defendant having refused to execute a deed, or even accept tender of the small amount which he claimed was still due, is entitled to have his title quieted as against the claims of the defendant.

3. LIMITATION OF ACTIONS ⊜60(10)—RUNNING OF STATUTE—QUIETING TITLE.
   Where complainant remained in possession of land which he had purchased under a parol contract and defendant vendor continued to assert

a claim against the land which amounted to a cloud on complainant's title, limitations did not run against complainant's suit to quiet title.

4. LIMITATION OF ACTIONS ⊂=130(6)—RUNNING OF STATUTE—INSTITUTION OF SECOND ACTION.

Complainant, a resident of Arkansas, in 1909 sued for specific performance of a parol contract for the sale of Georgia lands. After verdict for defendant in 1910 complainant was granted a new trial, and in July, 1913, having heretofore instituted in the federal court a suit for specific performance, dismissed his suit in the state court. Defendant in 1908 repudiated the contract, and sued out against complainant a distress warrant on the theory that he was a tenant. *Held*, that complainant's suit in the federal court was not barred by limitation though the four-year statute was applicable; Park's Ann. Civ. Code Ga., § 4381, declaring that, if a plaintiff shall be nonsuited or shall discontinue or dismiss his case and shall recommence within six months, such renewal case shall stand upon the same footing as to limitations with the original case.

5. LIMITATION OF ACTIONS ⊂=130(6)—RUNNING OF STATUTE—ACTION IN FEDERAL COURT.

Where a resident of foreign state filed in the state court of Georgia a bill seeking specific performance of a contract to convey Georgia lands and then dismissed such suit, having previously filed suit for similar relief in federal court, such suit filed in the federal court must be deemed a renewal of original suit within Park's Ann. Civ. Code Ga. § 4381, and will toll limitations, despite the rule that a case, having been removed to the federal court, cannot be renewed in the state court within six months so as to avoid limitations; the complainant having option as to the tribunal in which he would seek relief.

6. JUDGMENT ⊂=647—CONCLUSIVENESS—DISTRESS WARRANT.

Where defendant, who complainant asserted sold the land under parol contract, sued out a distress warrant under which crops raised by complainant were levied upon on the theory that complainant was only a tenant, the judgment subjecting such crops to defendant's claim was not a conclusive adjudication against complainant's subsequent suit for specific performance, for a distress warrant may be sued out without personal service and judgment had even without the knowledge of the person whose property has been seized, and hence the judgment in the proceeding on the distress warrant is conclusive only as to the property taken, this being particularly true as there was evidence that the proceeding was for the purpose of preventing a third person from taking complainant's crop.

7. ESTOPPEL ⊂=68(1)—EQUITABLE ESTOPPEL—DURESS.

Where complainant, an ignorant negro, was acting under duress when defendant sued out a distress warrant and subjected crops raised on land sold complainant under a parol contract to an alleged claim for rent, defendant cannot set up, as an estoppel barring specific performance, the proceedings under the distress warrant, to which complainant did not object.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Bill by J. H. Fordham against T. B. Hicks. From a decree for complainant, defendant appeals. Affirmed.

Alexander Akerman and Charles Akerman, both of Macon, Ga., for appellant.

Robert L. Berner, of Macon, Ga., for appellee.

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

BATTS, Circuit Judge. J. H. Fordham, a resident of Arkansas, filed a bill against T. B. Hicks, a resident of Pulaski county, Ga., alleging that, under a contract with the latter, he and his mother-in-law went into possession of the land in controversy in 1892; that thereafter, about 1897, his mother-in-law moved out, leaving him in possession, and that he and defendant made another trade, whereby he was to pay $1,000 for the land in annual installments, without interest. He alleges that he remained on the land, made valuable improvements, paid all taxes and all the annual installments of purchase price. It is further alleged that, upon the payment of the entire amount, he demanded a deed, but defendant insisted that there was still due $104. This amount was tendered, but defendant still refused to make the deed. He prayed: (1) For a decree requiring defendant to execute a deed conveying the land; (2) that it be decreed that the complainant had a good and valid title to the land. By amendment, complainant alleged that in the year 1909 he filed in the superior court of Laurens county a petition in equity for specific performance of the contract; that the allegations therein were substantially as in the present bill; that at the July term, 1910, of that court a jury returned a verdict in favor of the defendant; that a motion for a new trial was granted, and July 28, 1913, complainant dismissed his action. A motion to dismiss set up that the bill showed on its face that the cause of action was barred by limitation; that it presented a stale demand; that the tender of the amount due on the purchase price was insufficient. The motion overruled, defendant, answering, alleged that after the complainant's mother-in-law left the land, the contract under which she and complainant had held was rescinded, and that complainant continued in possession as a tenant; that all payments thereafter made were for rent; that no tender of any balance was ever made him. Defendant, by amendment, alleges also that he sued out in the city court of Dublin a distress warrant against the complainant for rent for the premises for the year 1908, and had it levied upon the crops of that year, had the crops sold, and the proceeds credited upon the distress warrant. He alleges that complainant filed no counter affidavit or other defense, and that the distress warrant became a final judgment, conclusively adjudging complainant the tenant of defendant for the year 1908, and defendant pleads this judgment as an estoppel against the plaintiff.

[1] The Georgia statute codifies the general law as to specific performance; section 4634, Parks Annotated Code, providing:

"The specific performance of a parol contract as to land will be decreed" where there has been "full payment alone, accepted by the vendor, or partial payment accompanied with possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to the parol contract."

Assuming the truth of the statements of the bill, complainant was entitled to the remedy of specific performance prayed for by him.

[2] Complainant also makes allegations which are equivalent to a statement that the claims of defendant to the land constitute a cloud upon his title. If his allegations are true, he is entitled to a decree to the effect that he has a good and valid title to the land.

[3] Assuming that this court, disposing of a case in equity, is bound

by or will apply the statutes of limitations of the state of Georgia, it would seem that no provision of the Georgia law will bar this action to remove cloud from title. The complainant has, by himself or by his tenant, been in continuous possession of the land. The defendant asserted, and, to the time of the institution of this suit continued to assert, a claim constituting a cloud on the title. Under such circumstances, no statute of limitation could have application.

[4, 5] The suit for specific performance is not barred by the Georgia statute of limitations. Assuming that the four-years' statute is applicable, rather than the law of prescription of seven years, the suit was in time. In 1909 complainant filed in the state court a petition in equity for specific performance. This was within four years from the repudiation by defendant of the contract, and refusal by him to convey the land. This action was dismissed July 28, 1913, the present suit having theretofore been instituted. The Georgia Code provides (section 4381):

"If a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewal case shall stand upon the same footing, as to limitation, with the original case."

In Cox v. East Tennessee, etc., R. R. Co., 68 Ga. 446, and other cases cited in brief of appellant, it is held by the Supreme Court of Georgia that when a case has been removed from a state court to the Circuit Court of the United States, the jurisdiction of the former ceases, and, after nonsuit in the federal court, the case cannot be renewed in the state court within six months so as to avoid the statute of limitations, and that court has held that an action brought in the United States Circuit Court and dismissed by the plaintiff cannot, under the provisions of section 4381, be renewed in the state court within six months after such dismissal so as to avoid the bar of the statute of limitations, which had attached before the second action was brought. These cases do not require a holding that a person who has a right under the laws of a state, which he may assert in a state court, cannot, there being the requisite diversity of citizenship, and the amount involved being sufficient, assert the same right in the proper federal court. Under the facts here developed, complainant had a right, when he instituted this suit, to go into the courts of Georgia and pray for the relief he has prayed for herein. Under the laws of the United States, as a citizen of Arkansas, he had a right to appeal to the District Court of the United States for the Southern District of Georgia for like relief.

[6, 7] Defendant's plea of estoppel is without merit. The elements of estoppel are lacking. Nor will the fact alleged be held an adjudication of the relations between the parties. Under the laws of Georgia, the distress warrant may be sued out without personal service, and a judgment had, even without knowledge of the person whose property has been seized that the proceeding has been instituted. It may be that the sale thereunder is conclusive as to the property sold, but certainly it would be improper to give the procedure an effect beyond this.

There is also evidence that the proceedings in distress were the result of an arrangement between complainant and defendant for the purpose of preventing a third person from taking the crop of complain-

ant. The evidence indicates that the complainant is an ignorant negro; at the time he was acting under what was substantially duress; it would not consist with equity to permit defendant to take advantage of a condition created by his own wrong. There is a sharp issue of fact between the complainant and defendant as to the character of contract under which the former held the land. The district Judge holds that the evidence sustains the allegations of the bill. He was amply warranted in this conclusion.

The judgment is affirmed.

PAINTER v. UNION TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1917.)

No. 3019.

1. APPEAL AND ERROR ⟸113(1)—APPEALABLE ORDERS—ORDER DENYING APPLICATION SET ASIDE—DECREE OF SALE.
   An appeal from an order overruling an application to set aside a former decree of sale on foreclosure, and an order confirming the same, which was not an appeal in any sense taken, either from the decree of sale, or from the order confirming the sale, must be dismissed.
2. APPEAL AND ERROR ⟸113(2)—APPEALABLE ORDERS.
   On bill to foreclose a mortgage on the property of a railroad company, decree of sale was entered on June 28th, and the property sold by the master August 5th. The report of sale was confirmed August 8th, without an order nisi, and on August 15th a creditor, bondholder, and stockholder of the railroad company filed an application to set aside the sale and the order confirming the same, which application on September 16th was disallowed. The petition for appeal was filed and the appeal allowed on October 10th, the petition reciting that the creditor considering himself aggrieved by the order, judgment, and decree made and entered on September 16th did appeal from such order, judgment, and decree, confirming the sale at special master's sale held on August 5th, and the order, judgment, and decree overruling his application to set aside and revoke the order confirming the sale entered on August 8th. *Held*, that the appeal must be considered taken, not only from the order overruling the application to set aside, but from the decree confirming the report of sale, and hence in view of the citation, which cited appellant to appear and show cause why the judgment and decree, confirming the decree, should not be corrected, the appeal cannot be dismissed, as being solely from the order overruling the application to set aside the decree of the sale, and the order confirming the same, but that portion relating to the overruling of the application should be considered as surplusage.
3. APPEAL AND ERROR ⟸339(1)—TIME FOR APPEAL—STATUTE.
   In such case, as the appeal was taken from the decree, confirming the sale within six months after its entry, it was within the time prescribed by 26 Stat. 829, § 11.
4. RAILROADS ⟸192—FORECLOSURE SALE—CONFIRMATION—ORDER NISI.
   The confirmation of a sale of railroad property made on foreclosure of a mortgage, without an order nisi, is irregular.
5. RAILROADS ⟸192—FORECLOSURE SALE—CONFIRMATION—IRREGULARITIES—PREJUDICE.
   In a suit to foreclose a mortgage on railroad property, the court having decreed a sale confirmed the report of sale, without an order nisi. On application by a creditor, bondholder, and stockholder of the company to

set aside the sale and the order confirming the same, it appeared that the applicant admitted inability to inform the court of any person or corporation which in his judgment could reasonably be expected to become bidders for the property, should the sale be set aside, and it did not appear that better terms could reasonably be expected in case of resale. *Held* that, though the sale was confirmed without an order nisi, the irregularity did not prejudice applicant, and was no ground for setting aside the order confirming the sale, for applicant had the opportunity and did in fact present his objections to the confirmation, and it did not appear that a resale would be advantageous.

6. APPEAL AND ERROR ⊜719(1)—ASSIGNMENT OF ERROR.
An error not assigned on appeal from an order confirming a sale on mortgage foreclosure cannot be considered, where the error, if any, did not appear on the record so plainly as to warrant consideration under Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii).

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Bill by the Union Trust Company and another against Clyde R. Painter, creditor, bondholder, and stockholder of the Lake Erie, Bowling Green & Napoleon Railway Company, to foreclose a mortgage. From a decree of sale and an order confirming the sale, Clyde R. Painter, creditor, bondholder, and stockholder appeals; his application to vacate the same having been denied. Affirmed.

W. W. Campbell, of Toledo, Ohio, and Joseph Sagmeister, of Cincinnati, Ohio, for appellant.

Campbell, Bulkley & Ledyard, of Toledo, Ohio, Anderson, Wilcox & Lacy, of Detroit, Mich., and Brown, Geddes, Schmettau & Williams, of Toledo, Ohio (Lloyd T. Williams, of Toledo, Ohio, of counsel), for appellees.

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

McCALL, District Judge. [1, 2] This bill was filed by the Union Trust Company, trustee, versus the Lake Erie, Bowling Green & Napoleon Railway Company, to foreclose a certain mortgage. No answer was filed, and the case proceeded to a sale of the property and confirmation thereof. The case is here on appeal by Clyde R. Painter, creditor and holder of bonds and stocks of the defendant railway company. A motion is made by appellee to dismiss, on the ground that the appeal was taken from an order of the court below, overruling an application by Painter to set aside a former decree of sale and an order confirming the same, and was not an appeal in any sense taken either from the decree of sale or from the order confirming the sale. The motion should be granted (Willis v. Davis, 184 Fed. 889, 107 C. C. A. 211, Sixth Circuit; Conboy v. First National Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128), if the record in fact sustains the grounds on which the motion is predicated.

The decree of sale was entered June 28, 1916; the property was sold by the master August 5, 1916; and the report of sale was confirmed August 8th thereafter, without an order nisi. On August 15, 1916, Painter et al. filed an application to set aside the sale and the

order confirming same, which application was on September 16th disallowed. The petition for appeal was filed and the appeal allowed on October 10, 1916. Among other things stated in the petition is the following:

"Clyde R. Painter * * * considering himself aggrieved by the order, judgment, and decree made and entered on September 16, 1916, in the above-entitled cause and matter, does hereby *appeal from said order, judgment, and decree confirming the sale of the property* * * * *at special master's sale held on August 5, 1916* (italics ours) and the order, judgment, and decree overruling the application of said Clyde R. Painter et al. * * * to set aside and revoke the said order confirming said sale * * * entered on August 8, 1916, etc."

From this it appears that the appeal was taken, not only from the order overruling the petition to rehear, but also from the decree entered August 8, 1916, confirming the master's report of sale made on August 5th. This appears to be clear; but, if anything further is needed to disclose what the pleader had in mind when he appealed, it is found in the fourth assignment of error, which is in substance that the decree of August 8th confirming the sale of August 5th was contrary to law and the rules and principles of equity; and, further, the citation issued by Judge Killits cites and admonishes the appellee to appear and show cause why the judgment, order, and decree rendered August 8, 1916, confirming the sale of the property, etc., should not be corrected.

[3] It was not necessary to file a petition to rehear in order to give the right of appeal from the decree of August 8th, confirming the report of sale, Willis v. Davis, 184 Fed. 889, 107 C. C. A. 211; hence the appeal from the order overruling the petition to rehear should, as we think, be treated as surplusage. It appearing that the appeal was taken from the decree confirming the sale, and within six months after its entry, the motion to dismiss must be denied. 26 Statutes at Large, 826, c. 517, § 11; Foster's Federal Practice, vol. 3 (4th Ed.) p. 2065; Simpkins' Federal Equity Suit, p. 689.

Coming to the consideration of the errors assigned, the questions presented may be stated under two heads and disposed of together:

(1) Was the interest of appellant prejudiced by the action of the court below, in confirming the master's report of sale without an order nisi?

(2) Was the price for which the property sold so grossly inadequate that a court of equity should set it aside?

[4, 5] From an attentive examination of the record, it may be stated with fairness that appellant Painter, who was interested personally and as attorney for others, had knowledge or was chargeable with knowledge, of all that transpired in the progress of this suit in the court below, from the filing of the bill in foreclosure May 15, 1915, to the public sale of the property involved on August 5, 1916. In re McCall, 145 Fed. 898, 76 C. C. A. 430, Sixth Circuit. Indeed, no complaint is made of any action of the District Court prior to August 8, 1916, when the master's report of sale was confirmed. But it is insisted that the order confirming the sale was not made in accordance with law or equity procedure, in that no order or decree nisi

was made or entered, to the effect that the sale would be confirmed on a day certain, unless within that time sufficient cause to the contrary should be shown. It appears that on August 8th, three days after the sale, and on the same day the master filed his report of sale, counsel for the trustee under the mortgage moved the court for an order confirming the report of sale and also an order nisi, but for reasons appearing satisfactory to the court the motion for an order nisi was disallowed and the motion to confirm the master's report of sale was on that day allowed and the sale made absolute.

There is nothing in the record to indicate that appellant was present or represented, except it be generally by counsel for the trustee. However this was, several days later, on August 15th, appellant as attorney for the Department of Banks and Banking of the State of Ohio, and in person and by attorney, filed an application to set aside the decree of sale and the order confirming the same. This application was heard September 9, 1916, when much evidence was introduced before the court, whereupon the court said:

"After hearing the arguments and statements of counsel and the evidence, and no one advising the court of his desire to offer more than $140,000 for the property of the defendant, the Lake Erie, Bowling Green & Napoleon Railway Company, should the application be granted and the sale set aside and a new sale had, and the applicants above named admitting in open court that they were unable to inform the court of any person or corporation in their judgment who could reasonably be expected to become bidders for said property should the application be granted and said sale set aside and a new sale had, and there being no reasonable suggestion to the court of collusion, suppression of bids, or other vitiating circumstances attending said sale, and the court being of the opinion, considering all the circumstances attending said sale and bearing upon the transaction, that no better terms could reasonably be expected within a reasonable time than those obtained at said sale and that said sale was fairly conducted and had after full information of its terms, conditions, date, and place, which information was had by the applicants herein, finds that said application should be and the same is hereby overruled."

We agree with the learned trial judge in the conclusion reached to the effect that appellant's interests were not prejudiced by reason of any irregularity in the proceedings below, and that under the facts a resale of the property should not have been ordered on the grounds of inadequacy of price. We are strengthened in this view by the responses of counsel for appellant at the hearing to questions by members of the court, seeking to have counsel state just in what particular appellant was prejudiced to his detriment by the decree below, and if reversed what reasonable assurance was there that appellant would be benefited thereby.

We think, however, that the motion of counsel for the trustee for an order nisi ordinarily should have been granted, or by some other method an opportunity afforded to file exceptions to the master's report, prior to its confirmation. However, since the appellant on his motion for rehearing had the opportunity, and did in fact present to the court his objections to the decree appealed from as fully as he might have done under an order nisi, we think the denial of the motion for, or the failure of the court to grant, an order nisi was not prejudicial, even if irregular.

[6] It is further insisted by appellant that there was an arrangement between the purchaser Luce and certain stockholders and bondholders (in the Lake Erie, Bowling Green & Napoleon Railway Company), whereby they should participate in a reorganization without furnishing like opportunity to other stockholders and bondholders and creditors. This contention arises out of the fourth paragraph of the application to set aside the sale and order confirming same. Louisville Trust Co. v. Louisville, etc., Ry., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, and other cases are cited to support it. We find no error assigned in respect of this feature of the case; and we are of opinion that, if there was such error it does not appear on the record so plainly as to warrant its consideration under Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), if indeed it appears that the question was raised and presented to the court below in such manner and at such time as error could have been properly assigned.

The decree below is affirmed, with costs.

PORTER v. COBLE.

(Circuit Court of Appeals, Eighth Circuit. November 19, 1917.)

No. 4909.

1. REMOVAL OF CAUSES ⊂⊃19(1)—CASES ARISING UNDER UNITED STATES LAWS.
Judicial Code (Act March 3, 1911, c. 231) § 24(6), 36 Stat. 1092 (Comp. St. 1916, § 991[6]), expressly declares that District Courts shall have original jurisdiction of all cases arising under the postal laws, while section 28 (Comp. St. 1916, § 1010) declares that any suit of a civil nature at law or in equity arising under the laws of the United States of which the District Courts of the United States are given original jurisdiction may be removed by the defendant to the District Court. *Held*, that a suit, begun in state court to enjoin a postal inspector from delivering to a third person property in possession of petitioner who had been appointed a postmaster, may by defendant be removed to the federal court, regardless of the amount in controversy; the jurisdiction of the federal court in such case not depending on the amount involved.

2. REMOVAL OF CAUSES ⊂⊃86(9)—PETITION—VERIFICATION.
Under Judicial Code, §§ 28, 29 (Comp. St. 1916, §§ 1010, 1011), providing for removal of causes and for the verification of a petition for removal, a petition for removal from the state court of a suit by a postmaster against a post office inspector verified by one signing as United States attorney, is, the verification otherwise being sufficient, sufficient notwithstanding it was signed by the attorney as United States attorney, for those words may be treated as descriptio personæ.

3. APPEAL AND ERROR ⊂⊃1061(2)—REVIEW—HARMLESS ERROR.
Where the dismissal of a suit was proper, plaintiff was not prejudiced whether the court dismissed the same on motion or on its own motion.

4. POST OFFICE ⊂⊃7(1)—POSTMASTERS—REMOVAL.
Under Const. U. S. art. 2, § 2, cl. 2, declaring that the President shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors and all other officers of the United States whose appointments are not herein otherwise provided for, the President, while the appointment of a postmaster must be confirmed by the Senate, may, without the consent or submission of the matter to the Senate, remove a postmaster.

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5. UNITED STATES ⟸28—PRESIDENT—ACTION.
The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.

6. PLEADING ⟸8(13)—CONCLUSIONS.
An allegation, in a petition by a postmaster seeking to prevent a postal inspector from removing from his possession postal property, that such postmaster had not been removed according to law, is a conclusion of law and not well pleaded.

7. POST OFFICE ⟸7(1)—POSTMASTER—REMOVAL.
A petition by a postmaster seeking to prevent a postal inspector from depriving him of possession of postal property on the theory that he had not been removed as a postmaster according to law, which alleged that the Postmaster General had assumed the right and authority to remove him of his own act and decision, does not, none of the other averments showing that the removal was unauthorized, state a cause of action; for, there being no averments showing that the President did not authorize the Postmaster General to order removals, it must be presumed that the Postmaster General in ordering such removal acted by direction of the President.

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

Suit by John C. Porter against W. M. Coble, begun in the state court and removed to the federal District Court in which the United States intervened. From a decree dismissing the petition, plaintiff appeals. Affirmed.

William Ritchie, Jr., of Bridgeport, Neb. (G. J. Hunt, of Bridgeport, Neb., on the brief), for appellant.

T. S. Allen, U. S. Atty., of Lincoln, Neb. (Howard Saxton, Asst. U. S. Atty., of Omaha, Neb., on the brief), for appellee.

Before HOOK, SMITH, and STONE, Circuit Judges.

SMITH, Circuit Judge. The plaintiff, John C. Porter, alleged in a petition filed in the district court of Morrill county, Neb.:

That he had been duly appointed, commissioned, and qualified as postmaster at Bridgeport, Neb., an office of the third class, and that his term would not expire until 1918. That the defendant, W. M. Coble, as a United States post office inspector, has a right to inspect the office at Bridgeport, to inventory the property belonging to the government consisting of stamps, stamped envelopes, books, records, and funds received in due course of business therein.

"(3) That defendant has made demand upon this plaintiff for an inspection of the property so in his possession, and said defendant is willing to, has offered to, and will submit for defendant's inspection all property in his possession belonging to the Government and under the control of the Post Office Department; but that said defendant further says that after inspecting said property, inventorying the same, and taking possession thereof, he shall turn over and deliver the same to a third party, further claiming that this plaintiff has been removed as postmaster and that the bondsmen of this plaintiff have designated a party to whom said property shall be turned over and delivered. Plaintiff further alleges that he has not been removed according to law; that the President of the United States has never recommended his removal to the Senate of the United States, nor has the Senate of the United States ever approved of his removal.

"(4) Plaintiff further shows to the court that section 6 of chapter 175 of the Acts of the 44th Congress, 19 Stats. 78, 80 (section 7190, U. S. Compiled Statutes 1916), provides: 'Sec. 6. Postmasters of the first, second, and third classes shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years, unless sooner removed or suspended according to law. * * *'

"(5) Plaintiff further shows that the Postmaster General has assumed the right and authority to remove this plaintiff from his position of postmaster at Bridgeport of his own act and decision, and accordingly notified this plaintiff by letter through the regular course of mail. * * * But plaintiff alleges that said removal was not by the President, nor by and with the advice and consent of the Senate, and was unauthorized, unlawful, and illegal; that plaintiff's right to said office and to the emoluments thereof, until legally and lawfully removed or suspended, is a property right, and of which said defendant seeks to unlawfully deprive this plaintiff in the arbitrary manner above set forth; that if said property is turned over and delivered by said defendant to any third party this plaintiff will be deprived of the power to exercise and discharge the duties of postmaster, and will be thereby actually dispossessed of the office and of the emoluments thereof; all to the plaintiff's great and irreparable damage, and for which he has no adequate remedy at law; and that unless restrained by this court the said defendant will, in the arbitrary and unlawful manner above set forth, deprive this plaintiff of his rights, privileges, and emoluments, as hereinabove stated.

"Wherefore, plaintiff prays that said defendant be restrained and enjoined from delivering to any third party, during this plaintiff's term of office, any of the property now in this plaintiff's possession as postmaster of Bridgeport, and belonging to the United States, and from holding said property for a time longer than is reasonably necessary to complete his inspection and inventory of the same, and that upon the final hearing of this cause said injunction be made perpetual, and that plaintiff have all such other and further relief as in justice he may be entitled to."

Upon the plaintiff's application a temporary injunction was granted as prayed. The defendant appeared and filed a petition for removal of the cause to the United States District Court for the District of Nebraska, and the state court ordered the cause to be so removed. In the federal court the United States filed a motion to dismiss the case and the plaintiff filed a motion to remand it to the state court. The court overruled the motion to remand and dismissed the case, but whether upon the motion of the United States or on its own motion does not clearly appear. Thereafter the plaintiff appealed to this court.

[1] The plaintiff strenuously contended in his printed brief and oral argument and in a supplemental brief that the case was not removable.

Section 28 of the Judicial Code (section 1010 of the U. S. Compiled Statutes of 1916) provides:

"Any suit of a civil nature, at law or in equity, arising under the * * * laws of the United States, * * * of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district."

Section 24 of the Judicial Code expressly provides that:

"The District Courts shall have original jurisdiction as follows: Sixth. Of all cases arising under the postal laws."

The original jurisdiction of the District Court as applied to the postal laws is not dependent upon the amount in controversy.

This court practically overruled the objection from the bench at the time of the hearing that this case was not removable under these sections. In his supplemental brief the appellant says:

"The Case Was Properly Removed.

"The appellant will not discuss this point further except to point to * * * his brief. This may influence the court to change its ruling apparently made in the trial."

[2] Our ruling made at that time is adhered to. It may be added that the first assignment of errors is that the petition for removal was not verified by the proper party as required in sections 28 and 29 of the Judicial Code.

We do not find anything in either of these sections which governs who shall verify the petition for removal, unless it be in section 29, the requirement that the petition for removal shall be duly verified. The petition for removal is in the name of the defendant, W. M. Coble, but is signed "T. S. Allen, United States Attorney, A. W. Lane, Assistant United States Attorney, Attorneys for Petitioner." The verification is by T. S. Allen, and—

"says that he is United States attorney for the district of Nebraska, and as such is attorney for the petitioner for removal of the above entitled cause to the District Court of the United States as prayed for in said petition; that said petitioner does not verify said petition because he is absent from and not a resident of Morrill county, Neb.; that the allegations of said petition are true to affiant's knowledge except such as are therein stated on information and belief and as to such matters he believes them to be true."

This is then signed and sworn to. If it be assumed that the United States attorney was not, as such, attorney for the petitioner, he was an attorney of the United States District Court for Nebraska, and it is possible that the words "United States Attorney" were descriptio personæ; but no attack has ever been made, so far as the record shows, until the hearing in this court, upon his right to appear as United States attorney. In any event, there is nothing in the record to indicate that the application for removal was not properly verified.

As to the ruling dismissing the cause, four errors are specified:

First. Because the motion to dismiss was not made by a party to the suit.

Second. Because the cause had not been properly removed to the United States District Court.

Third. Because the district court of Morrill county, state of Nebraska, had jurisdiction and power to grant the relief sought by the petitioner.

Fourth. Because if the case were properly removed the petitioner is entitled to be granted the relief prayed for by the United States District Court.

[3] The second of these has in effect already been disposed of, and the disposition of the first and fourth will dispose of the case without consideration of the third. That is to say, we will assume for the purposes of this case alone that the district court of Morrill county, Neb., had jurisdiction and power to grant the relief sought by petitioner before the removal. It is true that the motion to dismiss was made in the name of the United States and not in the name

of the defendant. We have already called attention to the fact that it is not clear from the record whether the court sustained the motion or dismissed the case upon its own motion. Whatever may be the fact in this respect, the case was ordered dismissed and in the absence of any prejudice the plaintiff cannot complain. The real question is, was the petition properly dismissed, and not, who made the motion to dismiss, nor was it sustained, nor did the court, finding the petition stated no cause of action, dismiss it upon its own motion.

[4] This reduces the case to the consideration of the fourth specification.

The office in question is what is known as a presidential office, and the nomination to it was subject to the confirmation of the Senate. The United States Constitution, art. 2, § 2, cl. 2, provides:

"He [the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, * * * and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

The Constitution says nothing as to whether removals and suspensions may be made by the executive alone nor whether they must be with the advice and consent of the Senate. For nearly half a century no question seems to have been raised upon the subject in the Senate. This was doubtless due to the scant exercise of the power of removal or suspension in the early days of the republic.

During the time of President Jackson the question was raised by the Senate that in considering the case of the confirmation of the successor of a man removed the Senate could consider whether the removal was justified. President Jackson refused to furnish any information on the subject at the request of the Senate. Messages and Papers of the Presidents, vol. 3, p. 132.

On December 7, 1841, President Tyler in his annual message to Congress said:

"I shall cordially concur in any constitutional measure for regulating and, by regulating, restraining the power of removal."

The bitter controversy which arose between President Johnson and the Senate led to the passage of the tenure of office act. He deemed this law unconstitutional and refused to obey it and was impeached in part on account thereof and acquitted by the Senate. Soon after the inauguration of President Grant, the most burdensome portions of the tenure of office act were repealed; but in his first annual message he said:

"It may be well to mention here the embarrassment possible to arise from leaving on the statute books the so-called 'tenure of office acts,' and to earnestly recommend their total repeal. It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by federal appointment against the will of the President. The law is inconsistent with a faithful and efficient administration of the government. What faith can an executive put in officials forced upon him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an administration which they know does not trust them?" 7 Messages and Papers of the Presidents, p. 38.

In the first administration of President Cleveland a considerable number of persons were removed or suspended for offensive partisanship. Senate committees and members thereof had made numerous requests for the reasons for the suspensions of certain officials during the recess of that body. President Cleveland sent a message to the Senate in which he informed it that these requests would not be complied with. Messages and Papers of the Presidents, vol. 8, p. 375.

Turning now to the judicial precedents, it was held in Parsons v. United States, 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185, that the President could alone and without advice of the Senate remove an officer who had a fixed term before that term expired, and this was followed in Shurtleff v. United States, 189 U. S. 311, 23 Sup. Ct. 535, 47 L. Ed. 828. It must therefore be regarded as settled that the President had the power to remove the plaintiff at any time during his term.

[5-7] Could the Postmaster General make such removal?

The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Wilcox v. Jackson ex dem. McConnel, 13 Pet. 498, 10 L. Ed. 264; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915.

In United States v. Fletcher, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. Ed. 378, though the President was required to act in the matter in controversy in a judicial capacity under the Articles of War in approving a report of a court-martial, it was held that the Secretary of War having acted over his own signature it must be presumed he acted by direction of the President in so doing. Northern Pacific Railway Co. v. Mitchell (D. C.) 208 Fed. 469.

It is alleged:

"That he has not been removed according to law." This is clearly a conclusion of law and not well pleaded.

"That the President of the United States has never recommended his removal to the Senate of the United States, nor has the Senate of the United States ever approved of his removal." Neither of these acts was necessary to a legal removal.

"That the Postmaster General has assumed the right and authority to remove this plaintiff from his position * * * of his own act and decision," and "said removal was not by the President nor by and with the advice and consent of the Senate." None of these allegations negative that the President may have authorized the Postmaster General to make removals in his stead when necessary.

We therefore find it unnecessary to pass upon the question as to whether, if the plaintiff expressly negatived the conferring of any authority in removal matters in the Post Office Department on the Postmaster General, a cause of action would be stated. There is no such allegation, and the presumption must prevail that the Postmaster General had such authority, and the petition was rightly dismissed.

That disposes of this case, but it may be added that the United States District Court, sitting as a court of equity, has no jurisdiction over the appointment and removal of public officers. White v. Berry,

171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199; Couper v. Smyth (C. C.) 84 Fed. 757; Taylor v. Kercheval (C. C.) 82 Fed. 497.

The decree of the District Court is affirmed.

SPEAR v. UNITED STATES. *

PORTER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

Nos. 4864, 4865.

1. CRIMINAL LAW ⟸1151—CONTINUANCE—DENIAL—ABUSE OF DISCRETION.
Discretion of court on motion for a continuance is not subject to review in the appellate court unless it be clearly shown the discretion was abused.

2. POST OFFICE ⟸35—OFFENSE—FRAUDULENT USE OF MAILS—AGENCY.
Where defendant, having received, from those actively engaged in conducting a fraudulent scheme, drafts and checks obtained from the victims, delivered them to a local bank for collection, and the bank pursuant to its ordinary custom transmitted the same through the mails for collection, defendant, though the bank was an innocent agent, was guilty of violating Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]) § 215, denouncing the offense of placing or causing to be placed in a post office matter for the purpose of executing a scheme to defraud, as he was chargeable with notice of the ordinary custom of banks in transmitting negotiable paper through mail for collection.

3. CRIMINAL LAW ⟸763, 764(6)—INSTRUCTIONS—REMARKS OF COURT—WEAKNESS OF EVIDENCE.
In a prosecution for using the mails to defraud, comment of the trial court on the weakness of the evidence, offered by defendant to show that his connection with drafts and checks obtained by those actively engaged in the scheme was casual and innocent, was not improper, where the court did not refer to defendant's failure to testify.

4. POST OFFICE ⟸35—OFFENSES—ELEMENTS.
Where, others having through fraud obtained checks and drafts, defendant undertook to aid in their collection, and for that purpose deposited them with a bank for collection, and the bank in process of collection transmitted them through the mails, defendant is guilty of a violation of Penal Code, § 215, providing that whoever, having devised any scheme to defraud, shall for the purpose of executing it or attempting to do it cause to be placed any letter in any post office, shall be punished; for, the collection of the checks and drafts being an essential part of the scheme, defendant cannot escape on the theory that he could not have made himself a party to the fraud by subsequently aiding in the collection of such drafts.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Ed Spear and Jack Porter were convicted under Penal Code, §§ 215, 37 (Comp. St. 1916, §§ 10385, 10201), for fraudulent use of the mails and conspiracy, and they bring error. Affirmed.

George W. Murphy, of Little Rock, Ark. (C. Floyd Huff, of Hot Springs, Ark., and E. L. McHaney, of Little Rock, Ark., on the brief), for plaintiff in error Spear.

X. O. Pindall, of Little Rock, Ark., for plaintiff in error Porter.

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

*Rehearing denied January 31, 1918.

W. H. Martin, U. S. Atty., of Hot Springs, Ark. (W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark., on the brief), for the United States.

Before HOOK, SMITH, and STONE, Circuit Judges.

HOOK, Circuit Judge. Spear and Porter were again convicted of fraudulent use of the mails and conspiracy (Penal Code, §§ 215, 37), after having been awarded a new trial (Spear v. United States, 143 C. C. A. 67, 228 Fed. 485), and have again prosecuted writs of error. A description of the fraudulent scheme will be found in our former opinion and need not be repeated here.

[1] No error was committed in denying Spear a continuance. The granting or denial of a continuance is a matter of discretion, and is not subject to review in an appellate court unless it be clearly shown that the discretion was abused. There was no such abuse by the trial court.

[2] Complaint is made of the admission in evidence of letters of a bank transmitting by mail certain drafts and checks to other banks for collection and remittance. The drafts and checks had been received from the victims of the fraudulent scheme by those actively engaged in conducting it. The latter turned them over to Spear, and he delivered them to a local bank for collection. The bank did not cash them, but accepted them for collection. Part of the scheme was to keep the victims quiescent until reports of payment were received. Collection of the drafts and checks was essential to the full consummation of the fraud, and the evidence of Spear's guilty assistance was sufficient. When he intrusted them to the bank he made it his agent, although it was innocent of the fraud. United States v. Kenofskey, 243 U. S. 440, 37 Sup. Ct. 438, 61 L. Ed. 836. The drafts and checks were drawn on banks in distant cities. The custom among banks, almost invariable, is to forward such collection items by mail with letters of transmittal, and Spear must have known the local bank would follow the ordinary course in the absence of instructions to the contrary. When the bank deposited the letters of transmittal in the mails, Spear, in legal effect, caused them to do so. United States v. Kenofskey, supra.

[3] Complaint is also made that the trial court in charging the jury commented upon the absence of witnesses to identify the men who, in a short period of time, gave between $30,000 and $40,000 of such drafts and checks to Spear. We see no objection to the remarks of the court. They were addressed largely to the efforts of Spear, who did not testify, to show by evidence, that was unsatisfactory in both source and probative value, that his connection with the drafts and checks was casual, innocent, and in an ordinary way. A state of facts tending to incriminate him had been shown, and when he undertook to explain it his neglect to produce existing satisfactory proof peculiarly within his power was a proper subject of comment by the court if none was made on his own failure to testify. Graves v. United States, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021. The case of Perara v. United States, 136 C. C. A. 623, 221 Fed. 213, is

not in point. There the evidence that was not produced by the accused was expert testimony as to the authorship of certain handwriting. There was no presumption that the handwriting was that of the accused, and no incriminating state of facts with respect to it imposing upon him the burden of affirmative explanation. Furthermore, the production of the expert testimony was equally within the power of the prosecution. It was held that the effect of the charge was to cast upon the accused the burden of proving his innocence.

[4] The contention that the fraudulent scheme was complete when the drafts and checks were received from the victims, and that Spear could not have made himself a party to it by subsequently aiding in their collection, is answered by our former opinion and by United States v. Kenofskey, supra. Such of the special instructions requested and denied as were in proper form and embodied correct statements of the law were sufficiently covered by the general charge. There is nothing else in the assignments of error requiring notice.

The sentences are affirmed.

HUNT et al. v. ORR et al.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4803.

1. TRUSTS ⊜103(4)—CONSTRUCTIVE TRUSTS—ATTORNEYS.

Defendants, attorneys at law, to whom an incorporated collection agency sent for collection an account, reduced the same to judgment. Practically the sole asset of the judgment debtor was a statutory right of redemption from foreclosure sale of his half interest in mining property which was subject to a mortgage of $30,000. Three months of the debtor's period of redemption had expired when the judgment was obtained, and, while the holders of several judgment liens were successively entitled within short periods to redeem in case the right was not exercised by the debtor, it would require payment of nearly $45,000 for the holders of the judgment to redeem. Less than a month after rendition of the judgment defendants purchased it from their clients, receiving an assignment, and two weeks later they wrote the collection agency from which they received the claim a letter, which, taken in connection, with the prior correspondence, sufficiently informed their clients of the facts in the case. At this time defendants offered to reassign the judgment upon a refund of the amount paid, plus their fees. *Held*, that as complainants, the clients, declined, through the collection agency defendants' offer, they cannot, defendants having redeemed the property and thus acquired title by use of the judgment, hold defendants as trustees on the theory that they misrepresented the value and collectibility of the judgment, for defendants acquired title only through a series of errors by third persons.

2. TRUSTS ⊜103(4)—CONSTRUCTIVE TRUSTS—INFORMATION.

Where the proposal and information contained in defendants' letter offering to reassign the judgment was communicated to complainants, the judgment creditors, a trust could not be predicated on the theory that the collection agency was no longer complainants' representative; the judgment having been previously assigned, and that information to it was not information to complainants.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Robert W. Hunt and others against Charles N. Orr and others. From a decree for defendants, complainants appeal. Affirmed.

William D. Bailey, of Duluth, Minn. (Oscar Mitchell, Jed. L. Washburn, and Albert C. Gillette, all of Duluth, Minn., on the brief), for appellants.

Frank B. Kellogg and William G. White, both of St. Paul, Minn. (Theodore Hollister and C. C. Haupt, both of St. Paul, Minn., on the brief), for appellees Charles N. Orr and others.

John W. Gilger, of Minneapolis, Minn., for appellees Charles N. Spratt and others.

Before HOOK, CARLAND, and STONE, Circuit Judges.

HOOK, Circuit Judge. This is a suit by Hunt & Co. of Chicago, Ill., to charge Orr, Stark & Collett, a firm of attorneys at law at St. Paul, Minn., and others, as trustees for them of a half interest in a mining property in Northern Minnesota, and for an accounting, upon the ground that the defendant attorneys purchased from them a judgment, while the relation of attorney and client existed, by misrepresenting its value and collectibility, and afterwards used the judgment in acquiring the property in question. The trial court entered a decree for the defendants on the merits, and the plaintiffs appealed.

[1] The case is within a narrow compass of fact. The plaintiffs had an account against one Sauntry of Minnesota, who was considerably involved in debt. They sent it to an incorporated collection agency in Chicago for collection, and the latter sent it to Orr, Stark & Collett who brought suit in the name of plaintiffs, and recovered judgment for $741.38. The judgment was rendered December 19, 1910. Practically the sole asset of Sauntry, the judgment debtor, was a statutory right of redemption from a foreclosure sale of his half interest in the mining property under a mortgage for $30,000. His period of redemption was 12 months from the sale, 3 of which had expired when plaintiffs' judgment was obtained. There were also several judgment liens on the property, the holders of which were under the Minnesota statute successively entitled within short periods to redeem if no redemption was made by Sauntry. If Sauntry redeemed, his property automatically became subject to the judgments. The amounts of the foreclosure sale and the judgments ahead of the plaintiffs' aggregated about $44,000, which plaintiffs would have had to pay if they redeemed.

On January 10, 1911, the defendant attorneys purchased the plaintiffs' judgment for $275, and took an assignment of it. In the fall of that year, having secured financial aid, and Sauntry having failed to redeem, they utilized their position as judgment creditors by redeeming from the foreclosure sale and prior liens; and eventually, after considerable litigation in the courts of Minnesota, they secured an affirmance of title in them to the Sauntry property. Orr v. Sutton, 119 Minn. 193, 137 N. W. 973, 42 L. R. A. (N. S.) 146; Id., 127 Minn. 37, 148 N. W. 1066, Ann. Cas. 1916C, 527. The property was worth much more than the money they invested. If the case stood as

at the time the judgment was purchased, there would be grave reason for plaintiffs' contention that the attorneys did not perform the duty imposed by their fiduciary relation of fully and fairly disclosing what they knew of the value and collectibility of the judgment. But two weeks later, January 25, 1911, they wrote the collection agency from which they received the business a letter which we think, taken in connection with the prior correspondence, contained sufficient information. They also offered to surrender the assignment upon a refund of the amount paid for it, plus their fees in the case. The collection agency advised them that the plaintiffs regarded the matter as closed, and that it did not think it advisable to reopen it. We need not consider whether this letter was an admission of previous fault, and resulted from the wiser counsel of a member of the firm who had not theretofore actively participated in the transaction, or was due to a realization of a greater value of the judgment or to some other cause; for the fact remains that there was an offer to restore the original status, and all the information was given that could reasonably have been required in the relation and the circumstances. In declining the offer the plaintiffs were undoubtedly influenced by the necessity of putting up temporarily over $40,000 to gain the difference of the few hundreds between the amount of their judgment and the amount paid them for it. That necessity was unavoidable, and it was enough to deter them. We put aside what happened at the redemptions about 8 months afterwards. The chance of obtaining title to the valuable property by use of the judgment was too negligible, too remote to be a factor of value. If the large redemption fund were raised, it might have been expected to force the payment of the small judgment by others interested, but more than that was not reasonably conceivable at the time. That it resulted as it did was due to a series of errors by those who were dealing too narrowly and technically with Sauntry's judgment debts.

[2] It is contended that the letter of January 25th to the collection agency should not be regarded because the connection of the agency with the matter ceased when the judgment was assigned on January 10th; that the affair was closed and the agency was no longer the plaintiffs' agent or representative. As to this defendants invoke the doctrine of Hoover, Assignee, v. Wise, 91 U. S. 308, 23 L. Ed. 392, and say that as the plaintiffs intrusted the business to the collection agency and the latter employed the attorneys and conducted with them all the material correspondence about the suit, the judgment, the assignment, etc., the collection agency, not the plaintiffs, was the client of the attorneys. We need not determine this, because we approve of the finding of the trial court that the substance of the letter of January 25th was communicated from the collection agency to the plaintiffs, and that the latter, sufficiently advised of the situation, decided to let the matter rest as it was.

The decree is affirmed.

GUITERMAN BROS. v. FINCH, VAN SLYCK & McCONVILLE.

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

No. 4903.

PATENTS ⊂⊃328—VALIDITY—INFRINGEMENT.

Patent No. 1,016,214, for a knit collar piece to be sewn into the collar band of coats, and which, when fastened, took the form of a truncated cone, fitting the neck snugly at the top, which was made by a tuck stitch, the tension of the yarn being changed during process of knitting, *held* to show invention, but to be limited to that particular stitch, and not to be infringed by defendant's collar, knit on a different machine, in which several different stitches were used.

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

Bill by Guiterman Bros. against Finch, Van Slyck & McConville. From a decree dismissing the bill, complainant appeals. Affirmed.

Amasa C. Paul, of Minneapolis, Minn. (Arthur P. Lothrop, of St. Paul, Minn., on the brief), for appellant.

John E. Stryker, of St. Paul, Minn., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Appeal from decree dismissing bill for infringement of patent No. 1,016,214. The article sought to be protected was a knit collar piece, which was made to be sewn into the collar band of coats, and when fastened took the form of a truncated cone fitting the neck snugly at the top, thus excluding air and cold. The appellee, in its manufacture of coats, uses a knit piece which performs the same general functions.

The broad claim made by appellant is that its patent covers all knit devices which may be readily secured to coat collars and having an outer or exposed edge fitting snugly and elastically to the neck. The appellee denies that there is anything novel in appellant's product, but if there be any novelty it is not in the result accomplished by the knit collar, but in the manner in which that result is reached through a particular method of knitting the fabric, and that the method in question is not used in the manufacture of appellee's collars. The trial court found that there was novelty in appellant's collar, but that such should be confined to the method of knitting, and also that this method was not employed in appellee's collar.

The prior state of the art reveals clearly that a variation in the snugness of knit garments to fit different parts of the body as the neck, wrists, and waist, has been long in use. This variation was accomplished in course of knitting by a change in the kind of stitch used. These changes were based on a difference in the amount of yarn consumed. There were three different kinds of stitches which could be thus combined; the cardigan, half-cardigan, and tuck stitches. The smaller the amount of yarn used the greater the contraction and elasticity, so that starting with a cardigan stitch and proceeding through the half-cardigan and tuck stitches, a garment could

be produced which would outline a broken truncated cone of three zones. Such a garment would clearly show the zone of each kind of stitch and a noticeable difference in the thickness of the fabric for each zone. These garments were knit on a tubular machine. The cylinder thus knit could then be cut, the cut edges bound and a collar made.

The appellant made its collar by using only one kind of stitch, the tuck stitch. It accomplished the narrowing effect by changing the tension of the yarn during the process of knitting. The tighter the yarn the more contracted and elastic would be the fabric. By this method it could form a piece of fabric of innumerable progressively narrowing zones smoothly running into each other, of the same thickness and of progressive degrees of tension or elasticity. It was knit on a flat machine, thus requiring no cutting or binding of edges.

The article produced by appellant, while entering an old field with an old material, is a distinctly superior article, in that it is of better appearance, better responds to the demands of the situation, and is more economical in its use of material. It is therefore novel. But its novelty is solely due to the method of its manufacture. That is the contribution to the art. It is covered by the patent, is entitled to protection, and at the same time marks the boundaries of the invention.

There is no claim that the collars of appellee are made by this method. Therefore the trial court was correct in its result and its reasoning, and the order dismissing the bill is affirmed.

COHN, RISSMAN & CO. v. HICKEY-FREEMAN CO.

(District Court, W. D. New York. July 2, 1917.)

No. 140-B.

1. PATENTS ⟸328—VALIDITY—ANTICIPATION.
   Cohn and Weiner patent, No. 1,121,581, for an improved process for cutting and fitting wearing apparel, consisting of cutting and working and seaming together two pieces of striped or patterned cloth, keeping the stripes or patterns in parallelism with the seam line so that they will follow longitudinally the curves of the body to be fitted, *held* invalid for want of novelty.

2. PATENTS ⟸7—VALIDITY—NOVELTY—"PATENTABILITY."
   The patent law does not require that an article itself produced by a process should be new, since "patentability" exists in a new process for producing an old result.
   [Ed. Note.—For other definitions, see Words and Phrases, Patentability.]

3. PATENTS ⟸7—"INVENTION"—WHAT CONSTITUTES.
   It is not invention for a patentee to merely carry forward an old process, describing it in new terms and adapted equivalent modes under conditions recognized as possible within the knowledge of any mechanic.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]

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4. PATENTS ⟸49—VALIDITY—UTILITY.
Where demand for clothing made according to complainant's patented process resulted from extensive advertising, such demand does not show utility or invention.

In Equity. Bill by Cohn, Rissman & Co. against the Hickey-Freeman Company. Bill dismissed.

George S. Pines and Arthur H. Boettcher, both of Chicago, Ill., for plaintiff.

Church & Rich, of Rochester, N. Y. (Wile, Oviatt & Gilman, of Rochester, N. Y., of counsel), for defendant.

HAZEL, District Judge. The specification of the Cohn and Weiner patent, No. 1,121,581, dated December 15, 1914, for an improved process for cutting and fitting wearing apparel, states that the process consists of cutting and working and seaming together two pieces of striped or patterned cloth, keeping the stripes or patterns in parallelism with the seam line so that they will follow longitudinally the curves of the body to be fitted. According to the patentees, in making fitted coats it was customary to cut the inner edges of the back halves curved, with the result that in striped or patterned material the back seam was intersected with lines forming darts, which gave to the coat a crude appearance. They therefore proposed to parallel the stripes or patterns with the back seam: (1) By cutting the material for the back halves straight at the inner edges and parallel with the pattern; (2) by shrinking at the armpits to form shoulder blade pockets; (3) by drawing in or shrinking adjacent the armholes to further throw outwardly the upper portion of the cloth above the armpit line; and (4) to draw the material outwardly just above the waist by stretching along the outer edge at the waist line, and then to shrink out the resulting wrinkles or puckering of the cloth. The specification also states that after completing the second and third steps just specified the inner edge of the back half "will have the proper curvature, but the cloth above the vent line will have to be thrown back to give the proper angular position to this edge." The defenses are, invalidity, prior use, and noninfringement.

[1-3] Plaintiff concedes at the outset that matched back form-fitting coats were not novel in the custom tailoring art, but contends that in the ready to wear industry only form-fitting coats of the mismatched kind—those having converging longitudinal stripes or patterns—were in the market at the date of the invention, and that its method of making coats, though not limited to ready to wear coats, was new and novel and resulted in a better appearing garment.

The primal questions are whether the combination, including as an essential element the shrinking of the cloth at predetermined sections adjacent the armholes in order to curve the center seam, after drawing in the cloth or a section at the outside of the half below the armpits for making a hollow for the shoulder bade, was a new combination, and whether a new result was attained thereby. The claims disclose the process, while the specification points out the feature which the patentees contend differentiates their process from prior processes

of custom tailors, reference being made to the drawings. The involved claims read as follows:

"1. The herein described process of cutting and fitting from striped or patterned cloth the two halves of a coat back, which consists in first cutting each half above the vent line along a straight line parallel with the stripes or pattern line, then shrinking the cloth at *predetermined* sections adjacent the outer edge *to curve the upper part* of the *piece outwardly* to the desired seam curvature, then stretching a section adjacent the outer edge to throw the part above the vent line inwardly to get the desired angle of the seam euge with reference to the part below the vent line, and then sewing the *curved* edges of the halves together.

"2. The improved process of cutting and shaping patterned cloth to form the back half of a garment which consists in first cutting a piece with the inner seam edge straight and parallel with the pattern lines and the upper and outer edge in accordance with the neck, shoulders, arm, and waist, then drawing in a section of the cloth adjacent the outer edge below the armpit by shrinking the material *to throw the part above the armpit outwardly to effect curvature of the seam edge*, then drawing in the section adjacent the armhole by shrinking the material *to further throw out the part above the armpit line and to bring the seam edge to the desired curvature*, then stretching the section adjacent the outer edge at the waist to throw the part above the section inwardly, then taking in and smoothing out by shrinking the wrinkles caused along the seam edge by such stretching."

The novel elements said to be embodied in the claims I have italicized. If the contentions of the plaintiff are sound and such claims are valid, a practical domination by the plaintiff of the production by wholesale tailors of form-fitting matched back coats now extensively worn by men and boys will result. Therefore the evidence pro and con has been carefully considered and the conclusion has been reached that the process under consideration does not disclose any patentable difference over the prior process practiced by custom tailors for a number of years before the patent in suit in matching backs in form-fitting coats, and in my opinion such prior process was adaptable to the ready to wear industry. Even though the patentees were the first to adapt their specific method to form-fitting coats or striped or patterned material, only such slight changes or modifications were involved as would occur to the ordinarily skilled tailor, and did not call for invention. It is true that the patent law does not require that an article itself produced by a process should be new, since patentability exists in a new process for producing an old result. 30 Cyc. 823. But the mode of operation in question in a strict legal sense was not novel or new.

Generally to manipulate two pieces of cloth by stretching and shrinking at different points, to wit, the shoulder, the neck, and the inner and outer edges of the seam at the waist line to produce a form-fitting garment, was an expedient as old as the tailoring art; and it is not believed to have been difficult, at the time of the conception in suit, to produce by known steps a form-fitting coat of striped material in which the stripes ran parallel and did not converge at the back seam. In some of the ready to wear coats of striped material the lines, as heretofore stated, intersected the back center seam, but that was due, I think, to haste, ignorance, and carelessness on the part of those making ready to wear garments, and not to lack of knowledge by all

tailors as to how to make a form-fitting matched back coat. The patentees' method of shrinking the cloth at certain sections near the armhole to throw the cloth outwardly for the shoulder blade and further shrinking to curve the inner edge were steps familiar to the art.

Plaintiff claims that prior to the time of the patent in suit tailors, in making form-fitting matched back coats, shrunk for blade hollow only, and not to curve the upper part of the back half, but in my mind the shrinking to obtain a blade pocket resulted in curving the back seam. The patentees merely carried forward an old process, describing it in new terms and adapting equivalent modes or steps "under conditions recognized as possible, within the knowledge of any mechanic, but not previously stated in language," but this was not invention. Berardini v. Tocci (C. C.) 190 Fed. 329. As said in Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647, by Mr. Justice Lamar in quoting from the opinion delivered by Mr. Justice Swayne in Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566:

"But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use."

A few references to the testimony in support of the views herein expressed will suffice. The witness Cohn substantially testified that in making form-fitting matched back coats he took a hollow-backed pattern and straightened up the back seam, cutting the material by the straightened pattern, that he then sewed the parts together and shrunk them until they conformed to the hollow-backed pattern. Pingitore swore that he had made a number of "whole back coats" and "two-piece back coats" of striped material; that he shrunk and stretched the material at the center, sides, and waist line, stretching the side seam and shrinking the center line to make it follow the curve of the spine.

Weiner testified that for the past 30 years he had, at various times, made matched back form-fitting coats by cutting the back seam straight and by stretching at the side seam and shrinking at the inner seam at the waist line and by shrinking at the armpit, that this was the method used, not only in custom tailoring, but also in ready to wear manufacture, and that the object was to get a curved seam, but to have the stripes run parallel with the seam. The witness Scott illustrated the manner in which the back halves of coats were treated (see Exhibits E and F), and while Exhibit F indicates a longitudinal stretching of the back and Exhibit E an all-shrinking method without any stretching, his testimony in its entirety indicates that shrinking around the armhole was a familiar step in forming the blade pocket and in obtaining rounded shoulders. In the American Tailor and Cutter, dated May, 1908, there is described a method for cutting striped flannel in such a way as to parallel the lines in the center of the back. The article states that the pattern was cut with a straight center seam especially for striped goods, and that the back was stretch-

ed at the side seams and shrunk at the center seam to avoid bulging out at the waist and to impart a medium fit, and Haglund testified that he did not refer in the article to shrinking around the armhole, as that was required in all coats irrespective of the material.

Other credible witnesses have sworn that they have, for many years, practiced the principal steps described in the patent in suit in making form-fitting coats of striped or patterned material, although not specifically claiming that they shrink at the armhole to curve the inner edge of the back half. The witness Longo, however, on cross-examination said that shrinking at the armhole to make a blade pocket swung over the back half of the center seam, The witness Haglund, giving similar testimony, referred to a paper pattern (Exhibit 35), showing a straight inner seam and the effect thereon of shrinking and stretching at various points to curve the center seam at the upper part as well as at the waist line.

[4] Defendant also contended, and evidence is given in support thereof, that the use of a center seam in a coat of striped or patterned material was a matter of preference, largely governed by fashion, as was also the matter of a back with parallel or intersecting lines; but, in my opinion, mismatched back ready to wear coats first appeared upon the market, not so much in response to fashion, as because they were more easily and less expensively manufactured than the matched back garments. The demand arising for matched back form-fitting garments was, it is believed, due in a great measure to plaintiff's method of advertising by attractively contrasting such garments with mismatched back coats. Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707. Other contentions relating to the invalidity of the patent in question or the insufficiency of defendant's proofs to establish prior use need not be discussed, as in my opinion such prior use has been satisfactorily shown, and the patent in suit is therefore held invalid for want of novelty.

A decree may be entered dismissing the bill, with costs.

NORTH AMERICAN CO. v. ST. LOUIS & S. F. R. CO.

In re COY.

(District Court, E. D. Missouri, E. D. July 17, 1916.)

No. 4174.

1. RAILROADS ⇐161—LIENS—PRIORITY.

In 1912 intervener, while a passenger on the cars of the defendant railroad company, was injured in the state of Missouri. May 2, 1913, he brought an action in the circuit court of Arkansas against the railroad company to recover damages for his injuries, recovering judgment July 2d. May 28, 1913, on a creditors' bill filed in the federal District Court against the railroad company, receivers of all the property of the company were appointed and immediately took possession. Sand. & H. Dig. §§ 6251, 6252 (Kirby's Dig. § 6661), provides that every person who shall sustain loss or damage to person or property from any railroad shall have a lien on the roadbed, buildings, equipment, income, franchises, and all other appurtenances of such railroad superior and paramount to that of

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

all persons interested in the railroad, as managers, lessees, mortgagees, trustees, and beneficiaries under trusts, but such lien shall not be effectual unless suit be brought within one year after it occurs. *Held* that, intervener having sued within one year after his lien attached, such lien, having been reduced to judgment, could not be defeated on the ground that judgment was not recovered until after the appointment of receivers; the lien inhering, not in the judgment, but in the loss or damage.

2. RAILROADS ⟸161—LIENS—STATUTE.
The lien given by the statute was not limited to citizens and residents of Arkansas, and intervener, having instituted action in the circuit court of Arkansas, was entitled to the lien, though the accident occurred in Missouri.

3. RAILROADS ⟸171(8)—LIENS—PRIORITIES.
Under Sand. & H. Dig. §§ 6251, 6252 (Kirby's Dig. § 6661), declaring that every person who shall sustain loss or damage to person or property from any railroad shall have a lien therefor upon the roadbed, buildings, equipment, etc., superior to that of mortgagees, trustees, and beneficiaries under trusts, the lien given one injured is superior to the claims of mortgagees whose mortgages were placed on the railroad company's property after enactment of the statute.

In Equity. Bill by the North American Company against the St. Louis & San Francisco Railroad Company, on which receivers were appointed. Petition of J. L. Coy for intervention, praying the payment of the amount of his judgment against the defendant railroad company. On exceptions to the report of the special master. Exceptions sustained, and claim declared a lien and directed paid.

Pace, Seawell & Davis, of Little Rock, Ark., for intervener.
W. F. Evans and E. T. Miller, both of St. Louis, Mo., for defendant.
Nagel & Kirby and Allen C. Orrick, all of St. Louis, Mo., for trustees.

SANBORN, Circuit Judge. On August 17, 1912, J. L. Coy, while riding as a passenger upon the cars of the St. Louis & San Francisco Railroad Company, was injured at Chaffee, in the state of Missouri. On May 2, 1913, he brought an action in the circuit court of Crawford county, Ark., against the railroad company, to recover damages for his injuries. On May 28, 1913, upon a creditors' bill, filed in this court, against the railroad company, receivers of all the property of the company were appointed, who immediately took possession thereof and have since been administering that property. On July 2, 1913, a judgment was rendered in the circuit court of Crawford county in favor of Coy and against the railroad company for $18,000, which was subsequently affirmed on June 1, 1914, by the Supreme Court of the state of Arkansas. St. Louis & San Francisco R. R. Co. v. Coy, 113 Ark. 265, 168 S. W. 1106.

Prior to the time when any of the mortgages upon the property of the Frisco Company were made, and ever since, there has been a statute in Arkansas which provides that every person who shall sustain loss or damages to person or property from any railroad for which a liability may exist at law shall have a lien therefor upon the roadbed, buildings, equipments, income, franchises, and all other appurtenances of said railroad, superior and paramount to that of all persons interested in said

railroad as managers, lessees, mortgagees, trustees, and beneficiaries under trusts or owners, but such lien shall not be effectual unless suit shall be brought upon the claim within one year after it accrued. Sandels & Hill's Digest of the Statutes of Arkansas, §§ 6251, 6252; Kirby's Digest, § 6661. Mr. Coy has presented to this court his application for payment of his judgment out of the income or out of the proceeds of the property of the railroad company in preference to the creditors secured by the mortgages upon the property. The master was of the opinion that he was entitled to no preference, because he obtained no judgment until after the receivers were appointed in this court and the property was segregated and placed in their charge. It is also contended that Coy is entitled to no lien upon the property of the railroad company in Arkansas superior to that of the bondholders secured by the mortgage, because the statute giving the lien is a local statute of that state, which was not enacted for the benefit of nonresidents thereof, and because the accident upon which Mr. Coy's judgment is founded occurred in the state of Missouri, and not in the state of Arkansas.

[1] But under this statute of Arkansas the lien granted inheres, not in the judgment, but in the loss or damage to the person or property from the railroad, for which a liability may exist. This loss or damage to Mr. Coy, for which the liability of the railroad company existed, occurred in August, 1912, and from that time, in the opinion of the court, the lien upon the property of the railroad company existed. It is true that the continuance and the enforcement of the lien was conditioned by the commencement of a suit by Mr. Coy upon the cause of action within one year after that cause of action accrued and after the lien attached. But that is immaterial now, because he commenced his action within the year, and before the suit was commenced in this court for the appointment of the receivers and the administration of the estate.

[2, 3] Nor was the benefit of the statute or the remedy granted under it limited to the citizens and residents of Arkansas, or to those who sustained damages within that state. The statute is broad, simple, and comprehensive. It provides that every person who shall sustain loss or damage to person or property from any railroad, for which a liability may exist at law, shall have the lien. In the opinion of the court Mr. Coy is entitled to a lien upon the property of the Frisco Railroad Company situated in the state of Arkansas from the time of his injury in August, 1912, to the present time, prior in right and superior in equity to the claims of the parties secured by the mortgages upon the property, all of which were placed there after the Arkansas statute was enacted. Southern Railway Co. v. Bouknight, 70 Fed. 445, 446, 450, 17 C. C. A. 181, 182, 186, 30 L. R. A. 823; Central Trust Co. v. Railroad Co. (C. C.) 65 Fed. 257, 260, 262; Railway Co. v. Frazier, 139 U. S. 288, 11 Sup. Ct. 517, 35 L. Ed. 196; Thompson v. St. Paul City Ry. Co., 45 Minn. 13, 47 N. W. 259.

It is accordingly ordered that the fourth, fifth, sixth, and ninth exceptions to the report of the master be, and they are hereby, sustained, and it is further ordered and adjudged that the claim of the intervener, Coy, for payment of the amount of his judgment and interest, is secured by a lien under the statute of Arkansas upon the property of

the Frisco Railroad Company in Arkansas, dating from August, 1912, prior in time and superior in equity to the liens of the various mortgages upon this property, that the said claim is hereby allowed as a preferential claim, and the receivers are hereby ordered and directed to pay it out of the income of the property now in their hands, and that in case such payment is not made on account of an appeal herefrom, or otherwise, that then, in case this order and decree shall be affirmed, the purchasers at the foreclosure sale herein shall take the property subject to said lien, shall by such purchase assume the payment of this claim, and that upon the affirmance of this order they shall forthwith pay it.

Ex parte CALLOWAY.

(District Court, M. D. Alabama, N. D. at Montgomery. November 13, 1917.)

ARMY AND NAVY ⊂=20—MILITARY SERVICE—CUSTODY.

Petitioner, who duly registered as required by National Conscription Act May 18, 1917, c. 15, was drawn for military service, duly examined, and accepted. On October 23, 1917, petitioner was directed by the local board of the draft body having custody of his registration papers to report to the office of the board on October 29th for transportation to one of the mobilization camps of the National Army. Petitioner failed to report, being in custody under an indictment found October 18, 1917, charging him with burglary and petit larceny. November 2d he pleaded guilty to the offense of petit larceny, an offense involving moral turpitude, and was fined, being committed to work out the fine and costs. A few hours thereafter petitioner made application for writ of habeas corpus, alleging that he was illegally restrained of his liberty by the state authorities, and praying that he be delivered into the custody of the local board for military service. *Held*, in view of the rulings of the provost marshal general, petitioner having been convicted of an offense involving moral turpitude and having been taken into custody by the state authorities before he was required to report to the local board and before he became a soldier, he is not entitled to be discharged from the custody of the state authorities, though liable for military service at the expiration of his imprisonment.

In the matter of the petition of Phil Calloway for writ of habeas corpus. Writ denied.

J. W. Brassell and L. A. Sanderson, both of Montgomery, Ala., for petitioner.

Wm. T. Seibels, Co. Sol., of Montgomery, Ala., for respondent sheriff.

HENRY D. CLAYTON, District Judge. The facts necessary to an understanding of the question presented here for decision are without dispute. The petitioner was duly registered as required by the National Conscription Act. Act Cong. May 18, 1917. He was drawn for service in the army provided for in said act, duly examined, and accepted. On October 23, 1917, he was ordered by the local board of Montgomery, the draft body having custody of his registration papers, to report at the office of that board on October 29, 1917, for transportation to one of the mobilization camps of the National Army.

Petitioner failed to report at the office of the local board as ordered, for on that date he was confined in the jail of Montgomery county under an indictment found October 18, 1917, charging him with burglary, a felony, and petit larceny, a misdemeanor. On November 2, 1917, he appeared in the circuit court of Montgomery county, waived a jury, and in open court pleaded guilty to the offense of petit larceny, an offense involving moral turpitude, and was fined $25 and costs, and petitioner is now held in jail under a sentence of 57 days to work out the fine and costs as provided by the Alabama law.

A few hours after petitioner's conviction in the state court, and on the same day, he made application for the writ in this case, alleging that he was being illegally restrained of his liberty by the state authorities, and praying that he be delivered into the custody of the local board of Montgomery for military service in the National Army of the United States.

It will be noted that the petition for the writ in this case is not filed by the local board of Montgomery claiming custody of Calloway, nor is it filed by any representative of the United States Army. It is filed by Calloway himself, in his own name and in his own behalf, and he, the petitioner, whose application for the writ shows he is not entitled to his own custody, alone asks to be discharged from the custody of the state authorities.

Eleven days before the date he was to report to the local board, and before he actually became a soldier of the United States, he was indicted in a court of competent jurisdiction, and later, on his own plea, convicted, of an offense involving moral turpitude. Under these facts and circumstances, the court is of opinion that the petitioner is not entitled, on his own application, to be released from the custody of the state authorities, who hold him under a valid judgment of conviction in a court of competent jurisdiction for an offense involving moral turpitude, and not for any offense committed in the performance of his duty as a soldier of the United States.

In passing, it may be noted that this ruling is in consonance with the view taken by the provost marshal general in No. 5 of the Compiled Rulings of that office, paragraph (e), wherein it is stated that a person convicted of a misdemeanor is not entitled to exemption from draft on that ground; but, "if the person called is serving a term, unless the authorities release him, he will be required to serve after the expiration of his term." When the application for the writ in this case was filed, petitioner was held under a valid judgment of a court of competent jurisdiction, and, in effect, was serving a term.

The petitioner, on his own application and under all the facts and circumstances of this case, is not entitled to be discharged. His application for the writ will therefore be denied, and petitioner, Calloway, will remain in the custody of the state authorities. An order will be accordingly entered.

CONNECTICUT GENERAL LIFE INS. CO. v. WELDON et al.

(District Court, M. D. Alabama, N. D., at Montgomery. November 24, 1917.)

No. 227.

1. MORTGAGES ⟸126—DESCRIPTION—PROPERTY INCLUDED.

Where the written application for a loan signed by defendant showed that a part of the property which he agreed to mortgage was his homestead, which he occupied and on which was located his residence, etc., the mortgage, which did not describe the quarter section on which was located defendants' homestead, yet stated that it embraced defendant's home place, and that each and every part of such place was conveyed, whether particularly described or not, included that portion of the land on which was located defendant's homestead.

2. HOMESTEAD ⟸133—CANCELLATION OF CONVEYANCE—BURDEN OF PROOF—FRAUD.

Where the terms of a mortgage included defendants' homestead, defendants had the burden of proving that they were misled and deceived into signing it, and that it was obtained through fraud or misrepresentation of the mortgagee's agent.

3. MORTGAGES ⟸596, 597—FORECLOSURE—REDEMPTION.

Under Code Ala. 1907, §§ 5746, 5747, respectively declaring that where real estate is sold under any deed of trust or power of sale in a mortgage, it may be redeemed by the debtor from the purchaser within two years thereafter in the manner following, and that the possession of the land must be delivered to the purchaser within ten days after sale thereof by the debtor if in his possession or any one holding under him by privity title on written demand by the purchaser, a debtor, unless he surrenders possession of the land within ten days after written demand, loses his right to redemption.

4. MORTGAGES ⟸596, 597—FORECLOSURE—REDEMPTION—RIGHT TO REDEMPTION.

Under Code Ala. 1907, §§ 5746, 5747, relating to redemption of land sold under mortgage foreclosure and delivery of possession to purchaser, a mortgagor must deliver possession of all of the land mortgaged upon proper demand after sale, and his retention of a portion of the land included in the mortgage will, where without excuse, forfeit his right to redemption.

5. QUIETING TITLE ⟸7(2)—CLOUD ON TITLE—RIGHT OF REDEMPTION.

A purchaser of land sold under mortgage foreclosure is entitled to have quieted his title against the mortgagor's statutory right of redemption, where the mortgagor by his refusal to deliver possession of all of the premises within ten days after written demand forfeited his right of redemption.

6. COURTS ⟸328(2)—FEDERAL COURTS—JURISDICTIONAL AMOUNT.

Land worth not less than $7,500 was sold to foreclose a mortgage for $2,500. The mortgagor having refused to deliver possession of the whole of the mortgaged premises, the mortgagee, which purchased the property on foreclosure, sued to quiet its title to that portion of the premises of which it had acquired possession against any right of redemption by the mortgagor and incidentally to recover the land, possession of which the mortgagor had withheld. *Held*, that though the portion of land withheld by the mortgagor was worth less than $3,000, a greater sum than that amount was involved, the equity of redemption obviously being worth about $5,000, and hence the federal court had jurisdiction.

7. QUIETING TITLE ⟸50—SUITS—COMPLETE RELIEF.

A mortgagee having purchased property on foreclosure and having been admitted by the mortgagor into possession of all but a small part of the land sued to quiet title to such land on theory that mortgagor, by

refusing to surrender possession of whole on demand, had forfeited right of redemption, *held*, that, as equity abhors a multiplicity of suits, that portion of the bill seeking to recover the land withheld by the mortgagor is not open to objection on the theory that the mortgagee should not be allowed to maintain its bill to quiet title to lands not in its possession, but the right of the mortgagee to recover the lands withheld must be determined so as to give complete relief.

In Equity. Suit by the Connecticut General Life Insurance Company against James W. Weldon and another. Decree for complainant.

W. A. Gunter, Sr., of Montgomery, Ala., for plaintiff.
Curry & Walker, of Clanton, Ala., for defendants.

HENRY D. CLAYTON, District Judge. On April 29, 1916, J. W. Weldon and wife, to secure a loan of $2,500 made to them by the Connecticut General Life Insurance Company, a corporation and citizen of Connecticut, executed a mortgage to that company on certain land owned by them in Chilton county, Ala., and described in the mortgage as follows: S. W. ¼ of S. W. ¼, Sec. 1; N. ½ of S. ½, Sec. 2; W. ½ of N. W. ¼, Sec. 12; N. W. ¼ of S. W. ¼, Sec. 12; and S. ½ of N. W. ¼, Sec. 2, all in township 20, range 13—and the land was further described, to quote the language of the mortgage, "known as the 'Home Place' of J. W. Weldon, and each and every part of said place is hereby conveyed whether particularly described or not, and all of the lands now owned by the said J. W. Weldon in Chilton county are hereby conveyed." The mortgage was duly recorded. Default having been made in the payment of some of the interest notes, the plaintiff elected to consider all of the debt due, as was provided in the mortgage, and foreclosed said mortgage by sale under the power in the mortgage. Accordingly, after due advertisement, the lands were sold on January 9, 1917. The mortgagee, the plaintiff, became the purchaser at the mortgage sale and received a deed in pursuance of the sale. Demand in writing was then made upon Weldon and his wife for the possession of the lands. They surrendered possession of the 400 acres of land described by number in the mortgage, but possession of 40 acres, the S. E. ¼ of the S. E. ¼, Sec. 2, Tp. 20, R. 13, which was their homestead and occupied by them as such and which 40 acres was not described by numbers in the mortgage, was withheld from and refused the plaintiff, Weldon alleging that this 40 acres was not included in the mortgage. The plaintiff then filed its bill in this court against the defendants, Weldon and wife, the mortgagors. The bill primarily seeks to quiet plaintiff's title to the 400 acres which it is now in possession of against any statutory right of redemption in the Weldons; plaintiff alleging that the defendants, by failing to surrender the entire tract of land within ten days after demand in writing, forfeited all right to redeem said land under the statutes of Alabama. Incidentally the bill seeks to recover the 40 acres of land, the possession of which is unlawfully retained by Weldon. Damages for its detention are also sought. The defendants in their answer, as amended, to the bill insist that the value of the 40 acres which they retain is only $600, and hence not within the jurisdiction of the court, and that the value of this disputed 40 acres is the only matter

in dispute here. They also allege that the mortgage, so far as the disputed 40 acres is concerned, was obtained by fraud and misrepresentation on the part of plaintiff, through its agent or attorney, and that defendants were misled and deceived into signing a mortgage which they never intended to sign. The cause is now submitted for final decree upon all the pleadings and upon the evidence which was heard orally before the court.

[1] 1. While the 40 acres of land, the ownership and possession of which is in dispute here, is not described in the mortgage by the government numbers of the land lines (section, township, and range), this tract of land is covered by the further description of the mortgaged premises as "the 'Home Place' of said J. W. Weldon, and each and every part of said place is hereby conveyed whether particularly described or not, and all of the lands now owned by the said J. W. Weldon in Chilton county are hereby conveyed." This description is not in itself indefinite, and clearly includes the disputed 40 acres. In addition to this, the written application of Weldon for the loan, which was signed by Weldon and is introduced in evidence, shows that a part of the property which he mortgaged was his homestead, which he occupied, and on which was located his residence, stables, cribs, outhouses, and tenant houses. It is not disputed that this was all the land he owned in Chilton county, Ala. There is no merit, therefore, in the contention that the description given in the mortgage does not cover the 40 acres in dispute, the S. E. ¼ of the S. E. ¼, Sec. 2, Tp. 20, R. 13, Chilton county, Ala.

[2] 2. The burden is upon the defendants in this case to prove to the reasonable satisfaction of the court that they were misled and deceived into signing the mortgage, or that it was obtained by the fraud or misrepresentation of plaintiff's agent. This burden they have not discharged. The oral and documentary evidence leave no room to doubt that they signed this mortgage with full knowledge of its contents and of the land they were mortgaging. The court is satisfied that plaintiff's agent, Adams, read the mortgage over to them, explained to them what land was included in the mortgage, and that Adams was not guilty of any fraud or misrepresentation in securing the execution of the mortgage. It is plain to the court that the defendants intended to mortgage their home place, and that they knew they were mortgaging it when they executed the instrument.

[3] 3. The Alabama statute, Code Ala. 1907, § 5746, relating to redemption of real estate by debtors, provides:

"*Where real estate*, or any interest therein, *is sold under* execution, or by virtue of any decree in chancery, or under any deed of trust, *or power of sale in a mortgage, the same may be redeemed by the debtor*, his vendee, junior mortgagee, or assignee of the equity or statutory right of redemption, wife, widow, child, heir at law, devisee, or his vendee or assignee of the right to redeem under this Code, *from the purchaser*, or his vendee, *within two years thereafter in manner following.*" (Italics supplied.)

"In manner following" is indicated by the next section of the Code (section 5747), which declares:

"The possession of the land must be delivered to the purchaser, within ten days after the sale thereof, by the debtor, if in his possession, * * * on written demand of the purchaser or his vendee. * * *"

Unless the debtor surrenders possession of the land within ten days after written demand, he loses his right of redemption. As was said by the Supreme Court of Alabama in Farley v. Nagle, 119 Ala. 622, 624, 24 South. 567, 568:

"The statute makes it a condition precedent to redemption, that the debtor must, within ten days after the sale, have delivered possession of the property sold to the purchaser on his demand or that of his vendee. Unless the debtor remains in possession after such demand as the tenant of the purchaser, a failure to deliver possession in the time prescribed forfeits the right of redemption. Stocks v. Young, 67 Ala. 341."

This is the law to-day. However, since the Code of 1907, § 5747, quoted above, the demand for possession must be in writing. Hutchison v. Flowers, 175 Ala. 651, 57 South. 719. The surrender of possession, upon written demand after sale, is a condition precedent to redemption; unless this condition is performed the right of redemption does not accrue. Stocks v. Young, supra; Sandford v. Ochtalomi, 23 Ala. 669; Paulling v. Meade, 23 Ala. 505; Baker v. Burdeshaw, 132 Ala. 166, 31 South. 497.

[4] 4. The words of the statute are that "the possession of the land must be delivered to the purchaser." The mortgagor, if he would preserve his statutory right of redemption, must yield possession and control of the mortgaged premises on proper demand after sale. He cannot illegally or arbitrarily refuse to deliver the possession of any part of the land mortgaged and preserve his statutory right of redemption to that part of the land which he did deliver. The delivery of possession required by the statute is delivery of possession of the entire tract of land mortgaged. "Redemption of lands under our statutes to that end cannot be exercised otherwise than that of the whole property bought at the sale. The process contemplated and required by the statutes makes an indivisible entity of the act of redemption." Morrison v. Formby, 191 Ala. 104, 105, 67 South. 668, 669. Property cannot be redeemed by piecemeal. Cowley v. Shields, 180 Ala. 48, 56, 60 South. 267. Nor can delivery of possession be by piecemeal. The mortgagor must deliver possession of all the land mortgaged, upon proper demand after sale, and his illegal retention of any part of the land, even though he has surrendered possession of the major portion of the lands, under the facts and circumstances of this case, forfeits his statutory right of redemption to the entire parcel of land. In the well-considered case of Nelms v. Kennon, 88 Ala. 331, 6 South. 744, 745, Justice McClellan, afterwards Chief Justice, speaking for the court said:

"It is upon the party seeking to avail himself of the right of redemption, to allege and prove the statutory delivery of possession. Precisely what constitutes such delivery has, it is believed, never been defined; nor is it our purpose to enter upon definition now, further than is necessary to meet the facts of this case. Of course, there can be no doubt that the statute means actual possession. It would seem to follow, too, that the delivery must be the 'clear possession,' as it is sometimes called, to the exclusion of every other person; the same as a sheriff would give on a writ of habere facias possessionem. This would involve the removal from the premises of the personal property of the debtor, and of his household, the members of his family, his servants, and all persons on the land, through family or contract relations to him, except only his tenants, who, by another provision of the statute, are

allowed to remain as the tenants of the purchaser. Excepting, however, tenants, who are thus specially provided for, we apprehend that the statute is not complied with, the delivery of possession required by it not accomplished, unless and until there is such termination of occupancy on the part of the debtor, his family and household, in their persons and effects, as will admit of the peaceable entry, and quiet, unrestricted, and unobstructed possession and use, of the purchaser."

[5] There has been no such delivery of possession here. The mortgagor in this case has, without legal or valid excuse, failed to deliver possession of 40 acres of land included in the mortgage, on proper demand after sale, to the purchaser. It follows, therefore, that he has forfeited his right to redeem any part of the land. His claim of an alleged statutory right of redemption to the land is a cloud upon the plaintiff's title, and is capable of being used as a means of vexatious litigation. The purchaser cannot, with safety, sell or improve the land with such a cloud hanging threateningly over it, and it should be removed.

[6] 5. Counsel for defendants, evidently proceeding upon the idea that the matter in dispute or controversy in this case is only the value of the 40 acres on which is Weldon's homestead, the value of which the court finds is less than $1,000, contend that the court is without jurisdiction of this cause because that sum is less than the requisite jurisdictional amount of $3,000. Judicial Code, §§ 24, 37 (Act March 3, 1911, c. 231, 36 Stat. 1091, 1098 [Comp. St. 1916, §§ 991 (1) to 991 (25), 1019]). However, after what has been said above, it is evident that the matter in controversy here is the claim of defendant's statutory right of redemption to the 400 acres of land described by numbers in the mortgage. The evidence clearly proves that this land is worth not less than $7,500, and that $8,000 to $10,000 would not be an unreasonable price for same. As the land is mortgaged for only $2,500, it is plain that defendant's statutory right of redemption, the existence of which is in dispute here, is clearly of value from $5,000 to $6,000. The requisite jurisdictional amount has been shown.

[7] 6. It is next insisted by defendant that plaintiff should not be allowed to maintain his bill to quiet title to lands which he is not in possession of. But the plaintiff is in possession of the 400 acres, and asks the court to remove a cloud on it. Before the court can determine this question an incidental question arises which must be disposed of, the title to the disputed 40 acres. This is merely collateral to the main purpose of plaintiff's bill to quiet its title to the 400 acres of land, and when the court once obtains rightful jurisdiction of the parties and the subject-matter of the action, both of which it has in this case, for one purpose, the removal of the cloud on the 400 acres, the court will make its jurisdiction effectual for complete relief—it will determine the whole controversy. Ober v. Gallagher, 93 U. S. 199, 206, 23 L. Ed. 829. As was said by this court in the case of Continental Trust Co. v. Tallassee Falls Manufacturing Co. (D. C.) 222 Fed. 694, 712:

"Of course, it is a familiar principle that, when a court of equity once acquires jurisdiction of a particular subject-matter and over particular parties, it will not determine the case by piecemeal, but will settle the whole

controversy and will not remit the parties to any other forum for any part of their appropriate relief."

This principle is thoroughly settled. Having determined that Weldon illegally retains possession of the S. E. ¼ of the S. E. ¼, Sec. 2, Tp. 20, R. 13, the court is of opinion that he should not be left in possession and the plaintiff forced to bring another suit in some other forum. The equitable jurisdiction of the court is clear to afford entire relief in one suit. Equity abhors a multiplicity of suits and will settle all suits about one matter in one suit wherever possible. Enterprise Lmbr. Co. v. First Nat. Bk., 181 Ala. 388, 61 South. 930. The plaintiff here is entitled to have complete justice done it in one suit. Under the facts of this case plaintiff has the legal title to this disputed 40 acres. Weldon should not be left in its wrongful possession.

A decree will be rendered in favor of the plaintiff granting the relief prayed for in the bill.

ALTHEIMER & RAWLINGS INV. CO. v. ALLEN, Internal Revenue Collector.

(District Court, E. D. Missouri, E. D. January 29, 1917.)

1. INTERNAL REVENUE ⊂⊃9—CORPORATION TAXES—"GROSS INCOME."

Act Aug. 5, 1909, c. 6, § 38(1) 36 Stat. 112, imposes a special excise tax of 1 per cent. upon the entire net income over and above $5,000 received by any corporation. Section 38(2) declares that such net income shall be ascertained by deducting from the gross amount of the income of such corporation: First, all of the ordinary and necessary expenses actually paid within the year; second, all losses sustained; and, third, interest actually paid within the year on its bonded or other indebtedness to the amount of such bonded or other indebtedness not exceeding the paid-up capital stock of such corporation. The statute further defines "gross income" as the gross amount of the income of such corporation received during the year. A corporation engaged in brokerage business bought and carried securities for its customers. On these purchases the customers paid only a part of the purchase price, and consequently owed the corporation balances on which they paid interest, while the corporation in turn also paid on the purchases only a part of the purchase price, and accordingly owed balances on them, on which it paid interest, but the interest received by the corporation from its customers on such purchases exceeded the interest paid by it on the purchases. *Held*, that in computing the gross income of the corporation, the entire interest received by the brokerage corporation from its customers on account of such securities must be returned as part of the gross income, without deducting therefrom the interest paid by the corporation on account of the same purchases.

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

2. INTERNAL REVENUE ⊂⊃9—CORPORATION TAXES—DEDUCTIONS.

In such case, the interest paid by the corporation on account of the purchases of securities must be treated as payments made by the corporation on its bonded or other indebtedness, and consequently can, in computing the net income, be deducted only to an amount not exceeding the paid-up capital outstanding at the end of the year.

At Law. Action by the Altheimer & Rawlings Investment Company against E. B. Allen, Collector of Internal Revenue for the First District of Missouri. Judgment for defendant.

David Goldsmith, of St. Louis, Mo., for plaintiff.

Arthur L. Oliver, U. S. Atty., and Wm. H. Woodward, Asst. U. S. Atty., both of St. Louis, Mo., for defendant.

DYER, District Judge. The plaintiff's brief intelligently and fairly states the case and the respective contentions of the parties. That statement is as follows:

This case has been submitted on an agreed statement of facts, which admits all the allegations of fact contained in the petition. It appears therefrom that the action is one for the recovery of money paid upon assessments made by the United States Commissioner of Internal Revenue under the excise law of 1909, which provided for a tax of 1 per cent. upon the net annual income of corporations. The petition contains three counts; the first being for the recovery of money paid on an assessment for the year 1909, the second being for the recovery of money paid on an assessment for the year 1910, and the third being for the recovery of money paid on an assessment for the year 1911.

The plaintiff made its return for each of these three years under that act, but the Commissioner of Internal Revenue held in each instance that the return did not show the proper net income, and accordingly made an assessment against the plaintiff for an increased amount for each of the three years. These three assessments were paid under protest, and the present action was brought after the preliminary proceedings required by the federal statutes had been taken.

The matter out of which the present controversy arose is the same under all three counts, and is as follows:

[1, 2] The plaintiff did a brokerage business, and in the course thereof bought securities for its customers and carried the same for the customers. On these purchases the customers paid plaintiff only a part of the purchase price, and consequently owed the plaintiff balances, on which they paid the plaintiff interest. The plaintiff in turn also paid on said purchases only a part of the purchase price, and accordingly owed balances on them on which it paid the interest; but the interest thus received by the plaintiff from its customers on said purchases exceeded the interest paid by the plaintiff on said purchases.

In making its returns under the federal statute the plaintiff included as gross income the difference between the interest thus received by it from its customers on said purchases and the interest thus paid by it on said purchases; but the Commissioner of Internal Revenue held that the entire amount received should be included as gross income, and that the aggregate deduction for interest paid by the plaintiff, whether for the interest on said purchases, or for interest paid otherwise, should be limited to $15,000. During each of the years involved the plaintiff paid for interest on other indebtedness than that for said purchases $15,000 or more. Accordingly, the commissioner in effect made no deduction whatsoever for the interest paid by plaintiff on said purchases.

The question now arising under each of the three counts of the petition is whether the plaintiff was within its rights when it included,

as gross income, in its return for each of the three years in question, only the difference between the amount received by it from its customers for interest on said purchases and the amount paid by it for interest on said purchases, or whether, as the government claims, the plaintiff was entitled to deduct for all interest paid by it during each of these three years, that is, for interest on said purchases, as well as for other interest, only the sum of $15,000.

The law under which these assessments were made provided for an excise tax against the corporation "equivalent to 1 per centum upon the entire net income over and above $5,000 received by it from all sources during such year." That law further provided that such net income should be ascertained by deducting "from the gross amount of the income of such corporation" received within the year from all sources, first, all ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and property; second, all losses actually sustained within the year, etc., and "third, interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation."

It is this third subdivision which underlies the claim of the government, for the government treats all the interest received by the plaintiff from its customers on said purchases as gross income, and treats all interest paid by the plaintiff on said purchases as interest paid "on its bonded or other indebtedness."

The law applicable to the case is to be found in the second paragraph of section 38 of the act of August 5, 1909, c. 6, 36 Stat. L., 112. It is as follows:

> Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint-stock company or association, or insurance company, received within the year from all sources, first, all of the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property. * * *
>
> Third. Interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the paid-up capital stock of such corporation, joint-stock company or association, or insurance company, outstanding at the close of the year. * * *

This statute defines "gross income" as "the gross amount of the income of such corporation * * * received within the year."

The Commissioner of Internal Revenue, in ascertaining and fixing the amount of the gross income of the plaintiff, refused to allow plaintiff for the interest paid by it on account of the purchases of bonds and stock, and treated such payments as having been made "on its bonded or other indebtedness." In the opinion of the court the action of the Commissioner was in accordance with the law.

Judgment for the defendant will be entered on each count of the petition.

DELANO MILL CO. v. OSGOOD.

(Circuit Court of Appeals, First Circuit. November 13, 1917.)

No. 1300.

1. MASTER AND SERVANT ⊂⊃224—MASTER'S LIABILITY FOR INJURY TO SERVANT —SCOPE OF EMPLOYMENT.

Defendant operated a woodworking mill, in which, on the roof above the finishing room, there was a dust room, into which the dust from the machines was carried by a fan. Plaintiff's intestate was operating a machine in the finishing room when a fire occurred in the dust room, and, taking one of the two fire extinguishers on his floor, he climbed the ladder and opened the door into the dust room, when an explosion took place by which he was fatally injured. His ordinary duties did not take him into the dust room, nor had he been instructed to go there in case of fire. *Held*, that his doing so was not within the scope of his employment, nor by implied request or invitation arising from the presence of the fire extinguishers in his own room, but was a voluntary act, as to which the defendant owed him no duty.

2. MASTER AND SERVANT ⊂⊃270(17)—ACTION FOR INJURY TO SERVANT—EVIDENCE.

In the absence of evidence that defendant knew, or that it was a matter of common knowledge among mill men, that the dust in the dust room was liable to explode, should a fire occur therein and air be permitted to enter, expert testimony of such fact was not admissible to charge defendant with negligence in failing to warn or instruct employés of the danger, nor was evidence generally of the fire insurance rates on the building.

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Action by William W. Osgood, administrator, against the Delano Mill Company. Judgment for plaintiff, and defendant brings error. Vacated and remanded.

William H. Gulliver and William C. Eaton, both of Portland, Me., for plaintiff in error.

Benjamin Thompson, of Portland, Me., for defendant in error.

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

BINGHAM, Circuit Judge. This is an action for personal injuries suffered by the plaintiff's intestate on the 9th of July, 1915, while attempting to put out a fire in the dust room on the roof of the defendant's mill. There was a trial by jury and a verdict for the plaintiff. The case is here on the defendant's bill of exceptions, and the errors assigned are to the court's denial of the defendant's motion for a directed verdict, to the refusal to give certain requested instructions, to the admission of evidence and to permitting certain witnesses to testify as experts.

[1] The declaration contains two counts. In the first count the plaintiff alleges that the defendant, on the 9th day of July, 1915, was and for a long time prior thereto had been engaged in carrying on the business of milling lumber and manufacturing therefrom various kinds

of cabinet work at its mill, situated at the corner of Fore and Cross streets, in Portland; that in said mill it operated certain finishing machines, which created a very fine dust and small particles of wood, which were removed from the machine by a blower system to a separator located above the dust room; that the dust room was built on the roof of the mill, and the dust and fine particles of wood descended from the separator into it; that the entrance to this room was by a ladder leading from the floor of the finishing room, through an opening in the roof of the mill, to a platform inclosed in a vestibule, and thence through a door leading from the platform to the dust room; that on said 9th day of July large quantities of dust and fine particles of wood had accumulated in the dust room and were liable to spontaneous combustion; that when the mill was in operation the air in the dust room was so filled with dust that in the event of fire therein, due to spontaneous combustion or otherwise, an explosion of great violence would occur the instant air came in contact with such fire and dust; that the defendant had fire extinguishers located in different parts of the mill; that it was the duty of the workmen employed in the finishing room and other parts of the mill to use the fire extinguishers in extinguishing any fire that might be discovered in the mill; that on the 9th day of July the plaintiff's intestate was in the employ of the defendant, engaged in operating a finishing machine in the finishing room; that it was the duty of the defendant to provide the plaintiff's intestate with a safe and proper place in which to perform his aforesaid duties, but that it carelessly and negligently allowed and permitted the place in which he was liable to be required to be in the performance of his duties to become unsafe, in that it allowed said dust room to become partly filled with said fine dust, with access thereto over the ladder and through the door into said room, so that, in the event of fire therein, a violent explosion would occur as soon as the door was opened; that the dangerous and unsafe condition of the room and the liability of explosion were well known to the defendant, or would have been by the exercise of reasonable care; that on the afternoon of said 9th of July, while the plaintiff's intestate was at work in the finishing room, a fire occurred in the dust room; that the plaintiff's intestate, without knowledge of the explosive character of the dust or the dangers to which he would be exposed by going into said room in the discharge of his said duties, seized a fire extinguisher and went up the ladder and into the dust room to extinguish the fire; that the instant the air through the door came in contact with the air and dust in the room an explosion occurred, and the flame enveloped the plaintiff's intestate as he attempted to escape down the ladder, severely burning him, from the effects of which he died on the 15th day of July, 1915.

The second count is like the first with the single exception that, instead of alleging that the defendant was negligent in failing to provide the plaintiff's intestate with a safe place in which to perform his duties, charged that it was the duty of the defendant to instruct him as to the dangerous and explosive character of the dust which it had permitted to be gathered in the dust room, and especially to warn him of the dangers to which he would be exposed in the event of fire

breaking out in the dust room and his going there to extinguish the same in the discharge of his duties.

In view of the allegation in each of the counts of the declaration—that the plaintiff's intestate, in going to the dust room to extinguish the fire, did so in the performance of his duties as a servant of the defendant—the motion of the defendant for a directed verdict raises the question whether there was evidence from which reasonable men might find that the deceased, in going to the dust room to put out the fire, was acting within the scope of his employment, pursuant to a legal duty which he owed the defendant under his contract of service.

The evidence discloses that the work he was called upon to perform in the defendant's mill was confined to working at a bench and on one or more machines in the finishing room on the second or upper floor of the mill, that his work in no way called upon him to go up the ladder into the dust room, and that he had never been requested or directed by any one in charge of the mill to go there in the event of a fire or for any other purpose. But, notwithstanding this, the plaintiff contends that there was evidence from which it could be found that he was impliedly requested to use the extinguishers and go into any part of the mill to put out a fire, including the dust room on the roof, and that, in attempting to do so, he was acting within the scope of his employment. The only evidence in support of this contention is that there were two fire extinguishers in the finishing room, one located in that portion of the mill facing Fore street and distant some 30 or 40 feet from the foot of the ladder, and the other in the rear portion of the room towards Commercial street. There were also two fire extinguishers on the floor of the mill below where the deceased worked, and the dust room was provided with automatic sprinklers. We are, however, of the opinion that, if from this evidence it could be found that the men employed in the finishing room, including the deceased, were impliedly requested as a part of their duties to make use of the fire extinguishers in case a fire occurred about their work in the finishing room, it would not warrant a finding that they were impliedly requested as a part of their duties to take fire extinguishers and go up over the ladder to the dust room on the roof to put out a fire in that room, a place where they had not been directed or called upon to perform any service in connection with their work, and where the defendant had provided automatic sprinklers in case fire occurred therein; that the deceased, in going there as he did, was not acting within the scope of his employment, but as a volunteer or bare licensee, as to whom the defendant owed no duty, except not to injure him intentionally or through its active intervention. McGill v. Granite Co., 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618; Hobbs v. George W. Blanchard & Sons Co., 75 N. H. 73, 70 Atl. 1082, 18 L. R. A. (N. S.) 939; Andersen v. Berlin Mills Co., 88 Fed. 944, 32 C. C. A. 143. The court, therefore, erred in refusing the defendant's motion for a directed verdict on both counts.

The evidence also discloses that the deceased had been over the ladder to the dust room at various times for purposes apart from his employment, and that he must have known of the location of the room, the purposes to which it was devoted, the character of its construc-

tion, and the means of access provided thereto. He also knew there was a fire in the dust room at the time he went there on the day of the accident. As a reasonably intelligent man, he must have known that, if he opened the door while a fire was in progress in the room, thereby creating a current of air, the fire would spread with greater rapidity than otherwise. So far as these matters could be found to have contributed to his injury, he is to be regarded as having assumed the risk arising therefrom. The only ground upon which the defendant could have been charged with negligence under the declaration in this case—had there been proof from which it could have been found that the deceased was acting within the scope of his employment in going to the dust room to put out the fire—would have been under the second count for failure to warn him of the explosive character of the dust in the air of the dust room, and that, if a fire took place, an explosion would occur if air was permitted to come in contact with the fire and dust. We are therefore of the opinion that the jury was not warranted in finding that the defendant was in default in respect to any duty it owed the deceased as to the location, use, or construction of the dust room, or the approach thereto, and that, for this reason also, a verdict should have been directed for the defendant on the first count.

[2] There was no direct evidence that the defendant knew that the dust in the air of the dust room, should a fire occur therein, was liable to explode if air was permitted to come in contact with the fire and dust. The plaintiff, however, through experts, was permitted to show that fine dust held in suspense in the air, if brought in contact with fire, was explosive. This was permissible, provided it was shown that this scientific fact was a matter of common knowledge among mill men engaged in occupations like the defendant's, for the purpose of charging it with knowledge of the explosive character of the dust. But some of the experts testified that this was a matter of common understanding, although it appeared they did not know it was commonly known by men engaged in occupations like the defendant's, and the testimony was permitted to go to the jury notwithstanding the defendant requested that it be stricken out. Under the circumstances it was error to allow this testimony to stand.

Shea, the defendant's superintendent, was called as a witness in its behalf. On cross-examination he was required, against the defendant's objection, to testify as to the fire insurance rates on the defendant's mill as it existed before the fire, and also as to the rates on a new mill which the defendant had constructed since the fire in another and remote part of the city, and the ground stated by plaintiff's counsel as the reason for offering the testimony was:

"I am bringing home notice to the man who was in charge of the mill of the fire risk he was maintaining there."

This evidence had no tendency to prove that the defendant knew the dust in the dust room was explosive, and we are unable to see wherein it was competent upon any issue in the case. It was, however, plainly prejudicial and its admission was error.

In view of the above conclusions, it is unnecessary to consider the

remaining assignments of error; and, as we are without authority to order a verdict for the defendant (Slocum v. New York Insurance Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029), the case must be sent back for a new trial.

The judgment of the District Court is vacated, the verdict set aside, the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers its costs in this court.

ALDRICH, District Judge. I concur, but I should prefer to have the decision based upon the rule of remoteness. The injury was outside the line of duty resulting from mere employment to work in the lower room, and the presence of the hand extinguishers was not sufficient, under the circumstances, either upon the ground of implied request, creating duty, or upon the ground of invitation, to carry the obligations of the employer into a field so remote from what was contemplated.

UNITED STATES v. ERVIEN, Com'r of Public Lands of New Mexico.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4673.

PUBLIC LANDS ⊜65—GRANTS TO STATES FOR INTERNAL IMPROVEMENTS—APPLICATION OF PROCEEDS.

By Enabling Act June 20, 1910, c. 310, 36 Stat. 557, Congress granted and confirmed to the state of New Mexico, then being organized, large bodies of public land for 19 different purposes, to each of which was allotted separately and severally a specified quantity. Section 10 declares that all lands granted shall be held in trust to be disposed of in whole or in part only in the manner provided and for the several objects specified, and that the natural products and money proceeds of any of such lands shall be subject to the same trust as the lands producing the same. The act further provided means for the disposition of the land and investment of the proceeds and that the proceeds shall be deposited in funds corresponding to the grant under which the particular land producing such moneys was by the act conveyed or confirmed, and further that no moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. *Held*, that the grant upon the conditions and limitations prescribed having been accepted by Const. N. M. art. 21, §§ 9, and 10, and some of the trusts being for such purposes as the establishment of insane asylums, etc., Act N. M. March 8, 1915 (Laws 1915 [2d Leg.] c. 60), authorizing the Commissioner of Public Lands to expend annually three cents on the dollar of the annual income from sales and leases of lands for making known the resources and advantages of the state, particularly to home seekers and investors, is in its application to the proceeds of such trust lands invalid, and compliance therewith by the Commissioner of Public Lands will be enjoined.

Appeal from the District Court of the United States for the District of New Mexico; Wm. H. Pope, Judge.

Suit by the United States of America against Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico. From

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a decree for defendant, complainant appeals. Reversed and remanded, with directions to enter decree for complainant.

Summers Burkhart, U. S. Atty., of Albuquerque, N. M.
Frank W. Clancy, Atty. Gen., for appellee.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

HOOK, Circuit Judge. This is a suit by the United States to enjoin a threatened breach of trust by the Commissioner of Public Lands of the State of New Mexico in respect of the proceeds of lands granted and confirmed to the state on its admission to statehood. Upon submission of the cause on petition and answer, the trial court entered a decree for the defendant, and the government appealed. The material facts are undisputed.

By the Enabling Act of June 20, 1910 (36 Stat. 557), Congress granted and confirmed to the new state then being organized large bodies of public lands aggregating about 3,000,000 acres, for 19 different purposes, to each of which was allotted separately and severally a specified quantity. The lands were to be selected under the direction and subject to the approval of the Secretary of the Interior from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of the state. Lands actually or prospectively valuable for the development of water power or for hydroelectric use or transmission were reserved. Section 10 of the act provides:

"That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory (of New Mexico), are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust."

The act also subjected the donations to the following limitations and restrictions: No mortgages or other incumbrances shall be given to any person or for any purpose under any circumstances. The lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at public auction to be held at the county seat where the lands to be affected, or the major portion, lie. Notice of the auction of a prescribed character must be given in a manner and for a length of time specified. Minimum prices varying according to locations are prescribed. Separate funds are to be established for each of the several objects for which the grants and confirmations are made and, the act goes on—

"whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this act conveyed or confirmed. No moneys shall ever be taken from one fund for

deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed."

The moneys are to be invested in safe interest-bearing securities to be approved by the Governor and the Secretary of State, who are to be bound for the faithful performance of their duties.

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof not made in substantial conformity with the provisions of this act shall be null and void, any provision of the Constitution or laws of the said state to the contrary notwithstanding."

The act further provides that:

"It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

Provision was also made for the acceptance of the act and the terms and conditions of the grant and confirmation, irrevocable without the consent of the United States and the people of the state.

The state accepted the grant and confirmation of the lands upon the conditions and limitations prescribed (sections 9 and 10, art. 21, Constitution of New Mexico). Afterwards, on March 8, 1915, the Legislature of the state passed an act (Laws 1915 [2d Leg.] c. 60) over the veto of the Governor entitled "An act concerning the publicity and promotion of public resources and welfare." It authorized the Commissioner of Public Lands to expend annually three cents on the dollar of the annual income from sales and leases of lands "for making known the resources and advantages of this state generally, and particularly to home seekers and investors." The defendant commissioner intends to exercise the authority so conferred and to devote a part of the avails of the lands granted and confirmed by Congress to the purposes mentioned.

We think it is clear that the contemplated use of the funds would be a breach of trust. Words more clearly designed than those of the act of Congress to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen. Each quantity of land with its proceeds was to be devoted to a particular object to the exclusion of all others. The act required "separate funds," and provided that:

"No moneys shall ever be taken from one fund for deposit in any other or for any object other than that for which the land producing the same was granted or confirmed."

If there had been a single donation in trust for one of the purposes specified, as, for example, "a miners' hospital for disabled miners," it could not reasonably be contended that the trust funds could properly be expended in advertising the agricultural resources of the state or to promote the general welfare. The aggregate of the lands granted and confirmed in trust comprised but about $1/26$ of the area of the state, all of which, together with the mass of other property privately

owned and subject to taxation, was interested in the exploitation of the resources of the state and the attraction of home seekers and investors. That there were a number of trust donations for separately defined purposes does not alter the situation. The idea of hotchpotch and a ratable contribution to a common object such as characterizes the proposed use was expressly negatived. While, of course, all of the trust purposes have relation to the general public good and would profit thereby, yet severally regarded, as was manifestly the intention, each is of a more definite and limited character. Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people, or that the proceeds should constitute a fund like moneys raised by taxation for "general purposes." Nevertheless, the state legislative act in question proceeds upon such a theory. The limitations upon the powers over the expenditures of these trust funds are in some respects like those not infrequently found in state Constitutions that taxes shall not be levied except for expressed purposes to which alone they shall be devoted when collected. It would go without saying that taxes levied and collected "for the payment of the bonds and accrued interest thereon issued by Grant and Santa Fé counties, N. M." (one of the trust purposes here) could not under such restrictions be lawfully expended "for making known the resources and advantages of this state generally." The ordinary result of such publicity would be at the best a general good to the state, its inhabitants, their property and enterprises, in which the various trust purposes would not be interested in proportion to the value or amount of their respective estates. To some it would be difficult to trace more than an indirect advantage, an advantage too remote to justify the expenditure of trust funds guarded by such limitations as were here imposed and accepted. Some of the purposes designated in the act of Congress are: An asylum for the insane; an asylum for the deaf and dumb; a reform school; an institution for the blind; and the enlargement and maintenance of the territorial penitentiary. To each of these, as to the others, was given a specified quantity of land for its exclusive use and benefit with conditions in detail as to the method of sale and the keeping of separate funds and accounts without borrowing or lending between them. It is said that an advertisement of the entire state would benefit every portion of it, and that the attraction of home seekers and investors would make for a wider and better market for the trust lands. But Congress made definite provisions specifying the character and extent of the notices of the sales. If additional advertisements of the state at large and its resources are deemed advisable, the cost should come from available public funds, not from those of the trusts. The proposed campaign of publicity is for the general advancement of the state. It has no immediate or direct bearing upon the trust lands or purposes except as they are within and pertain to the state at large. For aught that appears, the lands may or may not be offered for sale at the time. The advantage accruing is too indirectly consequential to authorize the use of the trust funds. It would be but a step further to argue the advantage that would accrue to the trusts from the physical construction of some

of the attractive resources of the state that are to be advertised, such as systems of public highways, irrigation, public schools, and the like.

The decree is reversed, and the cause is remanded, with direction to enter a decree for the plaintiff.

FARRELL et al. v. WYSONG et al.

In re EUREKA MINING & REDUCTION CO.

(Circuit Court of Appeals, Eighth Circuit. November 2, 1917.)

No. 180.

1. BANKRUPTCY ⟸211—COURTS—DISTRICTS.
Where the state court entered judgment for claimants awarding them a vendor's lien on property of the bankrupt, judgment of the state court awarding the lien is conclusive on the court of bankruptcy, unless the lien was voided by the filing of the petition in bankruptcy.

2. VENDOR AND PURCHASER ⟸269—VENDOR'S LIENS—RECOGNITION.
Vendors' liens are recognized and enforced in the state courts of Colorado.

3. COURTS ⟸372(1)—FEDERAL COURTS—ENFORCEMENT OF LIEN GIVEN BY STATE LAW.
The Federal Courts will enforce vendors' liens if in harmony with the jurisprudence of the state in which the action is brought.

4. BANKRUPTCY ⟸200(4)—LIENS—VALIDITY.
Vendors who sold mining claims to the bankrupt corporation recovered judgment against the bankrupt in the Colorado state court, which declared a lien on the property and ordered foreclosure and sale. The judgment was rendered within less than four months of the filing of petition in bankruptcy. Bankr. Act July 1, 1898, c. 541, 30 Stat. 564, § 67f (Comp. St. 1916, § 9651), declares that all levies, judgments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to a petition of bankruptcy shall be deemed null and void in case he is adjudicated a bankrupt. *Held*, that the section did not apply, and the vendor's lien could be enforced, for, being recognized by the state law, the lien came into existence on the sale of the property, and the judgment merely established the amount of the debt and ordered foreclosure.

Petition to Revise Order of the District Court of the United States for the District of Colorado; John A. Riner, Judge.

On petition of Harry A. Wysong, the Eureka Mining & Reduction Company was adjudicated a bankrupt. The claim of John L. Farrell and others was allowed by the referee in bankruptcy as an unsecured claim, and, the order being affirmed by the District Court, claimants petition to revise. Petition granted, with directions to set aside the order and enter an order allowing the claim of petitioner as a secured claim.

H. R. Kaus, of Denver, Colo. (Frank C. Goudy, L. F. Twitchell, and J. H. Burkhardt, all of Denver, Colo., on the brief), for petitioners.

Halsted L. Ritter, of Denver, Colo. (Means & Buenting, of Indianapolis, Ind., on the brief), for respondents.

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

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

CARLAND, Circuit Judge. This is a petition to revise, in matter of law, an order of the United States District Court, District of Colorado, which affirmed an order of the referee in bankruptcy, in the matter of the estate of the Eureka Mining & Reduction Company, a bankrupt, allowing the claim of John L. Farrell and Esther R. Abbott, executrix, as an unsecured claim against said estate. The claim allowed was based upon a decree of the district court of the city and county of Denver, Colo., in the case of John L. Farrell and Esther R. Abbott, as executrix of the estate of C. H. Abbott, deceased, against the Garfield Mining, Milling & Smelting Company and the Eureka Mining & Reduction Company, dated November 27, 1915. This decree adjudged that there was due from the defendants to the plaintiffs the sum of $4,262.10, with interest, as a balance upon the purchase price of a certain group of lode mining claims, known as the Black Hawk Group, situated in the Monarch mining district, Chaffee county, Colo., and more particularly described in the decree. The decree further adjudged and established a vendor's lien upon said real estate in favor of the plaintiffs for the amount found due, and ordered a foreclosure and sale of the same in the usual form. The petition to have the Eureka Mining & Reduction Company adjudged a bankrupt was filed December 7, 1915.

[1] Neither this court nor the court below has authority to review the decree of the state court. That the claimants have a vendor's lien upon the real estate is therefore not open to controversy, unless it can be said that the lien was avoided by the filing of the petition in bankruptcy. The referee decided that the lien came into existence as of the date of the decree, and therefore was avoided by section 67f of the Bankruptcy Act for the reason that the petition in bankruptcy was filed within four months prior to the date of the decree. The District Court affirmed the decision of the referee by deciding that the claimants were not entitled to a vendor's lien.

[2] We are of the opinion that both the District Court and the referee were wrong. It is not disputed that vendor's liens are recognized and enforced in the state courts of Colorado. Fostoria Gold M. Co. v. Hazard et al., 44 Colo. 495, at page 497, 99 Pac. 758; Marvin v. Stimpson, 23 Colo. 174, 46 Pac. 673; Schiffer v. Adams, 13 Colo. 572, 22 Pac. 964; Francis v. Wells, 2 Colo. 660; Salomon v. Martin, 17 Colo. App. 60, 67 Pac. 25; Mihoover v. Walker (Colo. 1917) 164 Pac. 504; Fallon v. Worthington, 13 Colo. 559, 22 Pac. 960, 6 L. R. A. 708, 16 Am. St. Rep. 231.

[3] The courts of the United States will enforce grantor's and vendor's liens if in harmony with the jurisprudence of the state in which the action is brought. Fisher v. Shropshire, 147 U. S. 133, at page 139, 13 Sup. Ct. 201, 37 L. Ed. 109, and the cases there cited; 39 Cyc. 1800; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509–517, 14 Sup. Ct. 842, 38 L. Ed. 802.

[4] There remains for consideration only the question: Was the vendor's lien obtained by the decree of the state court or by the con-

tract of sale, by virtue of which the land was conveyed by the vendors to the vendee? We are of the opinion that the lien came into existence upon the execution by J. L. Farrell and Esther R. Abbott of the contract of sale, dated January 14, 1911, with the Garfield Mining, Milling & Smelting Company and the delivery of the deeds thereunder to the vendee. By this contract the unpaid balance of the purchase money was definitely fixed in a liquidated amount. The vendee accepted the deeds, and thereby not only agreed to the amount remaining unpaid, but agreed to pay the same. The decree in the state court determined that the bankrupt obtained title to the property subject to the vendor's lien of claimants. The trustee has no rights in the propery subject to the lien superior to those of the bankrupt. Hurley v. Atchison, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729.

The proceeding in the state court was a suit to foreclose a vendor's lien, like a suit to foreclose a mechanic's lien or real estate mortgage. It established the amount of the debt, and ordered a foreclosure; but in Colorado the lien was created as of the date of the contract of sale. This is the effect of the decisions of the Supreme Court of Colorado in Wells v. Francis et al., 7 Colo. 396-415, 4 Pac. 49, and Mihoover v. Walker, 164 Pac. 504. In the Mihoover Case, the Supreme Court of Colorado decided that a vendor's lien in Colorado was available against all subsequent purchasers and incumbrancers of the land under the grantee who were not bona fide purchasers for a valuable consideration and without notice. The necessary result of this decision is that the vendor's lien comes into existence by virtue of the contract of sale. In Finnell v. Finnell, 156 Cal. 589, 105 Pac. 740, 134 Am. St. Rep. 143, the Supreme Court of California, in discussing the case of Fisher v. Shropshire, supra, announced the following rule:

"But the lien is presumed to exist, and is an incident of the transaction of sale, in all cases unless the intention of the vendor that it shall not exist be clearly manifested by his acts or declarations, and the burden of proof is on the vendee or his successors to show such intention."

It necessarily follows that section 67f is not applicable to the lien of claimants. The petition to revise is granted, with directions to set aside the order of the District Court and referee and enter an order allowing the claim of petitioner as a secured claim.

REDMAN v. DUEHAY, President of United States Board of Parole, et al.

(Circuit Court of Appeals, Ninth Circuit. November 19, 1917.)

No. 3030.

HABEAS CORPUS ⊂=23—PROCEEDINGS—AUTHORITY OF COURT.

Under Act June 25, 1910, c. 387, § 3, 36 Stat. 819 (Comp. St. 1916, § 10537), declaring that, if it shall appear to the board of parole from a report of the proper officers of the prison, or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the

welfare of society, then the board of parole may, in its discretion, authorize the release of such applicant on parole, a prisoner cannot, by habeas corpus, secure his release on parole where the board of parole found there was not a reasonable probability he would live and remain at liberty without violating the law, and that his release was incompatible with the welfare of society; the right of parole being vested exclusively in the board.

Appeal from the United States District Court for the Southern Division of the Western District of Washington.

Application by Thomas V. Redman for writ of habeas corpus against F. H. Duehay, President of the United States Board of Parole, and others, constituting a board for paroling prisoners in the United States Penitentiary, McNeil Island, Wash. From an order discharging a rule to show cause, applicant appeals. Affirmed.

Thomas V. Redman, in pro. per.

Clay Allen, U. S. Atty., of Seattle, Wash., George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for appellees.

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

HUNT, Circuit Judge. Appellant Redman, a prisoner in the prison at McNeil's Island, filed an application for release on parole with the board of parole for the United States prison at McNeil Island, Wash. The board heard the application, and thereafter denied it. By petition for writ of habeas corpus he set up that he had been denied a right, in that the board "did not show any cause whatsoever why it denied" his application, and that "unless good cause is shown by the board for not granting to him an order for parole," he is entitled to be paroled any time after having served one-third of his sentence. The District Court granted an order to show cause, and the board denied the allegations above referred to, and alleged that:

"The petitioner was granted a hearing in the manner provided by law, and that it was determined that there was not reasonable probability that the petitioner would live and remain at liberty without violating the law, and that in the opinion of the board his release was incompatible with the welfare of society."

After hearing testimony from a member of the board of parole the court discharged the rule to show cause and Redman appealed.

The only question involved occurs upon the meaning of section 3, Act Cong. June 25, 1910, c. 387, 36 Stat. 819 (Comp. St. 1916, § 10537), which reads as follows:

"If it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then said board of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe."

Language expressive of legislative intent could not be plainer. It must appear to the board by showing in the manner prescribed that there is reasonable probability that the applicant for a parole will abide by the law; and if in the belief or judgment of the board his release is not incompatible with the welfare of society, the board may, in its discretion, authorize parole. The opinion called for is that of the board, and the power to authorize release is vested exclusively in the board to be exercised as it may, in its wisdom, see fit.

Petitioner, having failed to show that he is entitled to relief from the courts, was properly denied the writ.

Affirmed.

HENKIN v. FOUSEK.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1917.)

No. 186.

1. BANKRUPTCY ⟸136(2)—PROCEEDING TO COMPEL SURRENDER OF PROPERTY—ISSUES AND PROOF.
   On a petition by a trustee to require a bankrupt to turn over money or property, the issue is whether he has such money or property belonging to his estate in his possession or under his control, on which issue the burden of proof is on the petitioner to establish such fact by a preponderance of the evidence, and, while evidence tending to show that the bankrupt fraudulently contracted the debts scheduled may be pertinent as affecting his credibility and the weight to be given to his testimony, that question is beside the issue, and the petitioner is not required to prove the fraud, even though alleged in the petition.
2. BANKRUPTCY ⟸440—APPELLATE PROCEEDINGS—MODE OF REVIEW.
   In bankruptcy proceedings, the remedies for review by appeal and petition to revise are mutually exclusive.
3. BANKRUPTCY ⟸439—ORDER OF SURRENDER OF PROPERTY—MODE OF REVIEW.
   An order requiring a bankrupt to turn over money or property to his trustee is reviewable by petition to revise, upon which only questions of law can be considered.
4. BANKRUPTCY ⟸446—APPELLATE PROCEEDINGS—PETITION TO REVISE.
   Where the only requisite raised on a petition to revise an order requiring a bankrupt to turn over money or property to his trustee is whether the order is sustained by the evidence and there is evidence to support it, there is no question of law which can be considered by the appellate court.

Petition to Revise Order of the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

In the matter of Louis Henkin, bankrupt; Charles B. Fousek, trustee. Petition by the bankrupt to revise an order of the District Court. Petition dismissed.

Elton W. Stanley, of Sioux Falls, S. D., for petitioner.

Herbert Abbott, of Sioux Falls, S. D. (Cherry & Abbott, of Sioux Falls, S. D., on the brief), for respondent.

Before HOOK, SMITH, and STONE, Circuit Judges.

SMITH, Circuit Judge. The petitioner, Louis Henkin, was about January 26, 1916, upon his voluntary petition adjudged a bankrupt by the United States District Court for South Dakota, and on February 14th the respondent Charles B. Fousek was appointed trustee of the estate. The bankrupt's schedules showed he had liabilities to the amount of $7,007.50 and no assets except $50 in cash, a traveling bag $10, wearing apparel $50, and a watch and cuff links $45, total $155, substantially all exempt. On March 18, 1916, the trustee filed before Hon. Henry A. Muller, special referee, a petition in which he alleged that the bankrupt's debts were all contracted on or about the 26th day of April, 1915, for eggs bought by him from his creditors; that he received and sold said eggs for his own benefit and obtained therefor the sum of more than $6,000 with the intent and purpose of defrauding the persons who sold him the eggs; that he obtained considerable amounts of money from the resale of the eggs which he has ever since and still secretes and keeps in hiding from his said creditors and this trustee. The trustee asked an order that Louis Henkin turn over to him the said sum or show cause for his failure to do so, and that upon his failure to make a showing he be attached for contempt. The special referee on April 3, 1916, issued an order to show cause. April 20, 1916, the bankrupt filed his answer in which he denied the fraudulent purpose and the secretion, concealment, and the wrongful withholding of assets. Further answering, he said:

"That he has been engaged as a dealer in produce for the five years preceding his adjudication, and that on or about April 4, 1915, he entered into a contract with the Cudahy Packing Company of Chicago, through their branch office in Sioux City, Iowa, under which contract he was to deliver to that company at Sioux City 1,000 cases of eggs each week for a period of approximately six weeks, at certain prices as determined by the Chicago market, with deliveries to be made weekly. By certain oral agreements, this written contract was somewhat altered as to the methods of purchases, deliveries, etc., and the bankrupt proceeded to fulfill it according to its terms, operating from his office at Elk Point, S. D.

"Notwithstanding unfavorable conditions during the first and middle parts of April, he delivered about 250 cases weekly to the said company, though realizing no profits thereon. Later, however, on or about April 26, 1915, he ordered approximately 2,500 cases of eggs on account of what he believed to be a favorable market, which would thus enable him, as he thought, to advantageously fulfill his contract with the Cudahy Packing Company. According to his custom, he used the Chicago market of Saturday (April 24th) as his purchasing price on Monday (April 26th). The Chicago market slumped 25 cents a case on Monday, shortly after he had sent out his bids, with the result that all of those to whom the bids were made took advantage of the same and unloaded onto the bankrupt the entire 2,500 cases. All of these various shipments of that date were immediately sold to the Cudahy Packing Company; but the latter, contrary to its custom, paid the bankrupt at the rate of the Chicago quotations of Monday instead of the Saturday quotations, thus making the bankrupt's absolute loss in the transaction 25 cents a case, or about $625. Immediately upon his learning of the acts of the company, he informed them that he would not fulfill the contract if its terms were to be thus construed to the advantage of the company at its own option, whereupon that company entirely held back payment for approximately $400 worth of eggs, thus causing the bankrupt a loss and shortage in operating funds, to the amount of over $1,000 at the end of the week, on or about May 1st.

"The bankrupt further says that, according to his information and belief, all of these 2,500 cases would not have been shipped had it not been for the

slump, for he had previously been advised to order that many, more or less, to insure his getting the 250 cases a week above mentioneed. For the larger portion of these 2,500 cases of eggs the bankrupt became indebted to certain of his present creditors to the amount of $6,864.20, as set forth in schedule A-3 of his original petition, for which, at the time of the purchase, his intention was to remit promptly, in the due course of business.

"The bankrupt remitted to the extent of about $6,000 to certain of the shippers following the purchases of April 26th, before he realized his losses, whereupon he sought the advice of one Solem, an agent of the Cudahy Packing Company at Sioux City, and of his lawyer, Mr. A. L. Fribourg, also of Sioux City. The loss was due, according to the bankrupt's information and belief, to the unjust and unfair interpretation of the contract by the said company, to the fluctuations of the market, and to other conditions affecting the conduct of such business over which the bankrupt had no control. Solem advised him to go to Chicago and interview the head office with a view of settling the dispute and canceling the contract, and, if unable to do so, to remain in Chicago during the balance of the egg season, where he could operate to much greater advantage, due to the many competitive markets, and due to his immediate presence at the egg exchange at the time of any fluctuations in price that might occur. His lawyer advised him to temporarily postpone making payments to the balance of his creditors, pending an adjustment of his affairs with the Cudahy Packing Company.

"Acting on the advice of these parties, he shortly thereafter, on or about May 3, 1915, left Elk Point for Chicago, taking with him about $300 in cash and $6,000 in the shape of three drafts each for $2,000, most of which represented the proceeds from the sale of the eggs. His intention was, first, to try and cancel his unfavorable contract with the Cudahy Packing Company, and, if unsuccessful in that, to remain in Chicago temporarily for the reasons above stated, and thus, if possible, to carry on his trading in eggs at a financial gain instead of at a loss, and thereby redeem his previous losses on the eggs purchased on or about April 26th, from his present creditors, pay them up in full, and continue to purchase eggs from them in the regular course of business.

"On arriving in Chicago on May 4, 1915, the bankrupt was informed by the Cudahy Packing Company that he would be held strictly to the terms of his contract, which forced him to choose the other alternative of remaining in Chicago temporarily for the reasons above stated. On that same day, while at the egg exchange, the bankrupt made the acquaintance of a stranger, whose true name is unknown to the bankrupt, but according to the best of his information and belief the stranger's name was Hawkins. This man introduced himself to the bankrupt, saying that they had previously met at a convention in Des Moines, Iowa. After going to the theater that evening, the bankrupt was met at the Sherman Hotel (where the bankrupt had registered) by the aforesaid stranger, and they proceeded to visit numerous cafés and saloons, freely indulging in the use of intoxicating liquors, until a late hour, after which they went to the bankrupt's room in the said hotel, and began to gamble, using cards as the medium and stud poker as the style. Winning heavily at first to the extent of about $200, the bankrupt attempted to win back the losses he had sustained from the unfortunate turn of the affairs of his egg business, and with this in mind he proceeded to plunge, but at daylight he was the loser of approximately $250, which comprised nearly all of the money he carried on his person.

"Stunned by his large losses, which, including the $400 held up by the company (the bankrupt believing this $400 to also have been a total loss to him), amounted to about $1,275, the bankrupt on the day following cashed one of the drafts for $2,000 at a local bank and resumed play that night with his new-found friend in a desperate effort to recoup from his previous losses. Under this impulse, the bankrupt continued to gamble for the balance of the week, losing rapidly and heavily in his vain attempt to put himself back on a sound financial footing. The night of May 5th, he lost practically the entire proceeds of the $2,000 draft he had cashed that day. The following day, May 6th, he cashed the other two drafts, losing over $1,000 that night, and on the

night of May 7th he lost the balance, thus bringing his total loss in business and gambling up to a total of approximately $6,000, which is the money the trustee now declares the bankrupt has in his possession or control. All of the said games of poker took place in the rooms of the bankrupt at the Sherman Hotel, which were, to the best of his knowledge and belief, first room 307 and later room 205. No other parties were present, and, to the best of the bankrupt's information and belief, the games were played without the knowledge of any other person, with the exception of a bell boy, who on one occasion served drinks to them, and to whom the bankrupt gave a tip of 25 cents in consideration of the bell boy keeping his silence because of the rules of the hotel against gambling. The bankrupt further says that the said games were played without chips, paper money of the larger denominations being the medium of exchange; that each night's session of gambling was preceded by visiting the various cafés and saloons until after the hour of midnight, which resulted in the bankrupt's nightly becoming intoxicated; that to the best of the bankrupt's knowledge and belief he was drunk and under the influence of liquor at and during most of the time the gambling was in progress; that the above-mentioned Hawkins, if that be his true name, was and is, according to the bankrupt's belief, a professional gambler, who took advantage of the bankrupt's condition and relieved him of all his earthly possessions.

"After thus losing all of his money with the exception of about $200 to the said stranger, the latter disappeared, and the bankrupt was unable to trace him after repeated efforts to do so, and since that time the bankrupt has never seen nor heard from the said stranger, nor does the bankrupt know where the said party can be found.

"For the week following this experience, the bankrupt says that he remained in Chicago under the doctor's care, suffering a breakdown on Sunday, May 9th. Broken down mentally and physically from the excessive use of intoxicants within the period aforesaid, from May 4th to May 8th, and due to the anguish and suffering over his stupendous losses in business and gambling, he continued to be under the doctor's care, taking treatment for a period of at least two months.

"Shortly after returning to Elk Point, the bankrupt, as soon as he was physically able to do so, took up the matter of bringing suit against the Cudahy Packing Company on the aforementioned contract and the amendments thereof made orally and by correspondence. Such suit was started by his Sioux City attorney on or about May 24, 1915, for $10,000 damages; but, due to the general legal advantages having been obtained by the company, the suit was dropped by the bankrupt on the advice of his counsel. Later in September, the company made a remittance of a small amount in settlement for the eggs, which had been held up, as previously stated.

"The bankrupt further says that he was solvent at the time he became indebted to his present creditors; that he acted in good faith and intended to pay them in full for the eggs according to the agreement; that not until the month of January, 1916, did he contemplate bankruptcy to relieve himself of his hopeless state of insolvency, which was more than eight months after the shipment of eggs to him by certain of his present creditors.

"In this bankruptcy proceeding the bankrupt says that he has testified truthfully and to the best of his knowledge and belief; that he has concealed no assets from the trustee; that the schedule filed with his petition properly represents all of his assets existing at the time thereof; that since the filing of the said schedule he has not come into possession of the funds mentioned in the petition of the trustee.

"Therefore, as to the delivering of the $6,000 as prayed for in the petition of the trustee, the bankrupt says that it is physically impossible for him to so deliver the same for the reasons herein stated, and because in truth and in fact he has it neither in his possession or control, nor is he able to obtain possession or control of the same."

The case was heard before the referee on March 8, April 25, and May 15, 1916. On July 25, 1916, the referee found that the bankrupt

still had in his possession the $6,000 in question, and on September 16th formally ordered him to turn it over to the trustee. September 20, 1916, the bankrupt filed a petition for review, and on February 20, 1917, the District Court sustained the order of the referee. Thereupon the bankrupt filed his petition to revise such ruling in this court.

The argument has taken a wide scope, but many of the questions discussed need not be determined in this case. There has been much discussion of what amount of proof is necessary in cases of this character. If this were a criminal contempt case, it would clearly be necessary for the prosecution to make a case beyond a reasonable doubt. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; Merchants' S. & G. Co. v. Board of Trade of Chicago, 120 C. C. A. 582, 201 Fed. 20, 27.

But even if this order should be followed by a contempt proceeding, it would be a "civil contempt" as distinguished from a "criminal" one. Freed v. Central Trust Co. of Illinois, 132 C. C. A. 7, 215 Fed. 873.

It is doubtful whether in civil contempt proceedings it is necessary to prove the contempt case beyond all reasonable doubt. The Supreme Court of the United States expressly declined to pass upon that question in Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. But this is not a contempt case at all, but is a civil proceeding to obtain an order to turn over property alleged to be in defendant's possession. It is true it is alleged the bankrupt acquired the property with intent to defraud his creditors, and if it was necessary to prove the fraudulent purpose it would be necessary to show that fact by satisfactory evidence. Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed 742; Walker v. Collins, 8 C. C. A. 1, 59 Fed. 70; United States v. Detroit Timber & Lumber Co. (C. C.) 124 Fed. 393; Arnold v. Horrigan, 151 C. C. A. 115, 238 Fed. 39, 46.

And in Re Hawks (D. C.) 204 Fed. 309, 316, it is said that to warrant a finding of fraud the evidence must be of such nature as to be convincing and inconsistent with a presumption of honesty, and this court in Schweer v. Brown, 64 C. C. A. 574, 130 Fed. 328, said that in cases of fraud the evidence must be clear and convincing. It has been held that an action to set aside a patent or deed upon the ground of fraud can only be sustained upon a showing of the fraud by evidence clear, unequivocal, and convincing. Maxwell Land Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; United States v. San Jacinto Tin Co., 125 U. S. 273, 299, 8 Sup. Ct. 850, 31 L. Ed. 747; United States v. Mills (C. C.) 169 Fed. 686.

[1] The question in this case at once arises: Was it necessary for the trustee to prove the alleged fraud? That the $6,000 in question was once the property of the bankrupt is beyond question; that, if he still had it at the time he was adjudged a bankrupt, he was bound to turn it over, is likewise beyond dispute. The question of whether he contracted the debts scheduled in bankruptcy with intent to defraud his creditors throws an interesting sidelight upon the case, but not more.

There has been a conflict in the authorities from an early time as to whether, in view of the fact that such orders as this may be enforced by process of contempt, the rule as to the evidence required in a criminal contempt case applies. This turns largely upon the question of whether the court in the contempt case can investigate the question of the ability of the bankrupt to pay over money or turn over property, or is conclusively bound by the former adjudication. A most interesting list of the authorities on both sides of this question down to that time will be found in Re Haring (D. C.) 193 Fed. 168.

In Schweer v. Brown, 64 C. C. A. 574, 130 Fed. 328, this court in a case that had proceeded to an order of commitment declined to pass upon the question of the quantum of proof required, upon the ground that it appeared that appellant had the property there in question in his possession beyond all reasonable doubt. It must be remembered that that was an appeal, while this is on petition to revise in matter of law. In re Cole, 75 C. C. A. 330, 144 Fed. 392; Id., 90 C. C. A. 50, 163 Fed. 180, 23 L. R. A. (N. S.) 255.

[2] It is now the settled law of this circuit that the remedies by appeal and petition to revise are mutually exclusive. Century Savings Bank v. Moody, 126 C. C. A. 499, 209 Fed. 775.

[3] And it has been held that the only method of reviewing an order on the bankrupt to turn over money or property to his trustee is by petition to revise, and not by appeal. Kirsner v. Taliaferro, 120 C. C. A. 305, 202 Fed. 51; In re Mertens, 73 C. C. A. 561, 142 Fed. 445; In re Shidlovsky, 140 C. C. A. 654, 224 Fed. 450; Fisher v. Cushman, 43 C. C. A. 381, 103 Fed. 860, 51 L. R. A. 292; Lazarus v. Harding, 138 C. C. A. 414, 223 Fed. 50.

This case was brought to this court by the proper proceeding, but it does not follow that under it all the questions can be raised in this court which could have been raised if the remedy had been by appeal.

The Bankrupt Act, 30 Stats. 553, § 24, subd. b, U. S. Compiled Statutes 1916, p. 11346, § 9608, provides:

"The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

There is no question of law presented on this petition except that the petitioner claims there is no conflict in the evidence and that it appears he did not have the money in his possession or control at the time the order was made.

It will be conceded that it must appear that the money was in the hands of the defendant at the time of the order. In re Rosser, 41 C. C. A. 497, 101 Fed. 562; Samel v. Dodd, 73 C. C. A. 254, 142 Fed. 68; Stuart v. Reynolds, 123 C. C. A. 13, 204 Fed. 709. But that only questions of law can be considered. Good v. Kane, 128 C. C. A. 454, 211 Fed. 956; In re Rosser, 41 C. C. A. 497, 101 Fed. 562; In re Purvine, 37 C. C. A. 446, 96 Fed. 192.

[4] It is conceded that the bankrupt had about $6,300 in his possession early in May, 1915, between eight and nine months before his petition in bankruptcy. His only excuse is that he lost substantially

all of this in a poker game in Chicago. The referee and the District Court found that he had so lost none of it. This is not a case where he claimed to have spent the money for living or other charges or lost it in business. Upon the undisputed evidence he still has the money, unless he lost it in the poker game in question. Is there any conflict in the evidence on that subject, or is there such conflict in the bankrupt's testimony as to wholly discredit him?

He alleges in the schedule filed at the commencement of the bankruptcy proceedings that all his debts on open accounts were contracted on or about Monday, April 26, 1915. He complains that eggs were unloaded upon him because he agreed to pay 25 cents a case more than was warranted by the Chicago market. How his customers were to know that the price he was paying was too much, when he did not know, is not explained. The result is he claims a loss of $625. These eggs were bought on Monday, April 26th, and shipped to Sioux City, and he collected the $6,000 on them within a week. On Monday, May 3d, just a week after he bought these eggs of the persons who sold them to him, he had shipped them to Sioux City, collected the money on them, deposited it in the First National Bank at Elk Point, S. D., and secured from it three drafts on the Continental & Commercial National Bank of Chicago for $2,000 each. This was quite rapid action.

Considerable complaint is made that the Cudahy Packing Company only allowed him for the price of Monday, April 26th, instead of the price of Saturday, April 24th, two days before he bought the eggs. The contract with the Cudahy Packing Company was made orally with Mr. Solem on Saturday April 3, 1915, and was confirmed by a letter from Chicago on April 6th, by the Cudahy Packing Company by Maurice Manderville.

Subsequently to his return from Chicago, he brought suit against the Cudahy Packing Company for $10,000 damages under this contract, but dismissed it upon his own motion. He used it, however, while pending as the basis for excuses to his creditors. He agreed to remit to his creditors upon receipt of the goods, but he got the goods, shipped them to Sioux City, got the money on them, and never paid for them. There is nothing to indicate he had any cause for complaint in his transactions with the Cudahy Packing Company. He deemed it necessary to explain how he came to take this $6,000 to Chicago, and says he went down to get a cancellation of his contract with the Cudahy Packing Company (of course, he had no need for this $6,000 for that purpose), and, in case he failed to secure such cancellation, to go to buying eggs upon the market to carry out his contract. His contract was to deliver at Sioux City. The Cudahy Packing Company, having a contract with the bankrupt to buy eggs and deliver them at Sioux City "bought in your territory," it is manifest they were not bound to take eggs bought at Chicago at the very least unless delivered at Sioux City. If they would not cancel the contract, it is improbable that they would make a new contract by which he could buy in Chicago, where they doubtless had agents. The alleged scheme to buy in Chicago to perform a contract to deliver eggs "bought in your territory" is at least chimerical, yet this is the only explanation he gave of having the

money at Chicago at all. This money was derived from the very eggs he delivered to the Cudahy Packing Company.

The bankrupt testified he wired his brother, Dr. John Henkin, to meet him at the train, and he did so. Dr. Henkin swears he did not see the bankrupt at the train, did not see him until Friday, the 7th of May, after the bankrupt claims to have lost all the money. The bankrupt was unknown at the Chicago banks. He went to the drawee bank, the Continental & Commercial National Bank on Wednesday, May 5th, but they refused to cash these drafts until he was identified. He then went to Morris Tower, who was well acquainted with the father of the bankrupt, and Tower went with Henkin to the bank where Tower did business, the National Bank of the Republic, and identified him to that bank, and it guaranteed the indorsement of Henkin. Tower swears that Dr. John Henkin was along, as does Oscar H. Swan, now cashier of the bank. This is in direct conflict with the testimony of both the Henkins. The bankrupt thus cashed one of the drafts at the drawee bank. This, it will be remembered, was on Wednesday, May 5th. On the following Thursday, May 6th, the bankrupt cashed the other two drafts at the National Bank of the Republic. Mr. Swan, now cashier of the bank which guaranteed the indorsement on May 5th and paid the two drafts on May 6th, testifies that when he came with Mr. Tower on May 5th he did not observe anything indicating that the bankrupt had been up all night or drinking the night before, and when he came the next day there was absolutely nothing about him that indicated to him that he was carrying on a course of dissipation or excessive drinking. The bankrupt went direct to the Sherman Hotel. After his return home, he was sued by some of his creditors and judgment obtained. One of these, Eno, instituted proceedings auxiliary to execution, and the bankrupt was examined as a witness and testified that he occupied two rooms at the Sherman, 307 and 205, and "I think we played in 307." He was in fact registered in 411, and there is nothing to indicate he ever occupied any other room. This is mentioned, not as important in itself, but because he noticed and remembered the number of a bellman, who called at his room to take an order for two bottles of beer and two sandwiches, as No. 9. While a man is not expected to remember the numbers of all the rooms he occupies, he might remember whether he moved from one floor to another on the same trip, but much less would he remember the number of a bellboy who called at his room to take an order for two bottles of beer and some sandwiches, unless at the time he expected to call the boy as a witness, and this theory is corroborated in this case by the fact that he called the attention of the boy to a deck of cards and some money on the table, and said they were having a game, and gave him 25 cents as a tip. There was no one else in the room at the time but the defendant and the bellboy, but the latter saw some one in the bathroom. This entire scene is wholly consistent with the theory that it was a plan to make evidence when this lawsuit or a similar one arose, and seems inconsistent with any other theory, as it was unreasonable that the bankrupt should remember the number of the bellboy unless it was for the purpose of calling him as a witness, and still more unreasonable that he called to

the attention of the bellboy the fact that a game was going on, although they had no chips, and the money could have been pushed inside a drawer as well as the other party could be sent to the bathroom.

After the bankrupt gave the checks to the First National Bank of Elk Point for the three drafts in question, he had a balance of only $17.96, but he took with him to Chicago besides the drafts about $300 in money. The bankrupt reached Chicago at 8:30 a. m. Tuesday, May 4th. He claims he went to the Sherman Hotel, registered, got shaved, and went to the office of the Cudahy Packing Company.

"It was in the morning, and I got away from there (Cudahy Packing Company), so it must have been before dinner. I did not go back there in the afternoon. At the Cudahy Packing Plant, I met Mr. Manderville in the office.

"Q. Who else did you meet with. Was there a stranger there? A. I can't tell you his name. I don't remember. I think his name is nearly mine. I think it is Hawkins. I am not sure; I met him in the entrance. I was going up, and he recognized me. I am pretty sure that he did recognize me. This was in the forenoon. I next met this man, whose name I think is Hawkins, when I came down from the office. He waited for me. It was before lunch; I don't know the exact time. I could not give the hour. I next met him at the show that evening. I had tickets to one show, and he went to another one, and, if I remember right, it was right after the show, I am pretty sure. I met him at the Sherman Hotel. He called for me. The only way I can figure the time is by the show. I presume it was 11 o'clock.

"Q. Did you and he stay there until you went to bed? A. I think that we went to the North American Cabaret. That is a restaurant. We stayed there until they closed. They serve drinks there, and, if I remember right, they close or quit serving drinks at 1, and we were there half an hour or more after that. From there we went to the Sherman Hotel, if I remember right.

"Q. What time was it when you got to the Sherman Hotel? A. I don't know as you would call it that night. I was there next morning at 3 o'clock. I did not go to my room alone. I forget the name of the other person that was there. There was just we two."

He testified in the Eno case that the first night, Tuesday, he lost over $2,000. This was the 4th of May, and he had not drawn the money on any of the drafts. This testimony was manifestly untrue, as he could not have lost more than the balance of the $300 cash he took with him if he played on Tuesday. He swore that he cashed one draft each day, when in fact he cashed one on the 5th and two on the 6th of May. He testified on this occasion that he never commenced playing until about 3 o'clock in the morning. This was apparently to corroborate his statement that he had long been drinking with the supposed Hawkins, but it clearly appears that the bell man, on whom he relies to corroborate him, called at the room at 11:15 and they then appeared to have been gambling. If they had not, the whole transaction was a fraudulent pretense. The bankrupt swears he drank nothing but beer, and that he never drank anything but beer and wine; never drank distilled liquors. This made it necessary to swear it was late at night when he gambled with the man whose existence is known only to himself. The bankrupt testified in the Eno case that he had two brothers in Chicago. If there is anything he would be expected to know about, this is one. It clearly appeared he had only one there.

We have but touched upon some of the glaring inconsistencies and misstatements of the bankrupt, but we have said enough, as we think, to clearly show that both the referee and the District Court were justi-

fied in saying that the bankrupt was wholly unworthy of belief; that he never met the supposed Hawkins at all in Chicago and gambled with him;; but that the entire scheme was devised to assist him in swindling his creditors. Not only were the referee and District Judge so justified, but, if the case had been submitted to us, we would have found the same way. Good v. Kane, 128 C. C. A. 454, 211 Fed. 956; Schweer v. Brown, 64 C. C. A. 574, 130 Fed. 328; Seigel v. Cartel, 90 C. C. A. 512, 164 Fed. 691; In re Friedman (D. C.) 153 Fed. 939.

In the state of the record, there is no question of law for our consideration, and the petition to revise must be, and is, denied.

RIALTO IRR. DIST. v. STOWELL.*

STOWELL v. RIALTO IRR. DIST.

(Circuit Court of Appeals, Ninth Circuit. October 15, 1917.)

No. 2491.

1. COURTS ⊜366(7)—PRECEDENTS—FEDERAL COURTS.
A decision of a state court determining the character of bonds issued under a state statute is conclusive and binding on federal courts.

2. WATERS AND WATER COURSES ⊜230(4)—IRRIGATION DISTRICT—BONDS—VALIDITY.
Act Cal. March 7, 1887 (St. 1887, p. 29), under which an irrigation district was incorporated, declares, in section 12, that the directors shall have power to acquire by purchase or condemnation all lands and waters and other property necessary for the irrigation project, and that, in case of purchase, the bonds of the district may be used at their par value in payment. Section 15 declares that for the purpose of constructing necessary irrigation canals and works, etc., the directors shall estimate the amount necessary to be raised and shall immediately call a special election submitting to electors of the district the question whether bonds shall be issued, and that such bonds, if issued, shall be negotiable in form signed by the president and secretary, while section 16 provides that the directors sell bonds from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of canals and works, but that no bonds shall be sold for less than 90 per cent. of their face value after publication of notice of sale, etc. Section 42 declares that the directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise in excess of the express provisions of the act, and that any debt incurred in excess of such express provisions shall be void. *Held* that, while the bonds issued by an irrigation district are negotiable, yet those issued in violation of statute are void, and therefore bonds issued in exchange for construction work or in consideration of a contract for such work to be done in the future are void, although bonds issued in payment for water, pipe lines, and other property actually conveyed are valid.

3. LIMITATION OF ACTIONS ⊜22(5)—RUNNING OF STATUTE—BONDS—COUPONS.
An action on coupons attached to bonds issued by an irrigation district pursuant to such statute is barred by the four-year limitation prescribed by Code Civ. Proc. Cal. § 337, upon actions on contracts, obligations or liabilities founded upon instruments in writing executed within the state, for the bonds being negotiable, and constituting a lien on the property of the district, the bar of such limitation statute cannot be avoided on the

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

*Rehearing denied November 19, 1917.

theory that the action fell within the exception of section 312, declaring that civil actions without exception can only be commenced within the period prescribed, unless in special cases a different limitation is prescribed by statute; the bonds not being payable only out of a special fund, and a judgment not merely establishing their validity.

4. WATERS AND WATER COURSES ⟸230(6)—JUDGMENT—EXECUTION—RIGHT TO LEVY.

A judgment in an action on bonds issued by defendant irrigation district, reciting that plaintiff have and recover from defendant the sum of $50,577.70, together with costs, is such a judgment as will authorize the issuance of execution to be satisfied out of any property of the district subject to such process.

5. WATERS AND WATER COURSES ⟸230(5)—BONDS—"NEGOTIABLE INSTRUMENTS"—WHAT CONSTITUTE.

Bonds issued by an irrigation district under Act Cal. March 7, 1887, § 15, providing for election for submitting question of bonds, and declaring that such bonds shall be negotiable in form, are "negotiable instruments."

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

6. WATERS AND WATER COURSES ⟸230(6)—IRRIGATION DISTRICTS—BONDS—LIABILITY FOR PAYMENT.

Bonds issued by an irrigation district pursuant to Act Cal. March 7, 1887, § 15, providing for bond elections, and that the bonds shall be negotiable in form, though reciting that the bonds and interest thereon are to be paid by revenue derived from an annual tax on the real property of the district, having been made a lien on all the property of the district, are not payable only out of the fund derived from such taxation, and, on recovering judgment against the district, the holder of the bonds is not restricted to the special fund.

7. APPEAL AND ERROR ⟸1177(9)—DETERMINATION—REMAND.

In an action on bonds and interest coupons, where the record did not show how much the judgment should be reduced on account of recovery improperly allowed on interest coupons upon which action was barred by limitations, and there was no stipulation as to the matter, the judgment must be reversed and remanded.

In Error and Cross-Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action by N. W. Stowell against the Rialto Irrigation District, a corporation. There was a judgment denying plaintiff part of the relief sought, and defendant brings error, and plaintiff sues out a cross-writ of error. Reversed and remanded, with directions.

See, also, 246 Fed. 308, — C. C. A. —.

The plaintiff in error was incorporated under an act of the state of California commonly called the Wright Act, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887 (Stats. Cal. 1887, 29), to which act there were several amendments, as well as a supplemental one.

After the organization of the district, it issued bonds in the amount of $500,000, bearing date November 17, 1890, all of which were of the same tenor, and one of which is set out in full in the amended complaint filed by the present defendant in error, Stowell, July 5, 1912, his original complaint having been filed June 27, 1908, to recover $30,009 including interest, alleged to be due upon certain coupons annexed to certain of the bonds so issued, alleged to have been acquired and owned by him. By a supplemental complaint

the plaintiff in the action included in his demand certain other similar coupons, increasing his demand in the aggregate to $50,577.70 including interest.

To all of the bonds were attached both interest and installment coupons, and it was upon such coupons that the plaintiff to the action sought to recover.

By its answer the defendant to the action admitted that the bonds were issued by the officers of the district, but alleged that none of them were issued for a valid or lawful consideration, that none of them were dated or made payable as required by the statute, and that all of the acts of the officers of the district in issuing the bonds were unauthorized and void, and that all of the coupons maturing four years or more before the commencement of the action were barred by a certain specified section of the statute of limitations of the state of California.

After trial before the court the latter made a general finding on the issues in favor of the plaintiff and directed judgment in his favor for $50,577.70, which judgment was accordingly entered.

Each party sued out a writ of error—the plaintiff upon the ground that the court erred in refusing to allow him compound interest, which contention, however, he has in this court abandoned, leaving for consideration only the writ of error brought by the defendant to the action.

There are two other similar actions, it appears from the record, numbered 2492 and 2493 (246 Fed. 308) which, by stipulation of the parties and by order of the court, have been submitted upon the record and briefs in the present case, to abide the decision to be rendered herein.

Henry Goodcell, F. A. Leonard, Howard Surr, and Leonard & Surr, all of San Bernardino, Cal., for Rialto Irr. Dist.

J. W. Swanwick, of Los Angeles, Cal., for N. W. Stowell.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). In form the bonds were "promises to pay to the bearer" thereof:

"At the office of the treasurer of said district the sum of ($500.00) five hundred dollars in gold coin of the United States, at the dates and upon installments as follows: At the expiration of eleven years from date five (5) per cent. of said sum; at the expiration of twelve years from date six (6) per cent. of said sum; at the expiration of thirteen years from date seven (7) per cent. of said sum; at the expiration of fourteen years from date eight (8) per cent. of said sum; at the expiration of fifteen years from date nine (9) per cent. of said sum; at the expiration of sixteen years from date ten (10) per cent. of said sum; at the expiration of seventeen years from date eleven (11) per cent. of said sum; at the expiration of eighteen years from date thirteen (13) per cent. of said sum; at the expiration of nineteen years from date fifteen (15) per cent. of said sum; and at the expiration of the twentieth year from date a percentage sufficient to pay off said sum in full. Said installments are to be paid as provided in and only upon the surrender of the respective installment coupons hereto attached. And said district promises to pay interest on said principal" at a prescribed rate and at prescribed times upon the surrender of the respective interest coupons."

Each bond also recited that:

"This bond is one of a series of bonds amounting in the aggregate to five hundred thousand dollars caused to be issued by the board of directors of said Rialto Irrigation District and pursuant to a vote of the electors of said district at an election held for that purpose on the 15th day of November, 1890. The said series of which this bond is one is composed of one thousand bonds each of the denomination of five hundred dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of the act of the Legislature of the state of California entitled

'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887, and the acts amendatory thereof and supplemental thereto. The Rialto Irrigation District is composed of citrus producing lands divided into ten and twenty acre farms, irrigated by one thousand (1000) inches of water measured under a four-inch pressure, piped to each farm lot. All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is and the said bonds are by said act of the Legislature, made a lien upon all said real property."

The bonds were signed by the corporation by its president and secretary, and its corporate seal was affixed thereto.

Section 12 of the act under which they were issued provides, among other things, that:

The board of directors of the corporation, "and its agents and employés, shall have the right to enter upon any land in the district to make surveys, and may locate the line for any canal or canals, and the necessary branches for the same, on any of said lands which may be deemed best for such location. Said board shall also have the right to acquire, either by purchase or condemnation, all lands and waters, and other property necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs, for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district, hereinafter provided for, may be used at their par value in payment; and in case of condemnation, the board shall proceed, in the name of the district, under the provisions of title seven, of part three, of the Code of Civil Procedure. Said board may also construct the necessary dams, reservoirs, and works for the collection of water for said district, and do any and every lawful act necessary to be done, that sufficient water may be furnished to each landowner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law."

Section 15 of the act is as follows:

"For the purpose of constructing necessary irrigation canals and works and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised, and shall immediately thereupon call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question whether or not the bonds of said district shall be issued in the amount so determined. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county, where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notices must specify the time of holding the election, the amount of bonds proposed to be issued, and said election must be held and the result thereof determined and declared, in all respects as nearly as practicable, in conformity with the provisions of this act governing the election of officers; provided, that no informalities in conducting such an election shall invalidate the same, if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words, 'Bonds—Yes,' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall immediately cause bonds in

said amount to be issued; said bonds shall be payable in gold coin of the United States, in installments as follows, to wit: At the expiration of eleven years not less than five per cent. of said bonds; at the expiration of twelve years not less than six per cent.; at the expiration of thirteen years not less than seven per cent.; at the expiration of fourteen years not less than eight per cent.; at the expiration of fifteen years not less than nine per cent.; at the expiration of sixteen years not less than ten per cent.; at the expiration of seventeen years not less than eleven per cent.; at the expiration of eighteen years not less than thirteen per cent.; at the expiration of nineteen years not less than fifteen per cent.; and for the twentieth year a percentage sufficient to pay off said bonds; and shall bear interest at the rate of six per cent. per annum, payable semiannually on the first day of January and July of each year. The principal and interest shall be payable at the office of the treasurer of the district. Said bonds shall be each of the denomination of not less than one hundred dollars, nor more than five hundred dollars, shall be negotiable in form, signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. They shall be numbered consecutively as issued, and bear date at the time of their issue. Coupons for the interest shall be attached to each bond signed by the secretary. Said bonds shall express on their face that they were issued by authority of this act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser."

By the next section (16), the board of directors was authorized to "sell said bonds from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to fully carry out the objects and purposes of this act," with specific provisions respecting its intention to make such sale and in regard to public notice thereof, and in respect to the making and opening of bids and the making of such sale to the highest responsible bidder, and with the express provision that "said board shall in no event sell any of the said bonds for less than ninety per cent. of the face value thereof."

By section 42 of the act it is expressly declared that:

"The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred, in excess of such express provisions, shall be and remain absolutely void."

[1] The meaning of the act respecting the character of the bonds, for what they were thereby authorized to be issued and sold, and the meaning of the provision that they shall "bear date at the time of their issue," was involved in cases heretofore decided by the Supreme Court of the state, one of which (155 Cal. 215, 100 Pac. 248) was between the same parties now here. Of course, the decision of that court upon these questions is binding upon us.

[2] In the case of Baxter v. Vineland Irrigation District, 136 Cal. 185, 194, 195, 68 Pac. 601, it was decided, among other things, that such bonds are negotiable instruments, but it was thereby further decided that:

Such a "district has only the powers which are given it by statute; and if in its name bonds are issued which are beyond its power to issue (ultra vires), they are of no more value than is a paper purporting on its face to be a negotiable promissory note of a maker who never signed it, nor authorized any-

one to sign it for him"—citing its previous decision in the case of Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. 496, 1034.

In the subsequent case of Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248, the same court held that while an irrigation district organized under the act in question has power to issue its bonds at par for the purchase of completed pipe lines, water rights, and sources of supply suitable and necessary for the reception and distribution of the necessary water, upon the delivery of a deed conveying such property to the district, it has no power to exchange bonds for construction work or in consideration of any contract for such work, saying:

"The argument of respondent is that the contract provided an unauthorized and illegal method of issuing bonds of an irrigation district. Under section 16 of the Wright Act, the board is authorized to sell bonds from time to time, to raise money for the construction of canals and works, the acquisition of property and rights, 'and otherwise to fully carry out the purposes of this act.' Such sale must be to the highest responsible bidder, after publication of notice of sale as prescribed in the act, and no bonds are to be sold for less than 90 per cent. of their face value. Section 12 provides that 'said board shall also have the right to acquire, either by purchase or condemnation, all lands and waters, and other property necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs, for the storage of needful waters, and all necessary appurtenances. In case of purchase the bonds of the district * * * may be used at their par value in payment.' As this court said in Hughson v. Crane, 115 Cal. 404, 412 [47 Pac. 120, 121], 'these are the only provisions in the act for any disposition by the directors of the bonds of the district, and it follows that the only mode in which they can exercise their power of disposing of the bonds, so that they may become valid obligations against the district, is either to exchange them for property at their par value, or to sell them for money in the open market, under the restrictions and limitations given in section 16, at not less than 90 per cent. of their face value. The express provision giving to the board power to exchange them for certain property at their par value excludes the right of the board to exchange them for any other purpose, or to dispose of them in any other manner than by the sale authorized by section 16.' Applying these views to the facts before the court, it was held, in Hughson v. Crane, that the directors had no power to turn bonds over to an agent who was to sell them at not less than 90 per cent. of their face value, nor to deliver bonds to a contractor, in payment for construction work done by him for the district. Similarly, in Stimson v. Alessandro Irrigation District, 135 Cal. 389 [67 Pac. 496, 1034], it was decided that the statute did not authorize the directors of an irrigation district to make a contract with a water company whereby the district issued all of its bonds in consideration of the mere executory promise of the water company that it would in the future lease water to the district at a stipulated rent. In Leeman v. Perris Irrigation District, 140 Cal. 540 [74 Pac. 24], the doctrine of the former cases was reaffirmed. One of the bonds there involved was issued under circumstances similar to those considered in the Stimson Case, and, on the authority of that case, was held to be void in the hands of the original holder. Others had been exchanged by the district for warrants originally issued to pay for construction work. It was held that section 12 of the act did not authorize the directors to part with bonds in this manner. 'The only express authority given to use bonds in payment for any purpose,' says the court, 'is in the case of the purchase of property necessary for the works. * * * There is no express authority anywhere in the act for exchanging bonds for construction work, or for exchanging bonds for warrants issued for construction work. * * *'"

Now looking at the evidence in the present case, it is seen that the defendant in error himself testifies that a large number of the bonds,

on some of the coupons of which the court gave him, in part, the judgment here complained of, were issued to him under and in pursuance of a contract entered into between him and the irrigation district January 2, 1895, which contract, after reciting that the said Stowell had acquired all of the rights of the Semi-Tropic Land & Water Company under a preceding contract that had been made by the Rialto Irrigation District with that company, proceeded to state a new and additional contract between Stowell and the district, in words and figures as follows:

"Said N. W. Stowell agrees to furnish and lay a good and serviceable pipe of cement concrete and to excavate all trenches necessary, and backfill the same, covering the pipe to a depth of eighteen inches, and to furnish all gates and turnouts necessary, all to be of the same general style and quality as the work heretofore done in said district. Said pipe to be made of one part good Portland cement by measure, and four parts of sand and gravel. The following are the estimated quantities and sizes required: 10-inch pipe 27,020 feet, 14-inch pipe 6,800 feet, 20-inch pipe 3,550 feet, 8-inch pipe 7,800 feet, 22-inch pipe 3,838 feet, 30-inch pipe 7,310 feet. Prices agreed upon are as follows: (Here follow prices.) The sizes of the pipe made may be modified as the district engineer may elect, provided the whole cost does not exceed the total cost of the above estimate at prices agreed upon. The district to provide necessary and convenient rights of way for hauling and laying pipe. The Rialto Irrigation District agrees to pay for pipe in bonds of said district at par as follows: Upon each $5,000 worth of pipe when made at yard there shall be paid said Stowell $3,000 in bonds at par. Thirty-five days after the completion of laying of each successive mile of pipe, the balance due upon such mile shall be paid. Upon completion of a well 20 feet in diameter and 30 feet deep, to the satisfaction of the district engineer, there shall be paid to Stowell the sum of $2,500 in bonds. Fifty per cent. in value of the work to be done under this agreement shall be fully performed on or before March 1, 1895. Ninety per cent. in value of the work to be performed on or before June 1, 1895. The whole to be prosecuted diligently to completion. The said Stowell further agrees to furnish and lay 2,240 feet of pressure pipe at the Lord Place for the sum of ($2,475) twenty-four hundred and seventy-five dollars for 22-inch pipe of No. 14 iron; all payable in bonds at par, as work is completed. All earthwork and hauling from Rialto Station to ditch to be done by district. It is understood and agreed that all pipe heretofore furnished or constructed, or to be furnished or constructed for the Rialto Irrigation District or pipe system, and not heretofore deeded to said district, shall remain and be the property of N. W. Stowell until the bonds received, or to be received therefor, shall have been paid, and upon completion of the work herein agreed upon a deed of all the interests of said Stowell and the Stowell Cement Pipe Company to said pipe, and a deed from N. W. Stowell of a right of way for pipe lines, to said district, shall be executed and placed in escrow with W. S. Hooper, cashier, San Bernardino National Bank, until conditions above are fulfilled."

It was under this new and additional agreement between the parties to the present action that the defendant in error received, as has been said, a large number of the bonds in question. Those bonds, according to the decisions of the Supreme Court of the state, above cited, the district was without power to issue, for they were issued, not in consideration of property conveyed to the district, but for construction work to be thereafter performed by Stowell. Not only was the necessary statutory authority lacking in respect of those bonds, but the act creating the district contains in its forty-second section, as has been seen, the express declaration, in effect, that neither the board of directors nor any officers of the district shall have power "to incur any debt or liability whatever, either by issuing bonds or otherwise, in ex-

cess of the express provisions of this act, and any debt or liability incurred, in excess of such express provisions shall be and remain absolutely void."

In view of the statutory provisions that have been mentioned, it is impossible to hold valid the bonds issued to the defendant in error under and in pursuance of the contract of January 2, 1895, that has been set out. Authorities supra. See, also, Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040; Township of East Oakland v. Skinner, 94 U. S. 255, 24 L. Ed. 125; McClure v. Oxford Twp., 94 U. S. 429, 24 L. Ed. 129; German Savings Bank v. Franklin County, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; Coffin v. Board of Com'rs of Kearney Co., 57 Fed. 137, 6 C. C. A. 288; Dillon on Municipal Corporations (3d Ed.) §§ 457, 463, 511, 553; 15 Am. & Eng. Encyc. of Law (1st Ed.) 1292.

The other bonds upon which the judgment of the court below was in part based were issued by the irrigation district to the Semi-Tropic Land & Water Company for water, pipe lines, and other property actually conveyed to the district, the issuance of which, under the decisions of the Supreme Court of the state to which reference has been made, was within the statutory power of the district, and reciting upon their face, as they did, a compliance with all of the statutory requirements, and those here involved having been acquired by the defendant in error in good faith and for value, there can be no manner of doubt that they constitute valid obligations of the plaintiff in error.

Respecting the date of such bonds, the construction of the statute by the Supreme Court of the state (Stowell v. Rialto Irrigation Dist., 155 Cal. 215, 222, 223, 100 Pac. 248) is conclusive against the contentions of the plaintiff in error here.

[3-6] The only question remaining for consideration is whether the coupons annexed to and therefore becoming a part of the bonds last referred to were barred by the statute of limitations of California which was set up in bar. That statute reads, in part, as follows:

"Sec. 335. *Periods of Limitation Prescribed.*—The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: * * *

"Sec. 337. Within four years: (1) An action upon any contract, obligation or liability founded upon an instrument in writing executed within this state; provided, that wherever the time within which any such action must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six and before the first day of January, one thousand nine hundred and seven, such action may be commenced at any time before the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within four years as in this section provided."

Section 312 of the same Code declares:

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

It is insisted on behalf of the defendant in error that the statute of limitations is inapplicable to the case, and has never commenced to run against any of the coupons here involved for the reasons, as claimed

by counsel, that the bonds are not negotiable instruments; that they are not general obligations of the district, but are payable only out of a nonexisting "particular fund" and "amount in effect, if not in terms, to a promise on the part of the district to pay the principal and interest of the bond at the dates therein mentioned, provided the fund out of which the payment is to be made shall have been collected." And counsel further says:

"The only judgment we can obtain in this action is a judgment establishing the validity and amount of the indebtedness represented by the bonds in suit. It is not a judgment upon which an execution will lie in any general sense, but only a judgment which may be the basis of another proceeding for the purpose of obtaining the money for its satisfaction."

The record, however, shows that the judgment which was in fact obtained and entered in the court below, and that is brought here for review, is very different from that suggested by counsel. After reciting the trial of the case before the court without a jury, the submission of oral and documentary evidence on behalf of the respective parties, and the findings and conclusion of the court, the judgment entered reads:

"Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that N. W. Stowell, plaintiff herein, have and recover of and from the Rialto Irrigation District (the defendant herein, the sum of $50,577.70, together with his, said plaintiff's, costs in this behalf taxed at $———. Judgment entered October 6th, A. D. 1913."

It cannot be doubted, we think, that upon that judgment, if affirmed, the party recovering it will be entitled to execution to be satisfied out of any property owned by the district subject to such process. See Mather v. City and County of San Francisco, 115 Fed. 37, 52 C. C. A. 631; Herring v. Modesto Irr. Dist. (C. C.) 95 Fed. 705, 709; 2 Dillon on Mun. Corp. § 856, where will be found indicated the appropriate further proceedings in the event the judgment debtor has not sufficient property to satisfy the judgment.

That the bonds provided for by the act of the Legislature in question, the issuance of which was thereby authorized, were negotiable instruments has been decided by the Supreme Court of the state, as has been shown. They were required to contain, and did contain, an absolute promise to pay to the bearer of them certain sums of money at certain specified dates, with interest thereon at a certain specified rate, with appropriate interest and installment coupons annexed thereto. Neither on their face nor in the statute authorizing their issue is there any condition attached to their payment, nor, in our opinion, any provision in either from which any such condition can be implied. True, each bond recites that "all the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district," and that both such tax and the bonds are by the act under which the latter were issued made a lien upon all of the real property of the district; but that is very far from saying that the taxes so to be levied and collected should constitute a particular or special fund out of which only the principal and interest due upon the bonds should be paid.

United States v. County of Clark, 96 U. S. 211, 24 L. Ed. 628, presented a case where a county had subscribed for stock of a railroad corporation, and had issued bonds in payment therefor pursuant to a state statute which authorized a levy of a special tax to pay them, "not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year," but contained no provision that only the fund so derived should be applied to their payment. The defense made to the proceeding in the case, which was mandamus, was in effect that the debt authorized by the state statute was one payable from a particular fund. In holding to the contrary, the Supreme Court said:

"There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the states, and more than once by the federal government. The act of Congress of Feb. 25, 1862 (12 Stat. 346), set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per centum thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the amount of the duties collected. Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtor. Why, then, must not the special tax of one-twentieth of one per cent. be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of any other creditors of the county? These bonds are a debt of the county as fully as is any other liability. Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury collected for the discharge of its obligations; for it is by the law made the duty of the county court to order the payment out of the county treasury of any sum of money found by them to be due from the county. It would therefore have been the court's duty to direct its clerk to issue a warrant for payment, as in other cases. And surely it is not to be held, unless such a construction of the statute is absolutely necessary, that, when the Legislature authorized the county to incur the debt, it intended to deny to the creditor the right to look to the treasury of the county for its payment; in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor was relieved from attendant liabilities. And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of its purpose. It accords neither with its letter nor with its spirit. Yet it is for such an implication the defendants contend, and upon it their case wholly rests. The bonds, as we have said, and as is conceded, are an authorized debt of the county. The purpose for which they were authorized is manifest. It was to furnish aid to the construction of a railroad in which the public, and especially the county of Clark, were thought to be interested. The bonds, it is to be presumed, were intended to be for sale in the market; and it was the obvious intent alike of the state, of the railroad company, and of the county that they should bring the highest price possible."

In principle, what is there said is exactly applicable to the facts of the present case. And just as clearly do we regard, as wholly inap-

plicable here, cases founded upon statutes which, while authorizing the issue of bonds by a municipality, negotiable in form, yet provide for the creation of a special fund out of which only shall such bonds be paid.

A statute of the state of Kansas authorized certain cities within the state to pass ordinances imposing taxes for general revenue purposes on all the taxable property within their limits, and to make specified public improvements and to create certain specified assessment districts upon which to levy, in addition to general taxes, special assessments for the payment of such improvements; and it empowered the city to issue, for the cost of the improvements, bonds payable at the expiration of specified terms and to make assessments in each year to pay the principal and interest maturing thereon during the fiscal year, upon the taxable property within the assessment district. Other sections of the act authorized the city to provide, when necessary, for the issue of bonds for the purpose of funding any and all indebtedness of the city and required it to make provision by levying taxes payable in cash for a sinking fund for the redemption at maturity of "the bonded indebtedness of the city" and to levy annually taxes payable in cash on all taxable property within the city, in addition to other taxes, and in amount sufficient to pay the interest and coupons, as they become due, on all the bonds of the city. Under the statute the city passed an ordinance providing for certain street improvements, establishing the special assessment district for the paying of the costs of the work by the issue of special improvement bonds of the city, which bonds should be paid, both principal and interest, solely from special assessments upon property within the assessment district. Each bond issued under the ordinance stated in its margin that it was issued in pursuance of the ordinance of the city, and upon its face recited that it was a special improvement bond of the city. It also declared upon its face that the city, for value received, thereby acknowledged itself to owe and promised to pay to the holder the amount thereof, and each of the bonds was indorsed with the certificate of the auditor of the state that it was regularly and legally issued. A bona fide holder of some of the bonds brought suit against the city and recovered judgment for the amount thereof in the ordinary form, except that the court added that it "be enforced and collected pursuant to law in such case made and provided." The judgment not having been paid, the holder sued out a writ of mandamus to compel the levy of a general tax. The trial court held that the levy must be confined to special assessments upon the property within the street assessment district, but that holding was reversed by the Supreme Court in the case of United States v. Ft. Scott, 99 U. S. 152, 159, 25 L. Ed. 348, where that court said:

"The main difficulty comes from the peculiar phraseology of the city ordinance prescribing the source from which the means for the payment of the bonds should be obtained. The statement in the ordinance that the bonds 'shall be paid, principal and interest, solely from special assessments, to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved,' should be regarded only as an expression, in emphatic terms, of the purpose and duty of the city, as between all its taxpayers, to impose the cost of the proposed improvements

upon the property specially benefited. There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted. The general reference, upon the margin of the bonds, to the ordinance under which the improvement was projected, should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is that the city shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment. Experience informs us that the city would have met with serious, if not insuperable, obstacles, in its negotiations had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and pervades the statute of March 2, 1871, required an explicit avowal of such purpose in the bond itself, or, in some other form, by language, brought home to the purchaser, which could neither mislead nor be misunderstood."

Avery v. Job, 25 Or. 512, 36 Pac. 293, presented a case where a municipal charter provided that:

"All moneys collected from water rates shall be kept separate from all other funds, and shall be known as the water fund, and shall only be used to pay the costs incurred by the city in operating such waterworks and extending and improving the same, and to pay the semi-annual interest on the bonds issued under this act, and all the surplus collected from water rates shall go to create a sinking fund with which to pay the principal on such bonds at maturity."

The Supreme Court of Oregon said:

"The argument is that by this provision of the charter the money collected for water rates is made a special fund for the payment of the interest on the bonds as it accrues, and for the creation of a sinking fund for their payment at maturity, and that it is the only fund out of which such bonds or the interest thereon can be paid. As a general rule, when the Legislature authorizes a municipality to contract a debt, and issue bonds therefor, it is to be inferred that it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference; and, although a special tax or fund may be provided, the bondholders' remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way. The bonds, when issued, become a debt of the corporation for which it is primarily liable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of the general fund of the corporation."

See, also, Vickrey v. City of Sioux City (C. C.) 115 Fed. 437; United States v. Saunders, 124 Fed. 131, 59 C. C. A. 394; Mutual Benefit Ins. Co. v. City of Elizabeth, 42 N. J. Law, 235.

We regard it as clear that the bonds here in question constitute a general obligation of the irrigation district to pay the principal and interest thereof as therein provided for, and that a bona fide holder of such bonds is not limited to any particular fund.

Such being the case, that the statute of limitations of the state runs against the coupons, whether annexed to or detached from the bonds,

and bars them in four years from the time such coupons respectively mature, was distinctly adjudged by this court in the case of Mather v. City and County of San Francisco, supra.

The cases of Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766, Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646, and Robertson v. Blaine County, 90 Fed. 63, 32 C. C. A. 512, 47 L. R. A. 459, so much relied on by the counsel for the defendant in error, do not, in our opinion, at all support the contentions on the part of the defendant in error.

Some of the coupons involved in Lincoln County v. Luning were barred by the general limitation law of the state. But, said the Supreme Court:

"There has been this special legislation in reference to these coupons. The bonds were issued under the funding act of 1873. In 1877 the county was delinquent in its interest, and the Legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto, in the order of their registration. Statutes of Nevada 1877, 46. The coupons, which by the general limitation law would have been barred, were presented, as they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877, and from the time of their registration to the commencement of this suit there was no money in the treasury applicable to their payment. This act, providing for registration and for payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and, when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

Nothing needs to be added to show the inapplicability of that case to the present one.

The bonds involved in the case of Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646, were issued under and by virtue of a statute passed by the Legislature of California April 24, 1858 (Stats. 1858, 280), under which, as expressly stated by the court in its opinion, no action could be maintained against the city of Sacramento (against whose treasurer the mandamus proceeding was had), either on the bonds or coupons; but, according to one of the sections of the statute, 55 per cent. of certain revenues therein specified were set apart and appropriated for the payment of the annual interest on the bonds, and for their final redemption; and the act made it the duty of the treasurer of the city to pay the coupons when due as soon as those moneys came into the treasury. What the court held in that case was that it was not competent for the city to divert those moneys into other channels to the detriment of the bondholders; that:

"By law, it was the duty of the city to make provision for the payment of the bonds and coupons, according to the statute under which they were is-

sued, and, by omitting to perform such duty, the city could not create the defense of the statute of limitations; not until the funds were in the treasury, properly applicable, would the statute begin to run; not until that period would the petitioner have any right of action or proceeding against the treasurer."

The case of Robertson v. Blaine County, 90 Fed. 63, 32 C. C. A. 512, 47 L. R. A. 459, is as little in point. There certain bonds with coupons annexed had been issued by Alturas county, of the state of Idaho, subsequent to which Alturas county was abolished by act of the Legislature of the state, and, together with Logan county, was made to constitute the new county of Blaine, by which latter act Blaine county was made liable for the bonds that had been issued by Alturas county. The action was against Blaine county on the bonds issued by Alturas county, and would have been barred by the statute of limitations of the state but for the liability imposed on Blaine county by the act of the Legislature creating it. As stated by the court, more than five years having elapsed from the issuance of the bonds before the commencement of the action, the statute of limitations would have applied but for the act of the Legislature imposing the obligation upon Blaine county to pay them; the court very properly holding:

"So far as Blaine county is concerned, the bonds are but the evidence of the valid and legal indebtedness of Alturas, which it agreed to pay. The debt was originally to be paid by Alturas county, Blaine county, except for the provisions of the statute referred to, could not be held answerable for the debt; but, by the act, new obligations were created, and the manner of payment was changed. To recapitulate: The statute created a debt, duty, or obligation against Blaine county, to recover a portion of which this action is brought; but, in order to show a cause of action against Blaine county, it devolved upon the plaintiff to allege the issuance of the bonds by Alturas county, and their nonpayment, because the existence of such facts were necessary in order to show that they constituted a part of the valid and legal indebtedness of Alturas county, which Blaine county, by virtue of the provisions of the statute, became liable to pay. This debt, or obligation, or whatever it may be called, is in the nature of a specialty, and, in our opinion, is not barred by the provisions of section 4052 of the Revised Statutes of Idaho."

That case was decided long before our decision in the case of Mather v. City and County of San Francisco, above referred to, and was manifestly not regarded as affecting the correctness of the decision in the latter case.

[7] In the brief of counsel for the plaintiff in error it is said that by a stipulation of counsel it was provided:

"If the statute of limitations is held to be applicable to the case at bar, then, under the stipulation and order of court above referred to, the judgment in case No. 2492 should be reduced by $61,759.85 on account of barred coupons sued upon in that case, and in case No. 2493 the judgment should be reduced by $4,367 on account of barred coupons sued upon in that case."

We find in the record no such stipulation. Nor can we determine from the record with certainty the amount of the coupons involved in the present case that are barred by the statute pleaded in bar.

The judgment is reversed, and the cause remanded to the court below for further proceedings not inconsistent with the views above indicated.

RIALTO IRR. DIST. v. CHELLIS.*

CHELLIS v. RIALTO IRR. DIST.

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

Nos. 2492, 2493.

In Error and Cross-Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action between Burt Chellis and the Rialto Irrigation District. There was a judgment, and both parties bring error. Reversed and remanded, with directions.

Henry Goodcell, F. A. Leonard, Howard Surr, and Leonard & Surr, all of San Bernardino, Cal., for Rialto Irr. Dist.

J. W. Swanwick, of Los Angeles, Cal., for Burt Chellis.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. Pursuant to the stipulation of counsel for the respective parties, filed October 6, 1914, in the causes entitled in this court Rialto Irrigation District, a Corporation, v. N. W. Stowell, and N. W. Stowell v. Rialto Irrigation District, a Corporation, No. 2491, 246 Fed. 294, — C. C. A. —, and Rialto Irrigation District, a Corporation, v. Burt Chellis, and Burt Chellis v. Rialto Irrigation District, a Corporation, Nos. 2492 and 2493. and upon the authority of Rialto Irrigation District, a Corporation, Plaintiff in Error, v. N. W. Stowell, Defendant in Error, and N. W. Stowell, Plaintiff in Error, v. Rialto Irrigation District, a Corporation, Defendant in Error, No. 2491, 246 Fed. 294, — C. C. A. —, just decided, it is ordered that the judgment of the District Court of the United States for the Southern District of California, Southern Division, in each of the causes Nos. 2492 and 2493 be and hereby is reversed, and the causes remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this court in case No. 2491.

*Rehearing denied November 19, 1917.

A. B. DICK CO. v. UNDERWOOD TYPEWRITER CO.

(District Court, S. D. New York. October 18, 1917.)

1. PATENTS ⟸65—DESCRIPTION.
The patent law requires certainty of expression and a mere conjectural allusion or ambiguous reference to the subject-matter of a later patent contained in a prior will not overcome the validity of the later one.

2. PATENTS ⟸58—ANTICIPATION—BURDEN OF PROOF.
The burden of proving anticipation of a patent alleged to be infringed is on defendant, and in case of reasonable doubt, the doubt must be resolved against anticipation.

3. PATENTS ⟸124—CLAIMS—MULTIPLICITY.
Multiplication of the claims of a patent which relate to the same subject-matter and are both broad and specific, being undoubtedly phrased to protect the patentee against any possible prior inventions which might amount to anticipation, does not invalidate the patent.

4. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
Fuller patent, No. 1,101,268, for a stencil blank capable of being stencilized, consisting of a dry but hygroscopic sheet of fibrous material impregnated with a coagulated colloidal substance and a tempering agent, and No. 1,101,269, for a process of forming a stencil sheet, which consists in impregnating a sheet of fibrous material with a colloidal substance, rendering such substance normally nonplastic, but capable of being temporarily softened, *held* valid, not being anticipated, and, except as to claims 23 and 24 of the first patent, to be infringed.

5. PATENTS ⟸328—INFRINGEMENT—WHAT CONSTITUTES.
Fuller patent, No. 1,101,270, for a method of preparing duplicate stencils, consisting of a particular method of drying the stencil sheet after it has been cut and moistened, whereby the opening in the sheet made in forming the letters or figures is enlarged, *held* not to show invention, and not to be infringed.

In Equity. Bill by the A. B. Dick Company against the Underwood Typewriter Company. Decree in part for complainant, and for defendant in part.

See, also, 235 Fed. 300.

Samuel Owen Edmonds, of New York City (J. Edgar Bull, of New York City, of counsel), for plaintiff.

Briesen & Schrenk, of New York City (Hans v. Briesen and Fred A. Klein, both of New York City, of counsel), for defendant.

HAZEL, District Judge. Bill for injunction and accounting for infringement of patents No. 1,101,268, for an article of manufacture, No. 1,101,269, for the process of making the same, and No. 1,101,270, for the method of preparing duplicating stencils, granted on June 23, 1914, to Louis E. Fuller, patentee and assignor of complainant. The art of producing a stencil, consisting of a sheet of paper or other fabric upon which letters or figures were formed by writing, cutting, or perforating, was known long before the grant of the patents in question. In 1874 Zuccato received a British patent (No. 3,150) for a chemical process of reproducing writing, a so-called papyrograph, which was made of a closely woven sheet of paper, sized and saturated in resinous varnish and then dried. When written on with a solu-

tion of caustic soda the coating and paper base erode, and when the coating is washed away along the written lines, the paper becomes porous, permitting the ink of the copying press to pass through to reproduce the writing on underlying paper. Subsequently Edison's patent for an electric pen which pierced the prepared paper to permit ink to be applied to the writing was followed by the cyclostyle stencil in which a sheet of paper was placed upon a zinc plate and written on with a rotatable stylus having peripheral teeth, which perforated the sheet, and from which copies were made by applying ink thereto.

Next came a file plate for mimeograph copying (Zuccato's trypograph) in which tiny teeth penetrated the paper pressed down upon it by hand. In these stencils, which were mainly used for writing addresses, the paper was closely woven, and the coating on one side of the paper was hard, in order to keep impervious those parts not perforated or penetrated. Zuccato, who was a prolific inventor in the art, quickly adapted stencils to typewritten matter by putting above the type surfaces small, penetrating, pinlike projections, which made holes through which the ink was forced to reproduce the typed letters, and in another patent wound wires around the roller of the typewriter to make a rough surface upon which the sheet was placed for perforation when struck by the type. Patents No. 10,869, of 1891, and No. 16,056, of 1892. At a later time a close-fibered stencil paper with hard wax coating perforated by sandpaper or bolting cloth, upon which typing impressions were made by contacting the filmy paper, was used.

In the year 1887 an important discovery was made by John Brodrick, namely, the adaptability of Japanese Yoshino paper as a base for stencil sheets. Patent No. 377,706. Closely woven impervious paper treated with hardened wax was discarded, and an open weave paper, porous and veil-like, took its place. No sizing was added, simply a coating of soft wax to close the inherent interstices, plainly seen through a microscope, so that when the type struck the paper, the wax left the fibers at the point of contact without severing them. Brodrick's invention became involved in considerable litigation, and various federal courts had occasion to examine his achievement in connection with the prior state of the art. Judge Townsend, in A. B. Dick v. Henry (C. C.) 75 Fed. 388, concurring with Judge Green (A. B. Dick Co. v. Fuerth [C. C.] 57 Fed. 834), and with Judge Wheeler (A. B. Dick Co. v. Wichelman [C. C.] 74 Fed. 799, affirmed, 88 Fed. 264, 31 C. C. A. 530), substantially said that Brodrick's conception of the use of Yoshino paper made it unnecessary to cut or perforate the paper, and that the process was an expressing or extracting process as distinguished from a perforating or cutting process. Coating with soft wax a paper having holes in it was regarded by the learned court as materially different from prior processes wherein the paper was first coated and then holes cut in it by perforation or piercing.

The Brodrick claims were broadly construed to include any stencil sheet having for its base Yoshino paper or Japanese dental paper coated with a substance impervious to ink. That Brodrick made an important advance in the art is herein conceded on both sides. Indeed defendant admits that such stencil paper was the only stencil paper

that could be used successfully in typewriting machines. Brodrick's first patent expired in 1905, and his second in 1912. There were, however, certain objections to his stencil which the skilled in the art tried at various times to overcome. The number of copies that could be produced was limited, the stencil was very brittle and easily injured by changes in temperature, and the copies were often blurred.

The Dermatype stencil, as complainant's stencil is known, is claimed to be the first stencil practically indestructible either by variations of temperature or by handling, and may be filed away for an extended period and reused for duplicating a large number of copies in good condition. The preferred solution for the production of the stencil sheets comprises gelatin, white sugar, glacial acetic acid, glycerin, water, and potassium dichromate. After the coating has been applied the sheet is dried and exposed to daylight to make it nonplastic and insoluble in water. Complainant's claim is that its stencil sheet is normally dry, but hygroscopic and limited by the disclaimer filed herein to the extracting or expressing process, meaning thereby, as heretofore pointed out, that the film on the stencil is expressed or discharged by the stroke of the type without destroying the fibers; that the sheet for the first time is impregnated with a coagulated colloid or gelatin, rendering it impervious to ink until impressed by the type, when the fibers open for the ink to pass through, together with a tempering element for softening the colloid, and then moistened before being typed. Such method of impregnating the sheet was new and novel and of immediate value, as the vast number of sales of the product proves.

[1-4] All the claims in controversy relate generally to a stencil sheet of Yoshino paper impregnated as specified, and differ only as to their scope. Claims 2 and 22 of patent No. 1,101,268 and claims 2 and 4 of patent No. 1,101,269 alone will be set forth.

"2. A stencil blank capable of being stencilized, consisting of a dry but hygroscopic sheet of fibrous material impregnated with a coagulated colloidal substance and a tempering agent, substantially as described."

"22. A stencil blank capable of being stencilized by pressure, comprising a sheet of fibrous material impregnated with a compound consisting of protein one part, sugar one part, glacial acetic acid one part, glycerin two parts, and potassium dichromate sufficient to coagulate the compound when exposed to light, substantially as described."

"2. The process of forming a stencil sheet which consists in impregnating a sheet of fibrous material with a colloidal substance, rendering said substance normally nonplastic but capable of being temporarily softened, by treating the same with a coagulant and a tempering agent and drying the sheet so impregnated, substantially as described."

"4. The process of forming a stencil sheet which consists in impregnating a sheet of fibrous material with a colloidal substance, rendering said substance normally nonplastic but capable of being temporarily softened, by treating the same with a chromic coagulant and a tempering agent and drying the sheet so impregnated, substantially as described."

The defense is anticipation by the British patent No. 13,851, granted to Zuccato in 1893. Comparison of this patent with the prior basic patent to Brodrick and the patents in suit in connection with the evidence satisfies me that there are essential differences between them; Zuccato referring specifically to the perforating process, while Fuller's patents are limited to the expressing process. It is true there are

terms in Zuccato's specification from which it might be surmised that he intended to include Yoshino paper as a base for his coating, but his emphasis on tissue paper free from pin holes, preferably possessing a long fiber, and his reference to a medium ream weighing between four and six pounds, for coating on one or both sides, in view of his acquaintance with Yoshino paper and the Brodrick patent, indicates to my mind an exclusion of Yoshino paper in favor of a tissue paper of the closely woven type. The patent law requires certainty of expression, and not merely conjectural allusion or ambiguous reference to the subject-matter, before a prior patent can overcome the validity of a later one that has meritoriously progressed the art. The burden of proving anticipation is on the defendant, and in case of reasonable doubt as to anticipation, the doubt must ordinarily be resolved against it. Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017.

Zuccato's patent, although referring to imperfections in the stencil making art, was not designed to improve the Brodrick process. Zuccato's object was to improve the perforated type of stencil in which a Yoshino base was impracticable. And while he says that perforation of the paper results from the action of the type without cutting or breaking out the characters, he nevertheless did not have in mind the extracting or expressing process. Such wording seems to me to imply that the coating would not be crushed, owing to the use of glycerin in lieu of wax or paraffin, which, as heretofore stated, being brittle, was easily broken. Although Dr. Little believed that the glycerin coating softened the paper and was sufficiently waxlike in character to be pushed aside, he does not mean to be understood, I take it, that the coating was displaced without rupturing the fibers, as is the case with a Yoshino base. The two processes require different bases and different coatings to achieve the best results. The disclaimers in suit, properly filed, I think are unmistakably limited to a Yoshino paper base and to the expressing or extracting process. According to the evidence the compounded coatings were also dissimilar.

The claims in suit refer essentially to a coagulating gelatin—a term signifying a hard and nearly dry coating—and though the alum of Zuccato's mixture hardens the sheet, it fails to permanentize the coating or tan it, as in complainant's patents, and it becomes soft in cold water or dissolves in hot water; while, on the other hand, the coagulation in complainant's patents, resulting from the use of potassium dichromate, or its equivalent substances, such as tannin, tannic acid, and chrome alum, not only hardens the gelatin, but also makes it insoluble and permanent. In addition to being the first to impregnate with a gelatin and alum solution, Zuccato made other important changes. For example, he first dried the paper after coating, then soaked it in glycerin and water to invest it with moisture, and later allowed the water to evaporate, which required soaking the sheet in damp cloth before perforation, indicating an intention to retain a degree of moisture which would make the paper rotten and thus facilitate its perforation. The described treatment did not coagulate the gelatin contents as did Fuller's, although in the latter a certain amount of hygroscopicity was necessary. No stencil sheets made in strict accordance with Zuccato's process were produced by defendant,

and samples in evidence have, in most instances, a Yoshino base, which would seem to strengthen complainant's contention that stencils for the expressing process are not successfully made by the Zuccato method.

Defendant has sold three different kinds of stencil paper, the base in each being Yoshino paper, and the hardening element a coagulant within the terms of the patents in suit. The compounded coating of stencil Exhibit I consisted of gelatin, glycerin, Turkey red oil (or soap oil containing Turkey red oil), and chrome alum; of stencil, Exhibit J, gelatin, glycerin, and chrome alum; while the ingredients of stencil Exhibit K were gelatin, glycerin, and formaldehyde. The combination of chrome alum with gelatin, tempered with glycerin and Turkey red oil, was in its essence the coating of the patents in suit. Though potassium dichromate was not used by the Equilibrator Company in the manufacture of stencil sheets (Exhibits I and J), chrome alum served as a substitute, and was its recognized equivalent as a coagulant of gelatin. In defendant's stencil (Exhibit K), the coagulant was formaldehyde in combination with gelatin, forming the filling material of the Yoshino base, but according to a fair preponderance of the evidence the ingredient formaldehyde was known in the art to be the equivalent of potassium dichromate for coagulating gelatin, while alum, specified by Zuccato as the substance for rendering gelatin insoluble, only hardened it without permanentizing its condition.

Criticism is made upon the multiplication of claims; but, as they all relate to the same subject-matter and are both broad and specific, they were undoubtedly differently phrased to protect the patentee against any possible prior inventions, an expedient that does not invalidate them. Parke & Davis & Co. v. H. K. Mulford Co. (C. C.) 189 Fed. 95, affirmed 196 Fed. 496, 116 C. C. A. 262. In my opinion all of the involved claims of Fuller patent No. 1,101,268 are infringed by the defendant's commercial stencil sheets (Exhibits I and J), and all the involved claims in which formaldehyde (a nonmineral) is shown to have been the coagulant, save claims 23 and 24, which specify a mineral coagulant, are infringed by Exhibit K, also defendant's product. Patent No. 1,101,269 is infringed by defendant's stencil sheets in evidence, all having a Yoshino paper base, and the coating being a protein or gelatin, treated either with a coagulant such as dichromate or chrome alum and formaldehyde, and using glycerin for softening.

[5] Patent No. 1,101,270, relates specifically to printing multiple copies, as the patent states, more conveniently, economically, and with better results by the use of the stencil in question. The involved claims are for a particular method of drying the stencil sheet after it has been cut and moistened. This, it is explained, enlarges the opening in the sheet made in forming the letters or figures, and apparently refers to a drying additional to the drying of the coating in making the stencil; that is, a drying just before the stencil is typed; and, in my view, the evidence does not sufficiently show that the defendant company in making duplicate copies subjected the sheets to any such method of drying before use in the typewriter. But aside from this, the claims are simply for using the stencil sheets and moistening them in one way or another when they have become dry

from disuse, and the described method for drying them does not, in my opinion, involve invention in view of the fact that another patent in issue herein includes the method for making the stencil.

The Fuller patent for the article and the Fuller patent for the process involved herein are held valid and infringed, while the patent for duplicating copies is held not infringed by defendant. Decree accordingly, with two-thirds costs to complainant.

BAYLEY & SONS, Inc., v. BRAUNSTEIN BROS. CO.

(District Court, S. D. New York. July 3, 1917.)

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—DESIGN FOR ELECTRIC LIGHTING FIXTURE.
   The Bayley design patent, No. 49,593, for a design for an electric lighting fixture, consisting of a bell-shaped glass reflector suspended from a rod or chain with a bowl type reflector suspended underneath it, *held* not anticipated, valid, and infringed.
2. PATENTS ⊂⊃71—DESIGNS—ANTICIPATION.
   A design cannot be anticipated by showing the elements separately to be old, but the structure must be viewed as a whole as it appears in use.
3. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—ELECTRIC LIGHTING FIXTURE.
   The Bayley patent, No. 1,153,454, for an electric lighting fixture, *held* not anticipated, valid, and infringed.
4. TRADE-MARKS AND TRADE-NAMES ⊂⊃70(1)—UNFAIR COMPETITION.
   A defendant, who substantially copied a patented device made and sold by complainant under a trade-name, merely changing the name and advertising and selling it as his own product, *held* chargeable with unfair competition.

In Equity. Suit by Bayley & Sons, Incorporated, against the Braunstein Bros. Company. On final hearing. Decree for complainant.

See, also, 237 Fed. 671.

Harry Lea Dodson, of Chicago, Ill., and Zell G. Roe, of Des Moines, Iowa, for plaintiff.

C. A. Weed, of New York City, for defendant.

MANTON, District Judge. Plaintiff, suing on design patent No. 49,593 and mechanical patent No. 1,153,454, seeks to recover an injunction and damages for infringement. It also charges unfair competition growing out of the infringement of the design patent. Both the plaintiff and defendant are engaged in manufacturing lighting fixtures. The patent in suit is an electric light fixture known to the trade as "Equalite," and is described by the witnesses as having an art glass reflector, umbrella shaped (also called bell-shaped), with a straight lower edge suspended from a rod or a chain pendant and with a bowl type reflector suspended underneath the upper piece of glass; the upper part being constructed of panels, the bowl being plain. The inventor, George W. Bailey, assignor to the plaintiff, claims as follows:

"1. An electric lighting fixture having a shade and dish, the shade being formed of a plurality of panels formed of glass, said panels being secured to-

gether by ribs, top binding channels and bottom binding channels, each of the shape of a flat ring with inclined walls to accommodate the inclination of the panels at the edges thereof, means for securing the ribs to the channels, and means for connecting the dish to the shade.

"2. An electric lighting fixture having a shade and dish, the shade being formed of a plurality of panels formed of glass, said panels being secured together by ribs of H-shaped cross-section, top binding channels and bottom binding channels, each of the shape of a flat ring with inclined walls to accommodate the inclination of the panels at the edges thereof, the flanges on the ribs being cut away adjacent to the two channels and the web part of the ribs entering the channels and secured thereto, and means for connecting the dish to the shade.

"3. An electric lighting fixture having a shade and dish, the shade being formed of a plurality of panels formed of glass, said panels being secured together by ribs, top binding channels and bottom binding channels, each of the shape of a flat ring with inclined walls to accommodate the inclination of the panels at the edges thereof, the dish being formed of glass with a binding channel on the edge, hooks carried by the said channel, eyes carried by the ribs of the shade and links carried by the eyes and engaging with the hooks, a collar connected to the top binding channel of the shade, a canopy engaging with the collar, and a lamp socket carried by the canopy.

"4. An electric lighting fixture having a shade and dish, the shade being formed of a plurality of panels formed of glass, said panels being secured together by ribs of H-shaped cross-section, top binding channels and bottom binding channels, each of the shape of a flat ring with inclined walls to accommodate the inclination of the panels at the edges thereof, the flanges on the ribs being cut away adjacent to the two channels and the web part of the ribs entering the channels and secured thereto, the dish being formed of glass with a binding channel on the edge, hooks carried by the said channel, eyes carried by the ribs of the shade, and links carried by the eyes and engaging with the hooks.

"5. An electric lighting fixture having a shade and dish, the shade being formed of a plurality of panels formed of glass, said panels being secured together by ribs of H-shaped cross-section, top binding channels and bottom binding channels, each of the shape of a flat ring with inclined walls to accommodate the inclination of the panels at the edges thereof, the flanges on the ribs being cut away adjacent to the two channels and the web part of the ribs entering the channels and secured thereto, the dish being formed of glass with a binding channel on the edge, hooks carried by the said channel, eyes carried by the ribs of the shade and links carried by the eyes and engaging with the hooks, a collar connected to the top binding channel of the shade, a canopy engaging with the collar, and a lamp socket carried by the canopy."

I am satisfied that the type of lamp placed on the market known as "Braunstein's Best Commercial Light" is similar in design, shape, and ornamental effect to the lamp made by the plaintiff under the patent in suit. The plaintiff manufactured this light under its trade-name for a long period of time, and, from the testimony in the case, it has been well and favorably received by the trade and is associated with the plaintiff as its product, and therefore, unless the defenses urged by the defendant are good, a decree must go for the plaintiff. I shall therefore consider the defenses:

Defendant claims that the mechanical patent is invalid:

(a) Because every element of the claims of this patent is old separately, in prior patents, catalogues and prior structures, and also old in combination, so shown by any one of several exhibits.

(b) Because not only are the elements old in separate patents, prior structures and catalogues, but every element of the shade itself, as described in the claims, is old in combination as the proof discloses.

(c) Because the dish or bowl is conceded and has been proven to be old.
(d) Because bowls of the identical shape of the patent have been suspended by chains below shades of various shapes before as shown in prior patents and prior catalogues. In other words, that the mechanical patent is invalid because of the prior act, and that the combination of the members of this electric lighting fixture shows no invention.

The plaintiff concedes that the suspending of the bowl on chains and of the bell-shaped shade on chains is old in the trade, but claims that the combination as provided and manufactured by plaintiff under the patent amounts to an invention, and that the defendant is copying it in its product and infringes.

[1] As to the design patent, the defendant claims it invalid:

(a) "For double patenting, every feature of it being shown in his prior mechanical patent applied for and issued more than five months before he applied for his design patent, and therefore, what Bayley did not claim in his mechanical patent or in an application pending simultaneously therewith, he abandoned to the public."
(b) "Because the prior art shows that the bell-shaped shades are old and that the same shape of bowl or dish is old, and also that various shapes of shades with bowls suspended below are old, but, even if it did not, certainly no one could obtain a valid patent at this late date, for merely connecting two old shapes of articles in precisely the same manner as many other similar articles of various shapes have been connected by others."
(c) "That the defendant clearly has the right to make shades exactly like those he has been making for years, clearly has the right to make bowls or dishes like those that have been made for years, and clearly it does not require any more than the routine designer to suspend an old bowl below an old shade in view of the many prior patents on the market showing bowls suspended from various kinds of shades."

The design patent No. 49,593 is entitled to the presumptive validity of the law. Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 C. C. A. 23.

"If as a whole, the design produces a new and pleasing impression on the æsthetic sense, it is patentable." Matthews & Willard Mfg. Co. v. American Lamp & Brass Co. (C. C.) 103 Fed. 634.

And in Graff, Washbourne & Dunn v. Webster, 195 Fed. 522, 115 C. C. A. 432, it was said that it is the design as a whole that had to be considered; that the situation in this respect is analogous to machines made up of old elements. It sufficed that the machine produced a new result, or the design a new impression upon the eye.

[2] Many witnesses, whose testimony was taken by the plaintiff, described the Equalite as producing a new result by reason of its combination and a new impression upon the eye. The combination made by the plaintiff, as a whole, is new and has never been made before. In fact, the defendant claimed upon the trial that it was new when it manufactured it, and it has been extravagant enough in its claim to say that the plaintiff has injured the defendant by copying the defendant's new combination. A design cannot be anticipated by showing the elements separately to be old. Matthews & Willard Mfg. Co. v. American Lamp & Brass Co., supra. In that case, the court said:

"The patented design must be viewed and considered as a whole, and originality and novelty will not be denied to it because elements or compo-

nent parts of the design are old. * * * A combination of elements that are old is patentable, if it produces a new and useful result as the product of the combination; and a design which avails itself of suggestions old in the art is patentable."

The test for anticipation must be for the design as a whole. Bush & Lane Piano Co. v. Becker Bros. (D. C.) 209 Fed. 233; Mygatt v. Shaffer, 218 Fed. 827, 134 C. C. A. 515. The court in this circuit held:

"It is the design of the whole thing as it appears in use which is the test in cases of the class in suit."

Applying these tests to the inquiry as to the prior art, as disclosed by the catalogues offered in evidence by the defendant, such at least as should be considered by the court, the art does not disclose a lighting fixture in its entirety which justifies declaring void the patent.

I conclude, therefore, that the design as a whole is new and produces a new and pleasing impression on the æsthetic sense and in passing, a sense of uniqueness in character, all of which has won popularity in the trade and has made it a good seller.

Judge Grosscup, in the case of Pelouze Scale Mfg. Co. v. American Cutlery Co., 102 Fed. 916, 43 C. C. A. 52, well put it when he said:

"Design, in the view of the patent law, is that characteristic of a physical substance, which, by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. The essence of a design resides, not in the elements individually nor in their method of arrangement, but in the tout ensemble—in that indefinable whole that awakens some sensation in the observer's mind. * * * But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character."

Applying these tests, I find the design patent valid and infringed.

[3] The second patent in suit is a combination patent to which the defendant interposes the defense that the elements of plaintiff's structure were all old. I find that the flat ring at the top and bottom of the plaintiff's shade was not old according to the testimony. The defendant's president said that, before this particular shade was made, there was never a shade like it constructed in Europe or America. But, while the defendant denied using the H-shaped rib, still making the object which the patent describes as being in one piece in two parts, he cannot escape the charge of infringement, particularly where the patent is identical. Nor is it sufficient to say that all that was necessary to do was to take certain old elements and put them together in plaintiff's shade. The Supreme Court, in the case of the Diamond Rubber Co. v. Consolidated Rubber Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, said:

"Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand, and easy to be seen by merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration."

[4] Further, the court is of the opinion that the defendant is rightly chargeable with unfair competition. The plaintiff by industry and advertising has placed the Equalite upon the market successfully, and now the defendant has appropriated many of the features, nearly all, of the plaintiff's Equalite fixture. The plaintiff assembled the various parts together first and did so and produced them under the protection of its patent. The defendant's appropriation of this combination, and placing it upon the market, has been unfair and calculated to deceive the ordinary purchaser who would not be apt to discover the difference. His advertising it as his own product, after carefully copying it and differentiating it only under another name, is not sufficient to relieve it of the charge of unfair competition. Yale & Towne Co. v. Alder, 157 Fed. 37, 83 C. C. A. 149; Consolidated Ice Co. v. Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506; Yale & Towne Co. v. Worcester Mfg. Co. (D. C.) 205 Fed. 952.

The plaintiff may have a decree accordingly.

THE TRITON.

THE NANTICOKE.

(District Court, S. D. New York. March 20, 1917.)

COLLISION ⊂=95(3)—MEETING TOWS—LENGTH OF HAWSER—FAILURE TO KEEP LOOKOUT.

The tug Lackawanna, with a tow, was passing eastward in Nantucket Sound at night, when she came into collision with the meeting barge Nanticoke, in tow of the tug Triton, on a 200-fathom hawser, and was sunk. There was some fog, but at the time the vessels could see each other's lights, and the tugs passed port to port at a distance of 800 to 900 feet; but, although the Lackawanna ported afterward, she was struck by the tow on the port side about amidships. *Held*, on the evidence, that the Nanticoke was in fault for not following her tug, and for failing to have a lookout, especially in view of the fog; that the Triton was also in fault for using a hawser more than twice the length of 75 fathoms permitted by statute, and for going at excessive speed.

In Admiralty. Suit for collision by the Delaware, Lackawanna & Western Railroad Company, owner of the tug Lackawanna, against the steam tug Triton and the barge Nanticoke. Decree for libelant against both vessels.

A. J. McMahon, of New York City, for libelant.

Duncan & Mount, of New York City, for claimant Susquehanna Coal Co.

Kremer & Leavitt, of New York City, for Fischerauer, etc.

E. E. Blodgett, of Boston, Mass., and Floyd Hughes, of Norfolk, Va., for Triton & Lambert Point Towing Co.

MANTON, District Judge. This libel, filed against the steam tug Triton and the barge Nanticoke by the owners of the Lackawanna, seeks to recover for the complete loss of the tug, the property of the crew, and the lives of two.

The Lackawanna was bound east, towing three barges connected by hawser, and the Triton bound west, with a hawser 200 fathoms long and towing one large barge, the Nanticoke. The collision occurred August 15, 1915, at about 9:15 p. m., at a point about 2½ miles east of Handkerchief Shoal Lightship, in Nantucket Sound. While crossing Cross Rip Shoals, about 20 minutes before the collision, the Lackawanna blew a signal to the barges to prepare to anchor, and this because a fog had set in, and then changed her course from east to nearly northeast. Before the Lackawanna's tow had sheared from its course, a signal was heard about two points on the Lackawanna's starboard bow. Realizing that she was crossing the course of the west-bound vessel, the master testified he immediately put his tug back on the easterly course. Shortly thereafter, the lights of the Triton were seen, and at the same time the Triton saw the lights of the Lackawanna. At this time the vessels were about 1,000 feet apart, as stated by the Lackawanna, and about half a mile, as stated by the crew of the Triton. The Triton blew a passing signal, and heard the signal of the Lackawanna. The two tugs then saw each other, and navigated properly for a port to port passing, and passed each other port to port a safe distance of between 800 to 900 feet. However, the barge Nanticoke, while passing, collided with the Lackawanna, striking the Lackawanna on the port side about amidships and practically at right angles.

The Triton claims that the Lackawanna, after passing her, starboarded its helm and went to port, gradually approaching the course of the Triton and its tow, and that because the Nanticoke at this time was not following in the wake of its tug, but was about a point to a point and a half off the port quarter of the tug. It says that by thus converging the course of the Triton and her tow, it brought about, or helped to bring about, the collision. The Triton says that this change of course was apparent, because the Lackawanna's high lights, which were visible from astern only two points abaft the beam of the tug, remained visible from the Triton after the Lackawanna had passed the Triton. When the Triton saw the Lackawanna turning to port, fearing a collision, it blew a signal, "Attention," and "Port Helm," to the barge Nanticoke. It could not say that the Nanticoke heard the signal or obeyed it. It says that immediately afterward the fog shut in and obscured them, so that at the time of collision neither the barge nor the Lackawanna were visible.

This does not explain how the Lackawanna could be struck on the port side. The Lackawanna claims that it exchanged passing signals with the Triton, after which it ported its helm and drew further away from the Triton and its tow; that the high lights of the Nanticoke were then visible, and appeared to be in the wake of the Triton, and then, after passing the Triton astern, it saw the barge was not following in the wake of its tug, but was swinging off to the port toward the course of the Lackawanna. The Lackawanna then rung for "full speed ahead," because the barge was then approaching so near to the course of the Lackawanna so rapidly that there was no opportunity to avoid a collision. At the time when the Lackawanna blew the alarm signals and put its helm aport only the high lights

of the Nanticoke were visible; but shortly afterward, and just before the collision, the Triton hull and her green lights appeared, and the Nanticoke struck the Lackawanna on the port side. At the time of the collision the Lackawanna was headed almost southeast, and the Triton was headed almost northwest. This version, as given by Brophy and Kolner, I believe to represent the true facts of the happening.

The Triton was moving westward at about 4½ miles an hour, and the Lackawanna was moving eastward at about 2½ to 2¾ miles an hour. All three boats were visible from the time passing signals were exchanged by the tugs until the collision. The master of the Nanticoke claims that the fog continued up to this time. This must be rejected, for the two masters and two mates of the tugs say the lights were visible one-quarter to a mile, while the tows were passing, and that they had ceased to blow fog signals. The Lackawanna had electric light, and the Nanticoke oil lights. With the speed of the boats as stated, and the two tugs passing from 700 to 900 feet apart, and considering the length of the hawser between the Triton and the Nanticoke, it was physically possible for this collision to have occurred in the manner described by the Lackawanna, assuming that the Lackawanna took the course it claims to have taken at the time of the collision. It was the fault of the barge Nanticoke in not following the wake of the tug which brought her into collision with the Lackawanna on the port side. The theory of the Triton I do not think plausible, and it should be rejected.

The Nanticoke was off its course, and this claim is corroborated by the testimony of the Triton. The Lackawanna was heading substantially southeast at the time of the collision, and this is corroborated by the testimony of the master of the Nanticoke. I am also of the opinion that the Nanticoke was at fault for failing to have a lookout. She was 202 feet long, her pilot house was on the stern of the barge, at least 175 feet from the bow, and she was obliged to anticipate fog at intervals. For this fault she should be held. Davenport v. Winnisimmet, 162 Fed. 862, 89 C. C. A. 552; The Edward G. Murray, 234 Fed. 61, 148 C. C. A. 77. She was also at fault for failing to have a competent man at her wheel and to follow in the wake of her tow.

I think that the Triton is also at fault, and should be held. She was towing with a hawser in excess of that permitted by statute. The statute permits a hawser not exceeding 75 fathoms. The Triton admits that its hawser was 150 to 160 fathoms in length, while the master of the Nanticoke says it was 200 fathoms long. If it were not for the length of the hawser, the collision might have been avoided. The Lackawanna was 500 feet off the Triton's hawser when it had reached a point half way between the Triton and the Nanticoke. One-half the distance between the Triton and the Nanticoke was about 600 feet. There could have been no collision if the Triton had been towing with a hawser of the length prescribed by statute, for the Nanticoke could not have swung off at right angles in such a course as to come in contact with the Lackawanna. Even assuming the Lackawanna had converged on the Triton's course 300 feet, when it had reached a point approximately 500 feet astern of the Triton, that would be more than 75 fathoms from the stern of the Triton. Towing with such a hawser

has been held to be a fault. The Manhattan, etc. (D. C.) 181 Fed. 229; The Teaser (D. C.) 229 Fed. 476; McWilliams v. D., L. & W. R. R. Co., 207 Fed. 64, 124 C. C. A. 624. She was running, the captain says, at 4½ knots an hour; the chief engineer says, "running wide open—all the steam I could get." The Lackawanna had been at half speed for 15 or 20 minutes because of the fog through which she came. The Triton had heard the fog whistles before seeing the Lackawanna, and was obliged, by the rules, to go at a slower speed, having careful regard to the existing circumstances and conditions, by Pilot Rules, article 16. If the fog rule did not apply, then she might well be held to be at fault for violation of Pilot Rules, article 69. I consider that she was at fault because of excessive speed. City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053.

Accordingly I shall grant a decree for the libelant against the Triton and the Nanticoke.

POST PRINTING & PUBLISHING CO. v. BREWSTER, Attorney General of Kansas, et al.

(District Court, D. Kansas, First Division. December 8, 1917.)

No. 209–N.

1. INJUNCTION ⟸85(1)—RELIEF—SCOPE.
   State officials cannot be restrained and enjoined from attempting to enforce an act prohibiting the sale and advertisement of cigarettes, if valid, merely on the ground its prohibitive provisions did not apply to a particular newspaper company or its employés printing or publishing such advertisement, for there would be abundant opportunity to establish that fact in defense of a criminal prosecution.

2. COMMERCE ⟸16—"INTERSTATE COMMERCE"—WHAT CONSTITUTES.
   As "interstate commerce" is not only traffic, but is intercourse, the publication of a newspaper and its distribution from one state to another is interstate commerce.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. COMMERCE ⟸40(1)—INTERSTATE COMMERCE—BURDEN ON.
   The sale of cigarettes in a foreign state to a citizen of Kansas, in which state the sale of such articles was prohibited by Laws Kan. 1917, c. 166, and their carriage from such foreign state into the state of Kansas and delivery in the original packages, is an interstate commerce transaction, which it is beyond the power of the state of Kansas to prohibit or unduly restrict or burden; Congress having exclusive control of interstate commerce.

4. COMMERCE ⟸16—INJUNCTION ⟸85(2)—INTERSTATE COMMERCE—BURDEN ON.
   Laws Kan. 1917, c. 166, § 1, declares it shall be unlawful for any person, company, or corporation to barter, sell, or give away any cigarettes or cigarette papers, while section 2 declares that it shall be unlawful for any person, company, or corporation to advertise cigarettes or cigarette papers. Plaintiff, a Missouri corporation, engaged in the business of printing a newspaper in the state of Missouri, sold and distributed its newspaper throughout the state of Kansas, delivering the same by means of the postal service, express companies, and other carriers. The sale

of cigarettes was authorized in the state of Missouri, and Congress has placed no restrictions on interstate commerce in cigarettes. *Held* that, as the state of Kansas could not prohibit or unduly burden interstate commerce in cigarettes, it could not burden or unduly limit interstate commerce in newspaper advertising, for that would indirectly affect interstate commerce in the articles; and hence the statute, in so far as it was leveled against the advertisement of cigarettes in a newspaper distributed in interstate commerce, was unenforceable, and its enforcement by state officials may be enjoined.

In Equity. Suit by the Post Printing & Publishing Company against S. M. Brewster, Attorney General of the State of Kansas, and others. On motion to dismiss for want of equity. Motion denied, with leave to defendants to answer.

Frank M. Lowe, of Chicago, Ill., for plaintiff.

S. M. Brewster, S. N. Hawkes, and J. L. Hunt, all of Topeka, Kan., for defendant.

POLLOCK, District Judge. Plaintiff, a Missouri corporation, engaged in the business of printing and publishing a newspaper in the city of Kansas City, state of Missouri, brings this suit to restrain defendants, as officers of the state of Kansas, from enforcing against it, its agents, servants, and employés, the provisions of section 2, chapter 166, Laws of Kansas 1917, which reads as follows:

"It shall be unlawful for any person, company or corporation to advertise cigarettes or cigarette papers, or any disguise or subterfuge of either of these, in any circular, newspaper or other periodical published, offered for sale or for free distribution within the state of Kansas. It shall also be unlawful for any person, company or corporation to advertise cigarettes or cigarette papers on any street sign, placard or bill board, or in any package of merchandise, store window, show case, or any other public place within the state of Kansas."

The allegations of the petition concerning the threatened acts of defendants sought by plaintiff to be restrained in this suit are, in substance and so far as here material, as follows: Plaintiff is the owner and publisher of said the Kansas City Post; is engaged in the business of receiving for hire advertisements to be published in its said newspaper. Among such advertisements it has for a long time had, and now has, contracts made with manufacturers of cigars and cigarettes, by which contracts this plaintiff is bound to publish in the various editions of its newspaper advertisements about and concerning cigars and cigarettes. That said contracts for such cigarette advertisements now in force amount to more than $40,000 per year. That plaintiff has in the state of Kansas many thousand subscribers for its daily newspaper, the Kansas City Post, and that said newspaper is delivered by it to its various subscribers and readers in the state of Kansas by means of the United States postal service, railway express companies, and by carriers, who, as agents of plaintiff, deliver it to the various homes of said newspaper subscribers in the cities and towns of Kansas, and that said newspaper is also sold by newsboys or agents of plaintiff on the streets of the cities in the state

of Kansas and by news dealers who are agents of plaintiff, various hotels, drug stores, and other places of business in the cities of Kansas, and by newsboys on railway trains in the state of Kansas, who are agents of plaintiff; and your petitioner respectfully contends that under the law it has a right to do so. That defendant Hon. S. M. Brewster, as Attorney General of the state of Kansas, has advised, notified, and warned the plaintiff herein that he will, through the power vested by the laws of Kansas in his office as Attorney General, cause the arrest of all persons anywhere found in the state of Kansas selling or distributing said the Kansas City Post, if said newspaper so sold or distributed contains a cigarette advertisement, etc.

A restraining order was granted plaintiff on the filing of its petition, which defendants now move to vacate and to end this suit by a motion to dismiss for want of equity, which motion now stands submitted for decision on briefs filed and arguments presented.

If I read aright, the contentions of plaintiff, as made by and under its second amended petition, against which the motion of defendants to dismiss is leveled, are these: (1) That the legislative act quoted above was leveled by the law-making power, not against the printers and publishers of newspapers, but against those who sought to advertise the business of vending, giving away, or disposing of cigarettes through the medium of newspaper advertisements, or in other manner, in this state; hence, the threatened acts of defendants as alleged, if done against plaintiff and its business as a newspaper, should be enjoined. (2) If a contrary view of the true construction of the act be taken, the plaintiff is not and never has engaged in the business of printing or publishing a newspaper within this state; hence, in so far as such printing and publishing of its papers in a foreign state is concerned, it is quite beyond the jurisdiction and power of the state to prohibit or punish the advertisement of cigarettes therein. However, as it does, through the medium of interstate commerce channels, cause its printed newspapers to be carried into this state and to be here delivered to its customers through the medium of its agents and servants so engaged, the attempted and threatened enforcement of said act against such interstate commerce business by the officials of the state is an unwarranted interference with plaintiff's rights under the commerce clause of the national Constitution, and, so considered, the act is unconstitutional and void.

On the contrary, it is the insistence of defendants: (1) The act is directed as well against any person or corporation engaged in the business of printing, editing, or publishing a newspaper containing cigarette advertisements as it is against the business of any one engaged in selling, distributing, or otherwise disposing of cigarettes within the territorial boundaries of this state. (2) That the business of the plaintiff, as alleged in its petition, of carrying its publications into this state from the state of Missouri and here disposing of the same in the manner alleged, is not interstate commerce of such nature as to be beyond the power of the state to prohibit and punish, if said publications contain any advertisement of cigarettes, contrary to and in violation of said act.

Coming now to a consideration of the act itself, in order to determine therefrom the purpose and intent of the law-making power, it may be said: The title of the act is found to read as follows:

"An act to prohibit barter, sale, giving away, or advertisement of cigarettes or cigarette papers, or any disguise or subterfuge of either of these, and to prohibit the sale or giving away to minors of cigars, cigarettes, cigarette papers, tobacco or tobacco materials of any form, and repealing sections 3805, 3806, and 3807 of the General Statutes of Kansas of 1915."

Section 1 of the act reads as follows:

"It shall be unlawful for any person, company or corporation to barter, sell or give away any cigarettes or cigarette papers, or any disguise or subterfuge of either of these, or to have any cigarettes or cigarette papers in or about any store or other place for barter, sale or free distribution. If, upon what seems to be reasonable evidence any person, company or corporation is suspected of having in his or its possession any cigarettes or cigarette papers intended to be offered for barter, sale or free distribution, then, upon the sworn complaint of any citizen of the state of Kansas, specifying fully as to the alleged facts in the case, any officer authorized to make arrests may search the premises of such person, company or corporation and may confiscate any cigarettes or cigarette papers so found. The possession of such cigarette materials shall be considered prima facie evidence of a direct violation of this act."

From which it appears to have been the obvious legislative intent to prohibit absolutely and forever the barter, sale, gift, or other disposition of cigarettes in any form or manner whatsoever within this state. To accomplish this so-called beneficial result the law-making power thought it proper and necessary to prohibit and punish any one who within the state should by any writing, sign, or other means advertise the sale, gift, or other disposition of the nefarious article, lest the citizen, learning the source from which the same might be procured from without the state, should be tempted to so procure it, bring it into the state, and use it to his hurt.

[1] It is quite probable this well-meant, even if misguided, legislation is within the constitutional power of the state in the exercise of its reserve police powers; and, further, if this view of the act be not sound, and the act of printing or publishing a newspaper containing the unlawful and prohibited advertisement of cigarettes is not within the meaning and intent of the act, as is by the plaintiff contended, then I agree with the contention of defendants that they may not be restrained and enjoined from attempting the enforcement of a valid law merely on the ground its prohibitive provisions do not include the plaintiff and its employés, for, in such event, there is abundant time and ample opportunity to establish this fact in defense of the criminal prosecution. Ex parte Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; Davis Mfg. Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283.

[2] Coming now to the question: Is the business of plaintiff in carrying its newspapers into this state and here delivering them to its patrons, as alleged in its petition, interstate commerce? If so, and such publications contain cigarette advertisements, in violation of the

act, may the state within its constitutional bounds prohibit or punish the plaintiff, its agents, servants, and employés, for conducting or engaging in said interstate business? That the business of printing and publishing a newspaper such as that printed and published by the plaintiff in this case in the state of Missouri, and causing the copies thereof to be carried into this state and here delivered to subscribers and customers of the plaintiff through its agents and representatives, as alleged in the petition herein, constitutes the doing of interstate commerce business, cannot to my mind be disputed. In the great case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, Chief Justice Marshall said:

"Commerce, undoubtedly, is traffic; but it is something more—it is intercourse."

In W. U. Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, Mr. Justice Field, delivering the opinion of the court, said:

"Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence."

In International T. Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, Mr. Justice Harlan, delivering the opinion for the court, said:

"It is true that the business in which the International Text-Book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Text-Book Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. * * * Intercourse of that kind, between parties in different states, particularly when it is in execution of a valid contract between them, is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—'a new species of commerce,' to use the words of this court in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1 [24 L. Ed. 708]."

In Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 84 C. C. A. 167, Judge Sanborn, delivering the opinion for the court, says:

"All interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

In Preston v. Finley (C. C.) 72 Fed. 850, it was expressly held:

"Newspapers are subjects of commerce, within the meaning of the provision in the Constitution of the United States relating to commerce between the states."

See, also, Welton v. State of Missouri, 91 U. S. 280, 23 L. Ed. 347; County of Mobile v. Kimball, 102 U. S. 702, 26 L. Ed. 238; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; and the many other cases on this subject.

[3, 4] The sale of cigarettes in the state of Missouri, where the newspapers of plaintiff are published, is a lawful business, and the transmission by plaintiff of the intelligence where and on what terms cigarettes may be purchased by its subscribers, by way of advertisements inserted in such newspaper, is perfectly legitimate and proper. Further, it must be regarded as settled the sale of cigarettes in a foreign state to a citizen of this state, and their carriage from said foreign state into this state and here delivered in original packages in consummation of such sale made in a foreign state, is legitimate interstate commerce, which is beyond the power of the Legislature of this state to prohibit or unduly restrict or burden. Austin v. Tenn., 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; State v. Lowry, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. (N. S.) 528, 9 Ann. Cas. 350. In other words, while the business of bartering, selling, or in any other manner disposing of cigarettes in this state, or the business of advertising in any manner by any one within this state of the business of selling or disposing of cigarettes, is by the act in question properly prohibited, yet by reason of the exclusive control of Congress over interstate commerce it must, I think, be held, as the conduct of interstate commerce in cigarettes may not by a state be prohibited or unreasonably burdened, it follows, of necessity, the business of advertising such interstate commerce business, which advertising itself not only is a form of interstate commerce, but further adheres in the very conduct of the interstate cigarette business itself, is also beyond the power of the state to prohibit or make criminal and punish, and this for the reason it cannot be thought possible to make the advertisement of a lawful business unlawful and punishable as a crime. Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; In re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.

In State v. Bass Pub. Co., 104 Me. 288, 71 Atl. 894, 20 L. R. A. (N. S.) 495, the Supreme Court of Maine held:

"The defendants further urge that newspapers and magazines published in other states and containing advertisements of intoxicating liquors for sale come into this state by mail and otherwise in large quantities, and yet cannot be interfered with by the state authorities. That may be; but it does not follow that the state may not prevent such advertisements being printed in newspapers published in this state. If this state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within the state. It may to that extent control the conduct of printers and publishers within its own territory. Such we understand to be the logical result of the decision and reasoning in the Delamater Case by the court of last resort upon such questions."

This case, it would seem, draws the true distinction between a publication containing the prohibited advertisements printed in this state and without. However, it is earnestly insisted by defendants the case

of Delamater v. South Dakota, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733, is controlling here. I am of a contrary opinion. A study of that case will disclose the fact it is predicated upon the principle that intoxicating liquors, by reason of their very inherent nature and the results which flow from their use, had theretofore by the Congress in the Wilson Act (26 Stat. 313 [Comp. St. 1916, § 8738]) been withdrawn from that protection against state interference universally accorded to interstate commerce in other commodities; whereas, such discrimination against cigarettes or tobacco in any form carried in interstate commerce has not as yet been made by the Congress. This fact, to my mind, distinguishes the Delamater Case and the case of State ex rel. Black v. Delaye, 193 Ala. 500, 68 South. 993, L. R. A. 1915E, 640, from the present case.

It follows the motion to dismiss for want of equity must be overruled and denied, with leave to defendants to answer the second amended bill filed in this case within 30 days, if so advised by their solicitors. It is so ordered.

DICK CHIARELLO & BROS., Inc., v. CENTRAL R. CO. OF NEW JERSEY et al.

(District Court, S. D. New York. April 9, 1917.)

1. SHIPPING ⇐177—DEMURRAGE—DISCHARGING BY LIGHTER.
Where a vessel required to discharge her cargo at a dock employs lighters for the purpose, the consignee is not liable for damages in the nature of demurrage, if the lighters are discharged within the time allowed if the vessel had discharged directly.

2. SHIPPING ⇐183—DEMURRAGE—LIGHTERAGE.
The rules of the Maritime Exchange, Harbor of New York No. 4, regulating rates of demurrage in case of lighters, does not measure damages in the nature of demurrage, where there is no contractual relation between the parties and such damage must be proved.

In Admiralty. Suit by Dick Chiarello & Bros., Incorporated, against the Central Railroad Company of New Jersey and the Philadelphia & Reading Railway Company. Decree for respondents.

Nelson Zabriskie, of New York City, for libelant.

Henry L. deForest, of New York City, for respondent Central R. Co. of New Jersey.

William F. Purdy, of New York City, for respondent Philadelphia & R. Ry. Co.

MAYER, District Judge. In addition to necessary formal allegations, the libel sets forth: That libelant was the owner and charterer of certain lighters. That at various times during 1913 there were shipped from certain steamships then lying in the port of New York, on libelant's lighters, certain cargoes of railroad ties consigned to the Port Reading Creosote Plant at Port Reading, N. J.; these cargoes being the property of respondent the Central Railroad Company of

New Jersey. That libelant transported said cargoes of ties on its lighters under bills of lading or shipping documents, each of which contained a clause entitled "Rules Regulating Deliveries," which set forth the rate per day at which lumber was to be received from the lighters, and that "lighters reporting before 1 p. m. on any one day, their time to begin at 7 p. m. following morning. Lighters operating to 1 p. m., time to be combined from 1 p. m. following day * * * on lighters over 100 M. feet B. M. $20 per day. * * *" That, owing to the fault and neglect of respondents, libelant's lighters reported and were discharged on various later days set forth in a schedule, and that the cargoes were received by respondents under the above-mentioned bills of lading or shipping documents. That the fair, customary, and agreed time for discharging said cargoes was the reporting day and the additional lay days as set forth by libelant in a schedule, and that the number of days demurrage was also set forth in the schedule, the rates for which amounted in all to $1,260 beside interest. The libel then contains the following paragraph:

"Ninth. That each of said vessels of your libelant was, through the negligence, fault and delay of both of the respondents above named, detained after the discharge of their cargoes, over and above the said fair, reasonable, usual and agreed time, the number of days set opposite the name of each of said vessels, as stated in said Schedule A, and that the fair, reasonable and agreed sum for the use, hire or detention of each of said vessels was the sum of $20 per day, or as above stated $1,260 in all."

And the libel concludes with the allegation that there is owing to libelant by respondents as damages for detention the sum of $1,260 besides interest, payment of which was duly demanded and refused.

The libel is drawn on the theory that the action is one for strict demurrage arising out of a contract between the parties. The proof shows that there was no support for this theory of the libel, and that the action, if any, was for damages in the nature of demurrage.

The distinction between these two kinds of causes of action was clearly set forth in Dayton v. Parke, 142 N. Y. 391, 37 N. E. 642, and recently has been fully and carefully pointed out by Judge Rogers in Ben Franklin Transportation Co. v. Federal Sugar Refining Co. (C. C. A. 2d Cir.), 242 Fed. 43, — C. C. A. —.

The libel must be amended to conform with the proof, and, as all the evidence has been taken and respondents have not been subjected to surprise, and agreeably with the liberal practice in admiralty in such regard, it will save time and convenience to let the record note that the libel may be amended to conform with the proof.

[1] The facts hereinafter set forth are quite different in essential respects from those set forth in the libel. The two respondents maintain a creosoting plant at Port Reading as a joint operation. Each company buys ties, and Taylor, the superintendent of the plant, creosotes these ties and charges each company with its proper proportion of the expense of so doing. It is conceded that, in dealing with the lighters from the Iroquois and Mills, Taylor represented the Central Railroad Company of New Jersey, while in dealing with the lighters from the Shawmut he was representing the Philadelphia & Reading Railway Company.

There were three contracts for lumber with three vendors; two by the Central Railroad Company of New Jersey and one by Philadelphia & Reading Railway Company. They were similar in form, and that between Philadelphia & Reading Railway Company and Gress Manufacturing Company may be taken as typical. The essential features of the contract are as follows:

"We hereby agree to deliver to P. & R. Ry. Co. f. o. b. their wharf Port Reading, New Jersey, 25000 Sap Pine cross-ties in accordance with attached specifications and Purchasing Agent's Order No. 53. * * *

"Deliveries to be made between now and Jany 1, 1914.

"[Signed] Gress Mfg. Co. * * *

"Note.—When filled out send to J. D. Landis, Purchasing Agent, Reading Terminal, Philadelphia."

The essential provisions of order No. 53, addressed by the railway company to Gress Manufacturing Company, were:

"Please deliver to this company, according to specifications and subject to our inspection, f. o. b. our wharf Port Reading, N. J. 25000 Sap Pine cross-ties. * * * Consign to the Philada. & Reading Railway Company c/o C. Marshall Taylor, Supt. Creosoting Plant Port Reading, N. J."

The ties were shipped on the steamers Iroquois, Mills, and Shawmut. No bill of lading of the Iroquois reached the Central Railroad. In the bill of lading of the Mills there is no reference whatever to demurrage. In the bill of lading of the Shawmut (Southern Steamship Company) section 5 of the "Conditions" provided, inter alia:

"The carrier may make a reasonable charge for the detention of any vessel * * * for loading or unloading."

There was no provision in the bills of lading, or in any agreement between the shippers and the respondent railroads, for the transfer of the ties from the steamers to lighters and the subsequent discharge by lighters of these cargoes of ties. The Iroquois and the Shawmut docked at their piers in New York, and the ties were shipped to the railroad at Port Reading on libelant's lighters. In the case of the Iroquois, the lighter Seven Brothers No. 9 arrived at Port Reading on Thursday, January 9th, at 3:30 p. m., commenced discharging Monday, January 13th, at 1 p. m., and was finished on January 17th, at 10:30 p. m. Her captain, from recollection, testified that one of libelant's other lighters arrived after and unloaded before him. This is contradicted by Taylor, the superintendent, and Meisner, the pier foreman from his records. I accept the testimony of respondents' witnesses on this point as being more reliable than the unsupported recollection of the captain of the lighter.

In the case of the Shawmut, five lighters arrived at Port Reading. At Port Reading there is a dock with four slips, and an unloading hoist and platform where inspection is made is located about in the center of each slip. There are 26 feet of water in one slip and 22 feet at the other three. A berth was accorded these lighters, and the lighters discharged in turn at this berth, except that a second berth was available during the progress of discharging, so that one of these lighters, San Salvador, commenced unloading while another, the Vincent, was still discharging.

It will be remembered that the provision in the Shawmut bill of lading as to detention related solely to the "vessel," and did not mention lighters. Taylor showed that these five lighters were handled within the time allowable under the rules (infra) of the Maritime Exchange if the Shawmut herself had gone to Port Reading.

In the case of the Mills, the vessel herself reported at Port Reading June 24th at 3 p. m., and commenced discharging onto the pier by her own tackles one hour later. She remained for three days, having discharged several thousand ties on the dock; but, when she left, there were five lighters remaining to be unloaded, the main part of the cargo evidently having been discharged by the Mills over the other side to lighters.

The Mills lighters received the same kind of treatment as those from the Shawmut, and in this case also a second berth was apparently available during the progress of discharging, for the lighters Leo R. and Sallie C. both commenced to unload at about the same time on July 7th. In this instance, also, Taylor showed that the lighters were discharged well within the time allowable under the Maritime Exchange rules if the Mills had continued to discharge at Port Reading. Various receipts were mailed by libelant to Taylor in a letter asking that they be signed as a receipt for the cargoes, and at the bottom of these receipts are printed the rates of demurrage charges (being the "Rules Regulating Deliveries" referred to in the libel); but, both from the correspondence and the testimony of the witness Chiarello, it appears that the papers were receipts only, and not notice of a claim for demurrage, nor, indeed, could this printed matter be any evidence of any agreement for or assent to the payment of demurrage charges.

Respondents had nothing whatever to do with the hiring of the lighters, and there is no evidence that the shippers hired the lighters, and, indeed, the only evidence on the subject is that, in the case of one of the steamers, the lighter was hired by the steamer people.

There is some evidence that at the times in question it was customary to discharge cargoes of this character by lighters, but no evidence that there was an established universal and uniform custom at the port requiring consignees to do more than assign a berth to the lighters discharging the cargo ex a vessel in the manner done in this case. Indeed, Landis, the purchasing agent of respondents, showed, beyond question, that he had had dealings with the shippers for years, that they knew the facilities at Port Reading, and that about 25,000 ties constituted a schooner load; and Taylor testified that the then custom at Port Reading was to take cargoes arriving in their order, that these cargoes arriving on five lighters were treated as if they had arrived on one schooner, except when he happened to have an extra berth.

From the foregoing it will appear that the sole duty resting on respondents was to furnish a berth where the lumber company in each instance could place the ties for inspection with reasonable diligence, in accordance with the custom of Port Reading at that time, and this, on the evidence, was done. There was at most only the obligation on the part of respondents to treat the lighters the same as if they represented the vessel.

Libelant, unable to find any contractual relation between itself and respondents, contends, however, that respondents are liable because the lighters were detained:

First, over and above the customary and usual time for discharging like cargoes from lighters in and about the harbor of New York.

Second, over and above the time allowed for discharging like cargoes in and about the harbor of New York as established by the rules of the Maritime Exchange, which rules reflect or are in accordance with the custom.

Third, over and above the time fixed for discharging by the rules or tariff rates established by the Clyde & Mallory Lines and filed with the Interstate Commerce Commission.

As to contention third: The tariff is irrelevant because the Iroquois and Mills were not common carriers, and the ties on the Shawmut were moved on a port to port movement and are not subject to the Interstate Commerce Act.

As to contention first: There was no agreement to deliver by lighters, and at best demurrage or damages in the nature of demurrage, if any, would be that accruing for the undue detention, if any, of the lighters beyond a period equivalent to that necessary to discharge the vessels on which the ties were shipped.

[2] As to contention second: The rules of the Maritime Exchange referred to by libelant which cover a territory comprehensive of "Port Reading" are as follows:

"Rules Regulating Delivery and Receipt of Railroad Cross-Ties.

"Rule I.

"Regulating the Delivery of Railroad Ties.

"Consignees shall have twenty-four hours (Sundays and legal holidays excepted) after the vessel arrives, and the master or the vessel's agent reports, in which to furnish the vessel with a berth where she can discharge.

"At the expiration of said twenty-four hours, vessel's lay day shall commence; except that, in case consignees have given orders within the allotted time, and vessel fails to report at berth before noon, her lay days shall not begin until the morning following.

"Lay days allowed consignee for receiving cargo shall be as follows, viz.:

"Twenty-four hours to furnish a berth as provided in above rule, and one running day (Sundays and legal holidays excepted), for every fifty thousand (50,000) feet board measure of the ties."

"Rules Regulating Lighterage.

"Rule IV.

"Demurrage at the rate of ten dollars per day may be charged on parcels of merchandise of fifty tons and under on any one lighter and barge; fifteen dollars per day on parcels of over fifty tons and not exceeding one hundred tons, and twenty dollars per day on parcels of over one hundred tons."

Rule 1 refers to vessels. It does not subject the consignee to damages in the nature of demurrage in the absence of contract, if delivery is by lighters. Rule 6, regulating "Southern Pine Cargoes," if it were applicable, gives the consignee the right to receive the cargo in lighters.

Rule 4 obviously regulates the rate of demurrage, but cannot measure damages in the nature of demurrage. Such damages must be prov-

ed like any other damages, and, on the evidence, in this case, even if libelant were entitled to recover, no damage has been proved. Dayton v. Parke, supra.

Many cases have been cited such, for instance, as those where it is provided that the vessel shall be discharged "with customary dispatch" and the local custom is read into the contract. This proposition is, of course, elementary, but is foreign to this case. Taking the view most favorable to libelant, the duty, if any, from respondents to libelant, was fully performed in accordance with the principle of cases like Leonard v. William G. Barker Co. (D. C.) 214 Fed. 325; Fish v. 150 Tons of Brown Stone (D. C.) 20 Fed. 201; Steamship Rutherglen Co., Ltd., v. Howard Houlder & Partners, Inc., 203 Fed. 848, 122 C. C. A. 166.

The libel is dismissed, with costs.

DU PONT v. DU PONT et al.

(District Court, D. Delaware. July 24, 1917.)

No. 340.

1. CORPORATIONS ⟸410—STOCKHOLDERS—MANAGEMENT OF CORPORATE AFFAIRS.

Where a court has found that a corporation has an inchoate right to acquire property the title to which is in another, whether it will exercise such right must be determined by the corporation itself through its directors or stockholders, and the court is without power to substitute its judgment for theirs, even though the benefit to the corporation of exercising the right is clear.

2. CORPORATIONS ⟸157—SUIT BY STOCKHOLDERS—ACCOUNTING FOR DIVIDENDS RECEIVED.

On a finding by the court in a stockholders' suit that certain defendants acquired and hold stock of the corporation as trustees ex maleficio for the corporation and at its election are accountable for the same with all dividends received thereon, dividends paid in stock or bonds which are still held by defendants unconverted cannot be regarded on an accounting as cash dividends, but are recoverable in specie.

In Equity. Suit by Philip F. Du Pont against Pierre S. Du Pont and others. Supplemental opinion on settlement of decree.

For prior opinion, see 242 Fed. 98. See, also, 234 Fed. 459.

John G. Johnson, William A. Glasgow, Jr., Henry P. Brown, and Frank P. Pritchard, all of Philadelphia, Pa., and Robert Penington, of Wilmington, Del., for plaintiff.

George S. Graham, of Philadelphia, Pa., William H. Button, of New York City, and William S. Hilles and John P. Laffey, both of Wilmington, Del., for defendants.

THOMPSON, District Judge. As a preliminary to a discussion of the questions raised by counsel at the argument upon settlement of a decree, some of the findings and conclusions contained in the opinion filed April 12, 1917, require modification in order to avoid a construction inconsistent with the intention of the court.

1. In the opinion it is stated:

"Between March 1, 1915, and the time of the trial in July, 1916, cash dividends equivalent to 183 per cent. had been paid upon the stock of the powder company."

The evidence shows that of the dividends referred to, 5 per cent. paid upon the powder company's stock was in Atlas Powder Company preferred stock, that upon the E. I. Du Pont de Nemours & Co. stock the equivalent of 76.40 per cent. on the powder company stock was paid in Anglo-French bonds, and that dividends the equivalent of 101.60 per cent. were paid in cash. The statement in the opinion is modified accordingly.

2. It was found in accordance with the defendants' thirty-second request for finding of fact:

"(32) That on January 17 and 19, 1915, T. Coleman Du Pont by telegram and letter, withdrew his proposition."

In order that this finding may not appear inconsistent with the finding in response to the plaintiffs' twenty-fourth request, it is qualified by adding thereto:

"T. Coleman Du Pont's withdrawal of his offer was coupled with his expressed intention of renewing that offer as soon as he returned from Rochester."

3. It was found in accordance with the defendants' sixtieth finding of fact:

"(60) That the credit of the powder company was not impaired by the negotiation of the loan with J. P. Morgan & Co. or used in effecting that loan, in any manner by Pierre S. Du Pont and his associates."

The finding is modified by striking out the words "or used in effecting that loan."

4. It was found in accordance with the defendants' forty-second request for finding of fact:

"(42) That the disinterested members of the board of directors at the meeting of the board on March 10, 1915, voted against the acquisition of this stock, with the exception of two of the complainants and William Du Pont."

This finding is now modified by adding thereto, "with the exception of Mr. Connable, who was present and did not vote."

5. The fifth conclusion of law requested by the plaintiffs was adopted as a general basis for the method of accounting and as a declaration of the right in the powder company through which E. I. Du Pont de Nemours & Co. acquired its right, subject to the decision of the stockholders of E. I. Du Pont de Nemours & Co. whether the company should avail itself of the right to acquire the stock.

After the opinion was filed, the plaintiffs asked for an interlocutory decree, directing the individual defendants (with the exception of Henry F. Du Pont and Eugene E. Du Pont) and the Du Pont Securities Company to file in the cause a statement showing in detail the dividends paid since the second day of March, 1915, with interest, and the amount derived from the sale of the debenture stock of E. I. Du Pont de Nemours & Co. received in exchange for the preferred stock

of the E. I. Du Pont de Nemours Powder Company purchased from T. Coleman Du Pont, with interest, together with a statement showing the amount paid to T. Coleman Du Pont as the purchase money for the 63,314 shares of common stock and 14,599 shares of preferred stock of the E. I. Du Pont de Nemours Powder Company, with interest on that amount from the date upon which the said purchase was consummated. The defendants thereafter on May 1, 1917, voluntarily filed a statement of record, which it is unnecessary to set out here in full, showing:

Dividends paid on 63,314 shares of common stock of powder company, plus interest (exclusive of shares of E. I. Du Pont de Nemours & Co. and inclusive of shares of the Atlas Powder Company preferred stock at the value fixed by the dividend rate)	$1,920,197.53
Dividends paid on 126,628 shares of common stock of E. I. Du Pont De Nemours & Co., plus interest (inclusive of Anglo-French bonds at their value fixed by the company in declaring the dividend)	17,916,110.29
Dividends paid on preferred and debenture stock plus interest	40.639.97
Received upon sale of debenture stock, plus interest	1,593,922.00
	21,470,869.79
Amount paid T. Coleman Du Pont, plus interest	15,708,880.66
Apparent balance in excess of cost	5,761,989.13

As stated in the findings from the evidence produced at the trial the receipts in dividends, exclusive of the 126,628 shares of stock of E. I. Du Pont de Nemours & Co., were equivalent to $183 per share upon stock for which Pierre and his associates paid $200 per share. As the record then stood, therefore, if the company acquired the stock, it would have been obliged to pay out of its treasury $17 per share to make up the price of $200 per share paid for the common stock. In view of the present showing that the defendants have received over $5,000,000 in excess of what the stock cost, counsel for the plaintiffs contend that there remains no question of business policy to be determined, and therefore a decree directing the transfer of the stock and the payment of the difference should be entered without any action of the corporation or stockholders, because the stockholders could have no honest difference of opinion as to the benefits to be derived by the company from the purchase of the stock. I am not prepared to adopt this view.

[1] No principle of law or equity heretofore announced has gone so far as to assert that a court of equity may substitute its judgment for that of the corporation through its directors or stockholders in determining whether it should or should not acquire an asset to which it has no title but merely an inchoate right to assert a title. In all of the numerous cases cited by the plaintiffs, the decisions holding that action by stockholders contrary to the interests of the corporation at a corporate meeting would not be upheld, because it would be a fraud by the majority upon the minority, involved substantially the questions whether the corporation would rescind a contract parting with some of its assets, or would ratify the transfer of its assets where the transaction in relation to the assets was clearly an injury to the company

and in violation of its rights. It should be borne in mind that the rights of the company in the present case arise out of pending negotiations for purchase of its own stock; the amount of stock to be purchased and the price to be paid never having been determined by any affirmative corporate action. The defendants in acquiring the stock have been held to be trustees ex maleficio for the corporation, accountable to it at its election. The conclusion arrived at in the opinion heretofore filed that the question must be determined for the company by a meeting of its stockholders will therefore be adhered to. If the court is in error in declining to extend the doctrine of the cases illustrated by Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527, the plaintiffs will have an opportunity to have the error corrected in the appellate court.

[2] But the argument of counsel for the plaintiffs that no necessity arose for any preliminary action by the stockholders was also based upon their conclusion that an accounting would show no necessity for the payment of any funds out of the treasury of the corporation. This conclusion was based upon the statements filed of record by the defendants, showing a balance of value received in excess of cost, and the claim that the company is entitled to be repaid in cash for whatever the defendants received in dividends, whether those dividends were in the form of cash, stocks, or bonds. This position is, in my opinion, untenable. If the company is entitled to the benefit of the entire transaction, then what it is entitled to receive is what the defendants have derived from the transaction and have held or now hold under the constructive trust which has arisen in favor of the company. I am unable to distinguish between the rights of the company to the stock of E. I. Du Pont de Nemours & Co. received as a dividend upon the common stock of the powder company and its rights to the Atlas Powder Company stock and the Anglo-French bonds, also received as dividends. As was very forcibly pointed out by the counsel for the defendants at the argument, dividends paid by the corporations in stock or bonds cannot be regarded as cash payments in an accounting if the stock and bonds remain in the hands or control of the defendants unconverted. There has been no assertion by the plaintiffs of a right to demand the cash value of the 126,628 shares of stock of E. I. Du Pont de Nemours & Co., and the only ground upon which they rested their claim at the argument that the value of the Anglo-French bonds and the Atlas Company stock at the time of the declaration of the dividends should be paid in cash to the company was that the defendants, having no right as trustees to receive and hold the dividends, must account for them at the value at which they received them. The answer to that contention is that, as they claim that a trust has arisen in favor of the company, the company must take the product of the trust as it stands and cannot claim the stock dividends in specie in one instance and in the cash value of stock and bond dividends in the other instance. For all that appears, therefore, the company, upon the statement of an account would be charged with the value of the stock and bonds which it received, and a cash payment out of its treasury might be required to balance the transaction. Other questions are presented which can only be answered upon an accounting.

It appears that a large part of E. I. Du Pont de Nemours & Co. stock has been pledged by the securities company as security for a loan of $10,000,000 upon its notes, and that the common stock of the powder company has been distributed in dividends to the stockholders of the securities company. The amount of stock of either company, which can be reached in the hands of any of the defendants, can only be ascertained upon an accounting, and the amount of stock of E. I. Du Pont de Nemours & Co. necessary to make up a deficiency in unpledged stock, or the amount of the incumbrances upon pledged stock with which the defendants should be charged in an accounting, in case the equity in the pledged stock should be decreed to be in the company, is also a question to be determined upon an accounting. The contention that, in the light of the present record, the stock could be acquired without payment of any funds out of the company's treasury cannot therefore be sustained.

Moreover, the right to elect to take the stock is in E. I. Du Pont de Nemours & Co. and not in the powder company.

The plaintiff's present claim of a right to a transfer of the stock and an accounting to E. I. Du Pont de Nemours Powder Company, based upon the fifth conclusion of law, is asserted upon the ground that, when the bill was filed, the plaintiff "was not informed as to exactly the relations that existed between the E. I. Du Pont de Nemours Powder Company and the E. I. Du Pont de Nemours & Co.," and that the contract under which the E. I. Du Pont de Nemours & Co. purchased the property of the E. I. Du Pont de Nemours Powder Company is not in the record.

It is averred in the bill that E. I. Du Pont de Nemours & Co. purchased all the assets and assumed all the liabilities of the E. I. Du Pont de Nemours Powder Company. That averment is admitted in the answers of Pierre S. Du Pont, E. I. Du Pont de Nemours Powder Company, E. I. Du Pont de Nemours & Co. and the Du Pont Securities Company, and it was accepted as an uncontested fact at the trial that the chose in action represented by the claim in the present suit had passed to E. I. Du Pont de Nemours & Co. Moreover, the bill prays for a transfer of the stock and an accounting to the E. I. Du Pont de Nemours & Co.

Counsel for the plaintiffs call attention to the fact that E. I. Du Pont de Nemours & Co. in its answer disclaims any interest whatsoever in the stock formerly owned by T. Coleman Du Pont. If this were taken as a ground for declining to sustain the right of E. I. Du Pont de Nemours & Co., the plaintiffs would find themselves confronted by a dilemma, for the answer of E. I. Du Pont de Nemours Powder Company also disclaims any interest whatsoever in the stock.

The rights of the powder company having passed to E. I. Du Pont de Nemours & Co., the decision whether the latter company shall avail itself of its rights must be determined at a meeting of its stockholders. The fifth conclusion of law for the plaintiffs will be construed accordingly.

6. At the argument upon settlement of a decree, controversy arose over the question whether the acts of any of the individual defendants, excepting Pierre S. Du Pont, constituted a violation of duty owed

to the powder company and a fraud upon its rights in the acquisition of stock which would raise a constructive trust in favor of the powder company. The evidence did not connect Eugene E. Du Pont and Henry F. Du Pont with any interest in the stock either at the time of its acquisition or at the corporate meetings at which the question of its acquisition was voted upon. This is apparently conceded by the plaintiffs, and the bill will be dismissed as to those two defendants.

It was argued by counsel for the defendants that, under the court's findings of fact and conclusions of law, without, however, conceding the correctness of the findings and conclusions, the bill could not be sustained against any of the individual defendants except Pierre S. Du Pont. I do not coincide in this view of the case. Irenee Du Pont, Lammot Du Pont, A. Felix Du Pont, John J. Raskob, and Robert Rulith Morgan Carpenter participated with Pierre in violation of the duties which they owed to the powder company and in fraud of its rights, and they were parties to the purchase of the whole of T. Coleman Du Pont's stock and to the organization of the Du Pont Securities Company for the purpose of financing the purchase and holding the stock. As to them, therefore, a constructive trust arose which makes them jointly and severally accountable to the company, at its election, for the stock and all cash, stock, and bond dividends thereon, with interest, upon payment of the cost, with interest, and their reasonable expenses. Whether the commission paid to J. P. Morgan & Co. is a proper expense need not be determined until a decree for accounting is entered. The Du Pont Securities Company, acquired the stock subject to the right of the E. I. Du Pont de Nemours Powder Company, which has passed by assignment to the E. I. Du Pont de Nemours & Co.

Harry G. Haskell, Harry F. Brown, William Coyne, and John P. Laffey, however, stand in a different relation to the transaction. Their acts in taking part in the directors' meetings at a time when they were interested in the acquisition of stock in the Du Pont Securities Company constituted a violation of their duties to and a fraud upon the powder company, and, as to the stock distributed to them as dividends upon their securities company stock, they became trustees ex maleficio and are accordingly accountable. The extent of the accountability of the several defendants can only be determined upon an accounting.

Counsel for the defendants have already presented a form of interlocutory decree covering the question whether E. I. Du Pont de Nemours & Co. shall or shall not acquire the stock, and all cash and stock and bond dividends, together with interest, and covering the manner of conducting a stockholders' meeting for voting upon that question.

Counsel for the plaintiffs have presented a form of final decree, but no form of decree covering the question of acquisition of the stock or the method of holding a stockholders' meeting. Counsel for the plaintiffs may therefore submit a form of decree covering those points, and, if either side desire to be further heard, application may be made to have a time set for hearing counsel for all parties.

RAILWAY STEEL SPRINGS CO. v. CHICAGO & E. I. R. CO.

(District Court, N. D. Illinois, E. D. June 21, 1917.)

No. 57.

1. RAILROADS ⟸142—CONSOLIDATION—CONSTRUCTION OF AGREEMENT—MORTGAGES.

Two railroad corporations, of Illinois and Indiana, respectively, consolidated. Each had a first mortgage on its property, that of the Indiana company being wholly in that state, and each mortgage provided for subsequent issues of bonds thereunder for the purpose of making extensions or acquiring additional lines, and contained an after-acquired property clause. The articles of consolidation recited such mortgages and provided that they "shall have the force and effect of first mortgages executed by this consolidated company and shall equally secure the payment of all bonds which have been issued under either of said mortgages * * * as well as all bonds which may be hereafter issued by this consolidated company pursuant to and in accordance with the provisions of" the Illinois company mortgage which expressly permitted such issue in case of consolidation. It further provided that no bonds should be thereafter issued under the Indiana company mortgage. Other lines were afterward acquired or built, and bonds were issued therefor under the Illinois company mortgage, but none were thereafter issued under the Indiana company mortgage, and it was never recorded in Illinois. *Held* that, especially in view of their practical construction by the parties for many years, the provisions of the consolidation agreement did not have the effect of extending the lien of the mortgage of the Indiana company over the property of the Illinois company nor over the subsequently acquired lines of the consolidated company, nor was such lien so extended under the after-acquired property clause of the Indiana company mortgage.

2. RAILROADS ⟸167—MORTGAGES—AFTER-ACQUIRED PROPERTY CLAUSE.

The after-acquired property clause in a railroad mortgage can only be applied to property subsequently acquired by the mortgagor under its charter powers, and does not extend to property acquired in another state by a consolidated company of which the mortgagor becomes a constituent.

3. RAILROADS ⟸141—CONSOLIDATION—LEGALITY.

A consolidation of railroad companies, which has been in effect for 20 years unchallenged by the authorities of the states concerned, will not be held invalid as against the laws of such states in a suit between private parties.

In Equity. Suits by the Railway Steel Springs Company, by the Central Trust Company of New York, by the Metropolitan Trust Company of the City of New York, and by the Bankers' Trust Company of New York, against the Chicago & Eastern Illinois Railroad Company. Causes consolidated. On exceptions of the Metropolitan Trust Company to the master's report. Exceptions overruled.

This is a consolidated case, and the present issue arose on the claim made by the Metropolitan Trust Company of the City of New York, trustee in a mortgage executed by the Chicago & Indiana Coal Railway Company, December 1, 1885, that by the terms of the consolidation agreement entered into between the Chicago & Indiana Coal Railway Company and the Chicago & Eastern Illinois Railroad Company, on June 6, 1894, the lien of its mortgage was extended over the property of the Chicago & Eastern Illinois Railroad

Company and also over the property subsequently acquired by the company as afterward consolidated.

The Chicago & Indiana Coal Railway Company was a road completed between Fair Oaks, Ind., and Brazil, Ind., in the year 1886.

Mr. H. H. Porter, who owned the controlling interest in the Brazil Block Coal Company, a company owning most of the mines in the Brazil coal fields, Ind., acquired by foreclosure sale the property of the Chicago & Great Southern Railway Company, extending from Fair Oaks, Ind., on the Louisville, New Albany & Chicago Railway (known as the Monon) to Yeddo, in the same state, a distance of 76 miles. Mr. Porter organized the Indiana Railway to take title to the property. At the same time he organized the Lake Michigan & Ohio Railway Company for the purpose of constructing a road south from Yeddo to the Ohio river, passing through Brazil. The name of this latter company was changed to Chicago & Indiana Coal Railway Company in October, 1885. On December 1, 1885, the Chicago & Indiana Coal Railway Company executed its mortgage to the Metropolitan Trust Company of the City of New York and R. B. F. Pierce, trustee, to secure an issue of bonds, the total amount of which was unlimited. Under this mortgage, bonds to the amount of $1,000,000 were issued on account of the construction of the line from Yeddo to Brazil, and it was provided that additional bonds to the extent of $18,000 might be issued for each mile of single-track railroad thereafter acquired by construction, purchase, or consolidation, and a further additional amount of $7,000 per mile of railway constructed or acquired for the purchase of equipment, and $8,000 per mile for double track.

Under date of April 4, 1886, the Chicago & Indiana Coal Railway Company and the Indiana Railway Company were consolidated under the name of the Chicago & Indiana Coal Railway Company, with a capital stock of $10,000,000. The Chicago & Indiana Coal Railway Company thereafter extended its lines in a northeasterly direction from Fair Oaks, to La Crosse, a distance of 27 miles, completing the work in January, 1887. The trains of the Chicago & Indiana Coal Railway Company were intended to use, and for a year or more did use, the Monon tracks from Fair Oaks to Chicago.

For many years previous to this time the Chicago & Eastern Illinois Railroad Company, a corporation formed by the consolidation of Illinois and Indiana corporations, was operating a railroad from Chicago south through Danville to Terre Haute, and by means of a branch had been enjoying the monopoly of transportation of the coal from the Brazil coal fields. Soon after the completion of the Chicago & Indiana Coal Railway Company, fierce competition arose between the two roads over the Brazil coal business. As a result thereof, Mr. Porter bought the controlling interest in the Chicago & Eastern Illinois Railroad Company. This purchase was made about the middle of the year 1887.

On November 1, 1887, the Chicago & Eastern Illinois Railroad Company executed its general consolidated and first mortgage to the Central Trust Company of New York, as trustee, to secure an issue of bonds, the total amount of which was unlimited. Of these bonds $8,000,000 in amount were set apart to be used for retiring prior bonds, and the mortgage provided that additional bonds might be issued to the extent of $18,000 per mile of additional single-track extensions and branches thereafter acquired by the railroad company by construction, purchase, or consolidation, $7,000 per mile for every mile of railroad, including branches and extensions for additional equipment, and an additional amount of $8,000 per mile for every mile of double track (not meaning side tracks) thereafter acquired by the railroad company. The mortgages executed by the coal road and the Eastern Illinois contained in general the same provisions, with the exception that the Eastern Illinois mortgage contained the following provision not found in the Chicago & Indiana Coal mortgage:

"If the railroad company shall hereafter consolidate its property and franchises, by sale or otherwise, with the property and franchises of any other railroad company or companies, the several parties to such consolidation may, by apt words expressed in the agreement, give to this indenture the force and effect of a mortgage conveying to the trustee, above named as its

successor, all of the railroads and appurtenant property of the several parties, at the date of such agreement, and all railroads and appurtenant property which may be thereafter acquired, by construction or otherwise, by such consolidated company, to secure upon terms of equality the bonds which may have then been issued hereunder by the railroad company, as well as all bonds which may be thereafter issued by such consolidated company, in substantial compliance with the provisions hereof. In case such agreement shall be made, bonds issued by such consolidated company shall be substantially in the forms above set forth, but in the name of the consolidated company, and shall be executed under its corporate seal and attested by the signatures of its president and secretary. It is the intent of this provision to invest such consolidated company with power to issue bonds for the purposes expressed, and subject to the conditions named in this mortgage or deed of trust, to the same extent as they could be issued by the railroad company if no such consolidation had been made, thereby giving to the holders of all bonds issued hereunder, whether by the railroad company or its successors, equality of security."

During the summer of 1887, the Eastern Illinois had caused to be incorporated two other railroad companies, namely, the Strawn & Indiana State Line Railroad Company and the Chicago, Danville & St. Louis Railroad Company, for the purpose of constructing a branch to and an extension of the Eastern Illinois line. The roads were constructed with the funds of the Eastern Illinois, and under its supervision and by its employés. No stock was ever issued in these roads, and the same were finished and in operation by the Chicago & Eastern Illinois Railroad Company prior to November 1, 1887. The stockholders' meeting of November 1, 1887, which authorized the mortgage to the Central Trust Company, also ratified a consolidation agreement between the Chicago & Eastern Illinois Railroad Company and the two latter named roads under the name of the Chicago & Eastern Illinois Railroad Company. On November 12, 1887, the agreement was formally executed by the officials of the several companies. The latter consolidation agreement contained (article 7) the following provisions:

"Article VII. The mortgage or deed of trust made and entered into on the first day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company, party of the first part hereto and the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, trustee, shall have the force and effect of a first mortgage executed by the consolidated company, and shall equally secure the payment of all bonds which have been issued under it by the Chicago & Eastern Illinois Railroad Company, as well as pursuant to, and in accordance with its provisions by the consolidated company; but nothing in this article contained shall be construed in such manner as to limit or restrict the powers of said consolidated company to execute other mortgages or deeds of trust, conveying its property, or any part thereof, to secure the principal or interest of any other debt or debts which it may create."

On December 1, 1887, the Eastern Illinois and the Coal road entered into a traffic agreement whereby the traffic of both roads was controlled by a joint committee appointed by the directors of each company. In 1888, the consolidation agreement of November 12, 1887, was amended by a vote of the stockholders of the Chicago & Eastern Illinois Railroad Company to provide that the stock of the Eastern Illinois might be issued to be exchanged for the stock of any other railroad whose tracks connected with the Eastern Illinois.

In pursuance of this power, in March, 1889, the Eastern Illinois acquired the entire amount of outstanding preferred and common stock of the Coal road by exchange of its own stock therefor, share for share, and on May 1st took over the operation of the Coal road and closed all its books of account and took charge of its receipts and disbursements. The corporate organization of the Coal road was kept up by annual stockholders' meetings and by the election of directors to whom were issued qualifying shares.

Under date of June 1, 1892, the Chicago & Indiana Coal Railway Company executed a lease of all its property to the Chicago & Eastern Illinois Railroad

Company for 999 years. The Eastern Illinois Company agreed to pay, in lieu of rental, all taxes and assessments on the leased property and the principal and interest of all of the outstanding bonds secured by the mortgage to the Metropolitan Trust Company. Under date of June 6, 1894, the Eastern Illinois Company and the Coal Railway Company entered into articles of consolidation, the name of the consolidated company being the Chicago & Eastern Illinois Railroad Company. The consolidation agreement contained the following provisions:

"Article VII. The mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, trustee, also the mortgage or deed of trust made and entered into on the 1st day of December, in the year A. D. 1885, by and between the Chicago & Indiana Coal Railway Company and the Metropolitan Trust Company of the City of New York, a corporation created and existing under the laws of the state of New York, and R. B. F. Pierce, of Crawfordsville, in the state of Indiana, trustees, shall have the force and effect of first mortgages executed by this consolidated company, and shall equally secure the payment of all bonds which have been issued under either of said mortgages or deeds of trust by the Chicago & Eastern Illinois Railroad Company or the Chicago & Indiana Coal Railway Company, as well as all bonds which may be hereafter issued by this consolidated company, pursuant to and in accordance with the provisions of said mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and said Central Trust Company of New York, trustee.

"No bonds shall be hereafter issued under or pursuant to said mortgage or deed of trust made and entered into on the 1st day of December, in the year A. D. 1885, by and between the Chicago & Indiana Coal Railway Company and said Metropolitan Trust Company of the City of New York and said R. B. F. Pierce, trustees; but nothing in this article contained shall be construed in such manner as to limit or restrict the powers of this consolidated company to execute other mortgages or deeds of trust conveying its property, or any part thereof, to secure the principal or interest of any other debt or debts which it may create."

No consideration was paid to the Chicago & Eastern Illinois Railroad Company for the execution of the above article 7 either by the Metropolitan Trust Company or any one else.

The total amount of bonds issued by the Chicago & Eastern Illinois Railroad Company under its mortgage to the Central Trust Company was $21,343,000, of which $13,950,000 were issued subsequent to June 6, 1894. From the proceeds of these bonds issued for construction after June 6, 1894, the railroad from Chicago to Terre Haute was double-tracked, a line to St. Louis was acquired and also a line in Illinois to the Ohio river was purchased, and numerous feeder lines built.

In 1905, the Chicago & Eastern Illinois Railroad Company executed its mortgage to the Bankers' Trust Company of New York, under which about $18,000,000 of bonds were issued and are now outstanding. The claim of the Metropolitan Trust Company was that by virtue of article 7 of the consolidation agreement of June 6, 1894, its mortgage became a valid and subsisting lien on all the property of the Chicago & Eastern Illinois Railroad Company, as follows:

"(1) As to all property, rights and interests acquired by or through said constituent Indiana Company a first charge and lien prior and superior in law and in equity, to any other charges or liens whatsoever.

"(2) As to all property, rights and interests acquired by or through said constituent Chicago Company a charge and lien prior and superior to any other charges or liens whatsoever created thereon or attaching thereto subsequently to the date of said articles of consolidation, to wit, June 6, 1894.

"(3) As to all property, rights and interests other than such as are comprised in subdivisions (1) and (2) of this paragraph XVII, a first charge and

lien, prior and superior to any other charges or liens whatsoever, except to the extent, if any, that said mortgage of the Illinois Company, dated November 1, 1887, may be determined to be a valid and subsisting first lien thereon, and to this extent a first charge and lien jointly with the lien of said Illinois Company mortgage, said lien being in all respects joint and equal and without preference or priority of any kind in favor of the lien of said Illinois Company mortgage as against the lien of said mortgage of Chicago & Indiana Coal Railway Company."

Other facts necessary to an understanding of the question will be found in the opinion.

Holt, Cutting & Sidley and Charles S. Holt, all of Chicago, Ill., for Equitable Trust Co. of New York.

Arthur H. Van Brunt, of New York City, and William W. Gurley, Howard M. Carter, and Charles S. Babcock, all of Chicago, Ill., for Central Trust Co. of New York.

Sullivan & Cromwell, of New York City, Royall Victor, of New York City, and Brode B. Davis, of Chicago, Ill., Scott, Bancroft, Martin & Stephens, of Chicago, Ill., and Frank H. Scott, of Chicago, Ill., for Metropolitan Trust Co. of New York.

White & Case, Roberts Walker, and Henry B. Stimson, all of New York City, and Adams, Follansbee, Hawley & Shorey, Samuel Adams, and Mitchell D. Follansbee, all of Chicago, Ill., for Bankers' Trust Co.

Homer T. Dick, of Chicago, Ill., for Chicago & E. I. R. Co.

Will H. Lyford, of Chicago, Ill., for Receiver.

Spooner & Cotton, Charles P. Spooner, and Joseph P. Cotton, all of New York City, for Reorganization Committee.

Burry, Johnstone & Peters and William Burry, all of Chicago, Ill., for Farmers' Loan & Trust Co.

Levinson, Becker, Cleveland & Schwartz, Solmon O. Levinson, and Jerome N. Frank, all of Chicago, Ill., for stockholders' committee.

John S. Miller, of Chicago, Ill., amicus curiæ.

CARPENTER, District Judge (after stating the facts as above). [1] The question before the court is: Did the Chicago & Indiana Coal Railway mortgage of December 1, 1885, become a lien on railways and other properties in Illinois by virtue of the consolidation agreement of June 6, 1894?

Counsel for the Metropolitan Trust Company contend:

First. That article 7 of the consolidation agreement of June 6, 1894, is to be construed as giving to the Coal Railway mortgage a lien upon the then existing Chicago & Eastern Illinois property, subject to that of the Chicago & Eastern Illinois mortgage to the Central Trust Company of November 1, 1887; and a lien equal to and sharing with the lien of that Chicago & Eastern Illinois mortgage upon the property acquired by the consolidated company after June 6, 1894. Counsel point out that the salient provisions of article 7 here are in the same language as is found in the earlier Chicago & Eastern Illinois consolidated agreement of November 12, 1887, which was inserted in order to comply with the provisions in the Chicago & Eastern Illinois mortgage of November 1, 1887, for the issue of bonds for the consolidated com-

pany of 1887; and that in the consolidation of 1894 the language of the previous consolidated agreement was repeated in order to protect the security of the Coal Railway bonds and to provide for the issue of bonds under the Chicago & Eastern Illinois mortgage by the consolidated company.

Second. That the provision in article 7 that the two mortgages should have the force and effect of first mortgages executed by the consolidated company means the same with respect to one mortgage as the other. If the Central Trust mortgage became the mortgage of the consolidated company by virtue of this provision, so, also, the Coal Railway mortgage became the mortgage of the consolidated company. The provision means the same as if the two mortgages were re-executed by the consolidated company. The covenants and provisions of the Coal Railway mortgage, including the after-acquired clauses, became the covenants and provisions of the consolidated company, and applied to its after-acquired property. It was within the intention of the parties to the Coal Railway mortgage, at the time it was made, that the Coal Railway might be extended into Illinois and to Chicago. If they had in mind a particular line, that is not important; and, when afterwards the Coal Railway Company acquired property which brought its line into direct communication with Chicago, that line into Chicago was, upon the consolidation, after-acquired property within the intent of the after-acquired clause in the Coal Railway mortgage. So also as to the extensions and additions by the consolidated company through Illinois. That upon a consolidation the mortgage of a constituent does not cover property afterwards acquired by the consolidated company unless there comes in, in legal effect, a new mortgagor by the consolidation. The Central Trust Company mortgage became a lien upon the lines acquired by the consolidated company from Danville to Brazil, and from Sidell to Tuscola, and from Tuscola to Thebes and to East St. Louis only by the terms of article 7 of the consolidation agreement, by which the Coal Railway mortgage also became a lien upon that property. That the Central Trust Company mortgage became a lien upon the property acquired after the consolidation by virtue of the after-acquired property clause in its mortgage and the consolidation agreement. But that the after-acquired property clause of the Metropolitan Trust Company mortgage is almost identical in terms, and also came into operation under the same provision as that of the Central Trust Company. As the bonds issued under the Chicago & Eastern Illinois mortgage after the consolidation, as contemplated by article 7, were to be secured by the after-acquired property of the consolidated company as well as by the existing property, so the bonds already issued under the mortgage must be so secured, and a fortiori the bonds issued under the Coal Railway mortgage must also be so secured; otherwise the two mortgages, which are to have the effect of first mortgages executed by the consolidated company, would not "equally secure the payment of all bonds which have been issued under either of said mortgages."

Such, briefly, are the contentions of counsel for the Metropolitan Trust Company.

The articles of consolidation of 1894 provided that, thereafter, bonds should continue to be issued under the Eastern Illinois general consolidated mortgage, and that mortgage was the only recourse which the consolidated company then had for raising necessary additional capital. That mortgage contained the following provisions:

"Whenever any additional mile or miles of single-track railroad shall be acquired or created by the railroad company by purchase, construction, consolidation or otherwise, and such fact shall be made to appear to said trust company, by the affidavits of the president or a vice president, and the chief engineer of the railroad company, showing among other things, the exact length of the railroad or railroads so acquired or created, and where the same begin and end; and upon the recording of said mortgage or deed of trust, as required by the laws of the state or states in which any of said additional railroad shall be situate, said trust company shall, upon the request of the board of directors of the executive committee of the railroad company, certify and deliver to the railroad company a further issue of bonds hereunder at the rate of, but in no event exceeding, the amount of eighteen thousand dollars per mile of single-track railroad so acquired or created.

"Provided that, if any railroad acquired by purchase, consolidation or otherwise, shall be incumbered by any mortgage which remains unsatisfied, bonds secured by this mortgage (the general consolidated and first mortgage) shall be issued thereon only for the difference between said incumbrance and the amount for which bonds might be issued hereunder if such incumbrance did not exist."

Commencing with the consolidation of 1894, and continuing until the appointment of the receivers, the Eastern Illinois, first, under the domination of Mr. H. H. Porter, and later under the domination of the "Frisco" System, more than a dozen times issued general consolidated bonds at the rate of $18,000 a mile, for additional railroad acquired by the Eastern Illinois, and no deduction from that amount per mile was made by reason of any existing mortgage on the newly-acquired property.

The record contains the affidavits and certificates furnished by the officers and directors of the Eastern Illinois, on which these additional general consolidated bonds were issued, and in each case of new construction or purchase no deduction was made for any existing lien created by the Coal Railway mortgage. In the case of the acquisition of the line from Danville to Terre Haute and Brazil a deduction was made for the amount of the prior mortgages which had been made by the former owners of those properties, but no deduction was made on account of the Indiana Coal Mortgage.

If the Metropolitan Trust Company contention is to be adopted, and the parties intended that, by the consolidation of 1894, the lien of the Coal mortgage was to be extended over all property thereafter acquired by the Eastern Illinois Company, not a single one of these general consolidated bonds could have been lawfully issued; as, in each case, the amount of the Indiana Coal mortgage lien was far in excess of $18,000 per mile of new railroad for which general consolidation bonds were issued and certified.

The practical construction thus placed upon the articles of consolidation of 1894 must be seriously considered, and all parties interested seemed to believe that the Indiana Coal mortgage was to be regarded

a first mortgage upon the Indiana Coal Railway as it then existed, and the Eastern Illinois mortgage was to be regarded a first mortgage upon the Eastern Illinois Railroad as it then existed, and upon any acquisitions thereafter made by the consolidated company.

When Mr. Porter acquired the Eastern Illinois stock, the Eastern Illinois Company was a successful railroad, and its general credit was a sufficient guaranty of the payment of the principal and interest of the Indiana Coal bonds.

The record shows that in 1902 Mr. Porter and his associates sold to the Frisco Company all of the common stock of the Eastern Illinois (including that which had been exchanged for the Indiana Coal Railway stock) at 250 for the common and 150 for the preferred. Dividends at the rate of 10 per cent. per annum were paid upon the common stock up to the date of the receivership; and dividends of 6 per cent. upon the preferred stock were paid from the time it was created in 1887 until the receivership.

When the refunding mortgage of 1905 was made, it included the first offer that was ever made to give the Indiana Coal bondholders a lien upon the Eastern Illinois Railroad. That mortgage provided that $4,626,000 of refunding bonds should be reserved, to be exchanged, par for par, for the Indiana Coal bonds.

Article 7 of the consolidation agreement of 1894 will not admit of the construction urged by counsel for the Metropolitan Trust Company. It affords no basis for contending that the Coal Railway mortgage was made a second mortgage upon the Chicago & Eastern Illinois lines, or was given a lien equal with that of the Central Trust Company upon after-acquired property of the consolidated company. It is admitted that each of the mortgages remains a first mortgage upon the property covered by it prior to the consolidation. Of course, this could not be otherwise. But the contention that one mortgage became a lien second to the other mortgage upon lines upon which the other was first has no support in article 7. The provision that these mortgages were to have the force and effect of first mortgages of the consolidated company does not mean that the Coal Railway mortgage should be a second mortgage upon the Chicago & Eastern Illinois property, or that the Central Trust Company's mortgage should be a second mortgage upon the Coal Railway. So, also, counsel eliminate "equally" in article 7. They say that the bonds are not equally secured, because the Eastern Illinois bonds are conceded a prior lien upon the Chicago & Eastern Illinois property in existence at the time of the consolidation, but they claim the Coal Railway mortgage was a second lien thereon; so, also, they claim a first lien upon the Coal Railway line of its bonds and give to the Eastern Illinois only a second lien. It cannot be that the words "shall equally secure" mean "shall unequally secure," when the security given to the Coal Railway bonds is compared with the security given to the Chicago & Eastern Illinois bonds.

The adoption in article 7 of the consolidation agreement of 1894 of the language in article 7 of the consolidation agreement of November 12, 1887, which counsel for the Metropolitan contend is important as

showing the meaning of article 7 of the agreement of 1904, shows that the words "shall equally secure" do not refer to a comparison of the bonds of one mortgage with those of the other mortgage, but only the bonds under one mortgage with the other bonds under the same mortgage, because in the 1887 agreement but one mortgage was mentioned. The apparent principal reason for the insertion of these words was to provide that all the bonds under the Chicago & Eastern Illinois Railway mortgage—both those issued prior and those issued subsequent to the consolidation agreement of 1894—should be equally secured, as the explicit terms of the Chicago & Eastern Illinois mortgage of November 1, 1887, require. That was the occasion for the insertion of this provision, and that gives to these words the same meaning and application as they had in the consolidation agreement of 1887. The provision in the Chicago & Eastern Illinois Railway mortgage, to which counsel on each side refer, which authorizes the consolidated company, in case of an agreement for consolidation, to issue bonds under that mortgage, expressly declares that all the bonds so issued shall be equally and in all respects secured by that mortgage, without preference, priority, or discrimination on account of, and without reference to, the time or times of the actual issue of the said bonds or any of them; and that it is the intent of that provision, investing the consolidated company with power to issue bonds under that mortgage, to give to the holders of all bonds issued under it, whether by the mortgagor railroad company or its successors, equality of security. What the parties had in mind in article 7 of the consolidation agreement of 1894 was these provisions of the Central Trust Company mortgage. Realizing this, article 7 plainly means that each mortgage shall equally secure all the bonds issued under it, and, with respect to the Central Trust Company mortgage, that this equality should apply as between bonds issued by the constituent Eastern Illinois before consolidation and those issued by the consolidated company under that mortgage.

The bondholders under the Central Trust mortgage had the contract right to the security of the property covered thereby, undiluted and unimpaired by the claims of the bondholders under the Coal Railway mortgage. This is conceded by counsel as to the property of the Chicago & Eastern Illinois at the time of the consolidation. But it is equally true under the terms of their mortgage as to property coming under this mortgage after the consolidation. It must be noted that, while the mortgage above referred to authorizes the extension of the lien under that mortgage over the property of a constituent in case of consolidation, it did not permit or contemplate the extension over the lines covered by it of the lien of a mortgage upon a constituent company. The Central Trust Company mortgage provided for further issues of bonds for the acquisition of additional lines in the amounts and upon the terms therein stated, and for the issue of such bonds for such purposes by the consolidated company, if an agreement for consolidation should be made. By such provisions the bonds so issued were to be secured by this mortgage upon newly-acquired lines, and all the bonds were to be equally secured. So that, beyond ques-

tion, the Central Trust mortgage by its terms extended to lines so acquired by the consolidated company. This right of the bondholders under that mortgage was a contract right which could be no more impaired by the parties to the consolidation agreement of 1894 than could the lien of those bondholders upon the then existing property of the Chicago & Eastern Illinois Company. In the case of the Central Trust mortgage, the consolidated company becomes the mortgagor in legal effect by the terms of the mortgage itself; and article 7 of the consolidation agreement is to be given such effect as the terms of the mortgage permits, and none other.

[2] Judge Woods held, in the case of New York Security Co. v. Louisville, E. & St. L. Consol. Ry. Co. (C. C.) 102 Fed. 382–398, that the after-acquired property clause in railway mortgages can rightly be construed to extend only to property subsequently acquired by the mortgagor.

The after-acquired property clause of the Coal Railway mortgage embraces only such extensions or additions as might properly be acquired under the charter of the Coal Railway Company, as was held by Judge Taft in the case of Compton v. Jesup, 68 Fed. 263–286, 15 C. C. A. 397, which was cited by counsel for the Metropolitan Trust Company. It was limited by its terms to property acquired by the mortgagor. There was no provision in the Coal Railway mortgage for the purchase of property to become subject to the mortgage by the issue of bonds after the consolidation, as was the case with the Central Trust mortgage. Moreover, the extent of an after-acquired clause is limited to the property acquired for the extension of the line of the mortgagor within the contemplated scope intended by the mortgagor, or appurtenant to the existing lines. The purpose of extending, contemplated by this mortgagor, was from its junction with the New Albany Road at or near Fair Oaks to a point at or near Chicago, and to some point on the east shore of Lake Michigan, and from Brazil to some point on the Ohio river. There was never the slightest intention of acquiring the Chicago & Eastern Illinois system in Illinois with its proposed extensions.

Moreover, the Coal Railway mortgage contemplated extensions by the issue of further bonds under that mortgage. By the agreement of consolidation of 1894 that mortgage became a closed mortgage, and no further bonds could be issued under it. This plainly was intended to recognize the fact that an end was put to the after-acquired clause in that mortgage.

The charter of the Coal Railway Company, or legislation in Indiana, could have no effect to authorize the Coal Railway Company to extend its line into Illinois. That could only be done under legislation of Illinois. And the consolidated company, in acquiring property in Illinois, is altogether an Illinois corporation, and acts under its Illinois charter, as held in Quincy Railroad Bridge Co. v. County of Adams, 88 Ill. 615–619:

"The Legislatures of this state and of Missouri cannot act jointly. * * * They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state."

The after-acquired property clause of the Chicago & Indiana Coal mortgage contains these words: "All railways which the * * * company may * * * hereafter acquire * * * by consolidation, * * *" etc. This clause throughout refers to what "the railway company" may "acquire"; nowhere to what may be acquired by a corporation resulting from a two-state consolidation. A succession of consolidations or mergers might be had with other Indiana corporations which, if on suitable terms, would subject the property of the successive consolidated companies to the lien of this clause. By deed or purchase, if allowed by statute, railways in Ohio, Michigan, or Illinois might be acquired and would be subject to the mortgage. While the clause in question can be no more sweeping than the law permits, it is possible to give effect to every word of it in conceivable cases, and it is not necessary to denounce any part for illegality or ultra vires.

The word "acquired" would in no event be an apt word for a two-state consolidation; neither corporation would acquire anything thereby. They are coupled together, but neither gets a tie, rail, or car that was the other's. The absence of any effort to record the Chicago & Indiana Coal mortgage in Illinois indicates, as I have said, that the parties in 1894 had no idea that the Chicago & Indiana Coal mortgage could ever embrace the Illinois property coming into the consolidation of 1894.

It is unnecessary to decide whether the articles of consolidation could duplicate the effect of the Chicago & Indiana Coal mortgage or vitalize its provisions so as to affect Illinois property, because the language of the articles is not capable of such construction. "Shall have the force and effect of first mortgages executed by the consolidated company" means that the consolidated company adopts these two documents as if executed by itself on the property then therein respectively embraced. It would have been easy to say "one first mortgage," if the scrivener had meant what counsel for the Metropolitan Trust Company contend; but the language is "first mortgages," in the plural. Furthermore, there cannot be two first mortgages on the same property. Therefore, when the articles of 1894 provided that the Indiana Coal mortgage and the general consolidated mortgage should be considered first mortgages of the consolidated company, the parties could only have intended that which was possible, namely, that the Indiana Coal mortgage should be considered a first mortgage on the Indiana Coal properties as they then existed, and the Chicago & Eastern Illinois mortgage should be considered a first mortgage on the Eastern Illinois properties, and upon all property acquired after the consolidation.

The Central Trust Company's mortgage provides:

"If the railroad company shall hereafter consolidate its property and franchises by sale or otherwise with the property and franchises of any other railroad company or companies, the several parties to such consolidation may, by apt words expressed in the agreement, give to this indenture the force and effect of a mortgage, conveying to the trustee above named, or its successor, all of the railroads and appurtenant property thereof of the several parties. * * *"

It was the intent of this provision to invest the consolidated company with power to issue bonds for the purposes expressed, and subject to the conditions named in this mortgage or deed of trust, to the same extent as they could have been issued by the railroad company if no such consolidation had been made; thereby giving the holders of all bonds issued hereafter, whether by the railroad company or its successors, equality of security.

The fact that the Indiana Coal mortgage contained no provisions for the issue of bonds thereunder by any successor of the Coal Company furnishes a good reason why the Central Trust Company mortgage was continued as an open mortgage, and the Coal Railway Company mortgage expressly closed. The after-acquired property clause of the Indiana Coal Company mortgage was specifically and strictly limited to the property thereafter acquired by the Coal Railway Company. There is no provision whatever in the Coal Company's mortgage for the issue of bonds thereunder by any party other than the original mortgagor, and its provisions as to after-acquired property must be strictly limited to property thereafter acquired by the mortgagor.

The words "equally secure" indicate an intention that the two mortgages shall respectively be held to secure the bonds issued under each; that is to say, that each bond under the Central Trust Company mortgage should be secured equally with each other bond issued under that mortgage, and that each bond executed under the Chicago & Indiana Coal mortgage would be secured equally with every other bond issued under that mortgage. If the intent were to make each mortgage secure the bonds issued under the other mortgage, the informal method adopted could hardly have accomplished it. The consent of bondholders to the imposition of the lien of other bonds upon their mortgage property, suitable action by the trustees, and some semblance of compliance with the statutes regulating conveyances and the recording thereof, would all have been necessary legally to effectuate any such purpose.

The conclusion seems inevitable that originally neither mortgage by virtue of the consolidation agreement alone crossed the state line, and that the consolidated corporation merely assumed, to such extent as it could legitimately and effectively, the two several mortgages, republishing them as first mortgages. It seems to be the ordinary case of a purchaser or property who permits a recital in his deed of conveyance that a mortgage exists upon the property, which he did not make, and that he assumes and agrees to pay it.

The future-acquired property clause in the Coal Railway mortgage, if it were still in force, could not bring property acquired in Illinois under the Illinois charter of the Chicago & Eastern Illinois within the scope or under the lien of the Coal Railway mortgage.

Under the contention of the Metropolitan Trust Company, the security of the Central Trust mortgage bondholders would be less than they contracted for. The security of the outstanding bondholders at the time of the consolidation would be much less than their mortgage

contract promised them. This lien claimed by the Coal Railway mortgage bondholders was an unrecorded lien put where it would not be discovered, and would escape the notice of persons purchasing the bonds of the Chicago & Eastern Illinois after the consolidation. By the terms of the mortgage, the after-acquired property of the Chicago & Eastern Illinois was to be purchased with the proceeds of these bonds to the extent of $18,000 per mile, less the amount of existing prior liens upon the property. The purpose was to give these bonds a first lien on all of the property acquired with their proceeds. Why then should the property acquired with the proceeds of these Chicago & Eastern Illinois bonds after the consolidation also be subject to the Coal Railway mortgage to the amount of the Coal Railway bonds. To give article 7 of the consolidation agreement any such effect would be to convict the parties to the consolidation of gross fraud in order to insure its success. It would require the strongest evidence to justify the court in reaching any such conclusion. Certainly it will not put a strained construction upon article 7 which its language does not justify, in order to reach such a result. The court will never force a balance in order to declare a fraud.

Each of the mortgages contemplated and provided that, in the case of the acquisition of property to come under their liens, the mortgage should be recorded as required by the laws of the state in which the acquired property should be situate. The fact that this was not done or provided for in the consolidation of 1894 shows that no such extension of lien by force merely of article 7 of the consolidation agreement was within the intention of the parties.

The law required the recording of the instrument creating the lien in order to be valid or effective against purchasers or creditors. Failure to record defeats the lien as against the bondholders of the Chicago & Eastern Illinois.

If the parties intended to give the liens contended for by the Metropolitan Trust Company, a new mortgage, or some proper instrument equivalent to a mortgage, and distinctly providing for the lien in clear language, would have been executed and recorded. It would have been easy so to do, and it would have been the natural thing to do.

The provisions of the Constitution of Illinois (article 11, § 13), and the statutes of that state (R. S. c. 114, §§ 19 and 21), respecting the power of railway companies to issue mortgages, were not complied with, but were violated by article 7 of the consolidation agreement of 1894, if it is to be construed as a new mortgage, as contended by counsel for the Metropolitan Trust Company.

Assuming that article 7 intended to create a mortgage lien of the Coal Railway mortgage upon the property of the Chicago & Eastern Illinois, there was no consideration therefor. The Coal Railway mortgagee or bondholders not only did not pay anything for what it is contended they got, but so far as the evidence shows did not know anything about it for many years.

There is this further equitable consideration: It is important in this connection to note that by the terms of the general consolidated mort-

gage, as recognized in the consolidation agreement of 1894, further bonds were to be issued to acquire new properties, but by its very terms no further bonds were to be issued under the Coal Railway mortgage. In fact, not a dollar was ever paid by the Coal Railway bondholders to the Chicago & Eastern Illinois Railway Company for the additional security which they claim to have under the consolidation agreement.

Operating under the terms of the general consolidated mortgage, millions of dollars worth of property were acquired by the consolidated company after 1894 with the proceeds of bonds issued under that mortgage. The use of the bonds for that purpose, coupled with the express declaration in the mortgage extending the after-acquired property clause to property to be acquired by any subsequent consolidated company, made the lien of the bonds so issued virtually a purchase-money mortgage lien on the property acquired after 1894 with the proceeds of those bonds. There is no corresponding equity in favor of the Coal Railway bonds. It would be a great injustice to permit the constituent mortgagor roads, operating under an agreement made between themselves, to use the proceeds of the general consolidated bonds in purchasing property, and without the consent of the bondholders divide the mortgage lien on such after-acquired property ratably between them and the Coal Railway bondholders, who had not advanced one penny for the acquisition of the new property.

Having defined the respective positions of the Chicago & Indiana Coal mortgage and the consolidated mortgage, it seems unnecessary to go further into the question of liens at this time. As my views preclude the enforcement of any lien of the Chicago & Indiana Coal mortgage on property other than the Chicago & Indiana Coal mileage existing in 1894, no claim of the Chicago & Indiana Coal bondholders upon other Chicago & Eastern Illinois railways or property remains to be considered. Any contest between the consolidated mortgage and the refunding mortgage does not interest or concern the Chicago & Indiana Coal bondholders, and such contest, if there be any, is therefore reserved for future consideration.

[3] The validity of the consolidation of the Coal Railway and the Chicago & Eastern Illinois has been challenged upon this hearing on the ground that their roads were parallel and competing. As early as December, 1887, an operating agreement was entered into between the two companies under which the railways were operated under one management; in 1892, a lease was made by the Coal Railway Company of its property for 999 years to the Eastern Illinois Company, in which the lessee undertook and covenanted to pay the interest and principal of the bonds of the Coal Railway Company secured by the mortgage to the Metropolitan Trust Company. These were steps towards the consolidation of the railroad commencing 30 years ago, and were followed by the consolidation agreement of June 6, 1894, and for 30 years these lines have been operated as one system, and for 20 years or more the consolidation agreement of 1894 has stood unchallenged. The Attorneys General of Illinois and Indiana, who were charged with the duty of redressing violations of the constitutional

provisions of those states against the consolidation of parallel and competing railroads, raised no question, so far as the record shows. On the other hand, these officers and the Supreme Courts of these states appear to have recognized the consolidation of these roads. C. & E. I. Railroad v. Doyle, 256 Ill. 514, 100 N. E. 278; State of Indiana v. C. & E. I., 145 Ind. 229, 43 N. E. 226; C. & E. I. v. State, 153 Ind. 134, 51 N. E. 924. Moreover, the complainants in the consolidated cases here appear to have recognized this consolidation upon the record; and the jurisdiction of this court to include the Coal Railway in the receivership and to foreclose its mortgage, I think, assumes, and implies at least, the lawful consolidation of these roads; and this court will continue herein to regard such consolidation as valid and effective. The effect of this will be the recognition of the Coal Railway bondholders as creditors of the defendant Chicago & Eastern Illinois, without any mortgage lien except upon the property of the constituent Coal Railway Company.

Decree may be prepared accordingly.

MICHIGAN CENT. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917. On Motion for Rehearing, December 4, 1917.)

No. 2859.

1. CARRIERS ⊜26—CARTAGE TARIFF—LIABILITY FOR DEMURRAGE.
Under the provision of a cartage tariff that shipments so handled will not be subject to car service or storage service accruing through the company's failure to make delivery within specified free time, goods subject to cartage tariff are not exempt from demurrage, unless the failure to make delivery within the specified free time is that of the company.

2. CARRIERS ⊜26—CARTAGE TARIFF—DEMURRAGE—"DELIVERY."
"Delivery," within the provision of a cartage tariff that shipments so handled will not be subject to car service or storage service accruing through the company's failure to make delivery within the specified free time, is the cartage delivery to be made by the company's cartage agent from the car duly placed on the delivery tracks to the terminal cartage point.

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

3. CARRIERS ⊜26—CARTAGE TARIFF—DEMURRAGE—FAULT OF RAILROAD OR CONSIGNEE.
Failure of the company's cartage agent to make delivery of the contents of cars within the free time allowed after the cars were placed on the delivery track was not that of company, so as, under the cartage tariff, to free the consignee from liability for demurrage, where it was because the consignee was not ready for their contents, and instructed the cartage agent, who was willing and ready to seasonably unload and deliver every car, to unload and deliver other cars, and so due to the consignee's fault; and this, though the cars had been placed on the delivery track in an order different from that of their shipment, in which order the consignee wanted their contents, any claim of the consignee on this account being separate from that of liability for demurrage.

4. CARRIERS ⊜26—DEMURRAGE TARIFF—"RAILROAD ERROR OR OMISSION."
Provision of a demurrage tariff that no demurrage charges shall be assessed for detention of cars through railroad errors or omissions refers to such errors and omissions after placement of the cars on delivery track and notice thereof.

5. CARRIERS ⊜38—OFFENSES—DEMURRAGE—KNOWLEDGE.
Under the rule that it will be charged with the sum of the knowledge of its agents within the scope of their respective functions, a railroad knowingly commits the offense of not assessing demurrage charges, where the traffic officials ignore the plain declaration of the cartage tariff under which the shipment is made that it is exempt from demurrage charges only if the failure to make the terminal delivery is that of the railroad, and the cartage agent knows that the cars are being held on the delivery tracks merely because the consignee will not accept unloading.

6. CARRIERS ⊜38—DEMURRAGE—BUNCHING.
Under provision of a demurrage tariff for extra free time in case of bunching, as the direct result of the act or neglect of the carriers, bunching as the result of the consignee's previous fault in not accepting will not avail.

7. CARRIERS ⊜26—DEMURRAGE—NOTICE.
Though a demurrage tariff contemplates a notice of arrival of cars and a notice of placement, any notice of placement agreed on by the parties

is sufficient to start the running of time, irrespective of sufficient preliminary notice of arrival.

8. CRIMINAL LAW ⊂⊃1168(4)—HARMLESS ERROR—FAILURE TO WITHDRAW EVIDENCE.

Failure to directly and clearly withdraw evidence bearing only on issues withdrawn cannot be complained of, where its retention was not likely to prejudice the jury in the determination of the simple questions remaining.

9. CARRIERS ⊂⊃38—FAILURE TO ASSESS DEMURRAGE—PENALTY.

The trial court, in deciding what penalty to impose for carrier's failure to charge $60 demurrage on 12 cars, for which it was convicted, could consider discrimination disclosed, for which there could be no conviction till the Interstate Commerce Commission had passed on it, or even if it did not violate the letter of any demurrage or other tariff.

Evans, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

The Michigan Central Railroad Company was convicted of failure to observe published tariffs, and brings error. Affirmed.

Two indictments were returned, in the court below, one of which charged the plaintiff in error (hereinafter called the railroad) with giving a concession or discriminatory privilege in regard to transportation, in violation of section 6 of the act of February 4, 1887 (24 Stat. 380, c. 104) as amended June 29, 1906 (34 Stat. 586, c. 3591, § 2 [Comp. St. 1916, § 8569]), and the other of which charged a failure to observe the published tariffs, in violation of the act of February 19, 1903 (32 Stat. 847, c. 708 [Comp. St. 1916, §§ 8597–8599]). Each indictment contained 30 counts, and the same numbered count of each indictment referred to treatment given to one and the same carload shipment. Both cases were tried as one. At the conclusion of the trial, the United States entered a nolle prosequi as to the indictment for giving a concession. Upon the indictment for not observing the tariffs, the court instructed a verdict for the railroad upon 18 counts, and left to the jury the issue upon the other 12 counts. The jury found the railroad guilty on each of these counts, and from the judgment imposing fines thereon the railroad brings this writ of error.

The case grows out of the great congestion of railroad traffic existing in and about Detroit during the summer of 1912. The Fireproofing Company manufactured building tile at a point in Ohio, from which the Hocking Valley and Michigan Central had a joint through line to Detroit. It secured a contract for the sale of a large quantity of its product in Detroit, to be delivered by it at a building there in process of erection. The railroad solicited the transportation of this freight, and negotiations were had which resulted in an arrangement that the freight should be shipped by this route, rather than by other competing ones. It had been estimated that the tile would be needed on the building at certain times, and it is accurate enough to say that the various cars were shipped from the point of origin, consigned to the Fireproofing Company, at Detroit, and in due time for delivery upon the job at the estimated dates. The building operations were delayed, the tile could not be used at the expected times, there was no storage place in or at the building, and the consignee had no warehouse or storage place at Detroit. Either for this reason, or because of the freight congestion, which resulted in more or less traffic chaos, or for both reasons, these cars were for a long time in the possession of the railroad after reaching the Detroit district. The railroad had at least three yards. One, outside the city, was used generally for breaking up and distributing; one, at Fourteenth street, was of large extent, and was used mainly for storage pending delivery upon local industrial or team tracks; and one, at Third street, was used for team track delivery. It was

necessary that these cars of tile be set on the last-named track. Many of them were held a considerable time at the first or second of these yards, and were treated as still in transit, though notice of arrival was given to the consignee. Further notice was given after the cars were set upon the delivery track. After this setting, and after notice thereof, there was, in many instances, a further long delay before the cars were unloaded. It was the theory of the first-named indictment that these delays before placement were for the benefit of the consignee, because it was not ready to receive, and amounted, practically, to a storage privilege or concession, which was not permitted by the published tariffs, and was therefore forbidden. It was the theory of the railroad that these delays were caused by the traffic congestion, which was beyond its control, and that they were not, either in form or in substance, a concession to the consignee. Since this indictment was voluntarily dismissed, the subject need not be followed. Upon the second indictment, it was the theory of the prosecution that the published tariffs required the payment by the consignee and the collection by the railroad of a demurrage charge of $1 per day for each day of delay after the expiration of a fixed time, and that the published demurrage tariff had not been observed as to each one of the cars in question. As to the 18 cars, the court below held that there had been no delay which violated the provisions of the demurrage tariff. As to the 12 cars, it was the railroad's theory both that the specified time had not elapsed and that the time provisions of the demurrage tariff were generally inapplicable for the reasons to be stated.

There were in force at this time, by reason of due posting and publishing and acquiescence by the Interstate Commerce Commission, two tariffs which are of importance here. One is known as the cartage tariff, creating a cartage agent; the other as the demurrage tariff. So far as possibly pertinent, they are copied at the end hereof. It is undisputed on this record that, before the arrangement for railroad transportation was made, the shipper and the railroad, through its soliciting agent, and the cartage agent, had a conference at which the price of cartage delivery was fixed, and it was fully agreed and understood that under this cartage tariff the building tile to be shipped would be delivered by this cartage agent at the building where the material was to be used, and that the liability of the railroad company, as a carrier, continued until such delivery was made, and also that formal notice that these shipments were to be made under the cartage tariff was given pursuant to section 5 thereof before the shipments began.

At the trial the railroad company contended that it had not violated the demurrage rules, since it was expressly provided that they should not apply to cases governed by the cartage tariff. The trial court held that, since building tile was freight of the sixth class or under, it was excepted from the cartage tariff, and hence no defense could be based thereon.

Frank E. Robson and J. W. Dohany, both of Detroit, Mich. (Henry Russel, of Detroit, Mich., of counsel), for plaintiff in error.

Clyde I. Webster, U. S. Atty., of Detroit, Mich., August G. Gutheim, Sp. Asst. U. S. Atty., of Detroit, Mich., and John E. Kinnane, U. S. Dist. Atty., and J. Edward Bland, Asst. U. S. Dist. Atty., both of Detroit, Mich.

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

DENISON, Circuit Judge (after stating the facts as above). [1] The question chiefly argued before us was that upon which the case turned below, viz., whether the cartage tariff applied at all to these shipments. Another form of this question is whether the Ferguson Company, in the team delivery of the contents of the 12 cars to which this case was finally reduced, acted as the agent of the railroad pursu-

ant to its tariff designation as cartage agent, or whether it acted as agent of the consignee pursuant to the bargain between them as to the price of hauling. We have concluded that the record does not present this broad question so as to require its decision. The provision of the cartage tariff is:

"* * * Shipments so handled will not be subject to car service or storage charges, accruing through failure on part of this company to make delivery within specified free time."

It is plain that the exemption from demurrage does not reach either all goods subject to the cartage tariff or even any goods subject to that tariff, unless the failure to make delivery within the specified free time was the failure of the company. For the purposes of this opinion, and without any decision to that effect, we assume that the railroad, through its cartage agent, had, pursuant to filed and published tariffs, contracted to deliver these shipments, by team or truck hauling, to and at the building where the consignee was to use them, and hence there would seem to be the further assumption that the company had failed to make the agreed delivery; but, for the reasons to be stated, this further apparent assumption must be rejected.

[2] We first observe that, since paragraph 5 in the cartage tariff, from which we have quoted, and since the demurrage tariff, which is thus brought into consideration, both have reference solely to the failure to unload a car for more than 48 hours after notice that the car has been placed on the delivery tracks, it necessarily follows that, when this paragraph 5 refers to the "failure on the part of this company to make delivery within specified free time," the "delivery," to the making of which this clause refers, is the cartage delivery to be made by the company's cartage agent from the car duly placed and to the terminal cartage point. This clause, in this situation, cannot refer to any other kind of delivery.

[3] The undisputed testimony shows that, as fast as the cars were placed upon the team tracks, the consignee was notified; that thereupon the consignee, knowing by the number of the car the particular material which it contained, instructed the Ferguson Company what car to unload and deliver; that the Ferguson Company was constantly willing and ready to unload and deliver every car so placed, and within 48 hours after placement; and that the only reason why the 12 cars finally involved were allowed to stand more than 48 hours was that the consignee was not ready to use that particular material, and either had no place to store it or did not wish to handle it twice. In view of the daily conduct of the Ferguson Company and of the consignee, the situation is just the same as if the Ferguson Company had expressly offered to unload and deliver each one of these 12 cars within the specified free time, and as if the consignee had expressly said:

"We refuse to accept it; you must hold this car on the tracks until we are ready."

Such a situation does not disclose failure on the part of the company to make delivery, within the proper meaning of paragraph 5. Of course, in a certain broad sense, since it was the duty of the company

to make delivery (under our assumption), and since delivery was not made, it may be said that the company failed; but the question here must be as to the relative duties of the two parties. Demurrage is assessed for the default of the consignee in not unloading. This exemption from such assessment becomes reasonable only upon the theory that it was intended to exempt where the nondelivery was due to the fault of the company rather than to the fault of the consignee; and although this comparative standard is not expressed in words, we have no hesitation in deciding that it must be implied, and that the demurrage and the cartage tariffs, considered together, are open to no other reasonable construction.

Our conclusion that the undisputed testimony shows the situation above recited has been reached after some preliminary doubts. The record contains considerable evidence by which the consignee undertakes to put the blame upon the railroad and by which the railroad undertakes to assume that blame; but all this evidence, upon analysis, resolves itself into a claim that the railroad was at fault for placing these cars upon the delivery track in a consecutive order so vitally different from the consecutive order of original shipment that the consignee was under no obligation to unload them in even approximately the order of their placement. The consignee's evidence showed—indeed, it is practically undisputed—that there were some 20 different sizes and shapes of these tile required for this building, that it was essential to use them in the building in a certain order, that they were shipped from the factory in this order, but that they were so placed upon the team track that, e. g., tile for the tenth floor were thus delivered before tile for the first floor, which had been shipped 90 days before the other. Even if it were conceded that shipments might be delivered to the consignee in such gross inversion of the order of shipment by the consignor as to be a breach of the railroad's contract for proper carriage, it would not follow that the consignee might therefore disregard the published demurrage tariffs, and refuse to accept and unload the cars in the order of their arrival or placement. The whole body of demurrage rules and regulations is upon the theory that railroad tracks must not be used by shippers for warehouse purposes, and it cannot make any difference in the application of these tariffs that the shipper has no warehouse, or that a distorted order of delivery may make necessary a storage by the consignee or a handling otherwise unnecessary. If for this he may have a claim against the railroad, that would be another question. Darling v. Pittsburgh, etc., Ry., 37 Interst. Com. Com'n R. 401; and see Chicago, etc., R. R. v. Kirby, 225 U. S. 155, 166, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501.

There are two matters on the record which, while not controlling, yet tend to confirm the conclusion that there was nothing to go to the jury in dispute of the proposition that the final and vital delay was not because the Ferguson Company did not deliver, but was solely because the consignee would not receive. The first is that, as soon as the matter came to the attention of that counsel for the railroad who had special supervision of matters connected with the interstate commerce law, he directed that demurrage be collected for these cars; but this was,

concededly, at a time too late to have any direct bearing upon the main question. The other is that the trial judge, in his charge to the jury, assigned this as one of the reasons for his conclusion that the cartage tariff was not applicable; and to that portion of the charge which stated this fact as if it were undisputed the railroad took no exception, nor did it in any way call the attention of the trial judge to a claim that there really was an issue of fact on this point.

[4] Rule 8 of the demurrage tariff, when extended to clause (e), says, in effect, that no demurrage charges shall be assessed for detention of cars through railroad errors or omissions. Just as with reference to clause 5 of the cartage tariff, we observe that, since no demurrage can be assessed until after placement and notice, this clause (e) must refer to railroad errors and omissions occurring after that time; and, accordingly, the clause can have no substantial effect upon the situation here.

[5] It is urged that both the railroad traffic officials and the consignee acted in good faith in not assessing or paying demurrage charges, and took this course in the belief that the cartage tariff applied to these shipments, and that where the cartage tariff applied there could be no demurrage. It is therefore said that the railroad did not "knowingly" commit the offense alleged. If the tariff had been one open to two constructions, and the traffic officials in good faith had adopted that construction which the courts finally decided erroneous, the contention of the railroad in this particular would require further consideration; but here the traffic officials did not merely reach an erroneous conclusion as to whether the cartage tariff affected such shipments as these—indeed, we are assuming that they reached the right conclusion on that subject. What they did was to ignore the plain declaration of the cartage tariff that even as to those shipments to which it applied demurrage must be collected unless the failure to make terminal delivery was the failure of the railroad company. It is of the essence of the railroad company's position that the Ferguson Company was its agent in the matter of this delivery, and in that matter and to that extent stood in the place of the railroad company. The Ferguson Company had full knowledge of the fact that the cars were held on the track merely because the consignee would not accept unloading; and we conclude that the case was one, as the trial judge thought, for the application of the rule that the sum of the knowledge of the railroad agents, within the scope of their respective functions, is sufficient to satisfy the statutory condition that an offense exists only when the forbidden act is done "knowingly." Grand Rapids, etc., Ry. v. United States (C. C. A. 6) 212 Fed. 577, 586, 129 C. C. A. 113.

[6] The instructions of the court upon the subject of "bunching," as covered by demurrage rule 8, were without substantial error. Clause (b) 2 contemplates a claim by the consignee for more free time; but where the free time is allowed without claim, and the only question is whether the allowance was erroneous, the absence of claim is not material. The substance of this rule, as it must be applied to so much of this case as was finally submitted to the jury, is that if the cars were placed on the delivery track in accumulated numbers and in excess of

daily shipments, and if this was the direct result of the act or neglect of the carriers, the consignee was entitled to a specified extension of free time, and that for detention within such extended time no demurrage should be assessed. The court properly charged that the jury must consider whether this bunching was the result of the act of the carrier or the result of the consignee's previous fault in not accepting, and so in compelling the accumulation; and this fault of the consignee might be found with reference to the accumulation upon the Fourteenth street storage tracks as well as in other matters. These 12 cars were placed on the team track from July 12th to August 5th, and the conduct of the parties before or during this period was pertinent. The embargo declared July 6th was a declaration or claim (in this case, an admission) by the railroad that the consignee was at fault.

[7] The demurrage rules contemplate, as to cars which had the history of these 12, a notice of arrival and a notice of placement. We think the court correctly held that any notice of placement, which the parties agreed upon as sufficient, would be enough to set the time in motion, and that, as to these cars, placed upon that delivery track which had been agreed upon, the existence of a sufficient preliminary notice of arrival became immaterial when the superseding notice of placement was given.

Except for the disputes that existed, and which were submitted to the jury, as to who was responsible for the bunching, and as to whether the parties had agreed upon a form of notice of placement, the controlling facts were undisputed. It therefore becomes unnecessary to examine several complaints arising during the progress of the trial or concerning specific instructions.

[8] The court finally withdrew from the jury the whole theory of "constructive placement," which phrase referred to a holding of the cars upon the storage tracks, as distinguished from "actual placement" upon the delivery tracks; and the court submitted to the jury only the two disputes just mentioned, as bearing upon the duty to collect demurrage after actual placement. The considerable body of testimony which had accumulated regarding constructive placement, and other issues which had become immaterial, was not withdrawn from the jury as directly and clearly as might well have been done; but we cannot see how its retention in the record was likely to prejudice the jury in deciding these two rather simple matters—the only two about which there was any room for more than one conclusion.

[9] It is said that the fine imposed, $24,000, was excessive punishment for the failure to charge about $60 demurrage, and that the circumstances of the case and certain remarks by the trial judge sufficiently indicate that the greater part of this penalty was assessed, not for the offenses of which the defendant had been convicted, but for those of which it had been acquitted, or concerning which the indictment had been dismissed. There is superficial force in this complaint, but it is only superficial. The testimony had disclosed an aggravated case of violation of the very often declared purpose and scope of the law forbidding discrimination or special concessions. As many as 50 cars at once out of these tile shipments had been held for days upon

storage tracks, because the consignee was not ready for them, and this seemed to be one of the typical, if not one of the extreme, instances of the practices which had materially contributed to the congestion that had swamped the railroad service. Even though this involved a discrimination for which there could be no conviction until the Interstate Commerce Commission had passed upon it, or even if it did not violate the letter of any demurrage or other tariff, it was conduct which the trial judge could rightfully take into consideration when deciding what penalty to impose for those offenses upon which there had been a conviction; and, in the amounts which he fixed, he did not exceed the limits of discretion. In this comment, we pass by the obvious consideration that, if the penalty imposed is within the statutory limits, it must be an extraordinary case—if, indeed, there could be any—which would justify an appellate court in interfering.

The judgment of the court below is affirmed.

Cartage Tariff.

M. R. C. No. 765. I. C. C. 4005.

Michigan Central Railroad Co. Local Freight Tariff of Cartage Charges at Detroit, Michigan, Issued March 20th, 1911, Effective April 24, 1911.

1. The freight tariff rates of this company and its connections covering traffic to or from Detroit, Mich., are exclusive of the cost of cartage, but for the convenience of the public and for the purpose of securing uniformity of practice and to avoid unjust discrimination as between individuals, as required by law, this company has appointed the E. Ferguson Company, Limited, as its authorized cartage agents for the city of Detroit, and will be prepared to perform the cartage service from and to its freight houses and team tracks and the stores and warehouses of the public within the city limits.

2. The following rates will be collected for cartage to or from store or warehouse door when cartage is performed by the E. Ferguson Company, Limited:

Less than carload lots of 2¢ per 100 pounds (subject to exceptions shown below), minimum charge for any one consignment 15¢.

Carload package freight (subject to exceptions shown below), at 1½¢ per 100 lbs.

Exceptions:

[Here follows list of many articles, not including building tile, and ending with:]

Any article weighing over one thousand pounds.

All freight rated sixth class and lower.

Property named and referred to under head of "Exceptions," will be carted by the E. Ferguson Company, Limited, under their own arrangements with shippers or receivers.

3. The aforesaid charges as to carloads are to cover the collection and delivery of complete consignments only from one shipper to one consignee. Where the consignee wishes his consignment delivered to other parties than himself, thus involving the separate accounting and collection of charges, then the cartage charge applicable to less than carload traffic will apply. This company will only make one expense bill for each consignment.

4. This company will not bill forward for collection from consignees the cartage charge at Detroit on outward traffic, but collect it from the shippers.

5. Where standing orders covering all shipments or single orders covering particular shipments are placed with this company previous to arrival of shipments authorizing this company to deliver under above rules, shipments so handled will not be subject to car service or storage charges accruing through failure on part of this company to make delivery within specified free time; and where orders are given subsequent to arrival of shipment, same will be subject to car service and storage rules as outlined in M. C. R. R. I.

C. C. No. 3578, M. R. C. No. 574, R. C. O. No. 256, I. R. C. No. 275, C. R. C. No. 1357, G. F. D. No. 7776, supplements thereto and subsequent issues thereof and free time will be computed same as shipments not handled under this tariff.

Demurrage Tariff.

Found in I. C. C. No. 3578, as follows:

Car service rules applicable to all Michigan Central railroad stations in the state of Michigan, on both interstate and intrastate business, effective May 1, 1910.

Rule 1. *Cars Subject to Rules.* Cars held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose are subject to these demurrage rules.

* * * * * * * * * *

Rule 2. *Free Time Allowed.* (a) Forty-eight hours (two days) free time allowed for loading or unloading on all commodities.

* * * * * * * * * *

Rule 3. *Computing Time.* Note.—In computing time Sundays and legal holidays (national, state and municipal) will be excluded. When a legal holiday falls on a Sunday, the following Monday will be excluded.

(a) On cars held for loading, time will be computed from the first 7 a. m. after placement on public delivery tracks.

(b) On cars held for orders, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent to consignee. On cars held for unloading, time will be computed from the first 7 a. m. after placement on public delivery tracks and after the day on which notice of arrival is sent to consignee.

* * * * * * * * * *

Rule 4. *Notification.* (a) Consignee shall be notified by carrier's agent in writing, or as otherwise agreed to by carrier and consignee, within twenty-four hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and number of the original car. In case car is not placed on public delivery track within twenty-four hours after notice of arrival has been sent, a notice of placement shall be given to consignee.

* * * * * * * * * *

Rule 5. *Placing Car for Unloading.* (b) When delivery cannot be made on specially designated public delivery tracks, on account of such tracks being fully occupied, or from other cause beyond the control of the carrier, the delivery will be made at the nearest available point accessible to the consignee and the consignee so notified.

* * * * * * * * * *

Rule 7. *Demurrage Charge.* After the expiration of the free time allowed, a charge of $1 per car per day, or fraction of a day, will be made until car is released.

Rule 8. *Claims.* No demurrage charges shall be assessed under these rules for detention of cars through causes named below. If through error, demurrage charges are assessed or collected under such conditions, they shall be promptly cancelled or refunded by the carrier.

* * * * * * * * * *

(b) Bunching.

2. Cars for unloading or reconsigning.—When as a direct result of the act or neglect of carriers, cars destined for one consignee, at one point, and transported via the same route, are bunched in transit and delivered in accumulated numbers in excess of daily shipments, claim to be presented to the carrier's agent before the expiration of the free time. The consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment.

* * * * * * * * * *

(d) Delayed or improper notice by carrier.

Note.—When notice has been given in substantial compliance with the requirements as specified by the rules, the consignee shall not thereafter have

the right to call in question the sufficiency of such notice unless within twenty-four hours after receiving the same he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of said notice.

(e) Railroad errors or omissions.

EVANS, District Judge (dissenting). I agree with much that is said in the opinion, but some questions, which seem to me to be of a decisive character, were not alluded to. One hundred and fifteen errors were assigned, many of which were not argued, and most of which were probably speculative, but among those argued were those which raise the questions to which I have referred. In order to state clearly the grounds of the conclusion I have reached it is necessary to make a preliminary statement of certain facts shown by the record.

Two indictments were returned against the railroad company, and they were heard together as one case. The trial before a jury began on March 2, 1915, and a great deal of testimony was heard. The second of the indictments was numbered 5435, and charged 30 separate offenses under the interstate commerce law. The first of the indictments, numbered 5434, also contained 30 counts, 12 of which charged that in 12 separate instances, and in respect to each of 12 separate cars the railroad company had failed to collect demurrage charges, these separate failures being alleged to be concessions in rates of transportation unlawfully made to the shipper, viz., the National Fireproofing Company. After the trial had progressed for seven days indictment No. 5435 was withdrawn. The trial continued 15 days longer. At its conclusion, and after the argument to the jury, the court dismissed 18 of the counts of that indictment. Upon the remaining 12 counts (each of which, properly considered, covered the simple charge of failing to collect demurrage on a separate car) the case was submitted to the jury, and a verdict of guilty was returned upon each count. The charges efficiently made in these 12 counts are very simple, and presumably were of themselves of very easy solution, but in respect to the whole case a great mass of testimony had been introduced, a large part of which was objected to, and in many instances exceptions to the ruling of the court had been taken by the railroad company. These exceptions are covered by the assignments of error. The 12 counts, separately, contained exaggerated statements of the number of days for which, in respect to each car the demurrage charges had not been collected. This exaggeration was probably based upon the indefensible theory of "constructive placements" of cars. In point of fact, the record clearly shows that the real average was a little less than four days for each of the 12 cars. The testimony to which we have referred was more directly addressed to the charges made in counts other than the 12 now involved, though in its general terms it might seem to reach every phase of the case, but neither when indictment No. 5435 was withdrawn nor when the court, after the argument before the jury, took out of the case 18 of the counts in indictment No. 5434, and told the jury not to regard any of those counts, was anything done by the court to show the jury that much of the testimony that had been heard should not have any weight in the con-

sideration of the issues on the 12 counts submitted to them. Our reason for saying this will be more clearly indicated further along.

In respect to the 12 counts it is certain that when they were submitted to the jury all the evidence previously heard remained in the case, although much of it had been objected to and the objections had been overruled and exceptions taken. So far as the jury could understand, all this testimony bore upon the remaining counts, and they had no guidance for discriminating its inapplicability. The parts of the evidence which were obviously prejudicial were: First. That respecting certain embargoes established July 6, 1912, which might have greatly influenced the jury in what they did. Everything respecting these embargoes occurred some time after each of the cars referred to in the 12 counts had reached Detroit in due course. The question of an embargo upon freight outside of Detroit could not, we think, by any possibility, have been competent in respect to demurrage charges upon freights that had reached Detroit before an embargo was laid. Though, prima facie, incompetent, it remained in the case, and as we shall point out, was effectively used in another connection. Second. The numerous letters of Bernet, Ingalls and Rowley. This testimony, all left in the record and never taken from the jury, was bound to influence that body in its deliberations; and, third, the testimony relative to the inability of the National Fireproofing Company to unload shipments—in other words, testimony in respect to a certain congestion of traffic and in respect to the theory of "constructive placements."

Not only did the court, over the objections of the defendant, admit the testimony as to the embargoes of July 6, 1912, and later, to which we have referred, but by its charge made after all but the 12 counts had been eliminated, the jury were expressly instructed to consider that testimony in connection with the other testimony heard at the trial. To this part of the charge the defendant excepted and assigned error upon it. It seems to me that this was not only to the probable, but to the manifest, prejudice of the defendant, as all the embargoes related to matters outside of Detroit, and were issued after the delivery in that city of all the 12 cars. Under these circumstances this testimony and the charge upon it must have confused and misled the jury. Especially was this testimony also inadmissible because no allegation respecting the embargoes is made in the 12 counts.

The indictment in each of the 12 counts alleged that before the National Fireproofing Company received and unloaded the cars respectively referred to in the counts separately the railroad company did "constructively place" said cars in its yards in Detroit, and did notify the National Fireproofing Company accordingly. Testimony to establish this "constructive" placement was objected to, but was admitted and exceptions taken. The schedules, so far as I can see, contain no clause to justify the claims or the allegations of constructive placements. Nothing like it was, under the law, an element of the offenses charged in the 12 counts. These allegations and this testimony were alike impertinent and immaterial because of that fact, and proof of "constructive" placements was not warranted by anything

in the rules, schedules or tariffs. This testimony, I think, was wrongly admitted, and was prima facie incompetent. Nothing was disclosed to overcome this prima facie condition of incompetency. Furthermore, the law does not seem to me to have made criminal a mere congestion of freight traffic in large cities or elsewhere. It does require the prompt making and collecting of demurrage charges as they accrue in order to prevent unlawful concessions in rates for transportation, but this is very different from congestions or embargoes. While as to such demurrage charges and concessions the allegations of the several counts are pertinent and sufficient and proof respecting them plainly admissible, it was not so as to the immaterial allegations of congestions and constructive placements of cars for unloading—those mere acts not being criminal nor lawful elements of the offenses charged. An immaterial allegation in an indictment can afford no sound basis for the introduction of testimony to support it.

Possibly the errors I have referred to in respect to testimony did not influence the jury more than they did the trial judge, who appears to me to have inflicted an excessive penalty as a direct result of those errors. This seems apparent when we read what he said when imposing the sentence. The record shows that he then said:

"It is true that the penalty fixed by this statute is a very heavy one. The minimum is heavier than almost any other criminal statute fixes that I have anything to do with; and the maximum is correspondingly high. The ordinary small fine in matters of this kind would be too trifling to consider in connection with the magnitude of the offense in dollars and cents. I have already interpreted the law to mean that (and this is my honest belief) moral turpitude and intentional wrongdoing have nothing to do with it. The result that follows the congestion is of a magnitude that one can hardly comprehend. This case was a revelation to me as to the awful results following congestion. Thousands of cars are held that cannot be delivered, and of course millions of dollars of damage done to the public taken as a whole, the railroads, the shipping public, the consuming public, the purchasing public, and to every one. The results that follow misfortunes of this kind are enormous; they are of great magnitude. And it is a proposition of great magnitude; it is dealing with big things, with matters of great volume, and, in proportion, from a money standpoint, goes far beyond the ordinary affairs of life. They deal with millions instead of dollars and cents. So when we think about the subject-matter they are dealing with and the end meant to be accomplished, the penalty, as I see it, is entirely reasonable under the interpretation that I gave to it that intentional wrongdoing is not necessary."

The congestion he referred to may have been disastrous to individuals, but the charge against the defendant in the 12 counts under consideration was not really that of causing a "congestion," which, per se, was not unlawful, but that of failing to collect only a few days' demurrage on each of only 12 cars specified in the 12 counts—thereby making unlawful concessions in rates of transportation. He said that thousands of cars are held in such cases and that the misfortunes which follow were "enormous." The mere "congestion" which caused such results was not unlawful, and for that reason could not properly have been proved as an element of the offenses charged; and as the attempt to prove it had been made over the objections of the defendant it is well to say that the recent investigation of car service by the Interstate Commerce Commission developed that there is no statute, crim-

inal or otherwise, which is applicable to such a state of case. The learned judge spoke of the expense the government had incurred; but, while disclaiming a right or intent to punish for that, his remarks seem clearly to indicate that what had been shown while all the 60 counts were under hearing influenced him and evidently inflamed the penalties.

It seems to me, therefore, that, could this case come to be tried upon the 12 counts alone, and the testimony be confined to the legal offenses those counts actually charge, there could be a judgment rendered more nearly fitting the crimes charged, namely, mere noncollection of demurrage for a few days under circumstances indicating nothing like willful or wanton violations of the law, as, indeed, the learned court afterwards said was the fact. For these reasons, I think the judgment should be reversed for the errors pointed out. The case can then be retried in a different atmosphere and without the complications to which I have alluded. This, I believe, would be promotive of justice.

Of course I do not doubt that ordinarily the trial court may exercise the discretion the statute gives in determining between the lowest and the highest penalty prescribed; but where the court may not merely have done that, but may unconsciously have permitted other factors to intrude themselves, justice may require a correction of a wrong unintentionally done. I think there should be a reversal, with directions that will more strictly limit the investigation and testimony to the 12 counts in a way to avoid the errors pointed out.

On Motion for Rehearing.

DENISON, Circuit Judge. The motion points out two errors in the opinion.

It was said that the indictment for granting a concession was dismissed while the indictment for not observing the tariff was prosecuted to the judgment against which the writ of error is directed. The names given to the indictments should have been reversed. The same count of each indictment recited in identical language the same facts, but the concluding paragraph of each count in one indictment alleged that the described offense was the giving of a concession, and in the other indictment alleged that the same facts constituted a failure to observe the tariff. We do not see that the erroneous recital in the opinion as to the name of the surviving indictment could possibly have been important.

By way of giving support to the conclusion already independently reached that the evidence on a certain point was undisputed, the opinion recited that the District Judge had so stated in his charge to the jury and that his statement had not been then challenged. The rehearing application points out that this statement by the District Judge was not in his charge to the jury, but in the course of giving his reasons for rejecting the evidence claimed by defendant to be vital. It is not said that, whenever the District Judge made the statement, his attention was then, or ever, distinctly directed to the point. In view of the use which the opinion made of this subject-matter, whatever error there was therein cannot be controlling.

The careful review now made of the whole record confirms the majority of the court in its conclusion that there was no dispute in the evidence, concerning the precise point upon which the opinion made the case turn.

It is also now said that the defendant was indicted for violating the demurrage tariff, but convicted of violating the cartage tariff. We think this a misapprehension. To a prosecution based on the demurrage tariff, the defendant interposed the cartage tariff, practically by way of confession and avoidance. Conceding that the demurrage had not been collected, it justified because an exception to the demurrage tariff had been created by the cartage tariff. We held that the proper application of the cartage tariff did not justify the alleged exception. This did not convict defendant of an offense not charged.

In other substantial respects, the application presents nothing not already fully considered. It is denied.

In re DASHIELL et al.

In re BUSCH-GRACE PRODUCE CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1917.)

No. 2989.

1. JUDGMENT ⊂=675(1)—CONCLUSIVENESS—PARTIES ESTOPPED TO QUESTION.
   Where the trustee of a deed of trust given by a bankrupt, which was intended as a general assignment for benefit of creditors and was invalid under the law of the state where given, encouraged, if he did not instigate, the bankruptcy proceedings, furnishing the filing fees for the voluntary petition, and, while not a party to a suit by the bankruptcy receiver against creditors in which the trust deed was declared void, partly financed the bankrupt's side of the litigation, procuring a suspension of the order for payment to the bankruptcy trustee of the property in his hands pending appeal from the decree in the suit against creditors, intentionally and actively submitting his interest to the consideration of the court, and inviting its decision thereon, such trustee is, though he was not a party, estopped to question the decision in such suit.
2. JUDGMENT ⊂=683—CONCLUSIVENESS—PERSONS CONCLUDED.
   In such case, creditors of the bankrupt who had accepted, prior to the decision, the provisions of the deed of trust, are bound by the decision; it being binding on the trustee.
3. JUDGMENT ⊂=452—SETTING ASIDE—TRUSTEES—RIGHT OF BENEFICIARY.
   Creditors who had not accepted the deed of trust have no standing to attack the decree adjudging it invalid.
4. JUDGMENT ⊂=683—CONCLUSIVENESS—PERSONS CONCLUDED.
   Creditors, who had contemporaneous knowledge of the fact that the validity of the trust deed was involved in the suit and that the trustee was either co-operating with the bankrupt's representatives or submitting the subject-matter to determination of the court, cannot complain of the decree.
5. JUDGMENT ⊂=461(1)—CONCLUSIVENESS—PERSONS ATTACKING—BURDEN OF PROOF.
   Where the decree declaring the trust deed to be invalid was attacked by creditors of the bankrupt, they have, on the record presented, the burden of proving that they had no contemporaneous knowledge of the proceedings in which the trustee participated.

6. BANKRUPTCY ⟸288(1)—PROCEEDINGS—SUMMARY ORDER.
Where the trustee, under a deed of trust, executed by the bankrupt, which had been previously declared invalid, having been directed to deliver to the bankruptcy trustee property in his charge as trustee, with other creditors, applied for leave to reopen the order for payment on the theory that the decree declaring the trust deed was invalid and was not binding on them because they were not parties, the summary disposition of the application was proper.

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Western District of Tennessee; John E. McCall, Judge.

In the matter of the bankruptcy of the Busch-Grace Produce Company. Petition by C. S. Dashiell, trustee, and others, to revise an order of the District Court. Order affirmed.

Marsilliot & Chandler, of Memphis, Tenn., Hunter Wilson, of Jackson, Tenn., and Phil M. Canale, of Memphis, Tenn., for petitioners.

Wm. H. Fitzhugh, of Memphis, Tenn. (S. E. Murray, of Memphis, Tenn., of counsel), for L. T. Fitzhugh, trustee.

Royden Dixon, of Memphis, Tenn., for respondent.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This case is a sequel to Commercial Trust & Savings Bank v. Busch-Grace Produce Co., 228 Fed. 300, 142 C. C. A. 592, in which this court, affirming the District Court, held that the so-called trust mortgage given by the bankrupt produce company to Dashiell, trustee, was intended as a general assignment for the benefit of its creditors, that it was invalid under the laws of Tennessee for certain defects in execution, and, although made more than four months prior thereto, was thus void as against bankruptcy. After the decision of the District Court, Dashiell, to procure suspension, during appeal, of the order requiring him to turn over the assets in his hands to the trustee in bankruptcy, gave bond so to do in the event of the affirmance of the decree below. This proceeding is to revise an order of the District Court, made after the decision of this court, denying the petition of Dashiell and nine creditors for the revocation of the order mentioned, and requiring payment to the trustee in bankruptcy accordingly; the contention being that the court erred in holding the trust mortgage void, and that the petitioners, not being parties to the suit, were not bound by the action had.

[1] The agreed statement of facts presented on the former review contained this:

"It is agreed that the said Dashiell is not a party to any of these proceedings, except the bill in chancery filed against him, and is not resisting the bankrupt court but is insisting that said court is entitled to administer the funds in his hands."

In our opinion on the former review we said:

"The trustee under the trust deed in fact recognizes the jurisdiction of the bankruptcy court over the assets remaining in his hands, and denies the jurisdiction of the state chancery court thereover."

Although the bankrupt's attorney, at Dashiell's request, promised to (but did not) state to this court on the argument of the Bank Case that Dashiell "was not a party to this litigation and had not signed the agreed statement of facts," the record on this review (including the depositions taken before the referee, which counsel stipulated might be sent up as part of the record) is convincing that the agreed statement represented Dashiell's attitude, and fairly shows this situation: Because of the embarrassments created by the litigation in the state court, Dashiell encouraged, if he did not instigate, the bankruptcy proceedings; he furnished the $30 required on filing petition for adjudication; he took part in the preparation of the bill enjoining the suit in the state court; the agreed statement of facts and the brief of bankrupt's counsel in this court were both submitted to Dashiell and his counsel, the latter suggesting changes (presumably made) in both; Dashiell partly financed the bankrupt's side of the litigation, advancing the entry fee of $50 on filing the bill, as well as the cost of printing brief in, and the expense of counsel for bankrupt in attendance on, this court. His conduct seems scarcely consistent with a neutrality respecting conflicting claims of jurisdiction on the part of the state and federal courts, nor does it seem fully explained by the existence of injunction by each court against payment to the representative of the other. It seems probable that the efforts in the state court for his removal played a conspicuous part in determining his attitude, which was apparently one of active co-operation with the bankrupt. But if, for lack of actual control over the conduct of the case, he was not technically a party, the most favorable view that can be taken of his attitude is that he intentionally and actively submitted his interest to the consideration of the court, and invited its decision thereon. And having in mind his action in procuring suspension of the order for payment to the bankruptcy trustee, and the fact that the present controversy is merely between himself and the bankruptcy estate, he is plainly estopped to question the decision had. St. Paul National Bank v. Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189; Otterson v. Gallagher, 88 Pa. 355, 358; Conant v. Jones, 50 App. Div. 336, 64 N. Y. Supp. at page 190. The asserted fact that the moneys furnished for expenses of litigation were merely loaned from his own funds (they were never repaid) is not material. We may add that the evidence on the present hearing does not convince us that the substantial admission in the bank's answer, that the so-called deed of trust was a general assignment for the benefit of creditors, was unadvisedly or improvidently made (even though without it the debtor's intent may not have been conclusively established), nor that it was not intended to embrace all the debtor's property. The automobile was plainly included within the term "vehicles"; the claims, if any, against stockholders on account of capital stock bought from them by the corporation were clearly "choses in action." We are cited to no competent showing that either the stock in the Fair Association or the membership in the Merchants Exchange had substantial and realizable value —much less that they were consciously and purposely omitted.

[2-5] As to the intervening creditors: The so-called deed of trust was made December 31, 1914; the bill in the District Court below

was filed June 2, 1915; final decree was made therein 12 days later, and was affirmed by this court January 4, 1916. On March 10, 1916, Dashiell moved to vacate the order previously referred to, which directed the surrender of the assets to the trustee in bankruptcy. Six of the creditors in question asked leave to intervene on March 18th, the remaining three on April 2, 1916—about 15 months after the making of the trust deed. The absence of substantial equity on the part of the interveners in this proceeding is emphasized by the fact that under the so-called trust deed all creditors were to share ratably, except that there was excluded the claim, if any, of the landlord of the leased business premises for rent thereafter accruing. Whatever the reason for this exclusion, it does not appear that such rent claim has ever been made; and it follows that, aside from the matter of costs of the respective administrations, the interveners have no substantial interest in the specific form of administration, whether in the bankruptcy court, the state court, or by the trustee alone. The substantial issue is merely one of costs, in which the question of Dashiell's compensation seems to figure largely.

[6] It is fairly to be presumed that the intervention was had at Dashiell's instigation. Assuming, for the purposes of this opinion, that the interveners had accepted the trust deed previous to the former decision of this court, they would yet be bound by that decision, provided Dashiell was a party to the litigation. Beals v. Illinois, etc., R. R. Co., 133 U. S. 290, 295, 10 Sup. Ct. 314, 33 L. Ed. 608; Manson v. Duncanson, 166 U. S. 533, 543, 17 Sup. Ct. 647, 41 L. Ed. 1105. Unless they had so accepted, they have no standing here. But, in any event, if they had contemporaneous knowledge of the litigation, of the relation of the two defending creditors thereto, of the fact that the validity of the alleged trust deed (the only question here) was directly in issue and being tried out, and that Dashiell was either cooperating with the bankrupt's representatives or submitting the subject-matter to the determination of the court, they cannot be heard to complain. On this record the burden is upon them to show such lack of knowledge. Not only have they not sustained the burden, but the record is barren of suggestion that they had not such knowledge. If they had accepted the trust deed, they would naturally have had such knowledge. There is thus no legal or equitable merit in the intervention. The summary method of disposing of the application to reopen the order for payment to the bankruptcy trustee was proper.

The order of the District Court is affirmed.

CITY OF BOZEMAN et al. v. SWEET, CAUSEY, FOSTER & CO. et al.

(Circuit Court of Appeals, Ninth Circuit. December 3, 1917.)

No. 2959.

MUNICIPAL CORPORATIONS ⇐=918(3)—BONDS—VALIDITY—ELECTION NOTICE.

Notice of an election for the issuance of waterworks bonds declared that such election should be held for the purpose of submitting to the taxpayers the question of the issuance of waterworks bonds in the sum of $235,000 on the credit of the city. Const. Mont. art. 13, § 6, declares that no city shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding 3 per cent. of the value of the taxable property therein, provided that the legislative assembly may extend the limit mentioned by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality. Rev. Codes Mont. § 3259, subd. 64, confers power on cities to contract an indebtedness upon the credit thereof by borrowing or issuing bonds for the erection of public buildings, construction of sewerage, waterworks, etc., provided that the total amount of indebtedness incurred, including the then existing indebtedness, shall not exceed 3 per cent. of the total valuation of the taxable property, and that no money should be borrowed on bonds issued for the construction, purchase, or securing of a water plant, etc., until the proposition has been submitted to the vote of the taxpayers, provided that additional indebtedness may be incurred when necessary to procure a water supply for the city which shall own or control such supply, and devote the revenue derived therefrom to the payment of the debt, but that the indebtedness authorized, including all outstanding indebtedness, should not exceed 10 per cent. over and above the 3 per cent. referred to. The section concludes with the declaration that the limit of 3 per cent. shall not be extended, unless the question shall have been submitted to a vote of taxpayers affected thereby and carried by a majority. *Held* that, as statutes allowing municipalities to incur obligations in excess of those originally permitted should be strictly construed the notice of the bond election must be deemed insufficient to advise the electors that the bond issue would increase the city's indebtedness beyond the 3 per cent. limit, and hence bonds issued pursuant to the election are invalid.

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

Suit by Sweet, Causey, Foster & Company, a corporation, and others, against the City of Bozeman, a corporation, and others. From a decree for complainants, defendants appeal. Affirmed.

H. D. Kremer and George Y. Patten, both of Bozeman, Mont., for appellants.

E. C. Day and Thomas A. Mapes, both of Helena, Mont., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The appellees sued to compel the appellants to return certain checks deposited as earnest money in the purchase of certain municipal bonds issued by the city of Bozeman for waterworks and sewer purposes. The bonds were issued pursuant to the authority

of a special election held in Bozeman on April 3, 1916. For the purposes of the case it is only necessary to quote part of the notice of the election for the waterworks bonds:

"Said special election will be held for the purpose of submitting to the taxpayers, as defined by sections 468 and 469 of the Revised Codes of Montana of 1907, who are also possessed of the qualifications of electors in said city of Bozeman, the question of the said city issuing waterworks bonds upon the credit of the said city in the sum of $235,000, the proceeds from the sale thereof to be used as follows," etc.

At public auction appellees, after being awarded the bonds, deposited certified checks as security for completing the purchase. An agreement was made between the appellees and the city, providing, in effect, that if upon examination the appellees asserted that the proceedings leading up to the issuance of the bonds were illegal, they must establish such illegality, but that if the proceedings were legal, and appellees refused to accept the bonds, then the city was to retain the amount of the certified checks as liquidated damages; but, if the proceedings were illegal, then appellees would not have to take the bonds, and checks which they had deposited were to be returned to them. Appellees refused to accept the bonds after they were issued, basing refusal upon three grounds:

(1) "That at the time of the submission of the question of the issuance of the bonds to the taxpayers affected thereby the city of Bozeman was indebted in excess of 3 per cent. of the taxable value of the property of the city as the same appeared upon the assessment roll of said city for the year 1915; that the question of extending the limit of indebtedness of said city for the purpose of procuring a water supply or the construction of sewers in excess of the 3 per cent. limit of the taxable property and within the limit of 10 per cent. of the taxable property, as provided by the Constitution of the state of Montana, was never submitted to the taxpayers affected."

(2) "That the issuance of the $235,000 of waterworks bonds and $70,000 of sewer bonds would in fact increase the indebtedness as fixed by the Constitution of the state of Montana, assuming that the question of extending the limit of indebtedness beyond the 3 per cent. limit had been properly submitted to the taxpayers."

(3) "That the question of the issuance of the $235,000 of waterworks bonds, of which $100,000 were to be used for funding bonds and $135,000 for the construction of additions to the water supply, was a double question, and was submitted to the taxpayers of said city as one question, and that the taxpayers affected thereby were never permitted the opportunity of expressing their will upon the two separate questions."

After a hearing the court held that the issue of bonds was illegal, for the reason that the notices of election were insufficient, in that the question of extending or exceeding the 3 per cent. limit of indebtedness was not submitted to and voted upon by the electors. Decree was entered for the return of the certified checks, and appeal to this court was taken.

Section 6, art. 13, of the Constitution of Montana, is as follows:

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of

such city, town, township or school district shall be void: Provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

The Legislature of the state (Revised Codes of 1907, § 3259, subd. 64) conferred power upon cities:

"To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to wit: Erection of public buildings, construction of sewers, bridges, waterworks, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds: Provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not at any time exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for state and county taxes; provided, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof; and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt; the additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per centum, heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for state and county taxes; and, provided further, that the above limit of three per centum shall not be extended, unless the question shall have been submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of the majority of said taxpayers who vote at such election."

The first paragraph of subdivision 64 is the grant of power to the councils of cities to contract debt in either of two ways for any of the certain definite purposes named in the statute. Without such grant, of course, the council could incur no debt.

The second paragraph is really but a substantial reiteration of the words of limitation upon the amount of debt which may be contracted, as imposed by the constitutional clause heretofore quoted.

The third paragraph restricts the powers of the council as to borrowing money on bonds for construction, by forbidding any money to be borrowed on security of bonds for the specified purposes until the "proposition" has been submitted to a vote of taxpayers. The submission of the "proposition" means laying before the taxpayers the broad, basic proposed plan: Shall the city borrow money at all on bonds as proposed to be issued for securing a water supply or plant or system or sewer system? It is this proposed scheme which, if carried on, will affect the taxpayers, and it is for them to say whether they wish the city to proceed to inaugurate the scheme of proposed improvement by issuing obligations to carry it out.

The fourth paragraph reaches out to the matter of incurring additional debt, should such action be necessary to execute the proposed scheme to construct or buy. It is easy to understand how, under the limits of usually prescribed rates of taxation, a city ordinarily cannot procure a water system or construct sewage plants; hence, in order that such improvements may be brought within reach, not only may the usually provided limit of debt be incurred, but additional obligations are authorized, subject, however, to this qualification: That, in the event of the debt being incurred, the city shall own or control the supply to be acquired and devote the revenue to accrue from such system to the payment of the debt; and, furthermore, never shall the whole debt, additional and that which is unpaid of the debt primarily contracted, exceed 10 per cent. over and above the 3 per cent. of assessed valuation permitted by the previous paragraph of the statute.

The next paragraph has nothing directly to do with restriction of the power of a city to incur the amount of the debt contemplated as necessary to be incurred, for, as we have seen, that has already been granted and circumscribed. But it does prohibit any extension beyond the 3 per cent. limit; that is, it does prohibit the incurring of the additional 10 per cent. involved in the proposed extension of the limit, unless "the question" shall have been submitted to a vote of the taxpayers and carried as provided for. Now, when we consider that the whole of this last paragraph relates solely to the subject of increasing or assuming possible additional debt, it seems very reasonable to say that it is for the assurance of those vitally interested, the taxpayers, that the city cannot be put under the obligation attending such extension of debt, without first having been advised that it is proposed to extend the 3 per cent. limit of taxation, and without being asked whether they affirm or disaffirm the plan.

By applying this understanding of the law, we find that the notice of election in the present case failed by separate statement or any direct language to bring to the attention of the taxpayers that in what was proposed there would be an extension of the limit of the 3 per cent. fixed by law, and no question was asked whether such extension should be had. Appellant argues that, as the question of issuing bonds for waterworks in a stated specific amount, which was in fact in excess of the 3 per cent. limit upon the credit of the city, was submitted, that was the main issue, and that there was included in it the proposed extension of the 3 per cent. limit, and therefore that, by voting in favor of issuing the bonds, the taxpayers voted to extend the limit.

In a way, this reasoning is not without force. But it does not satisfy us as meeting the view that the question specially referred to in the last paragraph of the statute is the positive and specific one, whether it is the will of the taxpayers that the council shall impose upon the city additional debt, over and above the 3 per cent. limit fixed by law. By mandate of the statute this essential interrogatory shall be submitted, to the end that the taxpayers may know of proposed additional debt. Authority to issue bonds in a stated sum for a water and sewage system construction does not necessarily advise the taxpayer that the proposed

debt will be additional to the 3 per cent. allowed, and in fact it might not be. Any presumption which may be indulged in would be that the bonds are not in excess of the more general limit.

The cases which are cited by appellant as bearing upon the question are Carlson v. City of Helena, 39 Mont. 104, 102 Pac. 39, 17 Ann. Cas. 1233, and Arnold v. Miles City, 46 Mont. 481, 128 Pac. 915. But the point here under investigation was not involved in the Carlson Case. The issue turned upon whether authority to incur debt included authority to issue bonds, and in a careful analysis of the statute the court, through the learned Chief Justice, held that it did. But, as already said, the truth of that proposition does not carry with it authority to exceed the 3 per cent. limit. It is significant that in the Carlson Case the construction we put upon the statute was observed, for the notice of the special election stated that it was "for the purpose of ascertaining the will of the taxpayers to be affected thereby, and that authority may be given and power conferred upon the city counsel to increase the indebtedness of said city over and above the 3 per cent. limit fixed by law by the issuance," etc.

In Arnold v. Miles City, supra, the court stated that the "only question presented" was whether a city, after having necessarily and regularly incurred outstanding debt for a water supply and sewage system under the 10 per cent. limit, could thereafter incur an additional debt under the 3 per cent. limit for building a bridge, the existing debt, incurred under the 3 per cent. limit, having fallen below that limit by reason of payments made thereon. In the course of the opinion the court said that, when the taxpayers voted in favor of issuing bonds to construct a sewage system and procure a water supply, they thereby voted to extend the 3 per cent. limit for those purposes, and the limit was thereby extended. But it does not appear how the question of extending the limit for the water supply or sewage system was submitted, although the statement of facts says that it was necessary at the time the debt was incurred to resort to the 10 per cent. limit in order that the city might acquire a water plant and sewage system, and that the bonded debt was duly and regularly incurred for those purposes. The case, therefore, did not involve the question now before us.

Kerlin v. City of Devil's Lake, 25 N. D. 207, 141 N. W. 756, Ann. Cas. 1915C, 624, also cited by the appellants, was like the Carlson Case, supra, in that the official ballot specifically stated that the purpose was to increase the debt, and to issue bonds of the city in an amount equal to 3 per cent. "over and above the 5 per cent. limit of indebtedness." Other cases cited do not directly aid in the solution of the question before us. Nor are we materially helped by examination of section 3454 of the Revised Codes of Montana of 1907. That section is a declaration of powers conferred.

Without carrying the discussion any further, our judgment is that the principle that statutes authorizing municipalities to incur obligations in excess of those which are ordinarily permitted to be incurred should be strictly construed, and that the intent of the statutes referred to in this opinion was that the taxpayers should be advised that the proposed debt would be in excess of the 3 per cent. limit, and that such

advice in the form of a question should be specifically and clearly stated. Failure to pursue the requirements of the statute constrains a ruling against the validity of the bonds.

Affirmed.

WOODRUFF OIL & FERTILIZER CO. v. PORTSMOUTH COTTON OIL REFINING CORP.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1917.)

No. 1532.

1. FRAUDS, STATUTE OF ⟸158(4)—PROOF OF CONTRACT.
   Every essential element of a contract falling within the statute of frauds must be proved by writing.
2. FRAUDS, STATUTE OF ⟸116(6)—AGENCY.
   While an agent may bind his principal by a contract of sale in which he is also agent for the buyer when his dual agency is known and the binding nature of written memoranda signed by brokers and auctioneers rest on such rule, written memoranda signed by the representative of a brokerage firm, the members of which as individuals and partners were largely interested in the plaintiff corporation, is not binding on the defendant corporation, which it was contended through the agency of the brokerage firm made a sale to plaintiff falling within the statute of frauds; for when a seller denies the contract the buyer cannot establish it by means of a memorandum which he contended the seller authorized him to execute.
3. FRAUDS, STATUTE OF ⟸158(2)—CONTRACTS—PROOF OF LOST MEMORANDA.
   A contract within the statute of frauds may be established by parol evidence of the contents of a lost memorandum signed by the party to be charged.
4. FRAUDS, STATUTE OF ⟸158(2)—ADMISSION OF EVIDENCE.
   As the statute of frauds does not require the contract to be in writing, but only that evidence of it shall be in writing and signed by the party to be charged, a written communication to a third person setting out the contract is competent evidence of its terms.
5. FRAUDS, STATUTE OF ⟸158(4)—CONTRACT OF SALE—SUFFICIENCY OF EVIDENCE.
   Where the seller's president signed letters and telegrams referring to a sale to the buyer which had signed a memorandum, mailed to the seller, of the terms of the only sale to which the president could have referred, and there was uncontradicted evidence of a letter written by the president to a third person setting forth the sale, there was, though the letter was lost and parol evidence of its contents introduced, sufficient to satisfy the statute of frauds requiring the contract or some memorandum thereof to be in writing and signed by the party to be charged.

In Error and Cross-Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Action by the Portsmouth Cotton Oil Refining Corporation against the Woodruff Oil & Fertilizer Company. There was a judgment for plaintiff, and defendant brings error, while plaintiff assigns cross-errors. Affirmed.

F. B. Grier and J. B. Park, both of Greenwood, S. C. (Grier, Park & Nicholson, of Greenwood, S. C., on the brief), for plaintiff in error and cross-defendant in error.

C. P. Sanders and Henry K. Osborne, both of Spartanburg, S. C. (Sanders & De Pass and Bomar & Osborne, all of Spartanburg, S. C., on the brief), for defendant in error and cross-plaintiff in error.

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

WOODS, Circuit Judge. In this action for damages for breach of contract for the sale of cotton seed oil, the main question is whether the plaintiff has so met the requirements of the statute of frauds in the evidence introduced to prove the contract that the judgment in its favor may be sustained. The issue is presented by exceptions to the admission of testimony, and to the charge to the jury.

[1, 2] In September, 1915, W. H. Freund, representative of Aspegren & Co., produce brokers, met W. F. Bryson, president of Woodruff Oil & Fertilizer Company, on the floor of the Produce Exchange in New York, and upon his oral request undertook to sell to plaintiff, Portsmouth Cotton Oil Refining Company, through John Aspegren, its president, two tanks of crude oil for October and November delivery at $4.90 and one tank for December delivery at $4.93. Freund made and signed in the name of Aspegren & Co. a separate memorandum of each sale in the usual form, and mailed a duplicate to each party to be charged. The defendant company having failed to deliver the oil, the plaintiff in this action recovered as damages for breach of the contract the difference between the alleged contract price and the price at the date of contemplated delivery.

The employment of the brokers, their making and signing the contract, and defendant's failure to deliver, would require an affirmance of the judgment without respect to other evidence and questions arising thereunder, if the interest of the brokers in the purchasing corporation did not make their execution of the contract ineffectual to bind the seller. John Aspegren and Adolph Aspegren compose the brokerage firm of Aspegren & Company, and they are respectively president and secretary of the plaintiff corporation. Of the $109,000 stock of the corporation John and Adolph Aspegren own $100 each and Aspegren & Co. $49,800. We think the District Judge was right in holding that, on account of the interest of the brokerage firm in the purchasing corporation, the brokerage firm could not make a memorandum binding on the seller. An agent may bind his principal by a contract of sale in which he is also agent for the buyer when his dual agency is known. The business of brokers and auctioneers and the binding nature of memoranda signed by them rest on this rule. But the rule itself is founded on the presumed absence of any motive in the broker or auctioneer to falsify the agreement or to give either of his principals the advantage. Every essential element of a contract falling under the statute of frauds must be proved by writing. When the seller denies the contract, the buyer cannot establish it by proof that he was buying for himself and that the seller authorized him to

sign for both. The statute of frauds, intended to prevent imposition by one man imputing to another a sale on parol testimony, would be nullified by mere circuity if a party materially interested in making a purchase were allowed to prove by parol that he was authorized to sign the name of the seller, and that the seller knew of his adverse interest. Reed on Statute of Frauds, 369; Leland v. Creyon, 1 McCord (S. C.) 100, 10 Am. Dec. 654; Wilson v. Lewiston Mill Co., 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680; Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295.

[3] While there are numerous exceptions and assignments of error, the conclusion that the defendant was not bound by the memorandum of the brokers standing alone leaves the verdict and judgment dependent on the correctness of the following instruction to the jury:

"Did Mr. Bryson sign the telegram of September 28, 1915? Did he write the letter of September 29, 1915? Did he write to Clapp a letter containing the statement testified to by that witness? If he wrote and signed all those papers, did he sign them and was he acting for the defendant corporation in so doing? The question is for you to decide, it is for you to find the facts. Did the defendant Bryson, as the president of the defendant corporation, act for that corporation and sign the telegram, sign the letter of September 29th, and sign the letter testified to have been addressed to Mr. Clapp? Whether he signed these papers is for you to determine, and whether he was acting in his capacity as the president of the Woodruff Oil & Fertilizer Company, you must determine from the evidence. I charge you that if he signed all of those papers, taken together, they constitute such a writing as would take this case out of the statute of frauds."

Freund, the representative of the brokers, testified that he signed the memorandum of the alleged sale dated September 9, 1915, to the Woodruff Oil & Fertilizer Company, and mailed it to the defendant. The presumption is that it was duly received. On September 28, 1915, Bryson telegraphed to plaintiff, "Send tank to Clinton & Woodruff one each on contracts." The plaintiff answered on the same day that its records showed only one tank sold and asked what sale the other tank was to be applied against. On September 29th, Bryson wrote:

"I sold some oil for either Woodruff or Clinton to your buyer in N. Y. I never signed any contract or have none but want to fill anything you have there we owe you. Advise please at once."

On the next day plaintiff wrote a letter setting out sales for October, November, and December deliveries corresponding with broker's memorandum, saying the request for tanks before time of delivery specified would be referred to its president, and asking whether cars were desired at Clinton or at Woodruff. There was no reply to this letter or to a number of others written by plaintiff concerning the transaction until October when Bryson wrote as president saying that on receipt of telegram of September 28th, in which plaintiff "seemed to say you didn't know anything about any sale except one tank," he sold the oil on hand to another broker. As additional evidence of the sale, plaintiff's witness Clapp testified that in a letter, which he had lost, Bryson while in New York in September, 1915, wrote to him of the sale through Aspegren & Co. of three tanks of oil corresponding to the sales noted in the broker's memorandum.

The evidence of Clapp as to the contents of the lost letter was com-

petent. The statute does not prohibit proof of a contract of sale by parol evidence of the contents of a lost document signed by the party to be charged. 20 Cyc. 317; Van Boskerck v. Torbett, 184 Fed. 419, 107 C. C. A. 383, Ann. Cas. 1916E, 171.

[4] A written communication to a third party setting out the contract is competent evidence of the making of the contract, since the statute does not require the contract to be in writing, but only that the evidence of it shall be in writing and signed by the party to be charged. 20 Cyc. 255; Charlton v. Columbia, etc., Co., 67 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394, 110 Am. St. Rep. 495, 3 Ann. Cas. 402, and authorities cited.

[5] The case before the court then was this: Specific memoranda of sales dated September 9, 1915, signed by the purchaser, mailed to the defendant and presumably received; letters and telegrams from defendant's president in the same month evidencing sales to the plaintiff; evidence on behalf of plaintiff that there were no other sales to which these communications from defendant could have referred; absence of any evidence from defendant tending to show any other transaction to which its communication could have related; uncontradicted evidence of a letter written by Bryson, president of defendant corporation, to Clapp setting out the sales indicated in the broker's memoranda. This was sufficient to satisfy the requirements of the statute of frauds. Louisville, etc., Co. v. Lorick, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212; Peay v. Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731. In the former case, under verbal instructions from defendant, plaintiff's salesman sent a written order to plaintiff to ship to defendant a certain amount of paint at a stated price, payable in sixty days. The goods were accordingly shipped, after which plaintiff received a letter signed by defendant, saying: "Don't ship paint ordered through your salesman; we have concluded not to handle it." It was held that the two papers taken together constituted a sufficient memorandum in writing signed by defendant to charge him with a contract of sale. The court said:

"It seems to us, therefore, that the letter of defendants, taken, as it must be, in connection with the order sent to plaintiffs by the salesman, to which it expressly referred, and which was in writing, and specified all the necessary particulars as to price, quantity, quality, and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the statute of frauds. In the absence of any evidence that any other order was given, the language of the letter, 'Don't ship paint ordered through your salesman,' must necessarily be regarded as referring to the order of which a memorandum in writing was taken at the time by the salesman, and a copy thereof immediately forwarded to the plaintiff, who at once filled the order and shipped the goods to the defendants."

It was also held in that case and in Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496, that where the terms of a contract are drawn up in writing and signed by one of the parties, and the other afterwards writes an acceptance or recognition of a contract, but not in such terms as to identify it, parol evidence is admissible to show the contract referred to. Ryan v. United States, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447.

It follows that the defendant was not entitled to a directed verdict and that there was no error in the charge. The views and conclusions we have expressed dispose of all other assignments of error.

Affirmed.

SMITH et al. v. SHENANDOAH VALLEY NAT. BANK OF WINCHESTER, VA., et al.

In re NORWALK MOTOR CO.

(Circuit Court of Appeals, Fourth Circuit. October 22, 1917.)

No. 1528.

1. RECEIVERS ⟸128—CERTIFICATES—LIENS.
Receiver's certificates given for the operation of the business of a private industrial corporation cannot be made to displace prior liens, unless the holders of such liens have waived them, either expressly or impliedly.

2. RECEIVERS ⟸128—CERTIFICATES—PRIORITY—ORDER.
On a bill by two of the officers of a corporation, who had indorsed its note and were protected by a deed of trust, a receiver was appointed by the state court. The order appointing the receiver on the ground of insolvency authorized him to purchase such supplies and raw materials as might be necessary in the course of manufacturing the product of the corporation, and for the purpose of continuing operations to borrow a sum not to exceed $5,000 and execute receiver's certificates, which should be a first lien on the assets of the corporation. The lien creditors waived any rights which they had under the trust deed in priority to the receiver's certificates to be issued. The receiver contracted debts considerably in excess of $5,000. Thereafter the corporation was declared an involuntary bankrupt and its property sold. *Held* that, as indebtedness incurred by a receiver for the carrying on of a business for the private corporation cannot displace prior liens, unless the holders of such liens waived them, it was proper for the bankruptcy court to direct that the proceeds of property not subject to the deed of trust should be applied to the discharge of the receiver's certificates and only the unpaid balance of such certificates liquidated from the proceeds of the sale of the property covered by the deed of trust, for any other procedure would give priority to the receiver's debts as to which the lienholders did not waive their rights.

3. RECEIVERS ⟸128—CERTIFICATES—EQUITABLE ESTOPPEL—WAIVER OF LIENS.
In such case the fact that one of the beneficiaries under the deed of trust and one of the complainants in suit in the state court were engaged by the receiver to assist him in managing the corporation does not charge the lienholders with an implied waiver of their lien to an amount in excess of the $5,000 consented to.

4. BANKRUPTCY ⟸482(3)—ATTORNEY'S FEES—RIGHT TO.
Where a corporate receiver was appointed on the ground of insolvency, and under order of the state court he issued certificates, such certificates were not, the corporation having been adjudicated an involuntary bankrupt, liens on the corporate property when it came into the bankruptcy court, preventing the allowance out of the proceeds of a reasonable fee to the bankrupt's attorney provided for by Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, for all who dealt with the proceedings did so with notice that the corporation was subject to the bankruptcy laws.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Alston G. Dayton, Judge.

In the matter of the bankruptcy of the Norwalk Motor Company. Petition by C. G. Smith, receiver of the Norwalk Motor Car Company, and others, to review an order of the referee, opposed by the Shenandoah Valley National Bank of Winchester, Va., and others. From a decree affirming the order of the referee, petitioners appeal. Modified.

H. H. Emmert, of Martinsburg, W. Va. (Downey & Henson and C. E. Williams, all of Martinsburg, W. Va., on the brief), for appellants.

Stuart W. Walker, of Martinsburg, W. Va. (Faulkner & Kilmer, of Martinsburg, W. Va., on the brief), for appellees.

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

WOODS, Circuit Judge. The Norwalk Motor Car Company, a West Virginia corporation, began to manufacture and sell automobiles in 1911. On December 26, 1912, it gave its note to the Shenandoah Valley National Bank for $20,000, indorsed by G. W. McKown, S. H. McKown, J. M. Rothwell, A. E. Skadden, S. P. Hopkins, and Gray Silver, all of whom were stockholders or executive officers of the company. To secure these indorsers, it executed on the same day its deed of trust covering a large part of its property. On the 14th of October, 1914, under a bill brought by G. W. McKown, who was president, and S. P. Hopkins, who was sales manager, as creditors of the corporation, the circuit court of Berkeley county, W. Va., appointed a receiver of the corporation on the ground of insolvency and directed him to continue the business of the company. The order authorized the receiver "to purchase such supplies and raw material as may be necessary in the course of manufacturing the product of said company." It also authorized the receiver, "for the purpose of continuing the operation of the factory," "to borrow a sum, not to exceed $5,000, and to execute therefor receiver's certificates, which shall be a first lien upon the assets of said company and upon all the funds that may come into the hands of said receiver from any source." It appears from the recitations of the order that the Shenandoah Valley National Bank and the indorsers on the $20,000 note waived any rights they had under the trust deed "in so far as the aforesaid deed of trust may be a prior lien to receiver's certificates which are herein authorized to be issued by said receiver." The receiver's certificates were issued and the proceeds used for the purpose authorized by the order. The receiver contracted debts considerably in excess of the $5,000; but for this excess he had no authority to issue certificates.

On the 9th of February, 1915, the corporation was declared an involuntary bankrupt, and the property was afterwards sold under the orders of the bankruptcy court. The net amount derived from the sale of the property covered by the deed of trust, after deducting taxes and other expenses admittedly chargeable to this fund, was $5,399.58. The net amount derived from the sale of the property not covered by

the deed of trust, after deducting taxes and other expenses admittedly chargeable to this fund, was $3,059.20. The validity of the receiver's certificates issued by the state court was not drawn in question here or in the District Court. The District Court, in affirming the report of the referee, held: (1) That the net amount derived from the sale of the property not covered by the deed of trust should be applied to the payment of the receiver's certificates, and only the unpaid balance of the certificates liquidated from the proceeds of the sale of the property covered by the deed of trust, thus excluding from participation in the proceeds of the property not covered by the deed of trust the debts contracted by the receiver not embraced in the certificates; and (2) that a fee to the attorneys for the bankrupt for services allowed by the statute in the involuntary proceedings in bankruptcy should not be allowed out of the proceeds of the sale of the property in preference to the certificates of the receiver.

[1-3] We think the correctness of the first conclusion depends upon the construction of the order of the circuit court for Berkeley county appointing the receiver and authorizing the continuance of the business and the issuance of the receiver's certificates, and on the terms of the waiver of the lien of the trust deed. The rule is that receiver's certificates given for the operation of the business of a private corporation cannot be made to displace prior liens, unless the holders of such liens have waived them, either expressly or impliedly. The necessity for the continued operation of a railroad induced the Supreme Court of the United States to hold that a court of chancery having charge of railroad property might authorize the issuance of receiver's certificates for operating expenses, which would be a lien prior to the mortgage bonds. Wallace v. Loomis, 97 U. S. 146–162, 24 L. Ed. 895; Fosdick v. Schall, 99 U. S. 285, 25 L. Ed. 339. Though not deciding the point, the court indicates in Wood v. Guarantee Trust Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472, that such a power is not to be extended to receiverships of industrial corporations. Nothing can be added to the reasoning of Judge Caldwell against such authority in case of receiverships of private corporations in Hanna v. State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201. The receiver's certificates directed by the order of the state court to be used in the operation of this industrial corporation could have no effect to displace the lien of the deed of trust beyond the waiver of the lien in their favor to the extent of $5,000. The limitation of $5,000 expressed in the waiver negatived any inference of consent to the contracting of debts beyond that amount.

Had there been no waiver, it is clear that the property not covered by the lien of the trust deed would have been liable for the payment of the receiver's certificates issued for debts contracted in operation, and the property under the trust deed would not have been liable. The waiver of the lienholders was not in favor of the unsecured creditors generally, either of the corporation or of the receiver. It was nothing more than an agreement to waive the lien of the mortgage to the extent of $5,000 in favor of the holders of the receiver's certificates, and did not imply an agreement that unincumbered property should not be

first subject to the certificates to the exemption of property under the lien.

It is argued that some, if not all, of the lienholders or beneficiaries under the deed of trust participated in the application for the receivership and knew of the debts contracted by the receiver beyond the certificates in the operation of the plant; and hence they should be held to have assented to his action in contracting the debts not covered by the certificates, and that they are therefore estopped from objecting to the payment of these debts from the mortgaged property. While it is not necessary for us to express an opinion on the point, it may be that when a receiver acts within the authority of the orders of the court in contracting debts and the lienholders knowing of his contemplated action make no objection, they cannot afterwards be heard to say that the debts are not a valid charge upon the property in preference to their liens. In re Erie Lumber Co. (D. C.) 150 Fed. 817; In re Benwood Brewing Co. (D. C.) 202 Fed. 326. But in this case, the waiver of the bondholders to enable the receiver to carry on the business was for the specific amount of $5,000. The order of the court specifying that debts to that amount might be contracted and receiver's certificates issued therefor in the operation of the plant implied that the debt should not be extended beyond that amount. There is no evidence before us sufficient to charge the lienholders with an implied waiver of their lien for any greater amount. It is true that S. P. Hopkins, one of the beneficiaries under the deed of trust and one of the complainants in the suit in the state court, was employed by the receiver as manager of the plant, and he and G. W. McKown, another beneficiary under the deed of trust and also a complainant in the state court, were interested in the Norwalk Distributing Company which undertook to sell the output of the Motor Car Company under the receivership. But this does not prove that these parties consented to making debts beyond the $5,000 represented by receiver's certificates. The District Court properly held that, as between the lienholders and the creditors of the receiver, the property not covered by the trust deed should be first applied to the payment of the receiver's certificates, and that only the balance of the certificates remaining unpaid should be chargeable against the property covered by the lien.

[4] The Bankruptcy Act allows as a claim to be paid before distribution to creditors a reasonable attorney's fee for professional services rendered to the bankrupt in performing the duties required of him. When the assets came into the bankruptcy court, therefore, the property not covered by any lien was subject to the payment of this fee. The question is whether the receiver's certificates issued under authority of the state court were liens on the property when it came into the bankruptcy court which the attorney's fees allowed by law to the bankrupt could not displace. It seems clear they were not such liens. When the corporate property was taken over by the state court and a receiver appointed on the ground of insolvency, all who dealt with the court or with the property did so in the face of the records of that court which gave them notice that the corporation might be thrown into bankruptcy at any moment. All proceedings in the state court were,

therefore, subject to the risk of bankruptcy and its necessary incidents, and one of the necessary incidents of bankruptcy is the allowance of a reasonable attorney's fee to the attorney for services rendered the bankrupt in performing the duties required of him. It follows that the attorney's fee for services rendered the bankrupt under the statute must be deducted from the proceeds of the sale of the unincumbered property before applying them to the payment of the receiver's certificates. While the precise point here under consideration was not involved, the principle is applied in Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, In re Standard Fuller's Earth Co. (D. C.) 186 Fed. 578, and Paine v. Archer, 233 Fed. 259, 147 C. C. A. 265. We express no opinion as to the amount of the fee to be allowed. That is a matter for the District Court, considering the value of the services, the amount of the fund, the amount of fees received in the state court by the same counsel, and any other circumstances.

The result of our reasoning is that the funds in the hands of the court derived from the sale of the unincumbered property should be paid first to such counsel fee as may be allowed by the District Court to the attorneys of the bankrupt, and then to the certificates issued in the state court. The balance of the receiver's certificates remaining unpaid should be paid out of the funds in the hands of the court derived from the sale of the property covered by the deed of trust. The remainder of the proceeds of the sale of the property subject to the lien should be applied to the payment of the note held by the Shenandoah National Bank, secured by the trust deed, to the exclusion of those claiming to be general creditors of the receiver in the state court.

The decree of the District Court must be modified accordingly.

SOUTHERN RY. CO. v. BOARD OF COM'RS OF PUBLIC WORKS OF CITY OF UNION, S. C.

(Circuit Court of Appeals, Fourth Circuit. October 9, 1917.)

No. 1517.

1. COURTS ⟸366(7)—PRECEDENTS—FEDERAL COURTS—STATE STATUTES.

The charter of a South Carolina railroad company declares that, in the absence of any written contract between the company and the owner or owners of land through which the railroad may be constructed, it shall be presumed that the land on which the railroad may be constructed, together with 100 feet on each side of the center of such road has been granted, and the company shall have good right and title to the same, and the right of those entitled to the land shall be lost by failure to assert the same for 10 years after construction. The South Carolina Supreme Court in construing and giving effect to a similar provision in other railroad charters declared that there was no presumption that the railroad company entered upon the land and constructed its road without a written contract, and in order for it to maintain the statutory presumption it must show affirmatively that it had no written contract for a right of way. *Held*, that such decisions of the state Supreme Court are binding on the federal courts, and the lessee of the railroad company cannot obtain a right of way 100 feet each way from the center of its road, without

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

an affirmative showing that it entered and constructed the road without a written contract.

2. RAILROADS ⟸64(2)—CHARTERS—CONSTRUCTION—RIGHTS OF WAY.
Under such charter, the right given cannot be asserted until the absence of a written contract is shown, that being a condition to the assertion of the right, and it is no objection that the railroad company asserting the right is required to prove a negative.

3. RAILROADS ⟸82(2)—RIGHT OF WAY—OCCUPATION.
The operation of a railroad since 1847, the year it was chartered, where it did not continuously occupy as a part of its right of way a strip of land 100 feet on either side from the center of the road, will not establish the company's right to such strip; its charter declaring that, in event the railroad company should enter without a written contract, it should be entitled to such right of way.

4. APPEAL AND ERROR ⟸1046(1)—REVIEW—HARMLESS ERROR—TRANSFER OF CAUSE.
Where plaintiff was in no event entitled to relief, the denial of its motion to transfer the cause to the equity docket and trial with a jury was not prejudicial error, necessitating reversal, for the result would have been the same.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Action by the Southern Railway Company against the Board of Commissioners of Public Works of the City of Union, S. C. There was a judgment for defendant, and plaintiff brings error. Affirmed.

C. P. Sanders, of Spartanburg, S. C. (Sanders & De Pass, of Spartanburg, S. C., on the brief), for plaintiff in error.

Macbeth Young, of Union, S. C., H. J. Haynsworth, of Greenville, S. C., and P. D. Barron, of Union, S. C. (S. Means Beaty, of Union, S. C., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. In this action for injunction and damages the Southern Railway Company alleges that it has a right of way through the city of Union, S. C., of 100 feet in width on each side of its main track, and that the board of public works of that city has dug up the soil, built houses and fences, and set up hedges thereon, claiming that it was entitled to the use and occupation of the portion of the right of way so used to the exclusion of the plaintiff therefrom. The board of public works in their answer denied that the lands used and the buildings erected by it are embraced in the right of way of the defendant. The cause having been docketed as a law case, plaintiff's counsel moved to transfer it to the equity docket for trial. The motion was denied and the trial took place before a jury. At the conclusion of the evidence in response to motions from both sides for the direction of a verdict, the jury were instructed to find a verdict for the defendant, and judgment was entered accordingly.

[1] The Southern Railway Company, as lessee, is successor to all the rights of the Spartanburg & Union Railroad Company, chartered in 1847. The claim to the right of way of 100 feet in width, including

the land in controversy, depends on the following provision in the charter of the Spartanburg & Union Railroad Company:

"Sec. XI. That in the absence of any written contract between the said company and the owner or owners of land, through which the said railroad may be constructed, in relation to said land, it shall be presumed that the land upon which the said railroad may be constructed, together with one hundred feet on each side of the center of said road, has been granted to the said company by the owner or owners thereof, and the said company shall have good right and title to the same (and shall have, hold and enjoy the same) unto them and their successors, so long as the same may be used only for the purpose of the said road and no longer, unless the person or persons to whom any right or title of such lands, tenements or hereditaments descend or come shall prosecute the same within ten years next after the construction of such part or portion of the said road as may be constructed upon the lands of the person or persons so having or acquiring such right to the title as aforesaid, and if any person or persons to whom any right or title to such lands, tenements or hereditaments belong or shall hereafter descend or come, do not prosecute the same within five years next after the construction of the part of the said road upon the lands of the person or persons so having or acquiring such right or title as aforesaid, then he or they and all claiming under him or them shall be forever barred to recover the same."

The plaintiff introduced no evidence tending to show that there was no written contract for a right of way between the Spartanburg & Union Railroad Company, or any successor to its rights, with the owner or owners of land in the town of Union through which the railroad was constructed. Nor did it prove that the owner of the land which the board of public works have occupied by building and otherwise owned any land through which the railroad was constructed.

The South Carolina Supreme Court, in construing and giving effect to provisions in railroad charters like that above quoted, has held that there was no presumption that the railroad company entered upon land and constructed its road without a written contract, and that, therefore, in order for it to claim the statutory presumption of a grant to it 100 feet in width on each side of the road, it is necessary for it to show affirmatively that it had no written contract for a right of way. The reason for this conclusion is thus stated in Atlantic C. L. R. R. Co. v. Dawes, 103 S. C. 507, 88 S. E. 286:

"In the absence of a contract, the presumption is that they acquire what statute provides for subject to the exceptions. If they have a contract, it is in their possession, and whether there is one or not they know better than any one else. Suppose there was a contract in this case between the predecessors of both parties, and it was for less than what the charter provides for and they failed to record it. It would be preposterous to allow the plaintiff to throw it away, and claim under the statute, and acquire more than it is entitled to. Whether they have a contract or not, they know, or should know, or they could soon ascertain."

See Carolina & N. W. Ry. Co. v. Ford, 105 S. C. 80, 89 S. E. 809.

If these decisions of the state court are controlling, it would follow that the plaintiff failed to discharge the burden which was upon it of showing that it had no written contract and that its right of way embraced the property which the defendant is occupying and using, and therefore its claim for injunction and damages would fail.

We are unable to take the view that these decisions of the state court are nothing more than ordinary statements of a rule of evidence not

binding on a federal court in an equitable action for injunction. They are adjudications by the highest state court as to the meaning of a state statute, in that they hold that the statute allows to a railroad company the benefit of any presumption of a right of way 200 feet in width only when it establishes as a condition precedent that it constructed its road without a written contract for a right of way. The meaning thus given to the statute by the state court is binding on all federal courts. Bucher v. Cheshire R. R. Co., 125 U. S. 555–582, 8 Sup. Ct. 974, 31 L. Ed. 795.

[2] But, if the construction of the statute were open, it seems to us evident that since the right conferred by the statute cannot arise until the condition upon which it depends has been met, the assertion of the right in an action of injunction must fail unless the condition of absence of a written contract is first proved. It is no valid objection that the plaintiff is required to prove a negative. Chamberlayne on Evidence, § 979.

[3] Nor does the operation of the railroad since 1847, the date of the charter, help the plaintiff. It is true that the original existence of a right at some remote time in the past is presumed when it has been continuously asserted by affirmative action for twenty years. But in this case no continuous occupation of the land in dispute by the railroad, or any other acts showing active assertion of right, were proved. On the contrary, the evidence tends to show that the railroad company acquiesced in the occupancy of the land in dispute by the defendants and their predecessors in title, and encouraged them to construct expensive buildings and place other improvements on the property, which it had every reason to know would not have been placed there, had it asserted a right to have them removed at its discretion. The plaintiff's case failed for lack of evidence that its predecessor in title had no written contract for the right of way. This conclusion renders unnecessary the consideration of the defenses of laches, abandonment, adverse possession, and the question of the competency of the testimony objected to.

[4] It was earnestly insisted in the argument that the District Court was in error in refusing the motion of the plaintiff to transfer the cause to the equity docket and in trying it with a jury. Even if the District Court committed error in this respect, the judgment could not be reversed on that ground, because, if it had been tried on the equity side, the result must necessarily have been a decree for the defendant, which would have been the same practical result as a direction of a verdict for the defendant on the law side. Under the peculiar circumstances of this case, therefore, the question is purely academic and does not require discussion or decision.

Plaintiff did not ask to have the suit dismissed or to discontinue it, and cannot complain that the court directed a verdict in response to requests for a peremptory instruction from both sides.

Affirmed.

BLALOCK, Collector of Internal Revenue, v. GEORGIA RY. & ELECTRIC CO.

(Circuit Court of Appeals, Fifth Circuit. November 7, 1917.)

No. 3005.

1. INTERNAL REVENUE ⟸9—CORPORATIONS—CORPORATE INCOME TAXES.
Under Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112, a corporation organized for profit and carrying on or doing business is liable to a tax equivalent to 1 per cent. on its entire net income over and above $5,000 received by it from all sources during such year.

2. INTERNAL REVENUE ⟸9—CORPORATE TAXATION—LIABILITY.
Plaintiff corporation, by a lease authorized by its stockholders and those of the lessee company, demised all of its property to the lessee corporation; the lease containing a covenant whereby the lessee agreed with plaintiff, for the benefit of its shareholders, to pay to such shareholders quarterly sums or dividends, the sums or dividends to be paid on dates stated each year during the terms of the lease to the persons registered as holders of such shares on the tenth day preceding each date for payment. Pursuant to a stipulation in the lease, the agreement under the seal of the lessee company was indorsed on the certificates of the capital stock of plaintiff company. *Held* that, while a corporation is a purely artificial person and its shareholders are the real parties interested, yet as the excise tax of 1 per cent. on the net income of corporations over and above $5,000 received from all sources imposed by corporation Tax Act, 1909, is a charge made for the exercise of the franchise of doing business in a corporate capacity, the rent payments must be deemed income of the plaintiff corporation subject to taxation, though paid directly to the shareholders; the lessee company merely relieving plaintiff of the duty of distribution.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by the Georgia Railway & Electric Company against A. O. Blalock, Collector of Internal Revenue for the District of Georgia. There was a judgment for plaintiff, and defendant brings error. Reversed.

Hooper Alexander, U. S. Atty., of Atlanta, Ga., for plaintiff in error.

Walter T. Colquitt and Ben J. Conyers, both of Atlanta, Ga., for defendant in error.

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

WALKER, Circuit Judge. [1] The defendant in error, a corporation organized for profit, by carrying on or doing business in Georgia in the year 1912, subjected itself to liability to pay the tax provided for by the Corporation Tax Act of 1909, "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year." Blalock v. Georgia Railway & Electric Co., 228 Fed. 296, 142 C. C. A. 588, Ann. Cas. 1917A, 679, Comp. Stat. 1913, § 6300 et seq.

[2] The pending writ of error presents for review rulings of the trial court to the effect that amounts paid during that year by the cor-

poration's lessee directly to the corporation's stockholders as rent stipulated for in a lease by the corporation of its property, which went into effect on March 18, 1912, was not income of the lessor corporation within the meaning of the statute mentioned, and was to be excluded from consideration in ascertaining the amount of the tax for which the corporation was liable. These rulings were based upon provisions of the lease now to be mentioned.

The lease, after providing for the payment by the lessee of sundry amounts, including taxes, the expenses of insuring and maintaining the leased property, outlays for additional property, interest on the lessor's debts, and debts and obligations other than the principal of specified bonds issued by the lessor, which but for the lease would have been payable by the lessor, contained provisions whereby the lessee covenanted with the lessor, "for the benefit of the shareholders for the time being of the lessor, that it will pay to the said shareholders, respectively, as and for rent hereunder, without any deduction for tax or taxes which the lessor or the lessee may be required to pay or to retain therefrom," etc., specified "quarterly sums or dividends" of a named per cent. of the lessor's capital stock, "the said sums or dividends to be paid on" dates stated "in each year during the term of this lease to the persons registered as holders of the said shares on the tenth day next preceding each day for such payment." The lease contained a stipulation by which the lessee bound itself to indorse upon the certificates of the capital stock of the lessor an agreement, under the seal of the lessee, signed by its duly authorized officer substantially in a form which was set out, which form, after reciting the making of the lease and its above-mentioned provisions for the payment of quarterly sums or dividends states that the lessee "agrees with the said registered holder of the within mentioned shares to pay the said dividends accordingly and to enter into a like agreement with every holder of the said shares to whom a new certificate shall be issued, and to indorse such agreement upon every such certificate." The lease was authorized by the stockholders of the lessor and lessee companies, and was duly executed pursuant to authority so conferred, and on March 18, 1912, all of the property and assets of all kinds of the lessor corporation called for by the lease were delivered to the lessee in accordance with the terms of the lease, and during the remainder of that year the lessee complied with the stipulations above mentioned.

A result of the lease was to make each stipulated installment of net rent payable to those who were stockholders of the lessor corporation when that installment was due, in proportion to their then respective holdings of stock, instead of to the lessor corporation itself. We do not think that what was done amounted to an assignment by the lessor to those who were its stockholders when the lease was made of proportionate shares of the net rent to accrue in the future. If there had been such an assignment, any assignee would have had the power of disposing of his share of the rent without disposing of his share as a stockholder in the rented property. It plainly appears that this was not contemplated. By the explicit terms of the lease the installments of rent were made payable "to the persons registered as hold-

ers of said shares on the tenth day next preceding each day for such payment." There was no assignment having the effect of a severance or separation of the beneficial ownership of the rent to accrue from the beneficial ownership of the rented property. The beneficial ownership of both continued in those who at any given time were the stockholders of the lessor corporation.

A business corporation in many respects is like a trading copartnership. Each is an association formed by its members for pecuniary gain. In the one case, as well as in the other, gains or income accruing from the conduct of the business, or from the property owned by the association, inure to the benefit of its members. The law, by permitting the association to be made a corporation, enables the associated members to secure for themselves the benefits of defined and limited responsibility, and at the same time the execution of the purposes for which they are associated by means of an artificial being, changes in the membership of which cause no break in the continuity of its existence and are without effect upon its capacity to act, within the scope of the powers conferred by its charter, as a natural person. The excise tax provided for by the above-quoted statute is a charge made for the exercise or enjoyment of the privilege or franchise of doing business in a corporate capacity. The real beneficiaries of that privilege or franchise are the stockholders, not the artificial legal entity, which is incapable of itself enjoying the pecuniary gain which is the object of its existence. Due recognition and effect may be given to the fact that a business corporation has a legal existence separate from that of its members or stockholders, without ignoring or denying effect to the obvious fact that its stockholders are the real beneficiaries of its existence and activities, and that such a corporation is but performing one of its normal functions when it makes provision for a ratable distribution among its stockholders of net gains accrued, whatever may be the form such a provision assumes.

The annual tax required to be paid by the corporation is "one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year." Is net rent paid for the use of corporate property made any the less corporate income received by the corporation, within the meaning of the provision just quoted, by the circumstance that, pursuant to a provision of the corporation's lease under which the rent is payable, it is paid to the corporation's then registered stockholders in amounts proportionate to their respective holdings of stock, instead of in a lump sum to the corporation itself? We think not. Rents accruing and paid for the use of partnership property are not made any the less partnership income by being made payable to the several partners in proportion to their respective shares or interests in the firm at the time the payment is made. There is no such difference between a partnership and a corporation as to require a different conclusion when the only difference is that the recipients of the payment are the stockholders of a corporation instead of the members of a partnership.

The difference between the way the rent under the lease here in question was paid and the way the same aggregate amounts would

have been paid, if the lease had made the installments payable to the corporation itself, is one of method and not of substance. Where the circumstances of a corporation are such that it can and does adopt the policy of distributing among its stockholders as promptly as practicable net income accruing from the corporate business or property, an arrangement whereby its debtor, who contributes the whole or a part of this income, makes the desired distribution of it among the corporation's stockholders amounts to no more than the corporation procuring its debtor to render a service for it; the net result being that the debtor, instead of remitting or paying what it owes direct to the creditor, makes the payment to others as directed by the creditor. A creditor as truly receives payment of what is due him when, pursuant to his direction, the debtor makes payment to another, as he does when payment is made directly to himself.

Nothing in the language of the statute indicates an intention to make the liability of the corporation to pay the prescribed tax dependent upon the presence or absence of such a distinction, without a substantial difference, as exists between the receipt by the corporation itself of net income accruing from its business or property and the receipt of the same income by the corporation's stockholders as such, for whose benefit alone the corporation would have been acting, if it had received the income. The terms of the statute are not such as to require that it be given a meaning that would invite and make easy evasions of its provisions. The fact that the making of the defendant in error's lease was unaccompanied by an intention to evade payment of the tax in question is not material. Though such intention did not exist, a compliance with the provision governing the manner of paying the net rent as it accrued was without effect upon the corporation's liability to pay the prescribed tax, measured by what was really net income over $5,000 received by it within the meaning of the statute.

The conclusion is that the above-mentioned rulings of the trial court were erroneous. Similar conclusions, based on states of fact not essentially different from that disclosed in the instant case, were reached in the cases of Rensselaer & S. R. Co. v. Irwin (D. C.) 239 Fed. 739, and Anderson v. Morris & E. Co., 216 Fed. 83, 132 C. C. A. 327.

The judgment under review is reversed.

GEORGIA RAILROAD BANK v. KOPPEL et al.

In re ROSENTHAL.

(Circuit Court of Appeals, Fifth Circuit. October 22, 1917.)

No. 3020.

1. MORTGAGES ⊜171(4)—RECORD—EFFECT.

Under Civ. Code S. C. 1912, § 3542, declaring that all deeds to land, all trust deeds, or instruments in writing conveying either real or personal estate and creating a trust or trusts in regard to such property, or charging or incumbering the same, as well as all mortgages, or instruments in

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

writing in the nature of a mortgage of any property, real or personal, shall be valid, so as to affect from the time of delivery or execution the rights of subsequent creditors, whether lien creditors, or simple contract creditors, or purchasers for valuable consideration without notice, only when recorded within 10 days from the time of such delivery or execution, the fact that a written instrument in the nature of a mortgage was actually transcribed in the records of the county where the land was located is of no effect, and gives no constructive notice, where the instrument was not proven or acknowledged, so as to entitle it to recordation.

2. MORTGAGES ⟸173—RECORD—INSTRUMENTS IN NATURE OF MORTGAGE.
Where the owner of a bond for title to land in South Carolina assigned the same to a bank, and thereafter such bank, in consideration of the payment of the owner's indebtedness by the claimant bank, together with the owner, assigned the bond for title to secure to the claimant bank the repayment of the sums advanced, the assignment of the bond for title, being in writing, was an instrument in the nature of a mortgage, and under Civ. Code S. C. 1912, § 3542, was ineffective as against subsequent creditors and purchasers for a valuable consideration without notice, where not duly recorded within 10 days after execution or delivery.

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Southern District of Georgia; William Wallace Lambdin, Judge.

In the matter of the Bankruptcy of A. Rosenthal. On petition of L. Koppel and Albert G. Ingram, trustee, to review an order of the referee allowing the claim of the Georgia Railroad Bank as a secured claim, the order was reversed and set aside (238 Fed. 597), and the claimant bank petitions to superintend and revise. Affirmed.

Bryan Cumming, C. H. Cohen, and R. S. Cohen, all of Augusta, Ga. (Cumming & Harper, of Augusta, Ga., on the brief), for petitioner.

Samuel H. Myers and P. C. O'Gorman, both of Augusta, Ga. (Hamilton Phinizy, of Augusta, Ga., on the brief), for respondents.

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

BATTS, Circuit Judge. A. Rosenthal was adjudged a bankrupt in August, 1913. The Georgia Railroad Bank filed its claim as a secured creditor to the amount of $14,950, setting out, among other securities, that which becomes the subject-matter of this proceeding. L. Koppel, an unsecured creditor, filed a petition, alleging that the trustee had refused to proceed, and attacked the validity of the claim of the Georgia Railroad Bank as to such security. The referee held for the bank, and an appeal was taken to the United States District Court for the Southern District of Georgia, where the ruling was reversed. The judgment is before this court for review.

One Mealing, on July 3, 1911, executed to Rosenthal a bond for title to land in Aiken county, S. C.; the condition of the bond being that, upon the payment of $2,000 in the manner indicated, with interest, Mealing would execute a conveyance in fee simple, the payee of the bond obligating himself to pay taxes, and the bond providing that, in the event of nonpayment of purchase price, Mealing would be discharged from all liability to execute the deed, or, at his option, might

enforce the payment of the purchase money. On May 16, 1912, Rosenthal executed to the National Bank of Augusta a transfer or assignment of all his right, title, and interest in and under the bond; this assignment being indorsed thereon. On July 25, 1912, the National Bank of Augusta, in consideration of the payment by the Georgia Railroad Bank of the indebtedness of Rosenthal to the National Bank of Augusta, joined by Rosenthal, "to secure the Georgia Railroad Bank in the repayment of the sum so advanced for his benefit, as well as for the purpose of securing any and all other indebtedness he may at any time owe to the said Georgia Railroad Bank," assigned to that bank all the right, title, and interest of the National Bank of Augusta and of Rosenthal in the bond for title.

[1] Under the laws of the state of South Carolina:

"All deeds of conveyance of lands, tenements or hereditaments, either in fee simple or for life; all deeds of trust or instruments in writing, conveying either real or personal estate, and creating a trust or trusts in regard to such property, or charging or encumbering the same; all mortgages or instruments in writing in the nature of a mortgage of any property, real or personal, * * * shall be valid so as to affect from the time of such delivery or execution the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, only when recorded within ten days from the time of such delivery or execution in the office of the register of mesne conveyances or clerk of court of the county where the property affected thereby is situated in the case of real estate, and in the case of personal property of the county where the owner of said property resides." Civ. Code 1912, § 3542.

In order to become effective against a subsequent creditor, all instruments in writing charging or incumbering real or personal estate, or in the nature of a mortgage of any property, real or personal, must be recorded within ten days in the proper county office. Whether or not the bond for title was properly recorded is unimportant, so far as this controversy is concerned. The assignment to the National Bank of Augusta was not so proved or acknowledged as to entitle it to record; and this is also true of the instrument executed by the National Bank of Augusta and Rosenthal to the Georgia Railroad Bank.

If the latter instrument is an instrument in the nature of a mortgage, or if it charged or incumbered any personal or real estate, and if it was not, within the 10 days provided by law, properly recorded in Aiken county, S. C., it is ineffective as to subsequent creditors of Rosenthal. The circumstance that it was actually transcribed in the records of the county in no way affects the legal proposition involved. If the parties at interest had actually seen the record of the instrument, they would have been put upon notice of its existence; but the constructive notice resulting from the record of an instrument follows only when it is entitled to record.

[2] The only question which seems then to arise is whether or not the instrument executed by the National Bank of Augusta and by A. Rosenthal was "an instrument in the nature of a mortgage," or "charged or incumbered" real or personal estate. The instrument declares its purpose and effect. It recites:

"And the said Adolph Rosenthal, in consideration of the payment of said indebtedness, and to better secure the Georgia Railroad Bank the repayment

of the sum so advanced for his benefit, as well as for the purpose of securing any and all other indebtedness he may at any time owe to said Georgia Railroad Bank, hereby transfers all the right, title, and interest * * * of said Adolph Rosenthal in and to a certain bond hereto attached."

The bond attached was a bond for title describing the land to be conveyed. The purpose of the instrument is made perfectly clear by its terms. The transfer of the rights of Rosenthal is effected, but it is for a specific purpose indicated; that is, to secure the Georgia Railroad Bank in the payment of his indebtedness to the bank. The legal effect of a payment of the indebtedness is to replace in Rosenthal his interest in the land incumbered. A legal consequence of a failure on the part of Rosenthal to pay the indebtedness is the right of the Georgia Railroad Bank to foreclose the lien on the land created by the instrument executed by the National Bank of Augusta and by Rosenthal. The instrument is in the nature of a mortgage, because it is the conveyance of an interest in land for the purpose of securing a debt, because the payment of the debt will replace the title, and because, in case of a failure to pay the debt, the transferee will have all the rights of a mortgagee. It is hard to conceive an instrument, not in fact a mortgage, being more "in the nature of a mortgage" than the one under consideration. It also, of course, charges and incumbers the land.

It is insisted by petitioner that the conclusion reached is in conflict with the ruling in Re Floyd & Hayes (D. C.) 225 Fed. 262. In that case the question was whether or not certain assignments of notes, mortgages, and open accounts by Floyd & Hayes to the American Agricultural Chemical Company should have been recorded to enable the Chemical Company to claim the proceeds thereof against the trustee in bankruptcy of Floyd & Hayes. The referee held that it was not necessary, under the laws of South Carolina, to record assignments of notes and mortgages, and the claim of the Chemical Company was sustained. He held, however, that transfers of open accounts should have been recorded, predicating his decision upon Townsend v. Ashepoo Fertilizer Co., 212 Fed. 97, 128 C. C. A. 613. In disposing of the case the District Court said that the decision would depend upon the question whether the ruling of the Supreme Court of South Carolina in Bank v. Greenville, or the decision of the Circuit Court of Appeals of the Fourth Circuit in Townsend v. Ashepoo Fertilizer Co. is held to be controlling. The District Court thereupon decided that, unless some federal question was involved, the interpretation placed upon the state statute by the highest state court would be binding upon the federal courts, and finally held that under the recording act, as interpreted by the Supreme Court of that state, reservations of title of notes and accounts taken in payment of personal property in which title was reserved until sale to a third person, and assignments of choses in action, were not required to be recorded to be valid against subsequent creditors. This ruling was affirmed by the Circuit Court of Appeals for the Fourth Circuit in Ward v. American Agricultural Chemical Co., 232 Fed. 119, 146 C. C. A. 311.

We do not reach a conclusion in conflict with the decision in Ward v. American Agricultural Chemical Co. Neither a reservation of title nor the assignment of a chose in action is involved. By the execu-

tion of the bond for title, Rosenthal acquired an interest in and an equitable title to land. Certainly this was the case when he took possession and began to exercise other rights and began to discharge duties of ownership. This real property was a proper subject for a mortgage, and the owner executed that which could properly be called a mortgage, and which was certainly in the "nature" of a mortgage. The instrument was also "an instrument in writing" "charging or incumbering" "real or personal estate."

The preference of the Georgia Railroad Bank is properly rejected. The judgment is affirmed.

DUNSCOMB v. CHICAGO, B. & Q. R. CO.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1917.)

No. 2370.

1. JUDGMENT ⊂⊃692—CONCLUSIVENESS—PERSONS CONCLUDED.

Plaintiff's father, a resident of Ontario, died prior to plaintiff's birth, leaving a will, whereby he devised and bequeathed to his widow, plaintiff's mother, for life the income from all his real and personal estate, remainder over to any child or children of the marriage. The will appointed a resident of the city of Philadelphia trustee, authorizing him to collect and receive and pay over the income of the trust property. A portion of the trust property was in shares of the capital stock of defendant railroad company. After the widow's remarriage, the trustee with her consent disposed of such shares of stock and died shortly thereafter, having misapplied the trust property, only a small portion of which was recovered. A copy of the will and codicil had been lodged with the defendant's transfer agent. After the trustee's death, suit was instituted in Ontario against his administrator for the appointment of a new trustee. Complainant, the infant child of testator, being made a party defendant, appeared by guardian ad litem. An order was entered appointing a trust company as trustee to collect, and shortly thereafter, on petition of the guardian ad litem, as well as the trustee, an action was instituted in the state courts of New York to impeach the transfer by the original trustee of the capital stock of defendant railroad company. Judgment in such litigation was finally rendered for defendant and its transfer agent who was joined in that action. *Held*, that as complainant was the only person ultimately interested, and as the New York litigation was had on the petition of his guardian ad litem, the guardian ad litem subsequently participating therein, the judgment is binding on complainant, though he was not a party.

2. EQUITY ⊂⊃72(1)—SUITS—LACHES.

In such case, where complainant was 22 years of age when the New York litigation was finally terminated adversely to him, and he waited nearly 11 years before filing a bill against defendant, and such bill was dismissed 8 years thereafter for want of prosecution, a bill filed nearly a year thereafter by complainant comes too late and will be dismissed on account of laches; it appearing that a trust settlement was made between complainant and his mother on his petition about 13 years before the filing of the last bill, and that the complainant during all the interim had not been under any disability, this being particularly true as any right of defendant against its transfer agent who was the only one at fault had been long since lost by limitations.

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

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

Bill by George Hoyles Dunscomb against the Chicago, Burlington & Quincy Railroad Company. From a decree dismissing the bill, complainant appeals. Affirmed.

The material facts appear by stipulation. June 14, 1870, George Hoyles Dunscomb of the Province of Ontario, Canada, married Harriet C. Gore. Appellant, born May 31, 1871, is the only issue of the marriage. The father died March 21, 1871, leaving a will dated December 14, 1870, in which he bequeathed to his wife 100 shares of stock in appellee, an Illinois corporation, and other stocks and bonds, and making bequests of cash and chattels to various other persons, with residuary bequest of his property to the children of a brother, and appointing his wife and the brother as executors. There was a codicil of same date as the will, as follows:

"In the event of my having issue by my wife, Harriet Catherine Dunscomb, I give, devise and bequeath to my said wife, for the term of her natural life, the income from all the real and personal estate that I may die possessed of, and on her death I give and bequeath said real and personal estate to the child or children of our marriage now living, or who may be living at the time of my death, or born after my death, to be divided equally among them share and share alike.

"The real and personal estate to be realized by my trustee either at public or private sale, whichever may in the discretion of the said trustee be deemed best for the interest of my estate, at the death of my wife and divided among the issue of my marriage as above directed.

"And I do appoint Charles H. Muirheid, of the city of Philadelphia, in the state of Pennsylvania, in the United States of America as trustee under this my will to collect and receive and pay over the income of the trust estate, therein comprised, to my wife if she survives me, during her life, and at her death to dispose the said real and personal estate as above directed.

"And I bequeath to the said Charles H. Muirheid for his services as trustee the usual commission."

The will and codicil were duly probated in and according to the law of Ontario, and the wife was appointed sole executrix; the brother declining to act.

Among the assets of the estate were 261 shares of stock in appellee railroad company. The stock certificates therefor were assigned and surrendered by the executrix, and in pursuance were duly transferred by the National Bank of Commerce of New York, the transfer agent of the railroad company, to "Charles H. Muirheid, trustee for Harriet C. Dunscomb under the will of George H. Dunscomb," and new certificates of stock issued by the bank to Muirheid in his stated capacity; a copy of the will and codicil having been lodged with the transfer agent bank as evidence of the right of the executrix to assign the stock. While Muirheid so held the stock, the railroad company declared two stock dividends amounting on this stock to 13 and 21 shares, for which certificates were issued to Muirheid as such trustee. The market value of the stock fluctuated greatly between 1872 and 1877, at one time being as high as 143, the lowest point being 78. The trend was generally downward.

The widow married one Hunt, and they went for a time to England to reside. July 3, 1877, after correspondence between her and Muirheid, which showed a desire and consent on her part to have the railroad stock sold and its proceeds invested by Muirheid in more stable security, a sale was made at the then market price, of slightly below par, and the proceeds invested by the trustee in interest-bearing mortgages on Philadelphia real estate, which were considered good, and for about five years thereafter the interest on the mortgages was paid to Mrs. Hunt. The transfer agent accepted surrender, and canceled the certificates of this stock so standing in the name of the trustee, and issued new certificates to his vendees. The record shows that thereafter and down to 1900 the market value of the stock continued to fluctuate, going as high as

149⅛ and as low as 53½. Subsequently Muirheid used the mortgages, as well as other property belonging to the trust estate, for his own purposes. In 1883, Muirheid died leaving his estate wholly insolvent, and but a small part of the trust estate so misapplied was ever recovered.

In 1883, Mrs. Hunt, then residing in Ontario, brought suit there in chancery against Muirheid's administrator, Sharp, for the appointment of a new trustee for her deceased husband's estate; her then infant son being made a party defendant. The infant appeared by duly appointed guardian ad litem, and an order was entered appointing the Toronto General Trusts Company, a Canadian corporation, as trustee to collect. Shortly thereafter, on petition of the guardian ad litem, as well as of the trusts company, the court appointed the trusts company as trustee generally, and authorized the sale of certain railroad and other bonds which were yet remaining in the trust estate, and the investment of the proceeds in real estate mortgages. It appears that the securities which came so into the new trustee's hands, and were sold under such order, and the proceeds invested pursuant thereto, realized $12,750.19.

In the same proceeding, upon petition of the trust company and the guardian ad litem, the chancellor, on June 30, 1883, caused entry to be made upon his minute book that in his opinion suit should be taken by the infant, in the proper court, to impeach the transfer by trustee Muirheid of the railroad stock, and to take advice on prospect of success of such suit. It was stated in the entry that this would involve the expense of a visit of the guardian ad litem to the United States, which expense shall be borne by the trust estate.

Pursuant to the advice obtained and to such direction of the Chancery Court of Ontario, the trusts company as trustee of the estate of Dunscomb, deceased, brought suit July 6, 1883, in the Supreme Court of New York against the railroad company (appellee here) and the National Bank of Commerce of New York, to compel restoration of the railroad stock so sold by trustee Muirheid, and transferred by the bank, and an accounting for the dividends which had theretofore been declared on the stock, and, if it was impossible to restore or transfer the stock, then to compel payment of its value to the trustee. It appears that the guardian of the infant was also a general officer of the trusts company, and that prior to the institution of this suit an agreement in writing was entered into, whereby the guardian and Mrs. Hunt agreed, with certain attorneys who would undertake the suit, that these attorneys should be paid for their services therein a stipulated percentage of all that would be recovered in the suit or by compromise. It appears further that during the pendency of that suit there were negotiations for its settlement, and that on June 14, 1887, upon application of the trusts company and the guardian ad litem made to the Chancery Court in Ontario, in the said trusteeship there still pending, a certain proposed compromise of the New York suit was authorized by the Ontario court, although the compromise was in fact never effected. Answers to the New York suit were filed by the defendants therein, and on November 17, 1887, the suit was dismissed on the ground that the trusts company had not the legal capacity to sue in New York. Upon appeal to the General Term the judgment was affirmed, but was reversed by the Court of Appeals, and a new trial granted. T. G. T. Co. v. C. B. & Q. R. R. Co., 123 N. Y. 37, 25 N. E. 198.

Upon retrial the Special Term rendered judgment in favor of the railroad company and against the National Bank of Commerce. Upon appeal to the General Term the judgment was affirmed as to the railroad company and reversed as to the bank, that court holding that the trustee Muirheid had the right to sell the railroad stock in question. On appeal by the trusts company to the New York Court of Appeals, the judgment of the General Term was on June 20, 1893, affirmed.

On June 19, 1899, Mrs. Hunt and her son, appellant, who was then aged 28, filed petition in the High Court of Justice of Ontario for the discharge of the trusts company as trustee of the estate, and for direction to the trustee to transfer to the petitioners all property of the trust estate. On the hearing of the petition that court on June 21, 1899, found that the accounts of the trustee had been passed and are satisfactory to the petitioners, who are the only parties interested in the trust estate, and ordered that the trustee "do forth-

with transfer and assign the estate of the said George Hoyles Dunscomb as aforesaid to the petitioners and that thereupon the said the Toronto General Trusts Corporation be and they are hereby discharged of and from the said trust and from all accountability and liability in respect of the said estate."

On March 11, 1904, appellant exhibited in the circuit court of Cook county, Ill., his bill in chancery against appellee, setting forth the facts concerning said railroad stock substantially as herein stated, and asking relief similar to that sought in the New York action, and as here demanded. The suit was dismissed for want of prosecution December 11, 1912. Eight months afterwards the bill in this cause, similar in its scope to the others referred to, was filed, federal jurisdiction being invoked through diversity of citizenship, the plaintiff, although living at Chicago, being a citizen of Canada. Mrs. Hunt, the mother, was living when this suit was instituted. Upon hearing the District Court dismissed the bill for want of equity, and plaintiff appeals.

E. B. Wilkinson and M. F. Gallager, both of Chicago, Ill., for appellant.

J. A. Connell, of Chicago, Ill., for appellee.

Before ALSCHULER and EVANS, Circuit Judges, and CARPENTER, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). Three questions are in the main presented: (1) Does liability attach to appellee by reason of the action of the National Bank of Commerce of New York, its transfer agent, in accepting trustee Muirheid's cancellation and surrender of the stock certificates, and issuing new ones to Muirheid's transferees, involving primarily the question of the right of Muirheid as trustee to dispose of the stock? (2) Is appellant bound by the outcome of the litigation in the New York courts in the suit brought there by the Toronto General Trusts Company against appellee and the National Bank of Commerce? (3) Is appellant's right of action, if any he had, barred by his laches?

In view of the conclusion we have reached respecting the second and third propositions, discussion of the first will be quite unessential to the disposition of the appeal. We have, however, carefully considered that proposition, and its elaborate presentation by counsel, and are impressed with the apparent rectitude of the conclusion reached and disposition made of that issue by the New York General Term, arising, as the question did there, on appeal from a judgment of the Special Term holding the bank liable, but dismissing the railroad company. The General Term, in a somewhat extended opinion, reversing the Special Term, concluded that Muirheid, trustee, had full power to sell the stock, and that the bank properly accepted the surrender and made the transfer by issue of the new certificates to the purchaser. Toronto General Trusts Co. v. Chicago, Burlington & Quincy R. Co. and National Bank of Commerce, 64 Hun, 1, 18 N. Y. Supp. 593, affirmed by the Court of Appeals on the appeal of the trustee. Toronto General Trusts Co., as Trustee, v. Chicago, Burlington & Quincy R. R. Co., 138 N. Y. 657, 34 N. E. 514, and Toronto General Trusts Co. v. National Bank of Commerce, 138 N. Y. 657, 34 N. E. 514.

[1] Respecting the proposition that the determination in the New York suit is binding here on appellant, it is contended for him that the

trustee bringing that action was not a trustee for appellant, that appellant was not a party to that litigation, and is therefore in no way bound by it. Without going into the much mooted question of whether or not appellant was in law a cestui que trust under the codicil, we do not think that the particular facts here warrant so restricted a view of appellant's relation to the New York litigation as to give dominance to his precise relation to the trust as created. While the New York suit was nominally brought by the trustee, it is plain that it was brought on the behest of, and for the benefit of, appellant, and no one else. His mother as executrix had made absolute assignment of the stock to Muirheid as trustee, thereby investing him with the full legal title thereto (if indeed under the will he did not without such assignment have the legal title), and in her individual capacity she had requested and consented to Muirheid's sale and transfer of the stock, and reinvestment of the proceeds, and was in no position to complain of that transaction. The only person who then was beneficially interested in any controversy concerning the transfer of the stock was appellant. For him a guardian ad litem was duly appointed in a proper proceeding in the Canadian court, and it was on his petition that the new trustee was appointed, first with power only to collect, and on further petition of appellant by his guardian ad litem, with full powers as trustee. And it was on petition of appellant by his guardian ad litem that the Canadian court authorized an investigation at the expense of the trust estate, into the advisability of bringing suit in New York to recover the transferred stock or its value. And before the suit was brought appellant's guardian ad litem joined in an agreement with counsel respecting the amount and payment of the lawyers' fees for the prosecution of the New York suit; and appellant's knowledge of and participation in the conduct of that suit appears further from the action of the Ontario court, on appellant's petition through his guardian ad litem, some years after the New York suit was begun, authorizing compromise of that action on certain proposed terms. The High Court of Justice of Ontario had full jurisdiction over the rights of appellant, and appellant, by his duly appointed guardian ad litem, in proceeding with the suit in New York in the name of the trustee, was not less a party in interest there because the trustee only appeared as complainant, and the infant was not named as a party. That suit having been instituted by appellant acting by his guardian ad litem, in the name of the trustee, upon the theory that the trustee, if anybody, was lawfully entitled to the possession of the stock for the use and benefit of appellant, and therefore to maintain the suit, and defended as it was with ultimate success upon the ground that the first trustee, having lawful possession and title to the stock, had the right to dispose of it, we are not impressed with the contention that its determination is binding only upon the trustee, and not upon appellant, at whose instance, on whose behalf, and for whose sole benefit it was brought, and under whose direction it was maintained. We are of the opinion that, under the state of facts here appearing, the decision in the New York suit is so far binding on appellant that he cannot be permitted here to maintain the very same kind of action which in the New York suit was thus determined adversely to his interest. Thompson v. Maxwell Land

Grant Co., 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539; Green v. Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061; Plumb v. Goodnow's Admr., 123 U. S. 560, 8 Sup. Ct. 216, 31 L. Ed. 268; Richter v. Jerome, 123 U. S. 233, 8 Sup. Ct. 106, 31 L. Ed. 132; Corcoran v. Canal Co., 94 U. S. 741, 24 L. Ed. 190; James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476 (8 C. C. A.).

[2] Regarding the issue of laches, it appears that, on the date of the affirmance by the New York Court of Appeals of the decision of the General Term, appellant was 22 years of age. Presumably he then knew that his mother had barred herself from ever questioning the sale of the stock by Muirheid, and that in any event, as to her, the outcome of the New York litigation was final, and that, if any right of action remained by reason of the transfer of the stock, appellant alone was its beneficiary; and yet upwards of 20 years further elapsed before the beginning of this suit. It appears that in the meantime a suit was begun by appellant in the state court at Chicago, but nearly 11 years had passed at the time of its commencement, and it was finally dismissed for want of prosecution after pending for a number of years. It is insisted—and authorities in support are cited—that, while appellant might have brought the suit, the right of action was primarily in the trustee, and that appellant's failure to bring the suit would not be laches on his part, nor in any manner impair his right to bring it pending or on the termination of the trust. But notwithstanding the fact that his mother is still living, it appears that the trust was absolutely terminated by the proceedings of June, 1899, by the court in which it was pending, and which had appointed the Trusts Company as trustee. This termination of the trust was upon the petition of appellant, who was then 28 years of age, and of his mother. The order of the Ontario court terminated the trust, discharged the trustee, and recited, as was stated in appellant's petition for the order, that the trustee had conveyed to appellant and his mother all the trust property—including presumably any and all rights of action for the benefit of the trust estate which the trustee then had. Thenceforth it was in himself alone, and not longer in a trustee, that any right of action inhered; and yet since such termination of the trust more than 15 years passed by before this suit was commenced. The record does not disclose that appellant was laboring under any disability during all those years; indeed, the presumption of his intellectual equipment in at least ordinary degree is heightened by the record fact that he is assistant cashier in one of Chicago's largest banks. The alleged wrong, out of which the asserted right of action arose being primarily the wrong of appellee's agent the bank, if recovery were had against appellee, ordinarily it could have recourse for its loss against the agent who caused it. But any right of appellee against the bank is long ago barred by limitation, whereby, through appellant's unreasonable delay before beginning the suit, appellee would now be unable to impose the ultimate loss upon its responsible agent. We find present all those elements essential to sustain the defense of laches as a bar to appellant's asserted cause of action. Johnston v. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Venner v. Trust Co., 204 Fed. 779, 123 C. C. A. 591 (2 C. C. A.); Continental Nat. Bank v. Heilman

et al., 86 Fed. 514, 30 C. C. A. 232 (7 C. C. A.); Spoor v. Wells, 3 Barb. Ch. (N. Y.) 199; Jackson's Admnr. v. King's Admnr., 12 Grat. (Va.) 499.

The decree of the District Court is affirmed.

EASTERN OREGON LAND CO. v. DESCHUTES R. CO.

DESCHUTES R. CO. v. EASTERN OREGON LAND CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1917.)

No. 2814.

1. PUBLIC LANDS ⊂⊃79—RAILROAD LAND GRANTS—PRIORITIES.

Where S. in February, 1906, filed his application to select certain lands as forest reserve lieu lands, which applications were never dismissed or withdrawn until patents were issued in 1913, though the land was temporarily withdrawn from entry in the meantime, the rights of S. under such patents were superior to the right of a railroad whose profile under Act March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. 1916, §§ 4921–4926), granting rights of way through the public lands, was filed in 1908 and approved in 1910.

2. RAILROADS ⊂⊃64(2)—GRANTS OF RIGHTS OF WAY—EVIDENCE.

In a suit to restrain the construction of a railroad in which defendant alleged an agreement with complainant's predecessors in interest and asked that if the bill was not dismissed the court determine the amount of damages sustained, evidence *held* to show that complainant's predecessors in interest did not undertake to bind complainant, who then had an option to purchase the land, by their agreement as to the right of way.

3. RAILROADS ⊂⊃64(2)—GRANTS OF RIGHTS OF WAY—EVIDENCE.

In such suit, evidence *held* to show that it was a condition of the agreement between complainant's predecessor and defendant and of complainant's acquiescence therein that the railroad should be constructed at such a grade as to permit complainant to build a dam approximately 60 feet high, and that on the building of such dam it would be defendant's duty to protect its own roadway from injury by the water stored by the dam by riprapping or building a retaining wall.

4. RAILROADS ⊂⊃64(1)—AGREEMENTS AS TO RIGHTS OF WAY—DUTY OF PARTIES.

Under an agreement that a railroad company might build its road across certain land at such a height as to permit the landowner to build a dam on condition that the company would protect its own roadway by riprapping or building a retaining wall, it was the landowner's implied duty in building the dam to use every reasonable precaution by the construction of a spillway or other engineering device to carry off flood waters.

5. RAILROADS ⊂⊃64(1)—AGREEMENTS AS TO RIGHTS OF WAY—DUTY OF PARTIES.

Under L. O. L. §§ 6552, 6553, authorizing persons, companies, and corporations having title or possessory right to land to use and enjoy the water of any running stream to furnish electrical power and to condemn lands for sites for reservoirs for the storage of water, where the landowner had authority thereunder to acquire lands above the dam not owned by it at the time of the agreement for its reservoir and its water storage purposes, it would be defendant's duty to perform the same duties respecting its roadway through such lands subsequently acquired by complainant, as it undertook to perform respecting the lands owned by complainant.

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6. EMINENT DOMAIN ⟸316—COSTS—PERSONS LIABLE.

Where, in a suit to restrain the construction of a railroad, the answer asked the court, in case the bill was not dismissed, to determine the amount of damages to which complainant might be entitled, and no tender or offer to pay damages had been made prior to suit, the costs were properly imposed upon defendant as on the complainant in a condemnation suit; the answer having been framed in part as a suit for equitable condemnation.

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the Eastern Oregon Land Company against the Deschutes Railroad Company. From the decree (213 Fed. 897), both parties appeal. Reversed and remanded with directions.

In equity. Suit to restrain defendant railroad company from constructing, maintaining, or operating a railroad over certain lands owned by the complainant. From a decree restraining complainant from interfering with the maintenance and operation of the railroad over the lands in suit, and awarding complainant damages in the sum of $1,000 as compensation for the value of a 200-foot right of way through certain of its lands, and costs taxed at $513.22, both parties appeal.

This controversy arises out of conflicting claims by the Eastern Oregon Land Company (hereinafter designated as the "complainant") and the Deschutes Railroad Company (hereinafter designated as the "defendant") to reservoir and water storage rights claimed by the complainant in the Deschutes river and along its banks and rights of way claimed by the defendant over and across certain lands owned by the complainant and through which flows the Deschutes river in Oregon. The lands are located, and for convenience of reference they may be classified as follows:

(a) North half of the southwest quarter (N. ½ of the S. W. ¼) of section 35, township 3 south, range 14 east, Willamette meridian; lot 2 (N. W. ¼ of the N. E. ¼) of section 3, township 4 south, range 14 east, Willamette meridian.

(b) Southeast quarter (S. E. ¼) of section 34, township 3 south, range 14 east, Willamette meridian; southwest quarter of the northeast quarter (S. W. ¼ of the N. E. ¼), west half of the southeast quarter (W. ½ of the S. E. ¼), and east half of the southwest quarter (E. ½ of the S. W. ¼) of section 3; northwest quarter (N. W. ¼), and northwest quarter of the southwest quarter (N. W. ¼ of the S. W. ¼) of section 10, all in township 4 south, range 14 east, Willamette meridian.

(c) Lot 1 (N. E. ¼ of the N. E. ¼) of section 3; northeast quarter of the southeast quarter (N. E. ¼ of the S. E. ¼) of section 9, all in township 4 south, range 14 east, Willamette meridian.

There are certain other lands mentioned in the complaint which, it has been found, the line of the defendant's railroad does not cross or touch, and are, therefore, not involved in this appeal. These lands are described as follows:

(d) West half of the southwest quarter (W. ½ of the S. W. ¼) of section 27, township 3 south, range 14 east, Willamette meridian; southeast quarter of the northwest quarter (S. E. ¼ of the N. W. ¼) of section 3; northwest quarter of the southeast quarter (N. W. ¼ of the S. E. ¼), northeast quarter of the southwest quarter (N. E. ¼ of the S. W. ¼), and northwest quarter of the southwest quarter (N. W. ¼ of the S. W. ¼) of section 9; northeast quarter of the southeast quarter (N. E. ¼ of the S. E. ¼) of section 8, all in township 4 south, range 14 east, Willamette meridian.

The complainant sued to enjoin and restrain the defendant from constructing and maintaining its railroad along the Deschutes river over and across complainant's lands described above. The original complaint was filed April 18, 1910; the amended complaint, November 12, 1913. At the time the original complaint was filed the defendant was engaged in the construction of its

road through complainant's lands and had its grade practically completed. The road was located and the work of construction commenced while the land was claimed by complainant's predecessors in interest. These predecessors, so far as they are material to this controversy, were one J. H. Sherar, claiming the lands described in the preceding clauses (a) and (b) of this statement, and the Interior Development Company, claiming the lands described in the preceding clause (c), together with water power rights in the Deschutes river.

The Deschutes river flows through these lands in a deep gorge or canyon, and by reason of falls therein, the quantity of water, the uniformity of flow, and the steep and precipitous banks, the site is valuable for power purposes, provided (it is claimed by the complainant) a 60-foot dam, above ordinary low water in the river, can be maintained at the power site.

The defendant's road runs along the side of the canyon and has been constructed upon a grade at and above the power site, which complainant claims will not admit of a dam 60 feet in height in the river without flooding the fills and embankments of defendant's roadbed above such dam, and in times of high water endangering the road itself in that locality, unless the same is properly protected.

The further claim of the complainant is that the defendant entered into possession of its right of way under oral agreements or understandings with its predecessors in interest to locate its road so as to permit and protect the maintenance of a 60-foot dam, above ordinary low water in the river, but, as the road has been actually built, no such dam can be safely constructed, unless the defendant is required to protect its own roadway above the dam; and, as a consequence, the value of the water power is greatly impaired and damaged. It is alleged in complainant's complaint that the defendant has at all times known that the lands in suit are valuable chiefly because of the fact that the Deschutes river flows through them, and in its course through these lands the flow of the river is so great that it can be advantageously used for the development of power. The prayer of the complaint is that the defendant be enjoined and restrained from constructing, maintaining, building, or operating a railroad over the lands in suit, and from interfering with plaintiff's possession thereof.

The defendant's answer admits that complainant has the legal title to the lands described in the complaint, but it is claimed by the defendant that the complainant acquired its title to such lands after the defendant had entered upon such lands and partly constructed its grade; that defendant entered into possession of its right of way under an agreement with the executors of the estate of J. H. Sherar, B. F. Laughlin. and the Interior Development Company, the predecessors in interest of the complainant in such lands described, in which agreement it was provided that, if the road should be constructed as high as the same could be conveniently raised without making the expense prohibitive and without interfering with the proper and convenient operation of the line, the damage would be nominal; that Laughlin and the Interior Development Company at all times knew where the road was located, and at all times expressed approval of the height at which the line was proposed to be constructed and was being constructed, and never at any time objected to the defendant because of the height or manner in which said road was constructed or to the location thereof, until the line was practically completed across said lands. It is alleged in defendant's answer that it has acquired by purchase certain lands and the right of way over certain other lands for railroad purposes along the Deschutes river, above the lands owned by the complainant; that complainant has acquired no right to flow the waters of the river back upon any of the lands so acquired by the defendant or back or over or upon its right of way, or to raise the waters of the river above its natural flow; and the defendant charges that any dam which the complainant might construct across the Deschutes river, or the development of any power by the use of the waters of the Deschutes river by means of any such dam at or along or in the neighborhood of any of the lands described in the complainant's amended bill as belonging to the complainant, will result in the flooding and overflowing of the defendant's said lands so purchased for railway purposes. and will overflow the defendant's right of way, causing great and irreparable injury and damage to the defendant and its line of road.

The answer concludes with the prayer that the bill of complaint be dismissed; but, in case the court should adjudge that the defendant was not entitled to have the bill dismissed, then the court was asked to determine the amount of damages sustained by the complainant or to which the complainant might be entitled by reason of the location and construction of defendant's line of road over and across the lands owned by the complainant, and that it be decreed that complainant shall make, execute, and deliver a good and sufficient deed therefor upon the payment by the defendant to the complainant of such sum as the court shall find.

Wirt Minor and Veazie, McCourt & Veazie, all of Portland, Or., and Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., for appellant.

A. C. Spencer, W. A. Robbins, and James G. Wilson, all of Portland Or., for appellee and cross-appellant.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. With respect to the lands described as the north half of the southwest quarter of section 35, township 3 south, range 14 east, Willamette meridian, and lot 2 (northwest quarter of the northeast quarter) of section 3, township 4 south, range 14 east, Willamette meridian, the decree of the lower court provides that:

"The title of complainant to said property was acquired subsequent to the acquirement of said right of way of defendant over said property, and the same is subject to such right of way, provided, however, that the right hereby decreed to defendant shall not be understood or considered to interfere with or deprive complainant or its successor in interest of the right to construct and maintain a dam for hydraulic purposes in the Deschutes river where it passes through such property. and installing in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided the track or roadbed of defendant shall not thereby be flooded or damaged, or the operating of its road interfered with."

The first question to be determined is whether the title to the lands described in this part of the decree was acquired by the complainant prior to the defendant's claim of a right of way over such lands. It appears that one Joseph H. Sherar as early as 1871 bought the possessory right of an occupant in certain public lands along the Deschutes river. The land was not at that time surveyed. After the public surveys were extended over that section of the country, Sherar made a homestead entry of the southeast quarter of section 34, township 3 south, range 14 east. At the time he made such entry he supposed that it included the falls of the Deschutes river at that point, and not until 1901 did he discover that the south line of his homestead did not run south of the said falls. He thereupon took steps to acquire title to the lands upon which the falls are situated, namely, lot 2 (northwest quarter of the northeast quarter) of section 3, township 4 south, range 14 east; and, in addition, the north half of the southwest quarter of section 35, township 3 south, range 14 east, and the southeast quarter of the northwest quarter of section 3, township 4 south, range 14 east. As the line of the defendant's railroad does not cross or touch the last-named tract of land in section 3, the title thereto is not involved in this appeal.

[1] It will not be necessary to enter into detail concerning the steps taken by Sherar to acquire title to these tracts of land. It is sufficient for the present purpose to say that on the 13th day of February, 1906, Sherar filed a contest and protest against the application of one A. L. Veazie on behalf of the Interior Development Company to select these lands under the act of Congress of June 4, 1897, as forest reserve lieu lands, with base in the name of the Santa Fé Pacific Railroad Company. Sherar's protest against the Veazie selection was on the ground that the lands were not at the time of the latter attempted selection vacant or unoccupied lands, but were in the possession of Sherar, who at that time, to wit, on the 13th day of February, 1906, presented and filed in the land office his application to select the same lands as forest reserve lieu lands under the Act of June 4, 1897, with base likewise in the name of the Santa Fé Pacific Railroad Company. These applications were prosecuted in the land office, were never dismissed or withdrawn, and Sherar continued to reside on the lands until his death in 1908. These selections by Sherar were finally approved by the Secretary of the Interior and ordered passed to patent on February 25, 1913, and on that day patents were issued thereon in the name of the Santa Fé Pacific Railroad Company for the use and benefit of the heirs and devisees of Joseph H. Sherar, who held the power of attorney from the Santa Fé Pacific Railroad Company tc convey the selected lands. (Executors of J. H. Sherar v. A. L. Veazie, Attorney in fact for the Santa Fé Pacific R. R. Co., decision by Frank Pierce, First Assistant Secretary of the Interior, dated June 16, 1909. Not reported.)

These titles, evidenced by patents of the United States, were vested in the complainant at the time of the commencement of this suit. Upon the trial of the case it was stipulated that, prior to the issuance of patent by the United States for these lands to the Santa Fé Pacific Railroad Company for the use and benefit of the heirs and devisees of Sherar, the defendant had located and constructed its line of railroad over and across the said lands, claiming a right of way under the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." This right of way (200 feet in width, being 100 feet on each side of the center line of the railroad track) is claimed by the defendant to have been acquired under that act by filing with the register of the land office at The Dalles, Or., on the 8th day of November, 1908, a profile of its road, and the approval of said profile by the Secretary of the Interior on the 20th day of June, 1910.

The right of way granted by the act was a right of way over public lands; not a right of way over private lands, or over possessory claims to the public lands. See section 3, Act of March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. 1916, § 4923). It was the opinion of the court below that the subsequent approval of the prior application of the Santa Fé Pacific Railroad Company to select such lands in lieu of other lands under the Act of June 4, 1897, c. 2, 30 Stat. 36, did not relate back to the date of the application and supersede the rights of the defendant acquired by the approval of its map of definite location under the Act of March 3, 1875. This opinion was based upon the opinion of this court in Daniels v. Wagner, 205 Fed. 235, 125 C. C. A.

93; but that case was reversed in the Supreme Court on appeal (237 U. S. 547, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40); the court holding that one who has done everything essential, exacted either by law or by the regulations of the land department, to obtain a right from the land office conferred upon him by Congress, cannot be deprived of that right, either by the exercise of discretion or by a wrong committed by the land officers. Under this decision the Sherar lieu land selections, being first in time, were first in right. Clarke v. Halverson, 45 L. D. 54.

It is further stipulated that on April 26, 1906, all the lands in township 3 south, range 14 east, excepting any tracts title to which had passed out of the United States, should be temporarily withdrawn from any form of disposition whatever. The withdrawal was for the purpose of constructing irrigation works under the Act of June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1916, §§ 4700–4708). And on October 24, 1908, a similar order was made in section 3 of township 4 south, range 14 east. When these withdrawals were made, the title to the Sherar lieu land selections had, by the doctrine of relation, passed out of the United States (Daniels v. Wagner, supra) and was in no way affected by the withdrawals.

It follows that a footnote to the Sherar patents, that the lands described were subject to all rights under an application of the Deschutes Railroad Company approved June 20, 1910, under the Act of March 3, 1875, for right of way, was ineffectual to convey to the Deschutes Railroad Company such right of way, as the title to the land had already vested in Sherar's heirs and devisees.

It is also stipulated that on December 30, 1909, and March 18, 1910, the lands embraced in the Sherar lieu land selections were included in the temporary power site withdrawals Nos. 66 and 125 by executive order of the President of the United States, stating that the same were "in aid of proposed legislation affecting the disposal of water power sites on the public domain." These withdrawals were canceled as to the lands included in the Sherar selections on February 25, 1913, in order to allow patents to issue upon said lieu selections. These withdrawals having been made subsequent to the Sherar selections, they in no way affected complainant's titles derived from the United States and based upon such selections.

The dam site owned by the complainant is located across the Deschutes river and, as appears from the map, in lot 2 (northwest quarter of the northeast quarter) of section 3.

We are of the opinion that the court below was in error in that part of its final decree where it holds:

"That the title of the complainant to said property was acquired subsequent to the acquirement of said right of way of defendant over said property and the same is subject to such right of way."

Under the law, as declared by the Supreme Court in Daniels v. Wagner, supra, the title of complainant to said property was acquired prior to the claim of the defendant to a right of way over the same, and the decree should have so provided.

We concur in part in the further holding of the court that what-

ever right the defendant has (a question to be considered later) "shall not be understood or considered to interfere with or deprive complainant or its successor in interest of the right to construct and maintain a dam for hydraulic purposes in the Deschutes river where it passes through such property and installing in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes," but we do not concur in the proviso that "the track or roadbed of defendant shall not thereby be flooded or damaged, or the operating of its road interfered with." The defendant having entered upon these lands without authority, except such as we shall refer to later, no conditions can be imposed upon the complainant to protect defendant's roadbed and embankments from the waters of the Deschutes river. That condition rests upon the defendant as a duty incident to the maintenance of its right of way.

[2] 2. With respect to the lands described as the southeast quarter of section 34, township 3 south, range 14 east, Willamette meridian; the southwest quarter of the northeast quarter, the west half of the southeast quarter, and the east half of the southwest quarter of section 3; and the northwest quarter and northwest quarter of the southwest quarter of section 10, all in township 4 south, range 14 east, Willamette meridian—it was admitted by the defendant in its answer that the complainant was the owner of such tracts of land and that the defendant had located its road over and across the same. The court below awarded to the complainant the sum of $1,000 as compensation for the right of way taken by the defendant across said lands, and, upon the payment of that sum by the defendant before the final decree, the court entered its decree in favor of the defendant as the owner of such right of way.

The original bill of complaint, filed April 18, 1910, alleged title in these and the other lands described, and prayed for an injunction restraining the defendants from entering upon and trespassing upon the same and from constructing or building a railroad over the same and from interfering with the possession of the complainant or its enjoyment of the lands, pending the determination of the suit. At that time the line of road had been graded through part of these lands, but no rails had been laid thereon. There is no evidence in the record as to the quantity of land occupied by the road or its value, but the defendant alleges that it agreed to pay the Sherar heirs $1,000 for the right of way in case the holder of the option (the complainant) did not purchase the land. The complainant did purchase, and, upon this evidence as to an alleged agreement with the executors of Sherar's estate, the court assumed that $1,000 was a reasonable compensation to be paid for the right of way; but the agreement was not in writing, and the evidence is clear that neither the executors of the Sherar estate nor their attorneys undertook to bind the complainant to this agreement. On the contrary, the attorneys for the executors of the Sherar estate, in a letter dated August 25, 1909, addressed to J. W. Morrow, representing the defendant, said:

"The executors (of the Sherar estate) understand that if the persons (the complainant) who have agreed to purchase do not take the property (includes the lands above described) that your company will pay one thousand dollars

for the right of way. *If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way.*" Signed: Huntington & Wilson.

C. Monroe Grimes, one of the executors of the Sherar estate, testified that J. W. Morrow, representing the defendant company, came to him for the purpose of getting a right of way over the Sherar property and they went to Huntington's office and took it up with him; that Mr. Morrow was told:

"That if the Sherar estate did not negotiate a sale that was on at that time, that they should have the right of way to go through the property for one thousand dollars, *but in the event the sale was made they would have to make their terms with the other people (the complainant).*"

Mr. Morrow was further informed that the Eastern Oregon Land Company was the purchaser with whom the executors of the Sherar estate were negotiating.

The prayer of the defendant's answer was that the court should determine complainant's damages by reason of the location and construction of defendant's line of road over and across the lands owned by the complainant, in the event the court refused to dismiss complainant's bill. The court refused to dismiss complainant's bill, and thereupon fixed the value of the right of way at $1,000; but in the understanding or agreement between the parties this valuation was coupled with the condition that complainant should have the right to build a dam in the river 60 feet in height, and the defendant should take care of its right of way above this dam. The evidence upon this question will be discussed in the following paragraph of this opinion.

[3] 3. With respect to the lands described as lot 1 (northeast quarter of the northeast quarter) of section 3, and the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east, Willamette meridian, the controversy relates to an agreement or understanding between the predecessor in interest of the complainant and the defendant concerning the height of a dam complainant proposed to place in the Deschutes river for the purpose of developing hydraulic and electric power, and the elevation of defendant's railroad above the river so as to permit such a dam. This controversy is not, however, confined to the lands above described; it relates, either directly or indirectly, to all the lands involved in this appeal, and particularly to lot 2 (northwest quarter of the northeast quarter) of section 3, township 4 south, range 14 east, adjoining lot 1, above mentioned.

The conclusion of the court below, as expressed in its final decree, is that it was understood and agreed by the defendant and the Interior Development Company, the owner of the tracts of land above mentioned at the time of said agreement with the defendant, and at the time of the entry thereon and the construction thereover of defendant's line of railroad, *that the location of defendant's track should not interfere with or deprive the Interior Development Company or its successor in interest of the right to construct and maintain a dam in the Deschutes river where it flows through such property, for hydraulic purposes, and to install in connection therewith appliances for*

the purpose of developing hydraulic and electric power for all purposes. In this conclusion we concur. We think this agreement or understanding is fully supported by the evidence, and that the complainant acquired all the lands involved in this appeal with this agreement or understanding.

But the court adds a proviso to this conclusion, as follows:

"Provided, however, *that the track and roadbed of defendant should not thereby be flooded or damaged or the operation of its road interfered with.*"

In other words, that whatever dam the complainant may build must be constructed at the peril of causing injury to the fills and embankments of the defendant's railroad and of being held responsible therefor in damages, without any obligation or duty on the part of the defendant to protect such fills and embankments and make them reasonably secure against the water above such a dam.

We have failed to find any evidence in the record supporting this clause of the decree with respect to these lands, or any of the lands involved in this appeal. It was certainly not an agreement or understanding as stated by either of the parties, and we do not think it is an inferable conclusion from anything that passed between them.

It appears from the evidence that the defendant ran a survey through this property in October, 1908, for its line of road. This line was located on the water grade along the river. It passed the dam site on lot 2 of section 3, at an elevation of approximately 20 feet above the low water in the river, and this elevation was maintained along the river with some little variation until the line passed out of plaintiff's lands, crossing the south line of the northeast quarter of the southeast quarter of section 9, township 4 south, range 14 east, at an elevation of about 20 feet above the low water of the river. In February or March, 1909, B. F. Laughlin, holding an option to purchase the Sherar lands for a water power proposition, visited J. P. O'Brien, the president of the Deschutes Railroad Company, at Portland, Or., for the purpose of obtaining information concerning the location of the line of the Deschutes Railroad along the Deschutes river through the Sherar lands. Laughlin testified that O'Brien told him that he wanted the witness to get all the interested people to agree upon a price for a right of way on the river, and at the same time he guaranteed to protect the Sherar property to the fullest extent that it was possible. O'Brien called in Mr. Boschke, the chief engineer of the road, and asked him how they had run their grade on the river. Boschke replied that they had run it right along—a few feet from water. O'Brien told Boschke he would have to go back and rerun the line and save every foot of power for the Sherar property that could be saved; that they had examined the property with their engineer; and that they might have to buy it before they got through, but to save every foot it was possible to save. Mr. Boschke remonstrated, said he would have to go back 12 miles. O'Brien told him it did not make any difference how far he had to go back; he must do it.

Mr. O'Brien testified, concerning this conversation with Mr. Laughlin, that the line of railroad had been located at that time. His recol-

lection was that there had been several surveys. One was on the grade close to the river, and there was another, his recollection was, 35 or 40 feet above the river. He said Laughlin asked him how high they could get up in the air at Sherar's. The witness said he did not know; that would be a question of cost. As a result of it, he sent for Mr. Boschke. He told Mr. Boschke to run a line there and see how far he could get up at Sherar's, without making the cost prohibitive. He asked Mr. Boschke if he had any idea, or if he could get any idea from the data he had in his possession at that time, as to how high he could go without making the cost prohibitive, and Boschke replied, "In the neighborhood of 58 or 60 feet." O'Brien asked Laughlin if that would be satisfactory at that height—along in there between 58 and 60 feet. Mr. Laughlin said he thought that would be satisfactory; that any height that they could go above where the line was laid at that time was going to help them out. O'Brien asked Laughlin about the right of way. Laughlin said he did not think there would be any question about the right of way; that he would be willing to give the right of way free. The witness told Mr. Boschke to make a survey so as to see how high he could get the line up there without the cost being prohibitive. His recollection was that they spent about $100,000 additional in constructing the line where it was afterward located, over and above the estimated cost of the line on the river grade. This additional expenditure, he said, was made to preserve the power site so they could operate it. It was simply a question of how far they could get up in order to give Laughlin the additional height, in order to develop his power.

Mr. Boschke, the chief engineer, testified, concerning this interview between Laughlin and O'Brien, that the line was then located on the water grade along the river. Laughlin wanted them to change the grade so as to enable them to build a power house at Sherar's Bridge. He did not remember exactly the height he thought he could make; it was 45 or 50—perhaps 60—feet. The whole thing hinged on starting up on a maximum grade and getting as high as they could. That was what his instructions were to do. His understanding was that, if the grade of the road was raised as high as it could be raised, the right of way would be given for a nominal sum, or something of that kind. The purpose was to put the road at such an elevation as to allow Laughlin to build as high a dam as possible.

A. Welch, the president of the Interior Development Company during 1908 and 1909, testified that he visited Mr. O'Brien in September, 1909, in company with Isaac Anderson. They went to find out how high the railroad would be at the Sherar Bridge. They were taken by Mr. O'Brien to Mr. Boschke's office, and the maps were shown and examined. The witness said:

"Then they asked about the right of way, and we told them that, if they would protect our filing, there would be no charges for the right of way. We specified the height of the dam as 60 feet, that we desired." They said they "had taken that into consideration. They showed us the maps of the railroad grades and heights, which showed, as I remember it, between 64 and 65 feet above low water. They had at that time already raised their levels to that height before we made a request for it."

Isaac W. Anderson testified, concerning this conversation with O'Brien:

"I went to see Mr. O'Brien in company with Mr. Welch. I cannot give the exact language of the conversation, of course. I can give you the general conversation. We were expecting to construct a water power plant there, and our talk with Mr. O'Brien was regarding the location of the road; it should be high enough to allow us to build, to put in those improvements, the required improvements, which included naturally a dam, and our plans were to build a dam 60 feet high. * * * We had the maps there and went over the maps with him, or with the engineer, and the understanding we had was that the line would be so located that a dam of that height could be built; and my recollection is Mr. O'Brien instructed, then and there, Mr. Boschke to so locate the line." Mr. O'Brien told Mr. Boschke "that the line should be built there, that we had the rights there, and they should be protected."

Mr. J. W. Morrow, the right of way agent for the Deschutes Railroad Company, was present at the conference between Mr. Laughlin and Mr. O'Brien. Mr. Laughlin was interested in having the railroad company elevate the grade of its road as far as possible, and something was said to Mr. Boschke as to what elevation they could get there, or to what elevation they could reach, and he got the impression and understood then that Mr. Boschke said he could reach an elevation of 60 feet, and with that elevation Mr. Laughlin was entirely satisfied. On August 9, 1909, Mr. Morrow called upon Mr. J. Monroe Grimes, the managing executor of the Sherar estate, to discuss the question of the right of way through the Sherar properties. Mr. Morrow testified that Mr. Grimes said that, so far as he was personally concerned, he would be very glad to donate the right of way; that the value of the property—its principal value—was as a power location, and that by the construction of the line of railroad it would enable them to develop the power plant; that, without it, it would be practically impossible to do so. He said, however, that in view of the fact that there were other heirs to the estate, and that they were widely separated, he could not reasonably satisfy them without some compensation, and they agreed that $1,000 should be paid for the right of way. They then went immediately to the office of Mr. Huntington, the attorney for Mr. Grimes, and the agreement was restated in his presence. Mr. Morrow testified further:

"I was told that some parties had an option on the property, and an understanding was had that, in case the sale was made, then I should have to deal, or I must deal, with the purchaser. * * * At that conference, and with that understanding, it was agreed that the elevation of the line should be such that a dam 60 feet in height above low-water mark should be constructed. I, undoubtedly, had my profile with me at that time. I cannot recall exactly, but in all probability I did. I wouldn't go to solicit the purchase of a piece of right of way without the profile and map showing the location of the property; that is, it is not customary to do it, and I presume that I had it."

The witness testified that he was advised of the outstanding option on the Sherar property, and that on August 24th he met Mr. Walter S. Martin, the president of the complainant corporation, on the train coming from Salem, and the witness then learned that he, or his company, the complainant, was the prospective purchaser. The witness testified:

"We went into the matter pretty thoroughly: in fact, I think I broached this subject to Mr. Martin, and it developed that he was the prospective purchaser; and I outlined to him the agreement that I had reached with the Sherar estate representatives, and that agreement was entirely satisfactory to him. He said that we could go on and build the line, and, as a matter of fact, when the thousand dollar consideration was mentioned, Mr. Martin wasn't at all interested in that feature of it. I said to him, 'I have agreed to pay the Sherar estate a thousand dollars, and I will do the same thing by you.'

"To that Mr. Martin simply said that it was satisfactory. He was perfectly satisfied to have us go on and construct our line, and he was willing to carry out the agreement that I had had with the Sherar estate people."

On the next day Morrow wrote to Huntington & Wilson, attorneys for the Deschutes Railroad Company, as follows:

"Huntington & Wilson, Attorneys at Law, The Dalles, Oregon—Gentlemen: This will acknowledge receipt of your letter under date of August 25th confirming our conference and understanding over the contention with reference to the construction of our line through the Sherar's estate property, for which I thank you very much. And at the same time I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line."

This letter simply asserts that Martin had expressed a willingness to have the railroad company go upon the land and construct its line. It did not claim that Martin had consented to the railroad company constructing its line without regard to the terms that had been agreed upon concerning the protection of complainant's power plant, and there is nothing in the following correspondence upon this subject that gives to Mr. Martin's assent any waiver of such terms. Mr. Martin testified that the lands were required for hydroelectric possibilities, and, with respect to the interview with Mr. Morrow, he said:

"I remember that Mr. Morrow said that he thought the Deschutes river was an exceptional opportunity for the development of power and that we had a valuable property there. * * * What I said in reply to the thing (right of way) was that, if they do anything in regard to the right of way which damages the power value of that property, they do so at their own peril, and, if they damage that property from the point of view of its power possibilities, we will feel free to retire from our contract."

This evidence, taken in connection with all the surrounding circumstances and conditions, indicates that the agreement or understanding of the parties was that the railroad was to be raised so as to protect the power plant to be located upon the lands now owned by the complainant, and the defendant was to protect such power plant by taking care of its own right of way through such lands.

The railroad was constructed along the Deschutes river and through the lands involved in this appeal, upon a maximum grade of eight-tenths of 1 per cent. Upon this grade the road reached an elevation above the sea of 779.6 feet at a point designated on the map as the "Interior Dam Site." At this point the elevation of the river, in March, 1909, was 722.1 feet; making the elevation of the road above the river 57.5 feet. On April 3, 1910, the elevation of the river was 716.3 feet; the elevation of the road above the river being at that time 63.3 feet.

On August 31, 1910, the elevation of the river was 715.3 feet; the elevation of the road above the river being 64.3 feet. But it is plain from the testimony that, with the grade of the road as it has been constructed, a dam cannot be built at this point 60 feet in height above the river with safety to any interest connected with either the railroad or power plant properties without some method of protection on the part of the defendant; and we think the agreement to raise the elevation of the road to the grade to which it has been carried was coupled with the agreement to protect complainant's power plant by taking care of its own right of way through such lands. If this was not the agreement, then the raising of the grade by the defendant was useless and accomplished no purpose. Besides, it is obvious that the duty of the railroad company to take care of its own right of way is the usual and the only practical method of using such right of way to advantage.

Upon this question we have a practical demonstration of what the grade should have been, by a railroad constructed at the same time and under similar conditions, just across the river. At the same time the Deschutes Railroad was being built up the south bank of the river, the Oregon Trunk Line was engaged in building a railroad up the north bank of the river. The distance between the two roads at the dam site is 551 feet. As a result of the negotiations between complainant's predecessors in interest and the officers of that line of railroad for a right of way along the north bank of the river, that road constructed its grade at such an elevation that it passes the dam site at an elevation of 785.27 feet, or 5.67 feet higher than the elevation of defendant's railroad.

G. A. Kyle, the chief engineer of the Oregon Trunk Line, testified in this case that he did not consider a railroad constructed past the dam site, especially if a 60-foot dam is to be built there, would be safe at any less elevation than 70 feet. He accordingly raised the Oregon Trunk Line to that height above the river. He had examined the roadbed of the Deschutes Railroad Company at and above the dam site. He did not consider it would be safe to construct a dam at that point 60 feet in height with the railroad constructed as it is, unless they used a great deal of riprap on the present banks. If plenty of riprap was placed there, he thought the danger would be slight. Of course, it might cave out in a few places where the rocks are of volcanic ash—in fact, it is nearly all volcanic ash for a short distance, but that could be riprapped, he supposed, and made perfectly safe.

Mr. Boschke, the chief engineer of the defendant railroad, was asked:

"Q. Did Mr. Whistler (an engineer employed by the plaintiff to examine the lands in controversy as to their availability for power purposes) ever make any objection to you that your line wasn't high enough for the purposes for which his client wanted to use the property there? A. He spoke of the upper end, the way our grade lay, where the water came down, coming down the natural grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. I said to him, *that part of it, we would readily change that when the time came; when he had a dam there, but I did not believe in spending any money to change that at this time.* * * *

"Q. How high a dam did you calculate could be built at the dam site without interfering with your road? A. I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as I could get up, starting at eight-tenths grade at the tunnel. I think a dam readily could be built there 60 feet or over without flooding our tract or right of way so as to interfere with our railroad, if the flood waters were properly taken care of."

In the course of the cross-examination of this witness concerning a previous affidavit made in the case, he was asked this question:

"Q. If the dam were constructed at the dam site only 60 feet in height, you have so built your railroad it would not affect your railroad at that place? A. No. I think it could be built there and protected, *inasmuch as we would have to do more riprapping at those places*, I mean.

"Q. In your affidavit you say a dam can be built there 50 feet in height, without affecting your railroad? A. Of course, it can. *That is only a nominal expense, a few thousand dollars to riprap those banks and make them safe, but we certainly wouldn't be spending that money now until there is a dam there to spend it for.*

"Q. Then I understand, Mr. Boschke, that in your judgment a dam can be built at the dam site 60 feet in height, and it wouldn't affect your railroad as now constructed at all? A. I think so."

The witness was asked:

"Q. Then how did you expect to protect your railroad at the dam site? A. * * * Build a retaining wall, or something like that. It is only a matter of a couple of feet there. It wouldn't be a hard job to keep out two feet of water."

[4] The conclusion we draw from this evidence is that the defendant, in accordance with the agreement or understanding had between the original parties and the subsequent acquiescence of the complainant, has constructed its railroad through complainant's lands upon a grade that will permit the complainant to build a dam approximately 60 feet in height above the low water in the river, but that this agreement or understanding had this further condition, that, upon the building of such a dam, it would be the duty of the defendant to protect its roadway by riprapping, or by building a retaining wall along the river side of the fills and embankments of its right of way, so as to protect the same from injury by the water to be stored in the river and reservoir above such dam. This condition necessarily implies a duty on the part of the complainant, in the building of its dam, to use every reasonable precaution by the construction of a spillway, or other engineering device, to carry off such high water as may come down the river in flood seasons.

[5] 4. The defendant interposes the further objection to complainant's proposed dam, that the defendant has acquired certain lands by purchase and the right of way over certain other lands above the lands owned by the complainant; that the plaintiff has acquired no right to raise the water of the river so as to flow upon any of the lands so acquired by the defendant, or back or over or upon its right of way, or to raise the waters of the river above its natural flow or above its natural fall.

It appears from the evidence that the fall of the river between the dam site and the south line of the northeast quarter of the southeast

quarter of section 9, township 4 south, range 14 east—the western limit of complainant's lands—is approximately 25 feet. If the complainant acquires no other lands on the river above the lands mentioned, this would be the limit of the plaintiff's right of reservoir or water storage and would correspondingly limit the height of the dam. But the statute of Oregon provides that persons, companies, and corporations having title or possessory right to the land, shall be entitled to the use and enjoyment of the water of any running stream within the state to furnish electrical power for any purposes, and may appropriate such waters, and shall have the right to condemn lands for certain uses, among others, for the sites of reservoirs for the storage of water for future use. Lord's Oregon Laws, §§ 6552, 6553. The complainant, having the right of eminent domain, has authority to acquire thereby whatever lands are necessary for its reservoir and water storage purposes, as and for a public use. See Grande Ronde Electrical Co. v. Drake, 46 Or. 243, 78 Pac. 1031; Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725; Henderson v. Lexington, 132 Ky. 390, 111 S. W. 318, 22 L. R. A. (N. S.) 136.

The fact that the project is not now fully completed will not prevent the complainant from exercising its right to condemn; the right to complete a project so far completed is the essential right to condemn land for that purpose. When the project, corresponding to a dam 60 feet in height, is so completed, the defendant will be subject to the same conditions with respect to its right of way through such lands as it has undertaken to perform with respect to the lands involved in this appeal.

[6] 5. The next objection to the decree comes from the defendant. The objection is that the court below treated the case as a condemnation suit and imposed the costs upon the defendant. The prayer of the defendant's answer was that, in case the court refused to dismiss complainant's bill, then it should determine the amount of damages sustained by the complainant, or to which complainant might be entitled by reason of the location and construction of defendant's line over and across said property. In other words, the defendant's answer was framed, in part, as a suit for equitable condemnation, and it was so treated by the court. The defendant made no tender and no offer to pay damages until after this suit was commenced. The costs were therefore properly imposed upon the defendant as the complainant in the condemnation suit.

6. The time has passed when a decree can be entered in this case based upon the conditions prevailing when the suit was commenced. The railroad has been built by the defendant and is now in operation through the lands involved in this appeal. The complainant acquiesced in the building of the road through its lands, upon the understanding and agreement had by the defendant with complainant's predecessors in interest concerning the proposed dam, 60 feet in height above ordinary low water in the Deschutes river where it flows through such lands. This agreement provided for the protection of this dam and its use for hydraulic purposes in connection with appliances for the development of hydraulic and electric power for all purposes. The de-

cree must therefore conform to the conditions prevailing when the decree was entered in the lower court.

The decree of the lower court is, accordingly, reversed, and the cause remanded, with directions to enter a decree: That the title to lands described as the north half of the southwest quarter (N. ½ of the S. W. ¼) of section 35, township 3 south, range 14 east, Willamette meridian, and lot 2 (N. W. ¼ of the N. E. ¼) of section 3, township 4 south, range 14 east, Willamette meridian, was acquired by the complainant prior to the right of way claimed by the defendant. That the defendant entered upon and has occupied its right of way over such lands upon the condition that it would not interfere with, or deprive the complainant or its successors in interest of, the right to construct and maintain a dam for hydraulic purposes in the Deschutes river where it passes through such lands, 60 feet in height above the ordinary low water in the Deschutes river, and the right to install, in connection therewith, appliances for the purpose of developing hydraulic and electric power for all purposes; the defendant to protect such power plant and the appliances connected therewith by taking care of its own right of way through such lands by riprapping or by building retaining walls along the river side of the fills and embankments of its right of way, so as to protect the same from injury by the water to be stored in the river and reservoir above such dam; the complainant, in building its dam, to use every reasonable precaution by the erection of a spillway or other engineering device to carry off such high water as may come down the river in flood seasons. Upon the foregoing consideration, and the payment by the defendant to the complainant of the nominal sum of one dollar, in accordance with the agreement between the parties, the complainant will execute and deliver to the defendant a good and sufficient deed for the right of way through the lands described, 200 feet in width, being 100 feet on each side of the center line of the railroad track.

The decree will further provide: That the title to lands described as the southeast quarter (S. E. ¼) of section 34, township 3 south, range 14 east, Willamette meridian, and southwest quarter of the northeast quarter (S. W. ¼ of the N. E. ¼), west half of the southeast quarter (W. ½ of the S. E. ¼), and east half of the southwest quarter (E. ½ of the S. W. ¼) of section 3, northwest quarter (N. W. ¼), and northwest quarter of the southwest quarter (N. W. ¼ of the S. W. ¼) of section 10, all in township 4 south, range 14 east, Willamette meridian, is in the complainant. That, in addition to the payment of $1,000 for the right of way through such lands, it shall be decreed, as a further consideration for such right of way, that the defendant shall not interfere with, or deprive the complainant or its successors in interest of, the right to construct and maintain a dam for hydraulic purposes in the Deschutes river where it passes through such lands, 60 feet in height above the ordinary low water in the Deschutes river, and the right to install, in connection therewith, appliances for the purpose of developing hydraulic and electric power for all purposes; the defendant to protect such power plant and the appliances connected therewith by taking care of its own right of way through such lands by riprapping or by building retaining walls along

the river side of the fills and embankments of its right of way, so as to protect the same from injury by the water to be stored in the river and reservoir above such dam; the complainant, in building its dam, to use every reasonable precaution by the erection of a spillway or other engineering device to carry off such high water as may come down the river in flood seasons. Upon the foregoing consideration, and the payment by the defendant to the complainant of the sum of $1,000, in accordance with the agreement between the parties, the complainant will execute and deliver to the defendant a good and sufficient deed to a right of way through the lands described, 100 feet in width, being 50 feet on each side of the center line of the railroad track.

The decree will further provide: That the title to lands described as lot 1 (N. E. ¼ of the N. E. ¼) of section 3, and the northeast quarter of the southeast quarter (N. E. ¼ of the S. E. ¼) of section 9, all in township 4 south, range 14 east, Willamette meridian, is in the complainant. That the defendant shall not interfere with, or deprive the complainant or its successors in interest of, the right to construct and maintain a dam for hydraulic purposes in the Deschutes river where it passes through such lands, 60 feet in height above the ordinary low water in the Deschutes river, and the right to install, in connection therewith, appliances for the purpose of developing hydraulic and electric power for all purposes; the defendant to protect such power plant and the appliances connected therewith by taking care of its own right of way through such lands by riprapping or by building retaining walls along the river side of the fills and embankments of its right of way, so as to protect the same from injury by the water to be stored in the river and reservoir above such dam; the complainant, in building its dam, to use every reasonable precaution by the erection of a spillway or other engineering device to carry off such high water as may come down the river in flood seasons. Upon the foregoing consideration, and the payment by the defendant to the complainant of the nominal sum of one dollar, in accordance with the agreement between the parties, the complainant will execute and deliver to the defendant a good and sufficient deed to the right of way through the lands described, 200 feet in width, being 100 feet on each side of the center line of railroad track.

When the complainant has completed its project by the acquisition of title to other lands above those to which it now has title, the defendant will be subject to the same conditions with respect to its right of way through such lands as it is now decreed to perform with respect to the lands involved in this appeal.

The costs on this appeal will be divided equally between the complainant and the defendant.

HUNT, Circuit Judge (concurring). The case is not the simple one where an owner, who, having stood silent observing that a railroad is being built upon his land, thereafter seeks to eject the railroad company or to enjoin the operation of the railroad as located. Were it such, I doubt not that the only remedy the owner has would be suit for damages in compensation. Rather is it an instance of where an owner who, after parleying upon the very point involved, the location

of the road with relation to the preservation of water power, and after he has had an understanding with the company that the location to be chosen would not prevent the owner from constructing and maintaining a dam 60 feet above ordinary low water in the river, that height being necessary for the proper development of the water power, has agreed that the company may go on and construct its road. I put the case in this way, because, upon a careful reading of the whole evidence, I cannot reach any other conclusion than that the parties to the several original talks, keeping in mind the essential things to be accomplished, meant to have it that the location of the railroad would be such that the development of the water power by a 60-foot dam would not be interfered with or impeded. I gather that it was a reciprocal arrangement made so that the railroad company would, on the one hand, obtain the full enjoyment of the valuable right of locating its proposed railroad over the lands involved, while, on the other hand, the landowner would be safe in the knowledge that in passing the right of way he would yet preserve the valuable right to use and develop his property for water power purposes by constructing a 60-foot dam. And if a decree can be made whereby the enjoyment of the one right can be held compatibly with the other, I think the courts will but be making effective the expressions and purposes of those who conferred upon the matter when it was fresh for adjustment. I therefore think that Judge MORROW has drawn the proper conclusions from the evidence.

With respect to the acquisition of the Sherar lands by lieu selection, my view is that by filing the lieu selection on February 13, 1906, Sherar acquired a right—it can be called an inchoate or initiatory right to enter the land—of sufficient strength and extent to avail him, not necessarily against all right of the United States to withdraw the lands from disposition, but of enough extent to protect his selections so that when his claim was examined and was not rejected for some error in the matter of the selection or fault in the proceedings incidental thereto and was held valid and regular, and the order of withdrawal was canceled, he was properly entitled to a patent to the land. Right of selection was suspended between the date of the order of withdrawal and cancellation of such order, but not killed. This being true, the patent though not issued to him until February, 1913, protected his selection as a lieu entryman with rights initiated and accrued in 1906 prior to the temporary withdrawal order also in 1906, against the subsequent and intervening application of the railroad company made in 1908 after the withdrawal order, for right of way across the land.

I think this conclusion finds support in the reasoning of the opinions in Spokane Falls, etc., Ry. Co. v. Ziegler, 167 U. S. 65, 74, 75, 17 Sup. Ct. 728, 42 L. Ed. 79; Weyerhauser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. 300, 55 L. Ed. 258; and Daniels v. Wagner, 237 U. S. 547, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40. As also bearing upon the construction of the Acts of March 3, 1875 (18 Stat. 482, c. 152 [Comp. St. 1916, §§ 4921–4926]), and February 15, 1901 (31 Stat. 790, c. 372 [Comp. St. 1916, § 4946]), see the opinion of Secretary of the Interior in 32 L. D. 597.

GILBERT, Circuit Judge (dissenting). There is one proposition which I think is decisive of the whole question of this appeal. It is that the plaintiff and its predecessors in interest acquiesced in the construction of the road at the elevation at which it was built. The work of construction was begun in August, 1909, and it was continuously prosecuted until it was completed in the latter part of February, 1910. All the parties in interest knew that the work was being done. William McKenzie, one of plaintiff's agents, at Portland, testified that a profile of the road was submitted to him "along in August or September or October, 1909." In September, Whistler, an engineer, was employed by the plaintiff to examine the lands in controversy, and he reported to the plaintiff on October 6, 1909. In his report he referred to the fact that he had been instructed to take up with the two railroad companies "now building up the Deschutes Canyon the matter of their locations at Sherar Bridge power site." He stated that Boschke had turned over to him a blueprint of location and profile for some miles above and below the Sherar Bridge site, and he proceeded to say:

"Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine. In either case, however, I am reasonably certain the railroad company would object seriously to raising their location. An .8 per cent. grade was used by the company in climbing over the United States Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over the Sherar site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line."

Here was definite knowledge acquired by the plaintiff on October 6, 1909, that the road was being constructed probably not over 60 feet above the surface of the water. Boschke testified that:

Whistler "made no protest whatever as to the height at which our line was above the dam, in that vicinity. He never attempted to stop us from going ahead, or try to induce us to change our grade there."

No protest was ever made against the construction of the road at the altitude where it was placed by the plaintiff or its predecessors in interest until some time in March, 1910, and the objection which Martin, the plaintiff's president, made at that time, in his interview with Morrow, the right of way agent, was not that the railroad company had not carried out its agreements as to the altitude of its road above the dam site. The objection was confessedly inspired by a report which White & Co. had made recommending a dam 100 feet or more in height at the dam site. In his conversation with Morrow, Martin made no complaint that he could not construct a dam 60 feet in height. What he complained of was that he could not construct one very considerably higher than that. So in its first bill of complaint, which was filed on April 18, 1910, the plaintiff did not rely upon or plead an agreement which would permit the construction of a dam 60 feet high. In fact, it specifically denied that there had been any agreement at all, and its sole ground of complaint as alleged was that the road had been

placed at such a height that the plaintiff could not build a dam "exceeding 60 feet" in height. There never was a contention on the part of the plaintiff that there was an agreement or understanding that the road was to be so located as to permit the construction of a 60-foot dam at the dam site until the amended complaint was filed on November 12, 1913, about four years after the road was built. In that complaint the plaintiff made volte-face and alleged the things it had denied, and denied the things it had alleged in the original complaint. And even then the suit was not for the specific performance of an agreement or for damages for violation of an agreement, but it was a suit to obtain an injunction against maintaining or operating the railroad, and in the proofs in this case there is no testimony whatever that in purchasing the property the plaintiff relied upon or knew of any agreement between its predecessors in interest and the railroad company. In fact, Martin denied that there was such an agreement. He said:

"I ascertained that the people from whom we were buying the property had not in any way involved the property in any promises or agreements or deeds, or any act at all which involved the question of right of way. What remained to be settled, if we bought, was the question of whether the railroad had ever had any right to come on there at all or not."

To me it seems too plain to admit of discussion that the railroad company cannot now be made to change the location of its road, either to a greater elevation on its present line, which it seems is impracticable, or to remove it to a line further north where a workable higher grade might be found. There is but one remedy against a railroad company which has been permitted to go upon land and construct a line of road where the landowner has acquiesced in the construction of the road, and that is an action for damages.

"If a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages." Donohue v. El Paso & Southwestern R. Co., 214 U. S. 499, 29 Sup. Ct. 698, 53 L. Ed. 1060.

Where one stands by and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed or large sums have been expended on the faith of his apparent acquiescence, to eject the railroad company or enjoin the operation of the road as located. His only remedy is an action to recover compensation. Strickler v. Midland Ry. Co., 125 Ind. 412, 25 N. E. 455; Cowan v. Southern Ry. Co., 118 Ala. 554, 23 South. 754; Kakeldy v. Columbia, etc., R. Co., 37 Wash. 675, 80 Pac. 205; Slaght v. Northern Pacific R. Co., 39 Wash. 576, 81 Pac. 1062; Roberts v. Northern Pac. R. Co., 158 U. S. 1, 11, 15 Sup. Ct. 756, 39 L. Ed. 873; Goodin v. Cin. & Whitewater Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95; Dulin v. Railroad Co. 73 W. Va. 166, 80 S. E. 145, L. R. A. 1916B, 653, Ann. Cas. 1916D, 1183; Edwards v. Roberts, 26 Colo. App. 538, 144 Pac. 856; Payne v. Railroad Co., 43 La. Ann. 981, 10 South. 10. Compensation, under the facts of the present case, would mean all the damages which the

plaintiff or its predecessors in interest, or either of them, could lawfully recover for injury to the power site, and on well-settled principles the plaintiff would be entitled to no damages at all, for it made no payment of money under the option for the Sherar lands until after December 1, 1909, and it did not acquire any land of the development company until August 2, 1910. The right to recover damages therefore remained in its grantors. Roberts v. Northern Pacific Ry. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; Kindred v. Union Pacific R. Co., 225 U. S. 582, 32 Sup. Ct. 780, 56 L. Ed. 1216.

As to the lands acquired under the Sherar lieu selection, I think it is clear that the railroad company had acquired a valid right of way prior to the issuance of the patent, and that the patent properly granted the lands with an express reservation of the railroad company's rights. The lieu selection was filed on February 13, 1906. On April 26, 1906, while a contest was pending over the selection, it was ordered that certain lands, including the lands in controversy, "excepting any tracts title to which had passed out of the United States, should be temporarily withdrawn from any form of disposition whatever." This was done by the Secretary of the Interior for irrigation works under the Act of June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1916, §§ 4700–4708). On November 5, 1908, the railroad company adopted its line of definite location over the lands, and three days later filed its profile with the Register of the United States Land Office at The Dalles. On June 10, 1910, the profile was approved by the Secretary of the Interior. The withdrawal was not canceled until February 25, 1913, and on the same day patent was issued to the heirs of Sherar. The Act of March 3, 1899, c. 427, § 1, 30 Stat. 1233 (Comp. St. 1916, § 4945), provides as follows:

"That in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

It is said in Judge MORROW'S opinion that the withdrawal was without avail as to these lands, for the reason that by virtue of the filing of the lieu selection the land, within the language of the withdrawal, was a tract to which, by the doctrine of relation, "title had passed out of the United States," and this is said to be the purport of the decision of the Supreme Court in Daniels v. Wagner, 237 U. S. 547, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40. I submit that there is nothing in that case to sustain the proposition that title passes out of the United States upon the filing of a lieu selection. That decision goes no further than to hold that the entryman under a lieu land selection acquires a right to proceed and obtain title from the United States, and that, when his application is in proper form, the Land Office has no jurisdiction to reject it and sustain the later application of a contesting entryman. The right of an entryman on public land as against the United States is very different from his right as against another entryman. Certainly the right acquired by filing a lieu land selection is no greater than the right which is acquired by a pre-emption entryman upon government land. In both cases

the right acquired by the initial acts is the right to obtain title to the land. The courts have always held that the right of the pre-emption entryman before final payment is made and final receipt is given must yield to the right of the United States to withdraw the land. In Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668, it was held that the occupation and improvement of public lands with a view to pre-emption confer no vested right, but only a preference over others in the purchase of such lands, which right the land officers are bound to respect; but that this inchoate right is not valid against the United States, and that a vested right under the pre-emption laws is only obtained when the purchase money has been paid and the receipt of the proper land officer given to the purchaser. Until this is done the court held that it is within the legal and constitutional competency of Congress to withdraw the land from entry or sale. See, also, Yosemite Valley Case, 15 Wall. 77, 21 L. Ed. 82. A later expression of the doctrine is found in Russian-American Co. v. United States, 199 U. S. 570, 577, 26 Sup. Ct. 157, 159 (50 L. Ed. 314), where it is said:

"Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. Until this is done, it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler."

In Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 311, 23 Sup. Ct. 692, 696 (47 L. Ed. 1064), in determining the right acquired by the lieu land selector before approval of the selection and the acceptance of the deed, it was said:

"The ground upon which complainant insists that it is the equitable owner of the land selected is that it has relinquished a title in fee in a forest reservation, and has selected in lieu thereof vacant land open to settlement, and that the local land officers duly accepted, received, and filed the deed of the land relinquished, and the affidavit that the land selected was nonmineral, and that the officers duly entered such selection upon the official records of the land office, and then and there certified that the land selected was free from conflict, and that there was no adverse filing, entry, or claim thereto. Complainant asserts that was all that it could reasonably do; that nothing remained on its part to do; and that, when such is the case, the equitable title vests, and it is entitled to the protection of a court of equity to preserve and defend the title so acquired."

But the court said that "the mere filing of papers cannot create such title," and that "there must be a decision made somewhere regarding the rights asserted by the selector under the act before a complete equitable title to the land can exist." In short, it was held that the power to approve was judicial in its nature. The doctrine of that case is not overruled in Daniels v. Wagner; but, on the contrary, it is affirmed. Daniels v. Wagner holds that the Land Department committed error in law in assuming that it had a discretion to reject a lieu land selection which in all respects conformed to the statute. In other words, it is the doctrine of the decisions of the Supreme Court that by filing a lieu selection the selector does not acquire title, but only the right to obtain title, and that no interest vests in him until the officers of the Land Department shall pass judgment on the papers filed, accept his deed, and approve his selection, and that this is true, not-

withstanding that no discretion is vested in the Land Office to disapprove a selection and reject a conveyance in any case in which the papers are in proper form. This is recognized in the administrative ruling, 43 L. D. 293, that "no such right is acquired by a forest lieu, railroad, or state selector prior to approval thereof by the proper officer of the United States as will except the land from withdrawal by the government."

In brief, Congress has the power, and may vest it in the officers of the Land Department, to deprive one of his preferred right to acquire the title to public land, and confer it upon another, or devote the land to a public use, at any time before all the preliminary acts prescribed by law for the acquisition of title, including payment of fees, have been performed, so that it only remains to issue the patent. Before that time, the withdrawal of public lands suspends all rights of the entryman or the lieu land selector, and places the lands at the disposal of the government for any lawful purpose. One of the purposes for which it may be used is railroad building, and this is done by granting rights of way by statute across such reserved lands. The lieu land selector in this case had, under the terms of the reclamation act, the right to relinquish his filing and make "another and additional entry as though the entry thus relinquished had not been made." When he elects to stand by his entry, and the lands are again restored to public entry, and he acquires title, while he may be said to acquire it by relation as of the date of his selection, he nevertheless takes it subject to any burden which has been lawfully imposed thereon during the period of the withdrawal. The land so withdrawn in this case might lawfully have been devoted to reclamation works. In that event, the lieu selection would have been annulled.

Again, the evidence fails to show that there was an agreement that the line of road should be so located as to permit the construction of a dam 60 feet in height. The predecessors in interest of the plaintiff, with whom it alleges the agreement was made, are: (a) The Interior Development Company, (b) B. F. Franklin, and (c) the representatives of the Sherar estate. I turn to the consideration of the evidence as to each of these alleged parties to the agreement.

I. It is certain that there was no such an agreement with the development company.

Welch, who was president of the Interior Development Company, which company owned land where the dam site is situated until it turned its rights over to the plaintiff, was called as a witness for the plaintiff. He testified that in September, 1909, in company with Anderson of Tacoma, he went to the office of O'Brien, president of the Deschutes Railroad Company, to find out how high the railroad would be at the point of the dam site; that O'Brien took him to the office of Boschke, the engineer, and he was shown the maps. Welch testified:

"Then they asked about the right of way, and we told them that, if they would protect our filing, there would be no charges for the right of way. We specified the height of the dam as 60 feet, that we desired. The representative of the railroad company said that he had taken that into consideration. They showed us the maps of the railroad grades and heights, which showed, as I remember it, between 64 and 65 feet above low water. They had at that

time already raised their levels to that height before we made a request for it. * * * We decided that that height would satisfy us as far as the railroad was concerned. I mean the height allowing for a 60-foot dam.

"Q. When you went to the railroad company's office, they produced the profile showing the height of the proposed railroad at that place. Is that correct? A. Yes, sir. Q. And you expressed your satisfaction with that? A. Yes, sir; with the map. Q. And did you consider that that elevation would permit you to construct the dam in the manner in which you desired? A. We were satisfied we could construct a dam so we could get 60-foot fall. Q. And how had you in mind to construct the dam for that purpose? A. Well, we had in mind putting in some flood gates one way; and another one was with splash boards. Q. And that was practicable, you considered? A. We considered it was practicable, yes. * * * Q. And you so expressed your satisfaction to Mr. O'Brien and Mr. Boschke. Is that not correct? A. Yes, sir. Q. And advised them that they could go upon the land and construct on the elevation shown on that profile, and, if they did so that they could have the right of way free of charge, as far as the Interior Development Company was concerned? A. Yes, sir; that was the understanding. * * *

"Court: You thought you could construct a 60-foot dam without interfering with the railroad; is that what you thought? A. That was our opinion; yes, sir. Q. (Mr. Wilson) Who was interested in the Interior Development Company with you at that time? A. Mr. McCornack of Salem, E. P. Q. Did you and he own all the stock of the Interior Development Company? A. Yes, sir. Q. Was Mr. McCornack satisfied with that arrangement? A. Yes, sir."

Now, we have in this testimony the express agreement of the president and stockholders of the Interior Development Company that the railroad might be built at the elevation shown on its profile. The plaintiff in buying the property took it subject to that agreement, and was bound by it. The plaintiff, having called the witness, is bound by his testimony. There is no evidence which contradicts Welch's testimony. Anderson's testimony relates to the same conversation, and it in no way discredits or contradicts the testimony of Welch. Anderson was figuring with Welch on purchasing the land of the Sherar estate, for which Welch held an option. He was asked:

"Q. Now, at the time you were talking there, wasn't it understood you told O'Brien you wanted the road elevated? Didn't you say at that time, you and Welch, your people, that if he would elevate it to that height that that would be satisfactory to you, and that the railroad company could have the right of way free of charge if they would elevate it above to clear your 60-foot dam? A. I don't recall that. It may have been mentioned, and it may not. I would not deny or affirm that. I think I was there during the whole conversation. I don't recall any such conversation as that between Welch and O'Brien. I don't recall anything of the kind. I would not deny or affirm that. I don't recall it. I don't recall any conversation about right of way at that time."

It will be seen that Anderson did not deny or contradict the statement of Welch that he advised O'Brien and Boschke "that they could go upon the land and construct on the elevations shown on that profile." O'Brien corroborates the testimony of Welch. He testified that he pointed out to Welch what he proposed to do:

"That we had a line there that was along in the neighborhood of 60 or 62 feet, somewhere in about 60 feet, and told them that we had gone to a great deal of expense elevating our line, or we would go to a great deal of expense lifting our line to this height, and Mr. Welch said that was entirely satisfactory as far as they were concerned—Mr. Welch and Mr. Anderson. Mr. Welch said he would be very glad to donate the right of way free, if I went to that height."

There was no other witness who testified as to the agreement and understanding between the Interior Development Company and the railroad company. The evidence is clear that the development company assented to the construction of the road at the grade indicated on the profile, and on which grade it was constructed, and that it believed that it could construct its dam to a height of 60 feet without interfering with the railroad at that grade. That agreement so made is absolutely conclusive upon the parties to this litigation, so far as the lands purchased by the plaintiff from the development company are concerned. The plaintiff alleged in its second amended complaint that it was agreed between the development company and the railroad company that:

> The latter "should have the right to go upon the lands owned by the Interior Development Company and the lands claimed by the Interior Development Company as above set forth, and construct its railroad over the same. * * * Provided that the railway line to be constructed over said lands by the defendant should be constructed at such an elevation above the water of the Deschutes river that the construction and maintenance of the defendant's railway line should not interfere with the construction and maintenance of a dam 60 feet in height above ordinary low water in said river."

In so alleging the agreement, the plaintiff set forth only a portion of it. The rest of the agreement, as shown by the undisputed testimony, was that the railroad might be constructed at the line indicated by its profile, which was exhibited to the development company, and that the development company in building its dam to the height of 60 feet would take care of its own flood waters. The only water right, or right to construct a dam to divert the waters of the Deschutes river, which the plaintiff has acquired, is that which attaches to the land of the development company, and which was acquired by that company by its notice of December 7, 1908.

2. There was no such agreement with Laughlin.

Laughlin was the holder of the option known as the Hostettler option, an option to purchase the Sherar lands. Under Laughlin's option the plaintiff acquired the Sherar property. It alleged in its amended complaint that, before it purchased the Hostettler option from Laughlin, it was agreed between Laughlin and the railway company that the latter might enter upon the lands described in the option, and locate and construct its railroad line over the same, provided that it should be so located, constructed, and maintained that a dam 60 feet in height above ordinary low-water mark in the Deschutes river might be constructed at any place on the lands described. That allegation of the complaint was not proven. The plaintiff called Laughlin as a witness, and he denied it. He testified that he had a conversation with O'Brien in March or February, 1909, in which O'Brien guaranteed to protect the Sherar property "to the fullest extent that it was possible"; that O'Brien called Boschke in and told him he would have to go back and rerun the line and save every foot of power for the Sherar property that could be saved. Laughlin testified:

> "I don't think any height of dam was mentioned by me. I don't have any recollection about that. We had planned upon a 60-foot dam, 60 foot above mean low water. Q. Didn't you at that time agree that if they would elevate

their line to a level that would be 60 feet above low water, or permit the construction of a dam 60 feet high, that they might go ahead with their construction? A. No, sir; I did not. I said they could go ahead with their construction at that time, provided they paid for it, at any height; if they wanted to pay for all the property, they could go on water grade. Q. In your conference with Mr. O'Brien and Mr. Boschke in the Wells-Fargo building, you stated to them that it would be satisfactory to you, and to the people you represented, for the railroad company to proceed and build on a right of way that would enable and permit the construction of a 60-foot dam, and that if they would do that and raise the line to that elevation that you would see that the Deschutes Railroad Company would be given the right of way for a nominal consideration? A. I did not. I had no talk with them, or either of them, to that effect. Q. Now, in your conversation over the phone, didn't you have an understanding with Mr. Morrow that they could proceed with construction across this property if that elevation was maintained by the railroad sufficient to go over a dam 60 feet high? A. I did not, at no time, or at no place, nor in the presence of anybody at all. I think Mr. Morrow was present at the conference I had with Mr. O'Brien and Mr. Boschke in February or March, 1909. Q. Now, at that time and place, didn't you say to Mr. O'Brien and Mr. Boschke and Mr. Morrow that, if they would raise the grade as high as they could, you would be satisfied, and Mr. Boschke, the chief engineer, referred to his profile maps, and stated that it was possible for him to reach a height so as to clear a 60-foot dam? A. I did not. The matter was not mentioned, any particular number of feet."

The plaintiff having alleged the agreement as it did, and having made Laughlin its witness to prove it, is it not bound by the testimony which he gave? Let us see what other evidence there is to show that Laughlin's testimony should not be accepted as conclusive. The other persons present at the interview were O'Brien, Boschke, and Morrow. O'Brien's testimony was that:

He "asked Mr. Boschke in a general way if he had any idea, or if he could get any idea from the data he had in his possession at that time, as to how high he could go without making the cost prohibitive," and he said "in the neighborhood of 58 or 60 feet, along in there. I asked Mr. Laughlin if that would be satisfactory at that height, along in there, between 58 and 60 feet. Mr. Laughlin said he thought that would be satisfactory. * * * It was simply a question of how far we could get up in order to give him the additional height, in order to develop his power. It was thoroughly understood that the whole question depended, from my standpoint, on the question of how much money we could afford to spend there, without making the line so expensive that we would have to give it up. Q. And you did that, did you, to satisfy Mr. Laughlin in connection with your understanding there with him? A. I suppose that I had. Mr. Laughlin expressed himself as well pleased with what we had done, the instructions that I had issued to Mr. Boschke. And, as I said before, when I asked Mr. Boschke about how high he could go, if he could give an opinion as to how high he could go, or how high he thought he could go, on the data on hand, he said between 55 and 60 feet; and Mr. Laughlin seemed to be well pleased with that."

Boschke testified:

"I indicated approximately what elevation we could make at the dam site, at that conference. I knew we could get up some number of feet, and Laughlin said anything we could get up there would be very desirable. I don't remember exactly the height I thought we could make. It was 45 or 50 feet, perhaps 60. I don't remember, but the whole thing hinged on starting out on a maximum grade, and getting as high as we could. That is what my instructions were to do. Q. Did Mr. Laughlin express satisfaction or dissatisfaction with the approximate height that you indicated? A. Well, as I said, at

this conference he said that every foot we could get up there would be very desirable, and agreeable to them, whatever we could do."

Morrow testified that:

"He (Laughlin) was wanting to know about the elevation there, and really expressed himself as being satisfied with any elevation that we might reach. There was more or less discussion, and Mr. Boschke referred to his profile. and my understanding is, and I think it is true, that he said he could probably reach an elevation of 60 feet. Anyway, whatever that elevation was, Mr. Laughlin expressed himself as being perfectly satisfied with it."

There was no other testimony as to the agreement with Laughlin.

3. There was no such agreement with the representatives of the Sherar estate.

Those representatives were the two executors. Only one of them, Grimes, was called as a witness. His testimony is as follows:

"Q. You didn't have any negotiations at all in regard to a dam site there with the railroad company? A. Not any more than they were notified, that is, in our talk with Mr. Morrow, that if we gave them a right of way through there, they would have to keep high enough to protect the dam site. Q. How high a dam site would they have to protect? A. I had nothing to do about the figures that the dam site was to be, what height they were to keep. It was supposed to be from 60 to 65 feet, my understanding was. Q. Wasn't it 55 feet you were talking about? A. No, sir; I don't think so. I never heard of any 55 feet. Q. What did Mr. Morrow say about keeping up there to protect the dam site? A. I have no recollection of his making any reply whatever."

That is the whole of Grimes' testimony on the subject, and it is clear that his understanding was that the railroad was to be at an elevation of from 60 to 65 feet at the dam site. That understanding was carried out.

It thus appears by the testimony of the president of the development company, by that of Laughlin, and by that of the executor of the Sherar estate, all of whom were called as witnesses for the plaintiff, that there was no agreement on their part with the railroad company, such as is alleged in the plaintiff's complaint.

The testimony on which a contrary conclusion is reached is that of Anderson and Morrow. I have already discussed the testimony of Anderson, and shown that his testimony related only to the interview with Welch, the president of the development company, and that it is entirely in harmony with Welch's testimony. Morrow, it is true, testified, "It was agreed that the elevation of the line should be such that a dam 60 feet in height above low-water mark should be constructed," and this is quoted in Judge Morrow's opinion. But what Morrow so testified to is to be taken in connection with the other portions of his testimony, and, when so considered, all the circumstances indicate that the dam 60 feet in height which he contemplated, and to which he alluded, was a dam 60 feet in height such as Welch said he could erect at the dam site, when he said: "We had in mind putting in some flood gates one way; and another one was with splash boards." If the affidavits which Morrow and Boschke filed in 1910 are relied upon as impeaching the testimony they gave on the trial, I wish to say first, as to Morrow's affidavit, in which he stated that the chief

engineer, by reference to his profiles and maps, stated that it was possible to reach a height so that a dam 60 feet in height could be constructed, and this was agreed to on the part of Mr. Laughlin to be sufficient, Morrow explained that and stated that he believed the affidavit was erroneous, but he admitted that he had the understanding that it was possible to construct a dam of the height of 60 feet, and it seems to have been the understanding of all parties, in the few conversations in which the height of the dam in connection with the location of the grade at the point where the road was built was mentioned, that a dam 60 feet in height could be constructed in the manner in which Welch proposed to construct it. Such a dam, it is admitted, would not interfere with the railroad as constructed. So Boschke in his affidavit had stated that "if the height of the line of the Deschutes Railroad Company were raised to the height of 60 feet, or raised to a height to permit of a 60-foot dam at this dam site, it would be satisfactory." But in explaining his affidavit he said that "Laughlin stated that any height would be satisfactory that we could get up to." I submit that there is substantially no conflict in the testimony, and, if there were, it would be a case for the application of the rule that the finding of the trial judge on conflicting testimony will not be disturbed on appeal.

WHITE v. CHICAGO G. W. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1917.)

No. 4835.

1. RAILROADS ⟸359(1)—ACTION FOR INJURY TO PERSON NEAR TRACK—DEFENSES—TRESPASSER.
   It is no defense to an action against a railroad company for a personal injury that plaintiff was a technical trespasser upon the property of a third party.
2. NEGLIGENCE ⟸121(2)—PROOF OF NEGLIGENCE—DOCTRINE OF RES IPSA LOQUITUR.
   Where the plaintiff in an action for negligence sets out specifically in what the negligence of defendant consisted, the doctrine of res ipsa loquitur has no application.

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

Action at law by W. O. White against the Chicago Great Western Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

C. O. Holly and John McLennan, both of Des Moines, Iowa, for plaintiff in error.

Fred. P. Carr, George H. Carr, and Donald Evans, all of Des Moines, Iowa, for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

SMITH, Circuit Judge. [1] The Des Moines Union Railway Company is a terminal and railroad company at Des Moines, Iowa. It has

two main lines extending east and west near the center of the tier of blocks lying south of Cherry street crossing Eighth street. South of these tracks it has a switch which at its west end leaves the main tracks and extends east to the west line of Eighth street. Eighth street extends north and south across the two main line tracks referred to and east of the end of the switch mentioned. Eighth street is, and was at all times here material, curbed, and paved in the driveway, and had sidewalks and parkings along the sides. East and beyond the end of the switch referred to and of the west sidewalks on such street, and standing partly on the parking and partly on the paving, was a flagman's shanty used by an agent of the Des Moines Union for shelter while he was engaged in flagging trains passing over the two main tracks referred to and in warning the public who were about to use the highway crossing of approaching trains. It appears from the testimony that the Des Moines Union had granted a long-time lease of the switch in question to the defendant, the Chicago Great Western Railroad Company, for use as a wagon track. Prior to the happening of any of the matters here complained of the defendant had the care and control of the switch track. As the switch track did not cross or encroach upon Eighth street, it is quite clear that the flagman had no duty whatever with reference to that track.

The defendant had, in common with various other railroad companies, the right to use the two main tracks in question for its passenger trains. The Des Moines Union was engaged in operating, caring for, and controlling the two passenger tracks, while the defendant under its lease was operating, caring for, and controlling the switch. The plaintiff was employed as a night watchman at a building on Eighth street, which he alleged was the Jaeger Manufacturing Company's. The Jaeger Manufacturing Company was engaged in business on the southeast corner of Eighth street and the alley running east and west through the center of the tier of blocks in question and directly across Eighth street from the shanty referred to. On the evening of April 19, 1914, he was invited by the flagman at the crossing in question, who was in the employ of the Des Moines Union, which erected the shanty, to step into it for a social visit. While he was thus in the shanty, the defendant shunted some freight cars east on the switch in question, and they passed beyond the end of the switch across the sidewalk and the parking, struck the shanty, and inflicted injuries upon the plaintiff's person.

This suit was brought to recover for those personal injuries. The case was tried to a jury, and the court directed a verdict for the defendant, the Chicago Great Western Railroad Company, and to a judgment rendered on a verdict so returned the original plaintiff sued out this writ of error.

The instruction was based upon the theory that the defendant while in the shanty was a trespasser and the company owed him no duty. The evidence shows that the accident took place in a public highway, but it does not appear just what the title of the public was to the highway. In Iowa, in addition to the forms in which such title can ordinarily be acquired, the execution, acknowledging, and recording of

a plat of land in a city is equivalent to a deed in fee simple of all lands set apart for streets. Section 917, Code of 1897. Whether the public had a perpetual right of use of the street, or a title in fee simple, is, however, not very material.

So far as the main lines were concerned, the Des Moines Union had a right to lay them across the street without the consent of the city or of any property owner. Gates v. C., St. P. & K. C. Ry. Co., 82 Iowa, 518, 48 N. W. 1040; Morgan v. Des Moines Union Ry. Co., 113 Iowa, 561, 85 N. W. 902. As the Des Moines Union did not own, so far as shown by the record, the property across the street from the end of the switch in question, it is gravely doubtful if it could have extended the switch across the street without the consent or compensation of the owner of the Jaeger Manufacturing Company property. In any event it never attempted to exercise any such right. There is nothing in the evidence as to what, if any, right the Des Moines Union had to erect the flagman's shanty in question in a public street. The evidence does not show that it had been maintained in such a way or for such a time as to acquire the right by the statute of limitations.

We are inclined to the opinion that the city had a right to require the Des Moines Union to maintain a flagman at the crossing for the purposes for which he was there maintained, and to authorize the maintenance of the shanty for his protection from the weather, so long as it was so limited in its size and location as not to materially interfere with the use of the street. Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Id., 4 Dill. 593, 2 Fed. Cas. 898, 28 Cyc. 853. Suffice it to say that there is no evidence that the public right to the street had in any way been lost.

Conceding that the Des Moines Union could keep the public out of the shanty, it could permit individuals to enter the same, and its sole agent in charge of the shanty had invited the plaintiff to enter it. He did so, and was in the public street, with the permission of the Des Moines Union, the only one who it is even claimed had an exclusive right therein. He was thus in the shanty not as a trespasser against any human being.

But, if we assume he was a trespasser, it was against the Des Moines Union, and not on the property of the Chicago Great Western Railroad Company. Could that defeat his recovery, or aid in doing so? In other words, is it any defensive matter for a railroad company, that injured a claimant, that he was a technical trespasser upon the property of a third party? This question was before the Supreme Court of Arkansas and elaborately considered in St. Louis, etc., Railway Co. v. Jackson, 96 Ark. 469, 132 S. W. 206, 31 L. R. A. (N. S.) 980, and it was there held that the fact that the injured party was a trespasser upon the property of a third party would not avail the defendant. To the same effect is Missouri, etc., Ry. Co. v. Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196, and much can be found to sustain that doctrine in West Virginia, etc., Ry. Co. v. State, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574; Ambroz v. Light & Power Co., 131 Iowa, 336, 108 N. W. 540; Connell v. Keokuk Elec. Ry. & Power Co., 131 Iowa, 622, 109 N. W. 177; Louisville, etc., Ry. Co. v. Downey, 18 Ind. App.

140, 47 N. E. 494; St. Louis, etc., Ry. Co. v. Troutman (Tex. Civ. App.) 138 S. W. 427. The District Court was in error in its holding that the law with reference to trespassers had anything to do with this case.

[2] The plaintiff in error claims in substance that the maxim "res ipsa loquitur" applies to this case. This might be true if the plaintiff had not set out in full in what the negligence of the defendant consisted, viz.:

First: "That the defendant was negligent in failing to equip the end of the track with a bumper that would keep said car from running off of said track."

Second: "That the defendant company was negligent in failing to have a light or some signal in an attempt to run their cars across the street without tracks."

Third: "That the defendant company was negligent and careless in their failure to provide a switchman or brakeman on said cars for the purpose of giving to fireman or engineer his signal when to stop before reaching the end of said track."

Under such circumstances the maxim in question can have no application. Midland Valley R. Co. v. Conner, 217 Fed. 956, 133 C. C. A. 628.

The judgment of the District Court is reversed, and the case is ordered remanded to it, with instructions to set aside the verdict and grant a new trial.

JONES v. H. M. HOBBIE GROCERY CO.

In re COLLINS.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1917.)

No. 3108.

1. SALES ⊜44—FRAUD—WHAT CONSTITUTES.
An insolvent, who purchases goods without any intention or expectation of paying therefor, is, where the sale was induced by false representations as to his financial condition or by his concealment of his financial condition, guilty of fraud, and the seller is entitled to rescind the sale and recover his property.

2. BANKRUPTCY ⊜140(2)—TRUSTEE—RIGHTS OF.
A creditor of an Alabama bankrupt asserted, on the ground of fraud, the right to rescind the sale made to the bankrupt a few days before he filed his voluntary petition and to reclaim the goods sold. Code Ala. 1907, § 3386, declares that conveyances of personal property to secure debt or provide indemnity are inoperative against creditors and purchasers without notice until recorded, while section 3394 declares that contracts for the conditional sale of personal property, by the terms of which the vendor retains title until payment and the purchaser obtains possession, shall be void against purchasers for a valuable consideration, mortgagees, and judgment creditors without notice, unless in writing and recorded. Bankruptcy Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), declares that the trustee in bankruptcy, as to all property in the custody of or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. *Held* that, as it did not appear that there was any Alabama statute subordinating the right of a defrauded creditor of personalty to rescind the sale and reclaim the property to the lien of a judgment creditor of the fraudulent purchaser, the seller was, as against the trustee in bankruptcy, entitled to rescind the sale and reclaim the property.

Appeal from the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

In the matter of the bankruptcy of B. A. Collins. A petition by the H. M. Hobbie Grocery Company for review of an order of the referee denying reclamation of merchandise sold the bankrupt having been granted, and reclamation allowed (242 Fed. 975), E. O. Jones, trustee in bankruptcy, appeals. Affirmed.

Byrd G. Farmer and William R. Chapman, both of Dothan, Ala., for appellant.

Lee H. Weil and Davis F. Stakely, both of Montgomery, Ala. (Martin & Williams, of Dothan, Ala., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. The appellee asserted the right to rescind, on the ground of alleged fraud, a sale of goods made by it to the bankrupt a few days before the latter filed his voluntary petition in bankruptcy, and to reclaim the goods sold, which went into the pos-

session of the trustee in bankruptcy; no part of the purchase price having been paid. The trustee appeals from a decree sustaining the claim asserted.

[1] If one who at the time is insolvent, or in failing circumstances, obtains goods from another on credit, with no intention of paying for them, or at least with no reasonable expectation of being able to pay for them, and the sale was induced by false or fraudulent representations as to his financial condition, on which the seller relied, or would not have been made, but for his fraudulent concealment of his financial condition, or of the fact that he did not intend to pay, or reasonably expect to be able to pay, for the goods, the seller has the right to rescind the sale and recover his property. Maxwell v. Brown Shoe Co., 114 Ala. 304, 21 South. 1009; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993. The seller's petition in the pending case, and the evidence adduced in support of it, we think sufficiently show that, as against the purchaser, he had the right, under the rule just stated, to rescind the sale and recover the goods sold.

[2] It is contended in behalf of the appellant that this right does not exist against him, the purchaser's trustee in bankruptcy. This contention is sought to be supported by invoking the provision of the Bankruptcy Act that:

"Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." Bankruptcy Act, § 47a(2), as amended by Act June 25, 1910 (9 U. S. Comp. Stat. Ann. 1916, § 9631).

The contention stated cannot prevail, unless under the Alabama law the right conferred on the purchaser's creditor by the acquisition of a lien on the latter's property by legal or equitable proceedings is superior to that of the defrauded seller to rescind the sale and reclaim the goods sold. In our opinion that superiority does not exist under the Alabama law. An Alabama statute makes conveyances of personal property to secure debts, or to provide indemnity, inoperative against creditors and purchasers without notice, until recorded. Code of Alabama 1907, § 3386. Another Alabama statute provides that:

"All * * * contracts for the conditional sale of personal property, by the terms of which the vendor retains the title until payment of the purchase money and the purchaser obtains possession of the property, and all contracts for the lease, rent, or hire of personal property, by the terms of which the property is delivered to another on condition that it shall belong to him whenever the amount paid shall be a certain sum, or the value of the property, the title to remain in the other party until such sum or value shall have been paid, are, as to such condition, void against purchasers for a valuable consideration, mortgagees and judgment creditors without notice thereof, unless such contracts are in writing and recorded" as provided in the statute. Code of Alabama 1907, § 3394.

The statutes mentioned do not purport to affect such a transaction as the sale which is under consideration in this case. This case is one to which those statutes and decisions based upon them are not applicable. So far as we are advised, there is no Alabama statute which subordinates the right of a defrauded seller of personal property to rescind the sale and reclaim the subject of it to the lien acquired by le-

gal or equitable proceedings in favor of a creditor of the fraudulent purchaser. Prior to the enactment of the last-quoted statute a purchaser of personal property from one holding possession under a conditional sale, by the terms of which the property was not to belong to the buyer until he paid a note given for the purchase price, which was not paid, acquired only the conditional title of his vendor, and could not defeat a recovery in detinue brought by the original vendor, even though he showed a bona fide purchase for value and without notice. Sumner v. Woods, 67 Ala. 139, 42 Am. Rep. 104. Alabama decisions recognize the right of a defrauded seller of personal property to rescind the sale and recover the goods sold from one holding under a lien acquired, before the seller's exercise of the right to rescind, by legal or equitable proceedings instituted by or in behalf of a creditor of the fraudulent purchaser. Union Mfg. & Commission Co. v. East Alabama National Bank, 129 Ala. 292, 29 South. 781; McKensie v. Rothschild, 119 Ala. 419, 24 South. 716; Code of Alabama (1907), § 2948.

The conclusion is that under the Alabama law the right of a defrauded seller of personal property to rescind the sale and recover the thing sold is not, where that right is asserted against one holding the subject of the sale under a lien acquired by legal or equitable proceedings in favor of a creditor of the fraudulent purchaser, made dependent upon such creditor having had knowledge or notice, actual or constructive, before or when his lien attached, of the existence of the right asserted by the defrauded seller.

The decree appealed from is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 3, 1917.)

No. 2929.

1. POST OFFICE ⊂⊃9—RELATION—RIGHT OF UNITED STATES.
   The United States is a bailee for hire of registered packages and their contents, and can maintain an action against one who steals such mail, recovering the value of the property taken.
2. POST OFFICE ⊂⊃9—THEFT OF MAIL—ACTIONS.
   Defendant executed a bond conditioned that a postal employé would faithfully account for, deliver, and pay over to the proper official or person all moneys, mail matter, and other property of every kind which should come into his hands as an employé. The employé stole $15,000 contained in a registered package. Before the package was mailed, the sending bank insured it against loss with an insurance company, and after the theft the insurance company paid the loss to the bank, and as subrogee of the bank recovered from the United States $50, the liability of the United States for a registered package stolen. Rev. St. § 4058 (Comp. St. 1916, § 7607), declares that, whenever the Postmaster General is satisfied that money or property stolen from the mails, or the proceeds thereof, has been received at the department, he may, upon satisfactory evidence as to the owner, deliver the same to him, while Postal Regulations, §§ 143, 144, authorize a suit against an employé and his sureties, and direct that, if recovery is had, the amount shall be paid to the United States and to the losers of the mail. *Held* that, as the

United States was a bailee for hire of the packages stolen, it could, as such, recover on the bond of the employé, and recovery could not be defeated on the ground that, the insurance company having paid the bank, the doctrine of subrogation could not inure to it.

3. POST OFFICE ⟸9—THEFT OF MAIL—ACTIONS.
As the bond of the employé was conditioned that he should pay over to the proper official all moneys which came into his hands, the recovery of the United States, though for the benefit of the insurer of the bank, could not be limited to $50, which was the liability of the United States; but it could recover the amount of the loss up to the penalty of the bond.

4. POST OFFICE ⟸9—THEFT OF MAIL—ACTIONS.
As the bond made no provision for apportionment of loss, and there was no identity between the company, which insured the safe transmission of the registered package stolen, and defendant, which insured the conduct of the postal employé, there could be no apportionment of loss.

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 United States against the United States Fidelity & Guaranty Company, a corporation. There was a judgment for the United States, and defendant brings error. Affirmed.

The United States brought this action in its own behalf, and for the use and benefit of the subrogee of the First National Bank of Los Angeles, to recover judgment for $2,000, with interest, against the United States Fidelity & Guaranty Company, the penalty of a bond given by the Fidelity Company for that sum in favor of the United States. O. F. Altorre was a clerk in the post office at Los Angeles, and the Fidelity Company, plaintiff in error, became surety upon his bond. The bond called for the faithful discharge of all duties imposed upon Altorre by law or regulation of the Post Office Department, and that he would "faithfully account for, deliver, and pay over to the proper official or person all moneys, mail matter, and other property of every kind which shall come into his hands as such clerk, and which shall come into his hands by virtue of his occupancy of any position" in the post office. The defendant denied any liability to the United States, except for $50, and after trial judgment was entered in favor of the United States for $2,000 and interest. The company assigns error.

Upon the trial it was stipulated that Altorre stole $15,000 in money, contained in two registered packages, which came into his hands as a post office clerk, and which had been mailed by the First National Bank of Los Angeles, addressed to the Bank of Bisbee, Bisbee, Ariz. Before the packages were mailed, the sending bank insured the same against loss with an insurance company, and after the theft the insurance company paid the loss of $15,000 to the bank, and as subrogee of the bank the insurance company recovered from the United States $50, the liability of the United States for the packages stolen.

Gurney E. Newlin and A. W. Ashburn, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and Robert O'Connor and W. F. Palmer, Asst. U. S. Attys., all of Los Angeles, Cal.

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

HUNT, Circuit Judge (after stating the facts as above). [1, 2] Counsel for the Fidelity Company have argued at length that the doc-

trine of subrogation cannot inure to the benefit of the assuring company, that, inasmuch as the bank has been paid by the assuring company the full amount of the theft, as owner it has no interest in the litigation, and that the moral duty on the part of the government, as bailee, to procure a return of the money or equivalent to the owner, bailor, having been fulfilled, it is erroneous to permit recovery against the surety upon any assumption that it stands in the same position as the wrongdoer. But more than a moral duty attached to the United States in the premises. Section 4058, Revised Statutes (Comp. St. 1916, § 7607), provides:

"Whenever the Postmaster General is satisfied that money or property stolen from the mail, or the proceeds thereof, has been received at the dpartment, he may, upon satisfactory evidence as to the owner, deliver the same to him."

The Postal Regulations, sections 143 and 144, authorize suit against an employé and his sureties and direct that if recovery is had the amount recovered shall be paid to the United States, "and to the losers of the mail, as their respective interests shall appear." Gibson v. U. S., 208 Fed. 534, 125 C. C. A. 536. It is well settled that the United States is a bailee for hire of registered packages and their contents and can maintain action against one who steals such mail and can recover full value of the property taken. National Surety Co. v. U. S., 129 Fed. 70, 63 C. C. A. 512; U. S. Fidelity & Guaranty Co. v. United States, 229 Fed. 397, 143 C. C. A. 517. Nor need such an action depend always upon the liability of the bailee to the bailor. Bode v. Lee, 102 Cal. 583, 36 Pac. 936. As said by the Court of Appeals in U. S. v. Atlantic Coast Line R. Co., 215 Fed. 56, 131 C. C. A. 364, L. R. A. 1915A, 374:

"The government could also recover the value of the mail lost for the benefit of the owners of the mail, provided the contract did not negative the idea of the liability extending that far."

Not only does the undertaking here sued upon fail in such negation, but by the express language used therein, the clerk and his sureties gave bond that he would account for and pay over all property that would come into his hands as a postal clerk. United States v. American Surety Co., 163 Fed. 228, 89 C. C. A. 658; United States v. American Surety Co. (C. C.) 155 Fed. 941. As we look at it, much of the argument with respect to the question of subrogation is not very close to the case, for the United States expressly avers in its complaint that the action is brought in its own behalf, and for the use and benefit of the subrogee, and that it may maintain such an action is, in the light of the decisions, beyond successful dispute. Searight v. Stokes, 3 How. 151, 11 L. Ed. 537; U. S. v. Griswold, 8 Ariz. 453, 76 Pac. 596; Id., 9 Ariz. 304, 80 Pac. 317; and cases above cited. When recovery has been had by the United States, then it is that disposition of the money will be made to those entitled thereto, in this instance the assuring company, which paid the loss and alleged to be the subrogee of the bank. Nothing in U. S. v. Bebee, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121, cited by the defendant, is inconsistent with what we have said, and U. S. v. Atlantic Coast Line (D. C.) 206 Fed. 203, so far as it may hold to a contrary view, was questioned on review by the

Circuit Court of Appeals in 215 Fed. 56, 131 C. C. A. 364, L. R. A. 1915A, 374.

[3] It is said that the judgment is erroneous in so far as it awards recovery in excess of $50 and interest. We think this argument, which rests upon the assumption that no legal obligation devolved upon the United States to pay or recover for the benefit of any one the amount of money which was stolen, is answered by reference to the provisions of the obligation that the clerk shall faithfully pay over to the proper official or person all moneys which shall come into his hands as clerk. The authorities heretofore cited hold that upon a bond so written the United States, as obligee, may recover to the full amount of the loss up to the penalty of the bond.

[4] Defendant assigns as error the ruling of the court that there was proof of loss in excess of $50. The point is not well taken because there was evidence of the shipment of $30,000 money by mail by the bank at Los Angeles, of the recovery of $15,000, of the failure to recover the balance, and there was a stipulation that Altorre stole packages shipped by the bank and containing the $30,000. It is said the judgment was too great, even if recovery is proper, and that, if the assuring company and the defendant are bound by the same obligation, neither should be required to bear more than its pro rata portion of that burden. The bond, however, makes no provision for apportionment of loss, and there is no such identity between the assurance company and the defendant company as to risks, or subject-matter, as warrants right to contribution.

The other points made by defendant are of minor importance, and are not well founded.

The judgment is affirmed.

FELS v. GEO. LUEDERS & CO. et al.
In re J. RHEINSTROM & SONS CO.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1917.)

No. 3035.

1. BANKRUPTCY ⊜191(½)—LIENS—PRIORITY.
Under Ky. St. § 2487, giving to those who have furnished materials and supplies for the carrying on of the debtor's business a lien upon such property and effects as may have been involved in such business, and section 2488, declaring that such lien shall be superior to the lien of any mortgage or other incumbrance thereafter created, the lien for materials and supplies cannot be defeated by an assignee of accounts of the bankrupt, who received his assignment after the materials and supplies were furnished, on the ground that the lien for materials did not ripen until bankruptcy occurred, and until that time it was inchoate.

2. MECHANICS' LIENS ⊜16—PROPERTY INVOLVED IN DEBTOR'S BUSINESS.
Where a debtor by written instrument transferred and assigned to a creditor accounts receivable, the debtor guaranteeing the worth and collectibility of such accounts and in terms giving the creditor complete as well as sole power and authority to receive, receipt for and collect the same, though books of account were in fact retained by the debtor and all collections made by it, settlements being made at almost weekly inter-

vals, when new lists of pledged accounts and assignments thereof, accompanied by lists of accounts released, were prepared, the accounts assigned must be treated as involved in the debtor's business, the collection and assignment of accounts continuing up to within five days of the debtor's bankruptcy, and so the creditor as assignee of the accounts cannot defeat the lien created by Ky. St. § 2487, upon such property and effects of the debtor as may have been involved in such business in favor of one who furnished the debtor with supplies and materials, on the ground that the accounts were not involved in the debtor's business.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

In the matter of the bankruptcy of J. Rheinstrom & Sons Company. Samuel S. Fels asserted a lien upon certain of the bankrupt's running accounts receivable as superior to that of George Lueders & Co. and others. From an order allowing priority to the claims of George Lueders & Co. and others, Samuel S. Fels appeals. Affirmed.

W. H. Mackoy and S. M. Johnson, both of Cincinnati, Ohio, for appellant.

Leo J. Brumleve, Jr., of Cincinnati, Ohio, for appellees.

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

PER CURIAM. The bankrupt had been engaged in putting up and selling "Maraschino" cherries. In the distribution among creditors of the assets of owners or operators of manufacturing establishments, section 2487 of the Kentucky Statutes gave to those who had furnished materials or supplies for the carrying on of the business a lien "upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith."

In Central Trust Co. v. Lueders, 221 Fed. 829, 137 C. C. A. 387, this court held the statute constitutional, and the bankrupt's business that of operating a "manufacturing establishment," and affirmed the order of the District Court adjudging the claim of Lueders & Co. a prior claim upon the property and effects of the bankrupt involved in its business. An application for writ of certiorari to review that decision was denied. 238 U. S. 634, 35 Sup. Ct. 938, 59 L. Ed. 1499. As against general creditors, the liens of Leuders & Co., Nicholas & Co., and others similarly situated must be held established.

The present appeal involves only the claimed priority (over the liens for materials and supplies on the part of Lueders & Co., Nicholas & Co., and others similarly situated) of the asserted lien of Fels & Co. upon certain of the bankrupt's running accounts receivable, created in the course of business, under a pledge thereof to secure loans of money.

[1] The furnishing of materials and supplies by the appellees, at least in amount sufficient to exhaust these accounts, antedated their pledge to Fels & Co. One of the grounds on which the latter's claimed priority is rested is that the liens for materials and supplies did not ripen until bankruptcy occurred, and that such inchoate liens as were created by the furnishing of the materials and supplies are subordinate to the fixed rights meanwhile acquired by Fels & Co. in the same property. This contention must be rejected. Section 2488 expressly de-

clares the liens for materials or supplies "superior to the lien of any mortgage or other encumbrance thereafter created." This we think means "created after the materials or supplies are furnished." The case in this aspect is ruled by Louisville Woolen Mills v. Tapp, 239 Fed. 463, 52 C. C. A. 341, where, construing section 2488, this court held a lien for materials superior to the landlord's lien for rent created subsequent to the furnishing of the materials.

[2] The remaining ground of asserted priority is that the accounts pledged to Fels & Co. were not "involved in" the debtor's business at the time bankruptcy occurred, but had been, by virtue of the pledge, previously withdrawn therefrom. The accounts were in terms "transferred and assigned" by a written instrument, to which a list of the accounts was attached, the debtor guaranteeing the worth and collectibility of the accounts, and in terms giving the pledgees "complete as well as sole power and authority to receive, receipt for, and collect" the accounts, and to sue for their collection in the debtor's name or otherwise; the debtor agreeing to aid the pledgees in the collection, and, if desired by them, to act as their agent therein. It was expressly provided that, in case of any exchange for, substitution of, or additions to the pledged accounts, the provisions of the original pledge should attach thereto. There was also a declaration that the rights and remedies vested in the pledgees were cumulative, and not exclusive of prior or subsequent rights or remedies.

The books of account were in fact retained by the debtor, who made, in the course of its business, all collections of assigned accounts, using the proceeds thereof in its business, as seems to have been contemplated, and rendering to the pledgees, usually at intervals of from one to two weeks (extending over a period of nearly seven months), new lists of pledged accounts and assignments thereof, accompanied by lists of "accounts released," which covered accounts collected by the pledgor—the last list having been rendered but five days before the petition for adjudication of bankruptcy.

In disposing of the case, we assume that the transaction constituted a valid pledge of the accounts assigned as of the date of delivery of the various instruments of assignment and lists of accounts. We think it clear, however, that all the assigned accounts (thus including those embraced in the list furnished five days before bankruptcy) were "involved in the [debtor's] business" within the meaning of the statute. They were surely so involved before they were pledged; they were never, in a proper sense, withdrawn from the business; while in form there was an assignment, as matter of fact the assignment was merely a security, and was so definitely expressed in the instrument of assignment. Home Bond Co. v. McChesney (C. C. A. 6) 210 Fed. 893, 127 C. C. A. 552. Indeed, the attitude of Fels & Co. as creditors down to the end of the debtor's business life is definitely admitted by their presentation and allowance, as a claim against the bankrupt estate, of the notes secured by the accounts receivable. In no view which can be taken of the case were the pledgees' rights, in our opinion, any stronger than if, in place of a pledge of accounts receivable, there had been a mortgage of tangible personal property duly filed. In the latter case,

under the decision in Woolen Mills v. Tapp, supra, the lien of Fels & Co. would have been inferior to that of the appellees; and such is the case here.

The order of the District Court is affirmed.

SCHUESSLER v. LUNDSTROM.

In re OAK HILL MARBLE & STONE WORKS.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1917.)

No. 3040.

ACCORD AND SATISFACTION ⟸7(1)—ACCEPTANCE—DEBT.

Where a lessor accepted a smaller sum than the rent reserved in full payment, the debt was discharged.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the bankruptcy of the Oak Hill Marble & Stone Works. Major Schuessler petitioned for the enforcement of a landlord's lien, which was opposed by A. E. Lundstrom, trustee. From a decree awarding petitioner partial relief, he appeals. Amended and affirmed.

Needham A. Graham, Jr., of Birmingham, Ala., for appellant.

A. Leo Oberdorfer, of Birmingham, Ala., for appellee.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. This is an appeal from a decree in favor of the appellant for the sum of $75 found to be due to him for rent of premises leased by him to the bankrupt. The decree adjudged that the appellant had a lien upon assets in the hands of the trustee, and directed the latter to pay the amount awarded.

The decree is complained of on the ground that the amount awarded is less than that shown to be unpaid and due under the written lease between the appellant and the bankrupt. During a considerable part of the term covered by the lease the bankrupt paid $50 a month rent, instead of $85, the monthly rent called for by the lease. We think the evidence adduced well supported the finding made by the referee, which was approved by the District Court, that each of the $50 payments was accepted as full satisfaction of the rent for the month for which it was paid. But the evidence satisfies us that a mistake was made in computing the amount due to the appellant. Our conclusion from the evidence is that 2½ months' rent, at the rate stipulated for in the lease, was due and unpaid at the time the petition in bankruptcy was filed.

The decree appealed from is here amended, by making the amount awarded $212.50, instead of $75. As so amended, that decree is affirmed, with costs to the appellant.

CITY COUNCIL OF AUGUSTA v. POSTAL TELEGRAPH-CABLE CO.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1917.)

No. 3134.

APPEAL AND ERROR ⊜954(1)—DISCRETION OF COURT—PRELIMINARY INJUNCTION—ISSUANCE.

An interlocutory decree ordering the issuance of a preliminary injunction will not be disturbed on appeal, where no abuse of discretion was shown, and it did not appear that the injunction would cause any substantial injury to defendant, though complainant should fail to prevail in the suit on the merits.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Bill by the Postal Telegraph-Cable Company against the City Council of Augusta. From an interlocutory decree ordering the issuance of a preliminary injunction (242 Fed. 538), defendant appeals. Affirmed.

Isaac S. Peebles, Jr., of Augusta, Ga., for appellant.

C. E. Dunbar, of Augusta, Ga., and Eugene R. Black, of Atlanta, Ga., for appellee.

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

PER CURIAM. This is an appeal from an interlocutory decree ordering the issuance of a preliminary injunction. Our examination of the record has led us to the conclusion that it does not show that there was an abuse of discretion in making the order complained of, and that it has not been made to appear that the order has resulted, or is likely to result, in causing any substantial injury to the appellant while the cause is pending, even though the appellee should fail, in the trial of the case on its merits, to sustain the right asserted by its bill.

As no prejudicial error is shown, the decree appealed from is affirmed.

BOSTON & M. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. October 18, 1917.)

No. 1284.

INSPECTION ⊜7—PLANT INSPECTION—STATUTE.

Under Plant Quarantine Act Aug. 20, 1912, c. 308, 37 Stat. 315 (Comp. St. 1916, §§ 8752–8764), declaring that the interstate shipment of nursery stock and other plants, and plant products from one quarantined area to another, shall be unlawful without inspection, etc., the transportation of sawn and squared pine lumber from Maine to Massachusetts without a certificate showing that it had been inspected and pronounced free from gypsy moth is not a violation, for the act was not intended to apply to wood products manufactured to that extent.

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

The Boston & Maine Railroad Company was convicted of transporting, in violation of the Plant Quarantine Act of August 20, 1912, one carload of pine lumber from Maine into Massachusetts without a certificate showing it had been inspected and pronounced free from gypsy moth infection, and it brings error. Reversed and remanded.

David W. Snow, of Portland, Me. (Symonds, Snow, Cook & Hutchinson, of Portland, Me., on the brief), for plaintiff in error.

John F. A. Merrill, U. S. Atty., of Portland, Me.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

PER CURIAM. The information in this case charges the railroad company with transporting "one carload of pine lumber" from Saco, Me., to Holyoke, Mass., without a certificate showing that it had been inspected and pronounced free from gypsy moth infestation; in violation of the Plant Quarantine Act of August 20, 1912 (37 Stat. 315). The District Court has overruled a demurrer for insufficiency in law, which is assigned as error by the defendant railroad.

It was agreed by counsel at the argument that the lumber constituting the carload referred to in the information was sawn and squared pine lumber.

Such lumber, though in a sense a "plant product," we cannot regard as covered by the intended meaning of the act. We are unable to believe the quarantine and inspection requirements thereby established applicable in the case of wood products with regard to which a process of manufacture has been carried to such an extent as in this case. We think the demurrer should have been sustained.

The judgment of the District Court is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

ARNOLD-CREAGER CO. v. BARKWILL BRICK CO. et al.

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

No. 2953.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BRICK MACHINE.
The Arnold patent, No. 787,019, for a brick machine, claim 2, as limited by its terms, *held* not infringed. Claim 8 *held* void for lack of invention, in view of the prior art.

2. PATENTS ⟸165—CONSTRUCTION—VOLUNTARY LIMITATION OF CLAIMS.
The intentional limitation of a claim by the patentee is binding on him, although the limitation was voluntary.

3. PATENTS ⟸178—DOCTRINE OF EQUIVALENTS.
When a word of limitation in a claim in a patent for a machine is not a matter of mere form, as describing a particular machine, but represents a thought essential to that which the inventor regarded as his new step, its limiting effect cannot be neutralized through the rule of equivalents.

Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

Suit by the Arnold-Creager Company against the Barkwill Brick

Company and the Wellington Machine Company. Decree for defendants, and complainant appeals. Affirmed.

Edw. R. Alexander and M. B. & H. H. Johnson, all of Cleveland, Ohio, for appellant.

H. E. Smith, J. B. Hull, and Hull, Smith, Brock & West, all of Cleveland, Ohio, for appellees.

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

KNAPPEN, Circuit Judge. Suit for infringement of the Arnold patent, No. 787, 019, April 11, 1905. The invention relates to the type of "horizontal soft mud" brick machines, consisting generally of a pug mill by which the clay is—by means of knives and propellers carried by a "horizontal pug shaft" extending longitudinally through the mill—cut, mixed, and advanced into a charging or pressing chamber at the front end of the mill, where by means of a vertically reciprocating inside press it is forced into molds, which are then mechanically delivered from the machine. The claims involved are No. 2, which relates solely to mechanism for operating the press platen, and No. 8, which is confined to a provision for admitting air between the press platen and the clay. The present Mr. Justice Clarke, who presided below, held claim 2 not infringed, and claim 8 void for anticipation, and dismissed the bill. The appeal is from the decree of dismissal.

[1] Turning to claim 2, which we print in the margin: [1] When Arnold applied for his patent (September 23, 1904) the situation, so far as here important, was this: In 1900 Horton had obtained a patent on a press "located wholly inside of the chamber of the pug mill." He operated his press by means of a crank mounted on the pug shaft on the front end of the mill, through a vertically disposed pitman attached at its lower end to the crank and at its upper end, by a ball and socket joint, to a walking beam extending longitudinally above the mill, and to which the press platen stems were adjustably secured. Horton was marketing and manufacturing machines under his patent. Paradine, who claimed to have invented the Horton device, was manufacturing a machine called the "20th Century," which differed from Horton's, so far as important here, in that it used in place of a walking beam a rocker arm shaft which carried the press platen stems. In 1902 Arnold contracted with Paradine for the right to manufacture the latter's 20th Century machine on a specified royalty. An interference between Paradine and Horton was decided in 1903 in the latter's favor, but the plaintiff company continued for many years later to pay

[1] "2. In a brick machine employing a horizontal pug mill and shaft, a charging chamber and a press platen, the mechanism for operating the press platen, consisting of a crank mounted on the front end of the pug mill, a vertically moving plunger journaled in ways mounted on the frame, a stud shaft connected to said plunger and projecting outwardly above the crank pin, and a pitman connecting said stud and crank, a second stud shaft mounted on said plunger and projecting inwardly over the charging chamber, a rod rigidly connected to the platen and journaled on said inwardly projected stud shaft, substantially as described."

royalty to Paradine on all machines made by the company, although marked with and marketed under its own name after the Arnold patent issued.

Early in 1904 Horton sued Arnold's company for infringement; the suit was settled the following January by consent to decree sustaining the Horton patent, but without liability for past or future use of the alleged infringing machines. One of the defenses here made to claim 2 of the Arnold patent is that Paradine was, if not the sole inventor, at least a joint inventor with Arnold. We agree with Judge Clarke that upon the testimony there is grave doubt whether Arnold was the sole inventor of the subject-matter of that claim; but this question was not decided by Judge Clarke, whose opportunities in that regard were better than ours. We find it unnecessary to decide it, and for the purposes of this opinion we shall treat the invention as Arnold's.

Arnold's advance over Horton and Paradine was merely the substitution (for the walking beam of the one and the rocker shaft of the other) of the "plunger" running between ways on the outside of the chamber, interposed between and directly connected with the press platen stem and the upper end of the pitman—the "plunger," when the machine was assembled, being practically a part of the stem. The connections of both Horton and Paradine between the crank and press mechanism were direct in a proper sense, and Arnold in his testimony seems to so treat them. The latter merely showed a more direct method than that of his predecessors; and, given the interposed sliding "plunger," the outside guides followed naturally enough, in view of the then existing art. But Arnold's connection being more simple and direct, and effecting a positive movement of the press platen, resulting in greater speed and smoothness of operation—with less wear and tear and wobbling; less breakage and greater output (evidenced by public favor and by the alleged infringement)—had decided utility, and we think disclosed invention. From a mechanical standpoint, however, the advance in the art was slight.

The differences between the invention disclosed by claim 2 and the alleged infringing machine manufactured by the defendant Wellington Company for, and used by, defendant Barkwill Company, are these:

The machine disclosed by the specification is of the front delivery type, that is to say, the bricks are delivered from the *front end* of the pressing chamber, and thus of the mill, by a movement longitudinally of the mill; the plunger, sliding between ways on the outside of the front end of the charging chamber, is connected on its rearward, or inward, side by an inwardly projecting stud shaft to a yoke to which are attached rods supporting the press platen, and on the front or outward side by an outwardly projecting stud shaft to the pitman (near, but not at, its upper end), whose lower end is connected to a crank journaled directly upon the pug shaft. Defendant's machine is of the side delivery type; that is to say, the bricks are delivered from the side of the pressing chamber by a movement at right angles to the side of the mill. The plunger slides between ways located outwardly on the delivery *side* of the pressing chamber, and is connected on its rearward or inner side by a pin to the yoke carrying the rod support-

ing the press platen, and on the front or outer side by a pivot pin to the upper end of the pitman, whose lower end is connected with a double crank, carried not by the pug shaft (as it could not be), but by a countershaft (operated by gearing at the rear end of the pug shaft) lying parallel with the pug shaft and entirely outside of the pugging chamber. Defendant's pivot pins, connecting the pitman to plunger and crank respectively, are not unnaturally parallel with the face of the plunger, while those of the patent are at right angles thereto.

It is apparent that claim 2 does not read literally upon defendant's structure; for it seems plain that by "the front end of the pug mill" is meant the front end of the mill taken as a whole, at the front end of which is the charging chamber. Such is the natural meaning of the language used; and reference to the specification leaves in our minds no doubt that such was the meaning intended. Arnold manifestly had no idea of applying his press mechanism to anything but a front delivery machine, and it apparently did not occur to him that it was otherwise applicable. Horton was his chief competitor, and his improvement was made only in an effort to get the benefit of Horton's device through Paradine and to improve upon the latter. The claim is, broadly speaking, the measure of the patentee's rights, and is not infringed unless construed as broadly as if it read substantially:

"In a brick machine, employing a horizontal pug mill, a shaft, a charging chamber and a press platen, the mechanism for operating the press platen consisting of a crank mounted on a shaft on the outside of the pug mill, a vertically moving plunger, journaled in ways mounted on the frame and inwardly connected operatively with the press platen rod and outwardly connected pivotally with the upper end of a pitman whose lower end is pivotally connected with the crank."

[2] Assuming that defendant's device would infringe the claim in the absence of express limitation therein, yet, if the inventor has intentionally so limited it, he is bound by that limitation, notwithstanding it was voluntarily made (McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Cimiotti Co. v. American Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100; Ohmer v. Ohmer [C. C. A. 6] 238 Fed. 182, 193, 151 C. C. A. 258); and, notwithstanding the specific mention of the pug shaft in the first and third claims, we are of opinion that the inventor has intentionally limited claim 2, at least to the connection of the crank to the pug shaft upon the front end of the mill. Not only are the specifications and drawings generally consistent only with such limitation (the specification expressly states that the crank is journaled through sleeve on "the front end of the pug mill shaft"), but the very simplicity of the device (resulting in strength, smoothness and durability), which was its best claim to invention, included direct connection with the end of the pug shaft. Arnold testifies:

"I gained considerable simplicity in operation by connecting this plunger directly onto the pug shaft;" and "one of the important features, which I considered most broadly patentable at the time I filed my application, was the direct connection from the crank on the main shaft to the press on the inside. By the 'crank on the main shaft' I mean the main pug shaft."

Arnold may or may not have doubted the utility or patentability of his device, from the standpoint of simplicity, when not applied directly to main or pug shaft, but indirectly, through a countershaft. But, whatever his ideas upon this subject, it is enough that he limited himself as stated; he has no right to complain that his competitor has relied upon such obvious construction of the patent. In so saying, we do not overlook the rule that a generic claim may, in a proper case, be well supported by merely specific description and drawing (Paper Bag Patent Case, 210 U. S. 415, 418, 28 Sup. Ct. 748, 52 L. Ed. 1122), nor the other rule that an inventor need not, by his claim language, anticipate variations which are the substantial equivalent of his form, and that even express limitations found in a claim with reference to form or shape will not necessarily prevent the due application of the rule of equivalency (Western Electric Co. v. La Rue, 139 U. S. 601, 606, 11 Sup. Ct. 670, 35 L. Ed. 294; Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713; McSherry Co. v. Dowagiac Co. [C. C. A. 6] 101 Fed. 716, 721, 41 C. C. A. 627; Metallic Extraction Co. v. Brown [C. C. A. 8] 104 Fed. 345, 353, 43 C. C. A. 568; Schieble Toy, etc., Co. v. Clark [C. C. A. 6] 217 Fed. 760, 133 C. C. A. 490); but we think these principles inapplicable to this case.

[3] In a broad sense, and for many purposes, the side of the charging chamber is the perfect equivalent of the end of that chamber. It may be that Arnold would have been entitled to a claim like claim 2 with "discharge face" substituted for "front end"; and if the use of the phrase "front end" indicated only Arnold's intent to name the location that happened to be the appropriate one in the machine before him for his platen and plunger mechanism, it might well be that the defendant's side location would be its equivalent. However, as we have pointed out, the front end location was not a matter of mere form. The degree of direct communication and of simplicity which Arnold thought to characterize his invention demanded that the location should be on that face through which the pug shaft projected; and when it thus appears that the word of limitation represented a thought essential to that which the inventor regarded as his new step, its limiting effect cannot be neutralized through the rule of equivalency. Houser v. Starr (C. C. A. 6) 203 Fed. 264, 269, 121 C. C. A. 462.

It is now said that Arnold's substantial step in advance was to receive upon his plunger all the side thrust or tendency to circular motion involved in a pitman or walking beam or rocker arm, and thus transmit to the platen rods only an absolutely vertical motion. If this is conceded, it appears that he undertook to express this inventive thought in the first claim, which ends with the clause "whereby the said pitman drives the said plunger and platen rod vertically in unison." The first claim, however, includes a method of connection between crank and pitman, which method defendant does not use; and we cannot find in the second claim any attempt to state broadly the same inventive thought which Arnold undertook to cover by his first claim.

We therefore agree with the District Court that infringement is not shown.

As to claim 8, copied in the margin:[2] The idea of letting air into the press platen was not new. Brown, in 1851 (No. 8,269), showed a hole in the bottom of the pressing piston "closed by a valve opening downward for the purpose, when the piston rises, of allowing the air to pass through, and cause the clay to be detached, which would otherwise adhere by suction to the piston and resist its upward motion." Bisbee, in 1869, had shown a movable, perforated cap upon the lower side of the press plunger, whereby air was carried over the surface of the brick. Martin, in 1867, had shown pipes in the "follower," or press plunger, whereby the air enters as the "follower" is raised and escapes as the clay is pressed. There was, in our opinion, no invention in introducing the air through hollow plunger rods carried above the clay, nor in the use of the air valves employed.

The decree of the District Court is affirmed.

UNITED STATES DRAINAGE & IRRIGATION CO. v. MANAHAN.

(Circuit Court of Appeals, Third Circuit. November 2, 1917.)

No. 2297.

PATENTS ⟸328—VALIDITY—TRENCHING DEVICE.

The Skinner patent, No. 962,723, for an auxiliary tool for use in connection with spades, claims 1 and 2 are invalid, as too broad, covering, as they do, the use of an old device for the old purpose of venting the vacuum caused in the use of any trench-digging tool in wet ground.

Appeal from the District Court of the United States for the District of New Jersey; Charles P. Orr, Judge.

Suit in equity by the United States Drainage & Irrigation Company against Jesse P. Manahan. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 236 Fed. 144.

Munn, Anderson & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for appellant.

Francis C. Lowthorp, of Trenton, N. J., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. E. M. Skinner, the plaintiff's assignor, made application January 30, 1908 (Serial No. 413,400) for a patent for a trenching device. A division was ordered, and in due course two Letters Patent were issued—No. 926,145 for a "trenching device" and No. 962,723 for an "auxiliary tool for use in connection with spades." The plaintiff sued for infringement of the latter patent. The District Court dismissed the bill on the ground that claims 1 and 2 (the only claims in issue) were invalid because of prior uses and lack

[2] "8. In a brick press of the type shown in combination with the press platen of a hollow plunger rod passing through the said platen, and a valve to close said hollow rod, substantially as described."

of patentable invention, and, even if valid, the claims, being necessarily limited to the particular tool of the patent, had not been infringed. The plaintiff appealed.

The parties are and for a long time have been rival contractors for draining marshes and meadows in mosquito infested districts. Marshes are drained by running ditches or trenches of depth, length and direction sufficient to carry off the water. Before the inventions spoken of in this litigation, the tools with which trenches were dug were long-handle spades with blades varying from 8 to 10 inches in width and from 12 to 20 inches in length. The way in which trenches were dug with such tools was to cut the turf along both sides of the proposed trench and then dig out the earth between the lateral lines so cut and marked.

Wet marsh earth presented difficulties. Being heavy, several spadesful were required to reach the desired depth. Being soggy, it lacked the stability necessary for a fulcrum upon which to bear the spade in raising the load from place. The spade handle, when pressed down to lift up its load, would sink into the wet earth. To meet this difficulty and to obtain a leverage which the earth would not afford, trench diggers employed the obvious expedient of putting any available piece of wood back of the spade and using it as a fulcrum.

The sogginess of marsh earth presented still another difficulty. It developed a suction, which occurred when the spade was driven in, and which held the blade fast, or, as described by the patentee:

> "As the spade is moved to remove the sod, a vacuum tends to form between the spade and the transverse wall of the trench. Unless the vacuum is destroyed, it is almost impossible to remove the sod."

This suction was so great that, in exerting force to lift the sod, the handle of the spade sometimes broke before the earth yielded and the blade was released. It was obvious that this suction had to be overcome, and the means employed to overcome it was equally obvious. The laborer drove the spade into the earth, and then, instead of pulling back on the spade handle in an effort to lift it, as he would do in digging dry earth, he first thrust the handle forward, thus separating the blade from the earth in the rear and breaking the suction by opening the vacuum, and then put behind the blade a piece of wood, board, rail, barrel stave, or anything handy, so that on the reverse motion of the lift, suction would not be re-established. Thus in the prior art, suction, its problem, and means to overcome it, were known and dealt with.

Letters Patent No. 926,145, the first of the two patents issued on the division, was issued for a trenching device. It is not here in suit, but as the device of that patent is the principal device to which the device of the patent in suit is auxiliary and concerning which much of the testimony relates, it is necessary to speak of it and to distinguish it from the device of the patent in suit (No. 962,723). The trenching device of the first patent is a spade-like tool with a large blade about 12 inches wide and from 24 to 30 inches long. The lower edge of the blade is pointed and sharpened, and cutting edges project at right angles from its sides. It is somewhat suggestive of a

giant trowel with a blade abruptly turned instead of curved. The handle is a double arrangement intended to add leverage and aid lifting. In operation, the lateral knife-like projections perform the work which was done before by cutting the sod with an ordinary spade, and the main body of the blade of unusual size lifts a large core or plug of earth in one movement. A framework or a pair of boards placed laterally along the trench is used as a fulcrum for lugs or metal pieces outstanding from and in the plane of the blade. In inventing this device the patentee certainly made an improvement on the old trench spade, but he pointed out nothing new in the way of using it, for he employed a fulcrum similar in principle to the ones crudely used in digging with spades. This patent provides no means to overcome suction. That was left, on division, to the second Skinner patent.

Shortly after Skinner filed his application and before Letters Patent No. 926,145 for a "trenching device" was issued to him, Manahan, the defendant, made application and was granted Letters Patent No. 902,983, for a "digging implement." As the plaintiff does not charge infringement of Skinner's "trenching tool" by Manahan's "digging implement," neither patent is in suit. It is sufficient to say that the devices of these patents are different in construction, but similar in performance.

The advent of one or of both of these tools unquestionably wrought a great advance in the art of trench digging in marsh and meadow lands. Between 60,000,000 and 70,000,000 lineal feet of trenches of superior conformation have been dug with tools of the two designs. With the Skinner trenching device, 1,200 lineal feet of trenches can now be cut by three men in a day, as against 250 feet cut by the same number in the same time with ordinary spades. This difference has not only cheapened the operation of trench digging to overcome the mosquito pest, but has so reduced the cost that such adventures are financially possible, when before the old cost was in some districts prohibitive. How much credit for this achievement should be given the tool of the patent not in issue it is difficult to say, but that some credit must be given it and that all credit should not be given the auxiliary tool of the patent in suit must be admitted.

The plaintiff says in effect that the whole credit should be given the patent for an auxiliary tool, for without that tool it is impossible, because of suction, to use the very excellent trenching device of the first patent, that the tool which appears to be the minor invention is in truth the major invention, and to it should be credited the achievement of eradicating mosquitoes by marsh trenching at non-prohibitive cost.

The patent in suit (No. 962,723), as we have said, is for an "auxiliary tool for use in connection with spades." Strictly speaking, this tool is auxiliary to and intended particularly for use in connection with the trenching device of the first patent (No. 926,145), because it is the tool of a patent issued on the division of the application on which the first or trenching device patent was issued, and because the patent for the auxiliary tool refers to the device of the first patent by

serial number (No. 431,400) and shows diagrammatically its use in connection with that device. Though being really auxiliary to that device, the claims are not for an auxiliary tool alone, or for a tool auxiliary to that particular device, but are for a combination of an auxiliary tool with any tool or device used for digging trenches. The claims as drawn are even broad enough to cover the use of such a tool with spades of the prior art. They are:

"(1) In combination with a tool for digging trenches, a removable venting device adapted for insertion at the rear of said tool;

"(2) In combination with a tool for digging trenches, a removable back bar adapted for insertion at the rear of said tool."

The "auxiliary tool" of the patent title, mentioned in the claims as a "venting device," is described in the specification as a stake or stick with a point at one end and a handle at the other, with grooves on opposite sides extending lengthwise from top to bottom. No invention can be found in giving a stick a point and a handle. Invention may reside in the lateral grooves. Upon this, we are not called upon to express an opinion. The venting device of the patent, as urged by the plaintiff and as broadly claimed in the patent, is not limited to a stake or tool as described in the specification and shown in the diagram, but extends to any stake, stick, stave, rail or board, that is small enough to be inserted in the hole made by the trenching device and is large enough to break the vacuum and prevent it re-forming. The function of such a stake, stick or board used as an auxiliary to a trenching device to vent a vacuum is precisely the same as that performed by a like piece of wood when years before it was used as an auxiliary to a spade. The plaintiff, however, disclaimed at trial that the claims in issue cover the early use of a venting stick as an auxiliary to a spade, but maintained that the patentee first disclosed the use of such a stick with such a function in conjunction with a "trenching device," that the combination of such a stick with such a device amounts to invention, and that anyone who uses a plain stick, stake or board, as a means to vent a vacuum binding the blade of any trenching device, infringes.

This contention of counsel is consistent with the breadth of the claims in issue, for if construed as they read, they not only cover the stick thrust behind the spade in the early art, but they cover any stake or stick used to vent a vacuum made by any present or future "tool for digging trenches." These are very broad claims. What did Skinner do to entitle him to claims of such breadth? In using the venting stake of the prior art as a venting device for a modern trenching device, Skinner applied an old means to overcome a known physical difficulty ever present in the art, whether the operation be with old or new devices. Suction occurs in operating new trenching devices precisely as it occurred in digging with a spade. Suction being present in both, the problem is the same in both. The size or design of a modern trenching tool does not do away with suction or change its problem. Skinner used the venting stake or stick of the old spade as a venting tool, stake or stick, for the new patented device. In doing this, he did not put an old means to a new use. He adapted an old

means to an old use, and employed it in the same way and caused it to perform the same function in solving the same problem. The trenching device of the first patent is so superior to the old spade as a trenching tool that perhaps it may be called a different tool, as insisted by the plaintiff, yet after all, it is nothing more than a marsh digging tool. While the modern trenching device, whether Skinner's or Manahan's, is a great improvement over a trenching spade, yet it is operated just as the old spade was handled, by driving it into the earth, thrusting the handle and blade forward to break the suction, inserting a stake or stick back of the blade, and then drawing the blade back, and with the vacuum still broken, lifting the earth from place.

The function of the venting stake or stick in preventing suction, therefore, is identical in marsh digging tools, whether old or new, and the use of the stake or stick to overcome suction, developed by tools, whether new or old, large or small, superior or inferior, is so well known that we think the claims appropriating broadly the function of such a stake or stick for use in combination with "a tool for digging trenches," which means with *any* tool for digging trenches, are too broad to be valid. We therefore affirm the finding of the District Court that claims 1 and 2 of the patent in suit are invalid, and direct that

The decree below be affirmed.

ONE-PIECE BIFOCAL LENS CO. v. BISIGHT CO. et al.

(District Court, D. Maryland. October 26, 1917.)

1. PATENTS ⟸328—VALIDITY—BIFOCAL LENS.
   The Mayer patent, No. 798,435, for a single piece bifocal lens, is void; the Conner patent, No. 932,965, which is for the same thing, being entitled to priority.

2. PATENTS ⟸65—"ANTICIPATION"—PRIOR PUBLICATION.
   To constitute an anticipation of a patent for an article of manufacture by a prior patent or other printed publication, it is not necessary that such publication should describe the process of manufacture; but it is sufficient if it clearly and accurately describes the very thing claimed in the later patent.

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

3. PATENTS ⟸328—ANTICIPATION—BIFOCAL LENS.
   The Alexander patent, No. 954,772, claim 1, for "a solid bifocal lens, consisting of a single crystal, having formed upon one face a pair of concentric ground visual surfaces," is void for anticipation. Claim 3, which is for the same lens after it has been subjected to a further operation, also *held* invalid.

4. PATENTS ⟸72—ANTICIPATION—ARTICLE OF MANUFACTURE.
   Anticipation is not avoided by the fact that in the course of the manufacture of the patented product something is formed which is new and useful, if the patented product, when finished, is like something before described.

5. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BIFOCAL LENS.
   The Conner patent, No. 932,965, for a bifocal lens, comprising one piece of glass having an upper distance field, a lower and smaller near field,

and an arched division separating the two fields, but the lens at the curved line of joinder having a uniform thickness through both fields, was not anticipated and is valid; also *held* infringed.

6. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PROCESS OF MAKING BIFOCAL LENS.

The Conner patent, No. 925,802, for a process of making a bifocal lens, claim 1, is valid. Claim 2 is invalid, as not for a particular process, but for every way of making the product. Claim 1 also *held* infringed.

7. PATENTS ⟸11, 99—PROCESS PATENT—DOUBLE PATENTING.

A valid patent cannot be granted for a process, unless the patentee tells how to practice it, and if, in making a machine for that purpose, he exercises his inventive skill, he may patent the new machine, and it will not be a case of double patenting, unless the process cannot be practiced except by such machine.

8. PATENTS ⟸328—VALIDITY—MACHINE FOR MAKING BIFOCAL LENSES.

The Connor patent, No. 836,386, for a machine for producing bifocal lenses, claim 1, *held* invalid, as too broad.

In Equity. Suit by the One-Piece Bifocal Lens Company against the Bisight Company and Benjamin Mayer. Decree for complainant.

Edwin F. Samuels, of Baltimore, Md., Virgil H. Lockwood, of Indianapolis, Ind., and Edward Rector, of Chicago, Ill., for plaintiff.

W. Thomas Kemp, of Baltimore, Md., William M. Stockbridge, of New York City, Cyrus N. Anderson, of Philadelphia, Pa., and Victor D. Borst, of New York City, for defendants.

ROSE, District Judge. Five patents are here in suit. Four of them belong to the plaintiff, which says the defendants infringe all of them. The individual defendant, Mayer, was the patentee of the fifth. It is now owned by the Bisight Company, his corporate codefendant. After it was issued, the Patent Office declared an interference between its single claim and the pending application, which ultimately resulted in one of the plaintiff's patents now in suit. That interference was determined in favor of the plaintiff's patentee. The plaintiff now asks that the finding then made may be carried to its logical conclusion by a decree canceling and declaring null and void the Mayer patent.

The patents before the court relate to one-piece bifocal lenses, to methods of making them, or to the tools and machinery used in fashioning them. Many people need stronger glasses for near than for distant vision. It is not always easy to remember to carry two pairs. To be continually taking one pair off and putting the other on, even if both are at hand, uses up both time and temper. It is better to have both of them in the same frame.

The earliest known bifocal was one of the inventions of the many sided Franklin. He took two lenses having the needed difference in strength, and so cut them that they could be put into the same frame. The weaker, for distant vision, was placed in the upper part of the frame; the stronger in the lower. The bottom edge of the former and the topmost edge of the latter were horizontal, so that they would fit together more or less snugly. This device, like almost everything else which came from that incarnation of practical common sense,

worked, and in many ways worked well; but, while it was simple, it was also crude. It did not improve its wearer's appearance. The necessarily conspicuous line between the lenses was unpleasant to him. Dirt and dust worked their way in. A slight loosening of the frame would let the glass fall out. It was obvious that a bifocal in which both lenses were combined in a single piece of glass might be free from most of these objections; but the practical difficulties in the way of making such a device were great.

According to the testimony, the first important attempt to improve upon Franklin's glasses was the invention of what is spoken of in the record as the "old one-piece solid bifocal." In it the entire glass was first given the power required for the stronger or near field of vision, and then a portion of its upper surface was ground down so as to reduce its power. It followed, from this method of manufacture, that the division line between the two portions took the form of an up-curved or reversed arch. This was undesirable. A limited area will suffice for the strong lens, needed for near vision. The weaker should furnish a much wider field of view. Moreover, in a glass so made, there is a marked prismatic effect at or near the line at which the lenses of unequal power come together.

This old solid bifocal came upon the market nearly 70 years ago. It never became popular. The demand for it was never as great as for the Franklin, and now, when better lenses are available, it has practically gone out of use. The maker of it started with the strong lens, and obtained the desired inequality of power through weakening a portion of it by grinding it down.

Some 30 years ago it occurred to another inventor to reverse this process. He took a lense of the lesser power, needed for the distant field, and, by cementing another lens upon it, gave a part of its surface the added strength required for near vision. This resulted in a bifocal which was and still is popular. It can be cheaply made, and it serves its purpose well. It is still sold in far greater quantities than are its more modern, more theoretically perfect, but much more expensive, rivals. It has some shortcomings. In it the line of division between the near and distant field is marked, and forms quite a shoulder which is more or less unpleasant to the eye, and which has a tendency to collect dirt and dust. These objections are more or less felt, even when the upper edge of the added lens is ground as thin as is mechanically possible, and of course, when so ground, the thin edge may, and it sometimes does, break and chip.

Still another experimenter in this field of endeavor took Franklin's device as his starting point. He made his two fields separately. He cut each of them to the desired size and shape and cemented their edges together. In practice this made a bifocal in which the stronger field was circular in outline, or nearly so, and was, as compared with the weaker, limited in area. Inspired by their hopes, rather than by their modesty, the makers of this device called it the "Perfection Bifocal." It was useful, and is used.

Grinding down and building up, as well as clamping and cementing together, had not attained what was hoped for. About 1899 the

"Kryptok" was devised. Its inventor did not attack the problem, then apparently unsolved, of how to grind upon the same side of a single piece of glass two curvatures and thereby make an effective and comfortable bifocal. He found a way around this difficulty. He made a lens, the entire surface of which was ground to the same curvature, but which was a true and useful bifocal nevertheless. He availed himself of the difference between the refracting powers of crown and flint glass. He made the upper part of his lens, needed for the distant field of vision, of the former, and that for the nearer of the latter. He cut a recess in the lower edge of the crown glass, and fitted the upper edge of the flint glass therein. At first he cemented one to the other, but before long it was found that they could be fused with more satisfactory results. After they were united, in whichever way the union was effected, the common surface was given the desired uniform curvature. The result is a lens which is largely used. For a more detailed review of the bifocal art down to the invention of the Kryptok, reference may be had to the opinion of Judge Van Valkenburgh in Kryptok Co. v. Stead Lens Co. (D. C.) 207 Fed. 85, subsequently adopted by the Circuit Court of Appeals for the Eighth Circuit. 214 Fed. 368, 131 C. C. A. 144.

Satisfactory as the Kryptok in many ways is, like other human devices, it does not reach to the ideal conceivably attainable. Some of its shortcomings are due to limitations imposed by its distinctive methods of manufacture. There was and still is room for further exercise of inventive skill.

The story thus far told shows that it must have been hard to make a solid one piece bifocal. The "Cemented" and the "Kryptok" lenses bear witness that those most highly skilled in the art felt that it was easier to build up a bifocal than to fashion one out of a single piece of glass; a fact not without its lesson as to what was the true state of things in this industry prior to the disclosures of the patents in suit. The effort to make a better bifocal continued. At or shortly after the beginning of the present century, at least three persons in different parts of the country were independently working at the problem. To the rights of two of these, Alexander and Conner, the plaintiff has succeeded. The defendant, Mayer, is the third.

[1] Alexander applied for a patent on August 27, 1903, and Conner on October 23d of the same year, less than 60 days later. On July 27, 1904, after their applications had been pending nearly 2 years, an interference was declared as to certain features of the inventions respectively claimed by them. On June 19, 1905, priority was awarded to Alexander, and the patent in suit, No. 954,772, was issued to him on April 12, 1910. On March 10, 1905, while the Alexander-Conner interference was still pending, Mayer made his application, which was also for a single piece bifocal lens. Somebody in the Patent Office was napping. It was not at the time noticed that his single claim was in direct interference with a feature of Conner's invention, not involved in the Alexander interference. Mayer's application had a comparatively swift and easy passage through the office, and he obtained his patent, No. 798,435, on August 29, 1905, less than 6 months after he

first asked for it. Subsequently an interference between his already issued patent and the still pending application of Conner was declared. The examiner of interferences, the board of examiners in chief and the commissioner of Patents concurred in awarding patentable priority to Conner. Mayer took an appeal to the Court of Appeals of the District of Columbia, but abandoned its prosecution. On August 31, 1909, one of the patents in suit, No. 932,965 was accordingly issued to Conner. It contained a single claim which is identical with that of Mayer's patent.

If the decision of the Patent Office in the Conner-Mayer interference was right, the patent to Mayer must be canceled, irrespective of what conclusion may be here reached as to the validity of Conner's claim. The three Patent Office tribunals held that, even if Mayer had been, as he claimed, the first to conceive the inventive idea, he had been guilty of such laches in reducing it to practice that, as against Conner, priority could not be awarded to him. Upon such a question of fact the decision of the Patent Office tribunals, and the abandonment by the defendant of his appeal to the Court of Appeals of the District of Columbia, while not absolutely controlling, are entitled to great weight. Automatic Weighing Machine Co. v. Pneumatic Scale Co., 166 Fed. 304, 92 C. C. A. 206. It is not necessary to invoke that rule here. A careful consideration of all the evidence, not only that before the Patent Office, but that which the defendant now for the first time submits, independently leads to the same conclusion as that reached by the Commissioner of Patents and his subordinates. The Mayer patent, No. 798,435, must therefore be canceled.

[2, 3] The defendants' lens is accurately described in the single claim of that patent, which claim, as already stated, is identical with the Conner patent, No. 932,965, in suit. The defendants necessarily infringe it, if it is valid. Their contention that it is not can be more conveniently dealt with after like objections to the claims of the Alexander patent have been considered. There are five of such claims, but, while the plaintiff relies on all of them, it says that as a practical matter, it is unnecessary to consider any of them, except the first and third. The first reads:

> 1. A solid bifocal lens, consisting of a single crystal, having formed upon one face a pair of concentric ground visual surfaces.

The defendants say that it is for something which is described in earlier patents. An examination of most of the latter will be unnecessary. In 1866 an American patent, No. 59,995, was issued to one Gregg. He shows a bifocal lens in which the division line between the two fields is similar in curvature to that of Alexander's. He says he "constructs two distinct and perfect segments of lens concentric in one piece of glass, the upper portion having a broad field of vision for the purpose of seeing distant objects, and the lower portion, a lens, with upper edge concentric with the edge of the upper portion, and distinctly defined, adapted to seeing objects near the eye, and having a narrow field of vision." This appears to be a "a solid bifocal lens, consisting of a single crystal, having formed upon one face a pair of concentric ground visual surfaces." It is true Gregg does not tell how

such a lens can be made, and, in view of the history of the art, it is highly doubtful whether he ever made one or knew how one could be made.

In this respect there is not much to choose between him and Alexander. In his interference proceedings with Conner, the latter testified that he had never made such a lens as that described in his patent. It does not appear that any one else has ever made one in the way he tells the public they may be made. Under such circumstances, it goes without saying that the expert witnesses differ as to whether one could be made by his process. The decided weight of the testimony is that it could be. In the sense of the law, the device is therefore useful. Nevertheless, it has never been manufactured in the way disclosed in the patent. It is highly probable, therefore, that the method there set forth is, from a commercial standpoint, useless; but, if the fact were otherwise, could Alexander's first claim be upheld? It is for a product, not for a process. It is void if the thing it claims has been described in any printed publication prior to his conception of it. What will constitute such a description? The plaintiff answers that the product has not been described, unless it has been actually produced, or some practical means of producing it has been discovered or is known. As so affirming or assuming, reference is made to a score of cases. All of them have been examined. Many of them are clearly beside the mark. Not one is directly in point. Some of them deal with process patents. Those are authority for nothing more startling than that a process is not described, unless such description of it is given as will suffice to teach one skilled in the art how he may practice it. In others, machine patents were in suit. Either a machine patent will work, or it will not. If it will not, it is without patentable utility and void therefore. It is unnecessary to go into any inquiry as to anticipation. On the other hand, if it will work, a description of something which will not is not a description of it.

In a number of the cases cited by the plaintiff, product patents were involved. In such of them as held that a patented thing had not been anticipated by some previous description set up against it, the court was of opinion that such earlier description failed in some substantial respect to describe the thing claimed in the patent in controversy. Plaintiff calls attention to the fact that, in the last edition of Walker on Patents, the statement that a claim for an article of manufacture may be anticipated by a prior patent or printed publication which describes the article without describing any process of making it is qualified by the proviso that "the knowledge of the article would teach a skillful mechanic how to make it." Walker on Patents (5th Ed.) 71.

For the rule and its asserted limitation, two authorities are cited: Cohn v. U. S. Corset Co., 93 U. S. 366, 23 L. Ed. 907; In re Schaeffer's, 2 App. D. C. 8. In the former, the Supreme Court applied the rule, but used language which could be understood as recognizing the limitation. In the beginning of the discussion of the case, Justice Strong, after pointing out that an earlier English patent would be fatal to plaintiffs, if it described sufficiently the manufacture described and claimed in plaintiffs' specifications, went on to say:

"It must be admitted that, unless the earlier printed and published description does exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it, or repeat the process claimed, it is insufficient to invalidate the patent."

It will be noted that the sentence quoted has reference to other than product patents, and that the requirements with which its description must comply, in order that it shall effectively anticipate, are stated disjunctively. From such a description, persons skilled in the art must be able (1) "to comprehend it"; (2) "to make it"; or (3) "to repeat the process." The last of these alternatives obviously has reference solely to what will suffice to anticipate a process or method patent. Is the second, namely, a description which will tell the skilled "how to make it," required only in the case of an alleged anticipation of a machine patent, and will an earlier disclosure be fatal to a product patent if it enables the well posted in the art "to comprehend it"? The immediate connection in which this statement is found, and the apparent purpose for which it was made, suggests a negative answer, while one in the affirmative is apparently given in the statement of the doctrine held decisive of the case. There Justice Strong said:

"It is quite immaterial, even if it be a fact, that the Johnson specification is insufficient to teach a manufacturer how to make the patented corset. It is enough if it sufficiently describes the corset itself. Neither it nor the plaintiff's specification exhibits the process of making. Neither of them set up a claim for a process. The plaintiff claims a manufacture, not a mode of making it; and the important inquiry, therefore, is whether the prior publication described the article. To defeat a party suing for an infringement, it is sufficient to plead and prove that the thing patented to him had been patented or described in some printed publication prior to his supposed invention or discovery thereof. * * * What is required is a description of the thing patented, not of the steps necessarily antecedent to its production."

Is the force of this language materially weakened by the fact that the court went on to point out that what was known at the time the anticipating Johnson's specification was filed, was sufficient to enable one skilled in the art to make the corset?

The other case cited by Walker (In re Schaeffer, supra) was decided by the Court of Appeals of the District of Columbia some 16 years later. It sustained the Commissioner of Patents in refusing a patent for Alizarin on the ground that it had been described in a technical handbook, although no way of making it was there set forth. The opinion cites with approval 1 Robinson on Patents, § 330, to the effect that the method of producing the manufacture forms no part of the invention of it and "therefore need not be described." It is, however, true that the court did go on to suggest that, in the light of what was known at the time the anticipating description was published, one skilled in the art would have no difficulty in devising a way of making it.

There may be found in the books language which does not always accurately discriminate between the disclosure necessary to sustain a patent for an article of manufacture and that which will anticipate a subsequent patent for such article. One who gets a patent must pay the price. In return for his monopoly for a limited time, he must tell the public how it may enjoy the use of his invention, after his exclusive

rights in it have come to an end. He does not do this if he merely describes a new article, without telling how it can be made. Heming Manufacturing Co. v. Cutler-Hammer Manufacturing Co., 243 Fed. 595.

It does not follow that an accurate description of some new product may not extend the limits of the public domain. In the invention of any article of manufacture, there may be and usually are two steps—the conceiving or imagining of the possibility of such a thing, and the devising of a way of making it. Sometimes one, sometimes the other, of these may require the greater and more unusual exercise of inventive genius. The forming of a conception clear-cut enough to admit of intelligible description may be easy, or it may be difficult; but, when it has been accomplished, one part of the inventor's task is finished. When such a description is put in a printed publication, it is, from the standpoint of the patent law, done for all time. It makes no difference whether the printed publication be a patent or other printed document. If it be a patent, it is immaterial whether it be valid or not. If the man who formed the conception did not go further, and find out and describe some way of making the product, he may not have gone far enough to give himself any rights; but the publication of it in a patent, void though the latter may be, is a description in a printed publication.

The second step—that is, the devising of some way of making the article—still remains to be taken. He who first takes it is a pioneer in that particular field. He will have the right to claim broadly his way of making it, and his claims may be entitled to such a liberal construction that all other means that embody his thought, will be held equivalents, and as such subject to his monopoly. But that monopoly cannot cover anything which he did not invent. Under the patent laws, he cannot be the inventor of anything which has been previously described in any printed publication. The description under consideration is one which does not tell how to make the article it describes. It is one published at a time when those skilled in the art would not either from its disclosures or their knowledge, or from both combined, know how to produce it. For the reasons already stated, it is believed that, even under such circumstances, it may anticipate a later patent. It is, however, certain that, before it can be held to do so, it must affirmatively appear, beyond the opportunity for reasonable question, that it does in all respects clearly, accurately, and minutely portray the very thing claimed in the patent assailed.

Little attention will be given to the deductions of expert witnesses. A deaf ear will be turned to their ingenious arguments that, by putting together statements in one earlier description with others in another, a complete anticipation can be made out. Slight weight will be given to their contentions, not because they are not honest, able, and skilled, but because it is practically impossible for any man, with the disclosure of a patent in suit before him, to put himself in the precise mental attitude in which all the world was before those disclosures were made. It may now seem very clear that any omission from the earlier description of an element, quality, or characteristic of the pat-

ented thing, in view of what was then known, of what it disclosed, and of the purpose to which the article was to be put, must have been due solely to the fact that the author of the description thought it was superfluous to mention something, the presence of which he felt would be taken for granted. To act under such conclusion would be unsafe in any case in which the description set up as an anticipation did not tell how the thing described could be made, and when no way of making it was then known to the art. We have nothing the author of the earlier description did by which to complete, illustrate, or check up what he said. His words are all we have, and we will not be justified in adding to them, no matter how obvious such an addition may now seem to be. Nevertheless, even when subjected to the severe test thus laid down, it would seem that Gregg did describe a solid bifocal lens, consisting of a single crystal, having formed upon one face a pair of concentric visual surfaces, and, if he did, he described an article which Alexander sought to cover by his first claim, because at the time of Gregg's invention, and to-day, all lens surfaces are ground. That claim must therefore be held invalid.

How is it with the third claim of the same patent which reads:

3. A solid bifocal spectacle or eyeglass lens, consisting of a single crystal, having formed upon one face a pair of concentric visual surfaces of different dioptrics, one side of the outer surfaces being removed whereby the inner surface lies at or near one edge of the finished lens.

From what has already been said, it follows that Gregg describes a solid bifocal spectacle or eyeglass lens, consisting of a single crystal, having formed upon one face a pair of concentric visual surfaces of different dioptrics. The defendants say there could be no invention in cutting off a piece of the lens as originally made, so that what was originally the inner surface lies at or near one edge of the finished article. It is not likely that any one would argue that there could be. Cutting a lens is as familiar an operation to a lens maker as sawing a board is to a carpenter. The defendants contend that the claim is necessarily bad, because it is merely for an article old in the art, after that article has been subjected to an operation which involved no exercise of inventive genius. The plaintiff replies that the defendants misunderstand and misstate the issue. The claim is for a new article of manufacture. Upon the record it does not appear it was ever made before the date of patentee's conception. The claim was good, unless the lens was previously described in a printed publication. Was it? The plaintiff answers, No—not because the claim in suit requires that the new article of manufacture shall have been subjected to a well-known operation of the lens maker's art, but because the lens which, subjected to the operation, would take the form specified, was a lens which, as originally made, differed in material respects from any lens previously described.

The description of the invention and the way of making it, given in the patent, shows that the lens of the third claim before one side of its outer surface has been removed, has upon it two faces of different dioptrics, of which that of the greater power is circular in shape, while that of the lesser completely surrounds the more powerful. This lens

has the appearance of a round target with a circular bull's-eye in its center. Such a construction has a number of practical advantages, lending itself, as it does readily, to the operations of polishing and finishing. In point of fact, all the makers of solid one-piece bifocals now use this target lens. It has, therefore, patentable utility. There is no evidence that it was in fact ever made before the date of Alexander's conception of it, and no reason to believe that it was, nor was it ever described in any printed publication. It is true that there are shown, in a number of the patents of the prior art, finished lenses which might have been made from such a lens as that shown and claimed by Alexander in his third claim; but there is no evidence that they were in fact so made, and, as already stated, there is no evidence that any of them was ever made at all. It must therefore be held that the target lens has not been anticipated by any previous description.

[4] Defendants contend, however, that claim 3 is not for a lens which has the target shape; but it is for a finished lens which, in shape and other characteristics, differs not at all from the lenses shown in the patents to Gregg and to others in the prior art. They assert that it makes no difference that, in the course of the manufacture of the patented product, something was formed which was new and useful, if the patented product, when finished, is like something before described. The thing formed in the process of manufacture might be, if new and useful, itself patentable, because it had never been previously described; but the finished thing cannot be, because it, though produced in another way, is the same thing which had been theretofore described. Risdon Iron Works v. Madart, 158 U. S. 84, 15 Sup. Ct. 745, 39 L. Ed. 899. This contention is sound, and it follows that claim 3 of the Alexander patent must also be held invalid.

Conner Product Patent, No. 932,965.

[5] This patent has but a single claim, which reads as follows:

A bifocal lens comprising one piece of glass, having an upper distance field, a lower and smaller near field, and an arched division separating the two fields, but the lens at the curved line of joinder of the upper and lower fields having a uniform thickness through both fields, whereby the said division is practically free from prismatic effect.

This is identical with the single claim of the Mayer patent in suit. As already stated, the plaintiff seeks a declaration under section 4918 (Comp. St. 1916, § 9463) that the Mayer patent is void. The defendants say it is not, but at the same time in view of the possibility that the court may disagree with them, very strenuously argue that the Connor patent is void, for reasons which, if sound, necessarily require a declaration that the Meyer patent is equally worthless.

From what has been said, there is no question that the prior art does describe a bifocal lens, comprising one piece of glass, having an upper distance field, a lower and smaller near field, and an arched division separating the two fields. The only question is whether there is shown a lens of those characteristics, which, at the curved line of joinder of the upper and lower fields, has a uniform thickness through both fields.

The defendants contend that the Hanna patent, No. 306,918, of October 31, 1884, does describe such a structure. I do not think so. It cer-

tainly does not, except with the aid of the theories, perhaps the guesses, of the expert witnesses.

The defendants strongly rely upon English patent to Debenham, No. 25,110, November 29, 1899. That patent is probably a worthless one, but it does describe a one-piece bifocal lens in which there is no raised edge at the junction of the two powers, and it adds that, where there is, such an edge is not polished, but left rough and blackened and covered by a thin metal or other opaque band to prevent the eye from being dazzled by reflections or refractions. An expert witness in patent causes, or a member of the patent bar, may feel that Debenham gave a clear description of the lens Conner claims and of the lens the plaintiff and the defendants alike made; but it is not likely that anybody else would. The testimony shows that it is desirable that the line of division between the two lenses should have the property which Connor's has. Such a lens does not appear to have been anticipated, and is valid. If so, there is no question that defendants' device infringes it.

Conner's Method or Process Patent, No. 925,802.

[6] Conner's method or process patent, No. 925,802, has two claims, the first of which reads as follows:

> The process of making a bifocal lens from one piece of glass, including as a step therein the simultaneous generation of two concentric spherically disposed visual surfaces of different dioptrics upon one face of a piece of glass.

The patent raises the presumption that Conner was the first who, in making a bifocal lens from one piece of glass, simultaneously generated two concentric spherically disposed visual surfaces of different dioptrics upon one face of such piece; and there is nothing in the record to rebut this presumption. The defendants say that, even so, the claim cannot be sustained for two reasons:

> (1) It is for nothing other than the operation of a particular machine, and is therefore not for a true process.
>
> (2) That an earlier patent was issued to Connor for the machine, and that to sustain the patent for the process would be to uphold a double patenting of the same invention, the effect of which would be the unlawful extension of a monopoly in the inventive idea beyond the statutory period of 17 years.

It is not always easy to distinguish between a process and the mere result of the operation of a machine. Attempts to lay down and apply the rules by which it may be done are apt to end in disputes over words rather than over things. As the defendants in their brief well say: "Every case may be said to be sui generis." It sometimes happens that there is but one machine, or one succession of machines, by which the process can be carried out, and that such machines can themselves be put to little, if any, other use. In that event, the process and the result of the action of the machines are practically one, whatever theoretical difference it may be possible to make in words between them. Such, however, is not the case here. The evidence shows that the actual process claimed by Conner is now performed in different shops by the use of several different kinds of machines and tools. It is therefore a true process, as distinguished from the mere result of the working of a

particular apparatus. Aurora Mantle & Lamp Co. v. Kaufmann, 243 Fed. 915.

[7] The suggestion that it is a case of double patenting falls to the ground for much the same reason. A valid patent cannot be granted for a process, unless the patentee tells how to practice it. If no existing machine will suffice, he must make one that will. If in so doing he exercises his inventive skill, there is no reason why he should not patent the new machine. If he invents two or more different machines for doing the same thing, he can patent each of them. If he invents only one, and some one else subsequently invents another, such other person can patent his own invention. The question of double patenting can, in this connection, seldom arise, unless there is only one machine, or series of machines, which will perform the process. That the evidence shows was not the case here. If the claim is valid, it is infringed.

The second claim of this patent is for the process of making—

a bifocal lens from one piece of glass, which process consists in first grinding two concentric spherically disposed visual surfaces of different dioptrics, upon one face of the piece of glass, so that the glass will be smooth and even and have a uniform thickness at the line of junction of said visual surfaces; second, in forming the other face of said piece of glass as desired; and, third, in removing a portion of said piece of glass to give it the form of a finished lens and so that the inner visual surface will lie near one edge of the finished lens.

The defendants point out that the process as described by Conner consists of three steps:

(1) The grinding of the bifocal side.
(2) The grinding of the other or the so-called "prescription" side.
(3) Cutting the lens so that the near and stronger field will be at its lower part.

They say they do not infringe, because they change the order of these steps by cutting the lens after they grind the bifocal side and before they grind the other. This objection can be set aside. These are not steps, the order in the doing of which is important. Aurora Mantle & Lamp Co. v. Kaufmann, supra.

In the process covered by this claim, it is not essential that the two visual surfaces shall be simultaneously generated. The first step is merely the making of the thing claimed in the product patent. There is no invention in cutting off the superfluous glass, and that is all the third element of the claim amounts to. The second element, namely, "in forming the other face of said piece of glass as desired," or, in the language of the trade, "grinding upon the other face the prescription," is not new. If there is a new process here at all, it must be in the combining of the first and second steps.

The plaintiff claims that Conner was the first maker of a solid bifocal to shape two spherically disposed surfaces on one side of the lens and afterwards to grind the other side as the special needs of the particular wearer require. As a matter of fact, it may be so; but, if so, in what did the invention consist? If it was not done before, it must have been because nobody ever wanted to do it. Conner's invention consisted in shaping the bifocal side of the glass, and that was all there was of it. The trouble with this claim is that, in its essence, it is a claim

for every way of making the patented product. It is not a claim for a particular process.

Conner's Machine Patent, No. 836,486.

[8] The Conner machine patent, No. 836,486, has seven claims. It is the first of these that the defendants are said to have infringed, which reads:

> Apparatus for producing bifocal lenses including a rotary holder for the lens crystal, and means for grinding two bifocal surfaces of different dioptrics simultaneously on one face thereof, substantially as set forth.

Conner, as has already been held, invented a particular type of bifocal lens. His patent for it, and for the way of making it, has been upheld. He is also entitled to his exclusive rights in any particular machine or combination of machines which he has invented for carrying out or helping to carry out that process or to aid in the making of that product. He, however, cannot claim to monopolize machines which he has not invented. What this claim seeks to cover is all machines which will make his product, provided only that a rotary lens holder forms a part of them. The rotary holder was old in the art. He therefore claims the combining with an old thing of any and every machine or machines, tool or tools, which will achieve a particular result. He cannot claim machines which he has not invented. Indeed, if his claim be sustained, it would cover machines which nobody may have as yet thought of, but which may hereafter within the lifetime of his patent be devised. His monopoly must be limited to what he himself discovered. The claim goes far beyond that—so far that it cannot be saved by the phrase "substantially as set forth." It does not fulfill the statutory requirement that the inventor shall particularly point out and distinctly designate the invention he claims. The first claim of the Conner patent, No. 836,486, must therefore be held invalid.

It follows that the single claim of patent No. 932,965 and the first claim of No. 925,802 are valid, and that the defendants infringe them. The other claims sued on are invalid.

The defendants' contention that the plaintiff has lost its right to relief upon the two claims held valid and infringed, because of laches, cannot be sustained. The defendants received due notice that they were infringing. Under the circumstances revealed by this record, the plaintiff forfeited no rights by its tardiness in bringing suit.

A draft of a decree in the usual form may be submitted.

ATKINSON v. SCULLY.

(District Court, S. D. New York. April 30, 1917.)

1. TOWAGE ⇐19—LOSS OF TOW—LIABILITY FOR DEATH OF MASTER.
A tug with two coal laden barges in tow tandem on hawsers of about 225 fathoms each was on a voyage from Hampton Roads to Providence, R. I., when while passing to the eastward of Block Island in the early morning it was discovered that the rear barge had gone adrift. The wind was blowing a gale from the west. The forward barge, which was leaking at the commencement of the voyage, had been pumping constantly since the commencement of the heavy weather the day before. *Held*, that the master was not in fault for not leaving the leaking barge, which would have been thereby greatly endangered, to search for the one adrift, but that he was in fault for starting on the voyage with the barge in a leaky condition of which he had knowledge, and that the owner of the tug was liable for death of the master of the other barge, which was lost.

2. TOWAGE ⇐11(10)—LIABILITY OF TUG—BREAKING ADRIFT OF TOW.
A tug is held to a high degree of diligence in endeavoring to save a tow which has gone adrift.

3. TOWAGE ⇐11(5)—LIABILITY OF TUG—TAKING OUT LEAKY TOW.
A tug which takes out a leaky barge must be held liable for all the proximate results of such conduct.

4. DEATH ⇐95(1)—ACTION FOR WRONGFUL DEATH—DAMAGES.
Damages recoverable by an administrator for the death of his intestate who was lost at sea while acting master of a barge considered under the New Jersey statute (2 Comp. St. 1910, p. 1908, § 8, as amended by Act April 9, 1913 [P. L. p. 586]), which authorizes recovery for the pecuniary injury resulting to the wife or next of kin, who in the instant case were nephews and nieces of deceased.

In Admiralty. Suit by Gustav E. Atkinson, as administrator of the estate of Alfred Siljander, deceased, against Thomas J. Scully. Decree for libelant.

Warner C. Pyne and O. D. Duncan, both of New York City, for libelant.

Frank V. Barns, of New York City, for respondent.

MAYER, District Judge. [1] The action is to recover damages for the death of Alfred Siljander alleged to have been caused by the negligence of respondent and his servants and agents, including the master and crew of the tug John Scully. In December, 1913, respondent was the owner of the steam tug John Scully and of the barges Henry Failing and Francis Hampshire. On the voyage in question Siljander was acting as master of the Hampshire, having been hired to make the voyage by the barge's regular master who was ill. On the morning of December 5, 1913, the tug John Scully sailed from Hampton Roads. She had in tow the barges Failing and Hampshire laden with 2,927 tons and 1,600 tons of coal, respectively. Both barges were bound for Providence, R. I. At the time of sailing from Hampton Roads the weather was fair and a moderate wind of about eight miles an hour was blowing from the west. Proceeding to sea the barges were towed tandem fashion on long hawsers, the Hampshire being the tail barge.

The length of the hawser between the tug and the Failing was about 225 fathoms, and the hawser between the Failing and the Hampshire was about the same length. The tug with her tow followed the usual course up the coast. The fair weather of the 5th continued on the 6th. On the 7th it became cloudy, and some rain was encountered. At about 3 a. m., December 8, 1913, Montauk Point was passed outside of the gas buoy. The wind was then from the west, and it was blowing a gale. At somewhere around 5:30 a. m., as near as the witnesses could tell, while the tug was making a turn around the southeast end of Block Island, which was then about 1¾ to 2 miles distant, the hawser to the barge Hampshire parted, and the barge went adrift. Those on board the tug discovered that the barge was adrift while they were making their change of course, but they did not see her go adrift and were unaware of just when she did break loose. There were no witnesses surviving from the Hampshire, and no one was called from the Failing.

Capt. Willin of the Scully testified that when he discovered the Hampshire was adrift he slowed the tug down for about 15 minutes. First Mate Dodd of the tug, who was on watch in the pilot house from 12 midnight to 6 a. m., stated that he was sure the tug had not slowed down while he was on watch. The first assistant engineer, Peterson swore that the tug slowed down for about 15 minutes while Beebe, the chief, stated that they were slowed down "probably three-quarters of an hour, maybe not so long." The engineer's log, was not produced because it had been lost in the bilges.

I think it may fairly be concluded that the tug was slowed down about 15 minutes because Capt. Willin and Peterson seem to have been best informed on that point. After those on the tug realized that the Hampshire had broken adrift Capt. Willin and the mate consulted, and the captain concluded to go ahead because he was convinced that any other procedure would result in the loss of the Failing with all aboard.

The views and judgment of Capt. Willin from the time the craft came by Montauk Point until he decided to continue to Newport after the Hampshire had broken adrift are concisely summed up in the following extract from his testimony:

"Q. Coming by Montauk, was the tow coming all right? A. It was coming all right. Q. Did you consider going to the westward of Block Island and cutting through? A. Yes; I did. Q. Why did you not go through? A. Because I went in there twice in my life under the same conditions, and I had to keep off and go to the eastward. It threw the barges into the trough of the sea. Q. What was your reason for not going in? A. The barges make better weather running before the sea. Q. To the best of your knowledge, how was the tide running? A. I think the tide was running westward. Q. With the tide running west, would that increase the peril? A. It would make it a worse sea. Q. It would make what we call a weather sea? A. Yes. Q. You received no signal whatever from the Hampshire previous to her breaking adrift? A. None whatever. Q. Did you see the Hampshire after she broke adrift? A. No, sir. I saw the outlines of her before I saw we started ahead faster, and she seemed to be coming all right the last time I looked back. That was just before we found we were going ahead faster. Q. After you had got the barges by Southeast Head Light bearing northwest, did you consider going under the lee of Block Island, to see if you could find the barge

broken adrift? A. I said if we did, the Failing would go down and lose all hands. The mate and I talked this matter over. Q. Have you ever anchored a barge under Block Island under these conditions? * * * Q. After coming on your regular course did you receive any signal from the Failing? A. I received no signals from her. Q. Had you any idea as to the tightness of her hull? A. I knew she was leaking because they had been pumping all day. Q. Did you notice the conditions on the Hampshire? A. Everything seemed to be O. K. on her. Q. Are the barges equipped with sail? A. Yes. Q. What is it used for? A. Used in case of breaking adrift, to help them along. Q. Have they got sail enough to maneuver the ship? A. They have enough to move the ship 4 or 5 miles an hour in a breeze of that kind."

Willin was a man of great experience in this service on the coast, and in fact was the "oldest in the business," having had an experience of 30 to 32 years. The tug was properly equipped and manned, and the Hampshire was in excellent condition. The Failing, however, was leaking. It seems that she had had her yearly overhauling about five months before, and no complaint had been made to respondent's superintendent of repairs as to her leaking, but Captain Willin knew that she was leaking when she left Hampton Roads. After leaving Hampton Roads, Capt. Willin did not see any pumping on the Failing until December 7th, and thereafter the pumping was constant. Following are the relevant extracts from Willin's testimony in this regard:

"Q. The only way you knew the Failing was leaking was by seeing them pumping? A. They were constantly pumping. Q. Where was the pump located? A. Forward. Q. What kind of a pump was it? A. Steam pump. Q. You saw the steam exhaust? A. Yes. Q. Was there steam heat on the barges? A. I do not know, I know they had a steam pump, but I don't think they had steam heat. Q. Captain, was the Hampshire leaking also? A. I saw no signs of it. Q. You did receive any signals from either barge? A. No, sir. Q. No complaint from the Failing about leaking? A. Yes; when we started they complained about leaking. Q. At the time you left Hampton Roads? A. Yes, they said she was leaking but no more than usual. Q. They did not say it was increasing? A. No. Q. Then at the time you left Hampton Roads, you knew the barge was leaking? A. Yes. Q. Did you talk with the captain? A. No, sir. Q. Did they pump all the way to Newport? A. No, after we left Hampton Roads, we did not see any more pumping until the 7th and never saw it stop again until we got to Newport. Q. You received no word of the Hampshire leaking? A. No, there was no complaint from the Hampshire. * * * Q. In towing barges, do you find it is uncommon for them to leak? A. I think it is an ordinary thing for them to leak some. Q. Do you find any difference between built barges and ship barges? A. Yes. Q. Do you find that the ship barges leak more than the others? A. Yes; I think the older class of barges leaks more."

It is contended that the leaking was only to such extent as is usual for this type of converted ship barge, and that there was not any increase of leaking until the heavy weather of December 7th was encountered; but the testimony certainly leads to the conclusion that the Failing must have been far from tight, for she leaked very badly after the rough weather had set in. Under such circumstances, I am satisfied that it would have been folly for Capt. Willin to take the chance of leaving the Failing to her fate in the hope of finding the Hampshire and saving her. The situation was one where an experienced master was called upon to exercise judgment in a serious emergency. With a leaky barge in tow, his duty was to proceed to a port of safety as fast as he could and avert the possibility of further disaster. This he

did by going to Newport and returning to look for the Hampshire as fast as could be reasonably expected.

The sole question is whether the master should have started on his journey with the knowledge that the Failing was leaking; for the testimony does not disclose any facts which show that Capt. Willin was in any manner to blame for the breaking adrift of the Hampshire. I think the trouble in this case is that some men of the sea become indifferent to danger. They do something so many times without disaster that they no longer appreciate its danger, just as the seasoned New Yorker in crossing a busy thoroughfare will take a chance which would horrify a country visitor. And so in this case the captain evidently was indifferent to possible danger when he started from Hampton Roads with a leaky barge.

If the Failing had not been leaking, I am satisfied that with a westerly wind there was a lee to the eastward of Block Island in which the Failing could have been safely anchored. This was pointed out by Capt. Stone of the Navy, who impressed me most favorably, and he marked on the chart where he thought the Failing could have been anchored. Coxe, a tugboat captain, entertained the same view and expressed his opinion to the effect that the Failing could have been safely anchored in about two hours; that is to say, about 7:30 to 8 a. m., whereas the Scully did not get back to Block Island from Newport until about 11:30 a. m., a difference of 3½ to 4 hours. Who shall say that, if the Scully had been free to search for the Hampshire, she would not have found her in those 3 or 4 hours?

[2] It must be remembered that the courts have held tugs to a high degree of diligence in endeavoring to save a tow which has gone adrift. Usually, the tow is helpless, and to abandon it is to commit it to almost certain loss or injury where a gale is on and the sea is rough. Williams v. Alaska Commercial Co., 2 Alaska, 43, affirmed 128 Fed. 302, 63 C. C. A. 92; Appeal of Cahill, 124 Fed. 63, 59 C. C. A. 519; In re Moran (D. C.) 120 Fed. 556.

It follows from the foregoing that the Scully disabled herself from doing that which diligence and vigilance required, because she had taken a leaky barge in tow with full knowledge of that fact.

[3] It is no excuse that the weather at the beginning of the journey and for some time thereafter was good. No one can surely predict what the weather at sea may be three days hence; and prudence requires foresight and safeguarding against bad weather and rough seas. If a tug takes out a leaky barge, she must be held to all the proximate results of such conduct, and that is this case.

For the reasons stated, I therefore find respondent liable.

The next question is that of damages.

[4] The measure of damages in the case is governed by the New Jersey statute (2 Comp. St. 1910, p. 1908, § 8, as amended by Act April 9, 1913 [P. L. p. 586]) which provides inter alia:

"Death by Wrongful Act; Persons Entitled to Bring an Action; Distribution of Amount Recovered:

"Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin * * * their proportions provided by law in rela-

tion to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death to the wife, surviving husband, and next of kin of such deceased person."

The next of kin in this case are nephews and nieces.

Siljander was born in Finland in 1861, so that in 1913 he was 52 years of age. He was never married. Just when he came to this country is not in evidence. In 1877 he lived in Chicago, having a room with Gustav Atkinson, the administrator of the estate of Siljander. He was employed for several years on vessels on the Great Lakes. In 1905 he was employed on coastwise coal barges, and apparently continued to work on them until 1913. While Atkinson testified that Siljander had been master of coal barges, there is no definite testimony by which it may be determined what his earnings averaged. As master of the Hampshire he took the place of the regular captain, whose wages amounted to about $58 per month. Whatever the amount of his earnings may have been, he did not make any substantial savings, and it is fair to assume that, having reached the age of 52, he would not have changed his habits as regards savings, and never would have accumulated an estate. His nieces and nephews were Fena Carlson of Obo, Finland, Anna (Siljander) Brown, Albert, Victor, William and Arthur Siljander of Chicago, Ill.

As to the niece, Fena Carlson, there is no evidence as to her age, or any fact concerning her, except that she is a daughter of a deceased sister of Siljander. The other nieces and nephews are all children of Albert Siljander, deceased, who was a brother of Alfred Siljander. They all live in the city of Chicago. The oldest one, Anna Brown, is 30 years of age. She is married, and her husband conducts a private school in Chicago. Albert Siljander is 24 years of age, Victor Siljander in 23 years of age. Both of these men are draftsmen. William Siljander was 19 years of age at the time of the taking of the depositions in October, 1915. He had just been graduated from high school, and was about to begin work. Arthur Siljander, in October, 1915, was 16 years of age, and was attending high school. There is no evidence that any one of these persons ever received any pecuniary assistance from Alfred Siljander. They were all brought up and supported by their own parents, and there is no evidence from which an inference can be drawn that they could reasonably expect to ever receive any pecuniary advantage from Alfred Siljander. From the evidence it is quite apparent that Siljander saw little, if anything, of his Chicago relatives and they seem to have had no interest in him or he in them. He was of the type who lived on the water, concerned only with his own life and indifferent to relatives who, from the standpoint of a man like Siljander, presumably were well to do. From the testimony of Atkinson, the administrator, it may, however, be fairly concluded that he sent his sister in Finland, the mother of Fena Carlson, a little money occasionally. He testified to two such incidents in 1889.

The testimony is very meager, due, no doubt, to difficulty of communication during war times, and possibly the expense of issuing a commission.

I think it is fair to assume that Siljander by occasional remittances, would have sent his niece some small amount every year, although, frankly, this is somewhat in the nature of a surmise rather than a clear conclusion from testimony. However, as Judge Thomas said in The O. L. Hallenbeck (D. C.) 119 Fed. 468:

"This evidence does not furnish a very substantial basis for pecuniary damages, but, employing the latitude that is permitted, it is considered that there was some financial loss."

To award only nominal damages or to refuse to award any would not, in my opinion, be in accordance with principles of justice. The administrator was bound to produce all the witnesses he could, including experts, and as he has succeeded in proving the negligence of respondent, I think, under the peculiar circumstances of the case, that the award should be made having in mind what will be left after actual disbursements.

$500 will produce, at 5 per cent., $25 per annum, and we cannot speculate that Siljander would have sent his niece in Finland more than $25 each year, and $500 was the amount awarded in the Hallenbeck Case, supra, where the next of kin were sisters who were self-supporting. Of course, there are many cases where sisters and nieces are dependent on brothers or uncles and have been supported by them and their loss is fully as serious as the loss of a husband. In such cases, substantial damages may well be recovered. But, in the case at bar, there is no such situation.

Taking everything in consideration, libelant may have a decree for an amount equal to $500, plus any actual disbursements not taxable, such as experts' fees. If there is any difficulty as to these details, they will be adjusted on the settlement of the decree. The decree, of course, is with costs.

Submit decree on three days' notice.

Addendum.

Of course, the award must go to the administrator, and it would appear under the New Jersey statute that it must be divided in the proportions provided by the New Jersey law in relation to the distribution of personal property left by persons dying intestate. I do not, however, pass upon this point, as that will be disposed of in the court where the administrator will account. I have endeavored, however, to make clear that there was no pecuniary injury to the Chicago relatives, but only to the niece in Finland.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) best expresses the proper and logical disposition of a recovery for negligence. Under that act, where next of kin are concerned, then the recovery is for the benefit of the next of kin "dependent upon such employé."

In re ABOUDARA.

(District Court, N. D. California, First Division. July 3, 1917.)

No. 10502.

BANKRUPTCY ⊜226—CONCLUSIVENESS OF REFEREE'S FINDING.

Petitioner, in order to enable the bankrupt to continue in business, guaranteed payment to the seller of property in the possession of the bankrupt under a contract of conditional sale reserving title to the seller. Thereafter an adjudication in bankruptcy was had, and petitioner induced the seller to present a claim for reclamation of the property. The claim was defeated on the ground that the seller by accepting the guarantee of payment waived its right to reclaim the property. *Held*, that such adjudication did not, despite the rule that a matter once adjudicated may not thereafter be litigated, amount to an adjudication precluding a claim by a petitioner to retake the property on the theory that it had been subrogated to the rights of the seller.

In Bankruptcy. In the matter of the bankruptcy of S. Aboudara. Petition by the Eng-Skell Company to review an order of the referee denying petitioner's claim to retake property. Order of referee reversed.

Hiram E. Casey, of San Francisco, Cal., for claimant.
Wallace & Politzer, of San Francisco, Cal., for trustee.

DOOLING, District Judge. S. Aboudara held certain property under a contract of conditional sale, the title remaining in the seller M. Getz & Co. The seller was pressing Aboudara for payment, and Eng-Skell Company in order to enable him to continue in business guaranteed payment to M. Getz & Co. Thereafter Aboudara was adjudicated a bankrupt, and M. Getz & Co., at the instance of Eng-Skell Company, presented in the bankruptcy proceedings a claim in reclamation for the property in question. This claim was prepared by Eng-Skell Company, and was opposed by the trustee on the ground that M. Getz & Co. had waived its right to reclaim the property by accepting the guarantee of payment from Eng-Skell Company. This ground was sustained by the referee, and the claim of M. Getz & Co. was denied. Eng-Skell Company had notice of all these proceedings. Thereafter Eng-Skell Company presented its own claim for the property, basing it upon its right to be subrogated to the rights which M. Getz & Co. had at the time the guaranty was made. It also based it upon other grounds not tenable. The trustee opposed this claim also, and the referee denied it on the ground that the matters in issue had been theretofore adjudicated upon the claim of M. Getz & Co. A review is sought of the order denying the claim of Eng-Skell Company.

It is true that a matter once adjudicated may not be litigated again, and generally true that, not only all matters actually decided are held to have been adjudicated, but also all matters belonging to the subject of controversy, and properly within the issues which might have been raised and determined. But here the very reason for the decision in favor of the trustee and against the claim of M. Getz & Co. was

that Eng-Skell Company had guaranteed payment. The right of Eng-Skell Company to the property by subrogation could not be determined under the claim made by M. Getz & Co. The most that can be said is that Eng-Skell Company mistook its remedy, when instead of making a claim in its own right, which it could maintain, it procured a claim to be made by M. Getz & Co. which was foredoomed to defeat. I am of the opinion that such mistake on the part of Eng-Skell Company does not bar it from properly asserting a valuable and apparently unquestionable right.

The order of the referee is reversed.

THE EDILIO.

(District Court, E. D. North Carolina. September 12, 1917.)

No. 146.

1. SALVAGE ⟸48—RIGHT TO COMPENSATION—DISPOSSESSION.

In a suit for salvage by a second set of salvors, based on the dispossession against their will of salvors who were then continuously conducting salving operations, the burden rests on libelants to prove that the first salvors had no reasonable prospect of success, and, in the absence of such proof, their dispossession will be held wrongful and the subsequent services as inuring to their benefit.

2. SALVAGE ⟸9—CONTRACT—CONSTRUCTION.

A contract by the master of a stranded ship with the owner of fishing boats to use the same in pulling on the ship, the pay, if not agreed upon, to be fixed by a court, was not one for salving the ship, which precluded the master from discharging the boats, when their work proved ineffectual, and employing others.

3. SALVAGE ⟸30—NATURE OF SERVICE—COMPENSATION.

A partially loaded steamship stranded on the Cape Fear River bar. The bottom was sand, and the weather was fair, and she was in no immediate danger. The master made a contract with libelant for the service of its five fishing boats to pull on the ship, the pay to be fixed by the court if not agreed upon. At the end of three days, during which the boats pulled about two hours each day during high tide, and by direction of the pilot ran the ship's anchors, her position not having been appreciably improved, the boats were discharged and others employed by which the ship was lightened and with the assistance of a revenue cutter pulled free, at a total expense of $11,380. The pulling of libelant's boats was of no material benefit, but the running of her anchors contributed to her final release. The value of ship and cargo was about $1,100,000, and of libelant's boats not to exceed $135,000. *Held*, that the service rendered by libelant was one of salvage only of a low order; that taking into consideration the injury to the boats and their equipment and the loss resulting from their withdrawal from libelant's business, of which the master of the ship was advised before the contract was made, libelant was entitled to an award of $10,000.

4. SALVAGE ⟸30—NATURE OF SERVICE—GROUNDS OF AWARD.

Where a salvage service is rendered after negotiation at arm's length to a vessel not in imminent danger and at no material risk, a court will be slow to make a large award as might be done if the service was voluntary and rendered in response to a prompt and generous willingness to relieve distress and save life and property from imminent peril.

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

In Admiralty. Suit for salvage by the Fisheries Products Company and others against the steamship Edilio and others. Decree for libelants.

Rountree & Davis, of Wilmington, N. C., for libelants.

E. K. Bryan and Robert Ruark, both of Wilmington, N. C., for claimants.

CONNOR, District Judge. The Fisheries Products Company is a North Carolina corporation, engaged in fishing for menhaden on the Atlantic Coast and converting them into oil and other products. During the year 1916, the company was "the owner by lease, demise and charter," of five fishing boats. On, before, and after October 28, 1916, the boats were being used along the coast of North Carolina, between Norfolk and Charleston, in catching and bringing fish to the factory, located near Wilmington, N. C. T. H. Hayes was president of the corporation.

The Edilio is a steel steamship of 392.6 feet length, 57.6 feet beam, gross registered tonnage 4,719, net 2,916 tons, built at Sunderland, 1910, home port Genoa, Italy. She was in first-class condition in all respects.

On September 20, 1916, she sailed from Genoa, with her captain, Guiolo Cola, and a full crew, arriving at Baltimore, Md., October 13, 1916, under orders of the "Minister of War, Government of Italy"—directions of "Italian Admiralty." She brought no cargo. She took on, at Sparrow's Point, near Baltimore, under direction of Gen. Dozzi, representing Italian government, 5,200 tons "old steel rail—billets—from two to six feet in length." She had no charter party. The bill of lading did not show amount of freight to be paid by the government. The steel rail billets were valued, in the manifest, at $83,200. Her log shows that she sailed from Baltimore, October 26, 1916, at 10:40 a. m. and proceeded, "engines with full speed" to Wilmington, N. C., where she was to take a cargo of cotton, from Alexander Sprunt & Sons, and continue her voyage to Genoa. Her log, October 28, 1916, shows that at 7 o'clock a. m. she reached the Wilmington Bar (Cape Fear River). "Not being any pilot in sight we entered the channel. On reaching abreast of the Red Buoy, No. 4, we saw the pilot coming, but on account of the strong current, caused by the incoming tide, the ship failed to answer to her helm and dragged on the sand bank of the port side. A few minutes after, and precisely at 7:30 a. m., the Wilmington Pilot boarded us, and with his assistance, we do all possible maneuvers necessary for the occasion to free the ship."

The testimony of the captain, taken upon deposition, November 8, 1916, corresponds with the log. Capt. Adkins, a pilot, says that he boarded the Edilio within five minutes after she grounded and "assumed command of the ship immediately on going aboard. Just before going aground she had no speed whatever. She was just drifting. * * * We had seen the ship as she was coming. We don't wait for signals for a pilot." The point at which she grounded, and her location, with respect to the ocean and the channel, is described by Capt. Adkins, who says: "She was headed for the channel, having drifted

ashore sidewise." She was drawing about 20 feet aft, when she went in. The soundings taken by the pilot showed that she was in about 19 feet of water. Capt. Cola says that, when the vessel come to the bar, the wind was northeast, fresh wind—blowing about 15 or 20 miles an hour. Sea agitated "little bit." Capt. Adkins says, "Fresh blow, what I might call fresh gale, that is fine weather—east northeast, about 30 to 35 miles." This may be accepted as correct. Several of libelants' witnesses testify that the vessel was on "quicksand," some say "live sand," and that she was liable to sink into the sand if not promptly pulled off, or that the movement of the tide would bank sand around her keel and cut it away at the bow and stern, causing her to break in the middle. Bowen, a witness for libelant, says that he is familiar with the shoal on which the Edilio went aground; that she was in a dangerous position. "The sand down there is live and shifts on each side. It has a tendency to cut from the bow and stern of the ship and fill it up amidship." Several of the libelants' witnesses say that the shoal is composed of "quicksand," and that, at times, boats have sunk in it, lost; they were wooden boats, smaller than the Edilio. Charles St. George, Thomas St. George, P. T. Dicksey, Dunbar Davis, and E. H. Adkins say that the sand on the shoal is "live." "It is live on flood tide. The flood tide causes it to move, and on ebb tide it appears to settle down and become solid. The ship was in danger."

These, and other witnesses for libelants, say that she would, if not anchored, have moved further on the shoal—by the rise and fall of the tide, and its effect upon the sand.

Capt. J. J. Adkins, the pilot of 48 years' experience on the Cape Fear Bar, who went to the vessel, says:

"The bottom at that particular spot is what is termed level, but it is a misnomer to call it level; it don't fit. The tide doesn't make level bottom; there are little ridges, little hills and holes. That is because of the tide running over the waters; but, for all practical purposes, it would be considered level bottom. It is sand and shell. There are a great many shells in among that shoal, old broken up oyster shells, some very fine; but they get mixed up with the sand."

Referring to the danger of the vessel on account of the character of the sand, he says:

"I don't think there was any danger for the length of time for which the ship was ashore. I may be a little extravagant in that, but, Sir, my honest opinion is that the ship would lay there for years, without material danger or damage; that is my honest and candid opinion."

Jas. S. Williams has held master's license 19 years, on Cape Fear River and Bar, saw Edilio about 20 minutes after she went aground—was on the tug Resolute, and went to her. In regard to the character of the sand on which she lay, he says:

"I do not think there is any danger. Experience shows it is not the case there (that she would sink in the sand). Soundings show that it was not the case in this case; and in every other case of ships grounding there. I don't mean to say that water could not cut sand right under the bow and stern for a little ways."

In response to the question whether he knows the condition of the shoal there, what the bottom is, the character, he answered, "Yes, the sand," that he "didn't know of anything better."

In regard to the sand being "live," whether vessels would sink down in it, he said:

"At that particular place, small vessels have been wrecked there; they go so far and no further, stop; they never go out of sight. The fishing smack referred to is in about the same position she was a year ago. There are parts of wrecks that have been lying along that place for years and years. The Edilio didn't keep going. * * * I didn't consider her in any danger of damage, or of serious injury. She would have stayed there a long time; she would have stayed there several years, in my opinion."

There is other testimony, more or less conflicting, in respect to the character of the sand, and the probable effect on the action of the ship. The soundings, taken at several times, did not indicate that she was sinking in the sand, or going further on the shoal, or that she was in imminent danger of serious injury from either source. Much of the testimony, in that respect, is speculative, with probably an unconscious tone, from the temperament, viewpoint, and relation of the witnesses to the parties, and the result of the litigation. The character of the shoal, the sand, upon which the Edilio grounded, is relevant from several viewpoints.

The issue, in regard to the terms upon which libelants rendered service to the Edilio, is clearly presented by the pleadings and the testimony. Libelants allege:

"That on Saturday afternoon, about 7 p. m., Thos. H. Hayes, president of the libelants' company, with the captain of the John L. Lawrence, proceeded to the ship Edilio, when she was grounded on the Cape Fear Bar and, at the request of the captain of said steamship Edilio, went abroad the said steamship and was requested by the said captain to salve the ship, and agreed to do so; but the amount of the salvage was not agreed upon."

He alleges that, pursuant to said contract, he proceeded on Sunday morning, October 29, 1916, with his fishing boats, to perform the salvage service, etc., all of which is set forth in the libel; that the service was continued until Tuesday, October 31, 1916, when libelants' boats were ordered to cease their operations and service, and the hawser of one of them cut; that the ship was, thereafter, lightered by Jas. S. Williams, and pulled off the shoal by the revenue cutter Seminole; that, on October 29, 1916, and on each day thereafter, until Tuesday, October 31, 1916, libelants' boats were engaged salving the Edilio, in accordance with the contract made with the captain, and were ready, willing, and able to continue to salve the said steamship, but were prevented from doing so by said captain; that libelants' president, Mr. Hayes, was ready and able to lighter the Edilio, and offered to do so, but was prevented by the captain of the Edilio.

Claimants deny that any contract was made, or entered into, by the captain of the Edilio with Mr. Hayes, president of libelants' company, for salving the ship, and allege that Mr. Hayes requested the captain of the Edilio that he be allowed to salve the said steamship, but this request was declined; that the captain of the Edilio, after talking with Hayes, did say to him that he would agree for the said Hayes, with his fishing vessels, to pull on the Edilio and see if they could pull her from the shoals, but that he would make no contract or agreement with the said Hayes, whereby the libelants would be

given the privilege of salving the said steamship, without first consulting with the agents of the said steamship at Wilmington; and it was further agreed, as said Hayes refused to make any agreement as to what his charges would be for floating said vessel, by pulling on her, if he could do so, that the amount of his compensation should be settled by the court, if the agents of the Edilio at Wilmington and the said Hayes could not agree, and to this the said Hayes assented.

[1] While not determinative of the case, it is important, from more than one point of view, to settle the issues, in this respect, raised upon the pleadings and the evidence. If, as contended by libelants, the captain of the Edilio contracted with Hayes that he should salve the ship, and Hayes undertook under such contract to do so, he was entitled, in doing so, to use all necessary and proper means of which he was capable to complete his undertaking, and receive compensation therefor. It is insisted that Hayes recognized the necessity for lightering the ship, and so stated to the captain; that he was prepared to do so; and that the captain assented thereto. It is well settled, upon just principles, that as between two sets of salvors, if it appears that the claim of a set of salvors to a share in the salvage reward is based upon the dispossession, against their will, of other persons who were at the time continuously engaged in salving the vessel in distress, and who were willing themselves to persevere in the service which they had begun, the court allows the claim only, if it is clearly proved that the first salvors had not any fair prospect of success. In the absence of such proof, the burden of which lies upon the second set of alleged salvors, the court holds the dispossession to be wrongful, and treats the subsequent service rendered by the wrongdoers as inuring wholly to the benefit of those who have been dispossessed, and not as entitling the wrongdoers to any share in the salvage award. Kennedy, Salvage, 168.

[2] From this principle it follows that if, as contended by libelants, the captain of the Edilio made a contract with Mr. Hayes, as alleged, and he (Hayes) was ready, willing, and able to perform on his part, he was entitled to do so, and the refusal on the part of the captain was wrongful. The deposition of Capt. Cola was taken immediately after the ship went aground and the filing of the libel. Mr. Hayes, and the other witnesses who heard the conversation between Capt. Cola and himself, were examined orally. Mr. Hayes says that, on Saturday, October 28, 1916, his fishing vessels had been out, and, upon coming in, reported that a steamer was ashore on the bar; that about 6 o'clock he received, while at his factory, about 11 miles distant, a telephone message from some one at Southport, stating that the captain was desirous of obtaining assistance. It does not appear from whom the call came. He went, at once, to the Edilio on his vessel, the John L. Lawrence. Capt. Lawrence Brown, Capt. Lemuel Brown, and Capt. Lester were with him. Capt. Lemuel Brown went on board the Edilio and shortly thereafter came to the rail, and said that Capt. Cola wished him (Hayes) to come on board for a conference. He says:

"We talked about the position he was in. He seemed to be very much exercised and worried over the position he was in, and wanted to know if he

could make a trade with me to work on the ship. I asked him what preparations he had made already. He said he had sent for the revenue cutter Seminole, and she had promised to be down there. This was Saturday evening, and she had not come, and it was worrying him. I told him I would gladly telephone, upon my return to Southport, to the proper officer of the Seminole, and request that they come down Sunday morning, as it was too late for them to get down at that time, to do any service. He said: 'No, I am not anxious for them, I want you. You have got considerable boats to work.' He asked me how many I had, and I told him I had five in operation at that time, and he said, 'I want you to make some kind of a trade with me to work on this ship.' I asked him what kind of a trade he desired to make. I told him my business was fishing and our expenses were heavy; we had 30 to 35 men to the crew; we had a factory that had upwards of 200 men on wages. I told him fish were in abundance along the coast and it would cost him a lot of money to employ me, or to employ these boats, to work on his steamship, and, so far as I was concerned, I would much rather he would get the revenue cutter, as I thought they would render what assistance they could for nothing. He immediately made the statement that the revenue cutter was insufficient to do the work that they might, but it was insufficient. He insisted that I come and pull the ship off. I told him that was impossible; that the ship was grounded too far; that she would have to be lightered, and I would rather he would make other arrangements. I told him that at least a dozen times. He insisted he wanted me, however, and finally I told him, if I went to work, that I would suffer large losses and I should be recompensed for it. He admitted that was so. I told him the only way I would do anything at all regarding that ship was to lighter her, salve her, take the cargo out. I explained to him how I was equipped, that my boats had holds in the center where we carried fish and we could take the billets. I told him I would have to lighter it; that I had holds; that I could put enough of these steel billets in my boats to give them ballast, which would give them better pulling power. * * * I told him it was needless to pull. However, he wanted us to assist, said he would have high tide to-morrow and believed the ship would float on this high tide. I told him I didn't believe that, however, if he agreed to salve the ship and wanted me to do that. * * * I told him if we could agree after we got through, we would try to agree, on my price for the services, and if we were unable to agree we would leave it to the admiralty court, and that seemed to suit him. That is the trade and agreement we made that afternoon. I was to go out Sunday morning and pull on the ship, and if we couldn't move the ship I was to proceed to lighter her."

Capt. Cola says that:

When Hayes came on board the Edilio, Saturday night, he asked "If I wanted him to give assistance, and I said, 'Yes, we want your assistance for pulling steamer only, for pulling steamer.' I ask him how much he charge me, and he reply: 'I don't know, you must tell me how much you want. You know captain have big factory, and if come with fishing boats oblige to close factory.' He say, 'How much you want?' and I reply, '$200 each boat,' and he refuse to accept it. Later on I said too much talking; well, you pull steamer and the question be settled by the court. He says, 'Captain, take my advice, start lightering ship.' This, he says, on Saturday when grounded, 'take my advice, I have a great many fishing boats; can start lightering and tomorrow morning you can be floating.' I reply, 'No, I don't want to lighter ship, or do any other things without consent of Mr. Sprunt, our agent, and want to speak to him before I do other things.' "

It will be observed that the vital difference between Mr. Hayes and Capt. Cola consists in the question of salvage, including lightering, and of pulling on the ship.

Capt. Lemuel Brown says that he was in the cabin, and heard the conversation; that Capt. Lawrence Brown was also present; and that Capt. Willis was not in the cabin. After describing the manner in which the conversation began, he says that Mr. Hayes said:

"'We can't go to work on this steamer because our business is fishing and different from any other kind of business. I am at an awful big expense, because I am running five boats, and I have a big crew of men at the factory, which are idle when my boats are away from the factory, and no fish.' He explained that to the captain, and the captain undertook to make some kind of a trade. I don't know what it was, but Mr. Hayes told the captain of the ship, he said, 'I will take hold of this ship and go to work, under salvage basis, and no other way,' and the captain fully understood, for Mr. Hayes repeated it time and time again. It was as solid a contract as ever was made between two men. Capt. Cola accepted Mr. Hayes' proposition as to salvage."

The compensation was to be fixed by the court. "It was to be fixed on a salvage basis."

Capt. Lawrence Brown says:

"Mr. Hayes and the captain of the ship was talking about the ship being grounded, and the captain of the ship, he made some talk about some figures. Mr. Hayes told him, he said, 'I can't do anything like that. The only trade I can make with you would be under a salvage basis of floating your ship.' He said, 'You understand that,' and the captain said he did. He said, 'Go to the courts,' and he said, 'Yes.'"

In reply to a question, the witness says that Mr. Hayes said "something about lightering the ship"; that Capt. Willis was not in the cabin. Capt. Lester was on the Lawrence with Mr. Hayes, but did not go on the Edilio; that, when Mr. Hayes returned to the Lawrence from the Edilio, he said that "he had made arrangements to pull on the Edilio in the morning and he made it on a salvage basis; that is what he told us people." Capt. Chadwick, C. B. St. George, and Thos. St. George, and probably others, testify to declarations made to them by Mr. Hayes, in regard to his contract with Capt. Cola, corroborating his statement.

Capt. B. T. Willis was, at the time, keeper, or captain, of the Cape Fear Coast Guard Station, at Smith's Island, near by the place at which the Edilio grounded. He saw her before she went on the shoal and went to her; boarded her at 8:30 a. m.; found Capt. Adkins there; he went to Southport and left with direction to witness to remain; he did so until 11 o'clock p. m.; that Mr. Hayes and another man, who he says was either Lawrence or Lemuel Brown (they were both in the room while Willis was testifying, they are brothers, and resemble each other very greatly) only one came into the cabin. Capt. Cola asked witness to remain. After describing the meeting of Brown, as he boarded the Edilio, his conversation with Capt. Cola in regard to Mr. Hayes coming on board, Willis says that Capt. Brown introduced Mr. Hayes to Capt. Cola.

"Then Mr. Hayes went on and told him of the bad situation his ship was in; told him she was in danger; in fact, he had about the only facilities there were in this vicinity for floating her and wanted to take right hold and float her, but the captain wanted to know his price, and Mr. Hayes said: 'I can't make you a price, we will have to leave that to the court to decide; I will have to salvage the ship.' And the captain said, 'Salvage, no, no, no salvage' in his ship."

Hayes said he was at very heavy expense, with the fishing boats costing considerable money and, while the fish were not there, then he had just got a telegram to-day that the fish are coming. "So the captain said, 'What you take hold for?' And he said, 'I can't think

about taking hold only to salvage the ship,' and the captain said: 'You can't salvage my ship. I can't hear to that, you must make a price, we will have to have a price of some kind,' and he said, 'Tides are very short on high water.'"

The captain offered him $25 per tide for each boat that pulls. Hayes declined this; said he could not take it except for salvage. "About this time some one hollered, and I stepped on deck to see who it was, see what he wanted, and whoever it was said, * * * 'The cutter will be down to pull in the morning at 8 o'clock,' so Mr. Sprunt informed him. I said, 'All right,' and I stepped right back in the cabin and said: 'The cutter will be here in the morning. I have just received a message from her.' And the captain said: 'All right, then we won't need you unless you are willing to assist,' as I understood, for the $25. That was all I heard." Mr. Hayes left. Capt. Willis says that he told Capt. Adkins of the conversation the next morning. Capt. Adkins corroborates Willis in this respect, says Capt. Willis told him the next morning of the conversation between Capt. Cola and Mr. Hayes—as he testified—to same effect. Capt. Adkins had notified Mr. Sprunt of condition of the ship, and he got in communication with captain of the Seminole; he went to the ship early Sunday morning. That Capt. Cola did not wish to make any contract until he saw Mr. Sprunt is shown by the testimony of Jas. S. Williams, who says that he was at Southport when the Edilio went aground; had his tug there; that he went to the Edilio before noon and asked him "if there was any assistance I could render. I was told, 'nothing until the captain could see his agent.'"

Capt. Adkins says that he remained on the ship as pilot; took charge of her and remained all day Saturday; made some efforts to moor her without success; left Saturday afternoon, left Willis in charge, to remain until high water that night; went to Southport and took up the matter with Mr. Sprunt over the phone; advised him of ship's condition; went to ship next morning at 6 o'clock; during the morning some of the fishing steamers came; that he advised Capt. Cola to employ them to pull on the ship. "There could be no arrangements arrived at, price or figures, for getting the help of the fishing boats. Mr. Hayes refused absolutely to consider any price or offer whatever that might be tendered. I induced the captain to allow me, or persuade him to let the boats pull, and if he could do no better to settle the question of his services by arbitration, and if that could not be done to have recourse to the courts, which was the only alternative. Several times Mr. Hayes remarked that he would take hold of the ship only on a salvage basis. The captain refused absolutely to even countenance the matter, and my advice to him, as I thought it was proper, was not to assent to anything that was on a salvage basis, as the ship was not in a position to be salved."

The foregoing is, substantially, the direct evidence regarding the terms upon which the libelants' boats rendered service to the ship. The conduct of Mr. Hayes and Capt. Cola during the effort to pull the ship from the shoal throws light upon the question. Several of the crew on the Edilio testify that Capt. Cola told them, after Mr.

Hayes left the ship, that he had a contract with him for "pulling on the ship." The burden of proof to establish the contract as alleged is upon the libelants. It is manifest that Mr. Hayes, as did Capt. Cola, fully understood the import of the word "salvage," when used in connection with the terms upon which the service was to be rendered and accepted. One was insistently endeavoring to make it the basic factor in the contract, while the other was equally insistent upon keeping it out. Capt. Cola well understood the situation of his ship—an experienced pilot, with full knowledge of the situation, had been with him during the entire day and, as he says, did the unusual thing of leaving her at night with Capt. Willis, because he did not consider her in a dangerous position. Capt. Cola knew that Capt. Adkins would return in the morning; that he was within a short distance of Southport, in communication by rail, water, and telephone, with the ship's agent at Wilmington, some 30 miles distant; that the cutter was at Wilmington; and, after Capt. Willis delivered the message, that she would come Sunday morning. The weather was fair. Soundings had been taken during the day, showing the depth of the water and character of the shoal, that the ship was in no immediate danger from that source. Mr. Hayes is the only witness who thought the weather was bad, that the "wind was strong and the seas high," that the ship was "in a bad and dangerous place, and that she was hard and fast aground." There is no suggestion that Capt. Cola, or Capt. Adkins had sent, or caused the phone message to be sent to Mr. Hayes. It does not appear who sent it.

It is manifest that the suggestion of salving the ship had been made; the question which had engaged the attention of Capt. Cola and his pilot was that of "pulling her off." Without attributing any improper motive to Mr. Hayes, it is manifest that he had on his mind the purpose of making a "salvage contract," or a contract to render service on a "salvage basis," with a full recognition of the financial advantage of securing such a contract. It is equally clear that Capt Cola, not only had no purpose to make any such contract, but promptly and vigorously rejected the suggestion. The reasons are manifest. He said repeatedly that he would not do so until he consulted with Mr. Sprunt, the ship's agent. He went to Wilmington for the purpose, Monday morning. Libelants' witnesses are all interested, as is Capt. Cola. Capt. Willis and Capt. Adkins have no financial interest in the suit, or its result. It is difficult to reconcile the conduct of Mr. Hayes on Sunday, as testified to by Capt. Adkins, with his contention that, on Saturday night he had made a contract to render the service on a salvage basis. Either he is mistaken, or he was concealing from Capt. Adkins the fact that he had made the contract as he alleges. He says that he told Capt. Cola, on Saturday night, that it would be necessary to lighter the ship, and that he assented to his doing so. The evidence all shows that Capt. Cola did not think it was necessary and only consented to it after conferring with Mr. Sprunt. I am constrained to reach the conclusion that the only service libelants contracted to render, and Capt. Cola to accept, was that of pulling on the ship, aiding in getting her off the shoal, and that for such service the amount to be

paid was, if not agreed upon, to be fixed by arbitration, or by the court. We are thus brought to a consideration of the character of the service rendered and the award which should be made.

[3] A large number of witnesses, with many contradictory statements and conflicting opinions, were heard. Eliminating that which is repetition and speculation, the essential facts in regard to the service rendered and its effect upon the ship are not complicated.

On Sunday morning, October 29, 1916, Mr. Hayes went to the ship with two fishing vessels, the Adroit and the Lawrence, reaching there before high tide. The revenue cutter Seminole, a short time thereafter, and under the direction of Capt. Adkins, they all pulled on the ship, until the tide fell, about two hours. Hayes says some of the parties estimated that they pulled her the length of the ship, but he did not "think we moved her so far." Adkins says that:

"The efforts caused the ship to move about 20 feet on that tide after the Seminole got hold of the ship. She didn't move until the Seminole got hold of her."

The tug Gladiator was also pulling. Adkins said that he had "absolute range." After the boats stopped pulling, Adkins wished to run the starboard anchor. This was done for the purpose of keeping her head to the channel and from drifting further upon the shoal. The steamers Lawrence and Portland, which had come to the ship, ran the anchor Sunday afternoon. Hayes says that it was given 60 fathoms of chain. Others say it was only 45.

On Monday morning, early, five fishing boats belonging to libelants, the Lawrence, Price, Portland, Pocomoke, and Adroit, went to the Edilio. The Seminole reached her at 8:25 a. m. They all pulled during the tide, about one hour and a half. Capt. Uberroth, of the Seminole, says that he took the bearings of the ship by his compass and could not observe that she had changed her original bearings, "south by east, about one-half east." Adkins says the ship moved, on Monday, about 135 feet. Mr. Hayes says 200 or 300 feet; this was "on a line of her head; she may have moved sidewise." Capt. Adkins wished the starboard anchor, which had been run on Sunday, rerun. This was done, and the port anchor was run Monday afternoon, after the boats had stopped pulling. The port anchor had 75 fathoms.

On Tuesday all of libelants' boats pulled on the Edilio, began an hour and a half before high water, "because, in getting in position with three sets of boats pulling all across the tide, it was necessary to maneuver with the length of hawsers between these boats and from the stern of the boats to the ship." The Seminole and the Gladiator were also pulling. This was continued until the tide began to fall. The Seminole, after the tide, returned to Wilmington. Capt. Uberroth says:

"I did not see that the vessel had been moved at all at the end of the third day. I looked particularly. Her bow headed the same way."

Mr. Hayes says:

"They heaved on the anchors, and we pulled on the ship. The tide had fallen off that day about 18 inches lower than it had on previous days, and I

went aboard to see the captain, and told him I presumed now that he was satisfied that the ship had to be lightered. He made the remark that it would have to be so. I proposed that we start to lighter her. Mr. James Williams was aboard. He had gone on Monday night, and was there that morning when I got there. The captain referred me to Mr. Williams, and I spoke to Mr. Williams about lightering her. He said he guessed the ship would have to be lightered, but he would have to go ashore, and would see me at Southport; that he had talked with Mr. Sprunt, who wanted to hire me by the day, or so much per boat, to lighter the ship. I told Mr. Williams I had made a trade with the captain to salve the ship and I couldn't make any trade that would, in any way, interfere with that."

Adkins says that, on Tuesday, he placed Capt. Willis on the forecastle head to transmit such orders as he gave. He reported that, on heaving on the anchors, they were not holding—were not holding singly. "I told him to heave on both at the same time, which he had the mates to do. Adkins says that the starboard anchor had only 45 fathoms on Sunday, that it was not holding at all; it was of no assistance." He says:

"The efforts put forth Sunday, Monday, and Tuesday were wasted in the floating of the ship. I consider these words futile."

On Sunday evening Capt. Cola went to Southport, and, Monday morning, took the train for Wilmington, about 30 miles distant, for the purpose of seeing Mr. Sprunt. While Capt. Cola was in Wilmington on Monday, Mr. Sprunt made an arrangement, by which Mr. Williams was to go to the ship, as his representative, and, if she did not float on Tuesday morning's tide, he was to lighter the cargo and do what was necessary to float the ship. He went to the ship Monday night, with the understanding, with Mr. Sprunt, that he was to let the boats pull on the ship during Tuesday morning's tide, and if they did not get her off he was to make arrangements to get her off as he thought best and proper. Capt. Cola returned from Wilmington to the ship Monday night. On Tuesday the boats all pulled, but the ship did not move. Mr. Hayes was there, and asked about lightering the ship. Mr. Williams says:

"I asked him what kind of a bargain he would make, to come alongside and load the fish boats with iron, to name the price per ton, price per boat, or price per day to lighter on work on the ship, to float her, or a lump sum for the whole. He refused to name any price. He said he would not estimate what his expenses would be. He would do all he could without a bargain, which he considered not binding then, and would not make any definite bargain."

Mr. Williams refused to accept the service upon these terms, and said that he would get lighters in Wilmington; that Mr. Sprunt had instructed him not to employ any one without having a definite understanding. This was Tuesday afternoon. We have here a direct conflict between Mr. Hayes and Mr. Williams. Capt. Adkins says that he heard the conversation, but does not remember the exact words used by them, but the substance was that Mr. Williams said to Mr. Hayes, if he would furnish his boats and say what he would accept for them, he would submit the proposition to "somebody, he didn't say who." Mr. Hayes said he would accept no such proposition; he refused "to consider anything of the sort, as I understood at the time." If "he said anything about having a contract with the captain, I didn't

hear it." Mr. Williams says that he ordered the lighter Beaver to Southport at daylight, Wednesday, to proceed to the ship. He also secured the barge Davidson, and later the Fredericks. After the boats stopped pulling Tuesday, Capt. Cola discharged them. This was done about 11 o'clock. The captain of the Lawrence and other ships were told that they would not be longer needed. Capt. Lemuel Brown, on the Lawrence, was requested to "cast off from the ship, cast the ship's hawser off." They had the ship's hawser fast to the boat. He said he would be glad to do so, but had positive orders not to cast off from the ship. Capt. Brown says that Mr. Hayes had directed him not to cast off from the ship. Thereupon some officer of the Edilio cut the hawser of the Lawrence. It is conceded that the boats of the libelants were discharged on Tuesday afternoon and did not again pull on the Edilio. One of them stood off, near to her, Wednesday, and the captains say that they were ready to return Wednesday, if called upon. On Wednesday, Mr. Williams, pursuant to the arrangement made in Wilmington, on Monday, with Mr. Sprunt and Capt. Cola, and as the representative of Mr. Sprunt, Lloyd's agent, took charge of the Edilio. The capacity of her tanks was 2,700 tons. After securing the service of the barges, he directed that water be pumped into the tanks and began taking the cargo off—lightering the ship. As he took the cargo out, he had water pumped into the tanks. He took from the ship 1,100 tons of the cargo. He describes the manner in which he concluded the work:

"On Friday, November 3d, the wind was northeast, fresh, at 7 a. m. We began working the engines ahead about 12 o'clock and heaving on the anchors. * * * The Seminole anchored on the starboard bow. At 12:30 the Seminole made fast. The Gladiator then went ahead of the Seminole and pulled off the starboard. At 1 p. m. the ship swung to the starboard, as soon as the hawser tautened, and started to move ahead, immediately to one side and ahead, and never stopped. When she started, she never stopped. Her engines were worked astern, but she ran over her anchors; the winch couldn't take up the anchors fast enough. She was going off the shoal. We at first thought the anchors were dragging. I don't know whether they were or not that morning, but we thought they were until we stopped heaving. We were surging on the anchors, heaving them up, and when we slacked them down, and stopped, I knew the ship was moving. The ship's draft was about 27" less than before the lightering was begun. The ship was in the channel at 1:45 p. m. and proceeded to Wilmington. * * * I was satisfied with the soundings at all times."

He gave the soundings, as recorded, when taken, and produced a diagram made by him from the soundings. She was libeled, for $100,000, November 4, 1916, the day following her arrival, gave bond, was released, and proceeded on her home voyage.

In support of libelants' contention that Mr. Hayes contracted with Capt. Cola to salve the ship and, in doing so, to lighter her, he says that he engaged the barge Fredericks to go to the Edilio for that purpose, and that the barge was there on Tuesday. The evidence in regard to the movement of the Fredericks is somewhat contradictory; but it is clear that, by direction of Mr. Hayes, she was at the place where the Edilio was aground on Tuesday morning. On Wednesday, after his boats were discharged, and he found that Mr. Williams would

lighter the ship, Mr. Hayes released the Fredericks and she was employed by Mr. Williams.

Claimants contend that the service rendered by libelants was not salvage, but mere towage, and should be compensated upon that basis; whereas, libelants insist that the Edilio was in peril; that she was in a dangerous position in the shoal, and the subject of salvage service. The evidence shows that, while she was on the shoal, broadside to the ocean during the entire time she was there, the weather was fair, winds light, and conditions, in all respects, favorable. The opinions of witnesses differ as to the probability of a storm, and its probable effect upon her safety. There was no storm, no high wind, nor other change in the weather, which affected her position or increased the danger. The witnesses having the largest experience with vessels situate as the Edilio are of the opinion that nothing short of a hurricane blowing from the southwest would have injured or endangered her. There is no evidence indicating that the conduct of libelants' seamen, in charge of the boats, was affected by apprehension of change in the weather; they made no extra or hazardous exertions exposing themselves, or their property, to danger, on that account.

While the definition of a "salvage service," found in standard works on admiralty, and well-considered cases, as distinguished from "towage," are clear enough, it is frequently difficult to place each case on the right side of the line of separation. Judge Brawley, in The Apache (C. C.) 124 Fed. 905, and Besnard (D. C.) 144 Fed. 992, examines, with great care, the decisions, both English and American. The conclusion reached by him is that:

"Any service, or assistance, applied for, or received by, a vessel in peril, or distress, which in any measure conduces to its safety, is in the nature of salvage service."

In The Lowther Castle (D. C.) 195 Fed. 604, Judge Rellstab says:

"A 'salvage service' is a service which is voluntarily rendered to a vessel, needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended. * * * Assisting a vessel 'in a situation of actual apprehension, though not of actual danger,' is salvage."

Dr. Lushington, in The Charlotte, 3 W. Rob. 68, says:

"All services rendered at sea to a vessel in distress are salvage services. It is not necessary that the distress should be immediate and absolute; it will be sufficient, if, at the time the service is rendered, the vessel has encountered any damage or misfortune, which might possibly expose her to destruction, if the service was not rendered."

In The Phantom, L. R. 1 A. C. 58, he says:

"It is sufficient, if there is a state of difficulty or reasonable apprehension" or "if there be a possible contingency that serious consequences must have ensued." The Ella Constance, 33 L. J. Adm. 191; The Hesper (C. C.) 18 Fed. 696; The Brina P. Pendleton (D. C.) 200 Fed. 848; The Urko Mendi (D. C.) 216 Fed. 427.

While the danger was remote, the Edilio was on a shoal, exposed to the ocean. She had met with a misfortune; she had failed to come off on her own steam; she required assistance to enable her to float.

The service rendered by libelants in pulling on her, and running her anchors, comes within the definition of "salvage service," but is of a low order. I have had more difficulty in finding that the service resulted in benefit to the ship. The "pulling" done on her does not appear to have contributed, in any appreciable degree, to getting her off the shoal. It is probable that the anchors, in some measure, did so. It is doubtful whether, without them, she would have gone further on the shoal. It was prudent to run them.

It is clear, however, that Capt. Cola accepted the services of the boats, and promised to pay therefor such amount as the court of admiralty should award. The Alcazar (D. C.) 227 Fed. 633. The anchors were run by direction of the pilot, who was, in that respect, the representative of Capt. Cola. Assuming that the service actually rendered was salvage "of a low order," as classified by Judge Brawley in The Besnard, supra, in which the remuneration earned would be little more than compensation pro opere et labore, what sum should be awarded libelants? An answer to this question necessitates a consideration of the elements which should enter into the award. The evidence, in regard to the value of the Edilio and her cargo, is in a small compass, but very conflicting. I dismiss Mr. Hayes' statement that Capt. Cola told him that the ship was worth $2,000,000, the cargo $500,000, and his freight money $600,000. Capt. Cola manifestly could not have done so, and if he did it was not true. Mr. Sprunt says that, prior to the beginning of the war, the Edilio would have cost $300,000; "her value was enhanced by war conditions nearly threefold, approximately nearly $800,000." He further says:

"Were she under the American flag, and not subject to extra war risks, and requisition as all trading vessels of the belligerents are, her value at that time would have been greater."

Mr. Sprunt has been engaged in the shipping business, at Wilmington 51 years; has served as Commissioner of Navigation and Pilotage 26 years; 31 years British Consul, and 5 years Imperial German Consul; resigned three years before war was declared; has been 7 years Lloyd's agent at Wilmington, has recently bought a large ship. He is a very large exporter of cotton. He says that $1,000,000 is a fair value of the Edilio. Her manifest showed the value of her cargo to be $83,500. The ship was sailing under requisition of the Italian government, then at war with Austria. This affected her value. She had no cotton on board at the time she went aground. Mr. Sprunt says that the freight on the cotton, which she took on at Wilmington, 7,200 bales, amounted to $93,364.66.

Mr. Edward Koles, a ship broker, residing in New York, for 16 years, says that the Edilio is registered in British Lloyds, "Italian Steamer A 1." Her cash market value, October 28th, would be $225 to $250 per ton, dead weight. He does not think that the fact that she was sailing under the Italian flag would affect her value at all. While this may be, to some extent, a matter of opinion, I am impressed with the reasonableness of Mr. Sprunt's statement in this respect. It stands to reason that, in the condition of the war, a vessel sailing under a neutral flag would be safer than one sailing under the flag of a

belligerent, and therefore of larger present market value. Two large vessels, sailing under the German flag, were, at the time of the hearing, "tied up" in the port of Wilmington, and had been so since the war begun. Certainly the valuation placed upon them prior to the war would not be the same at this time. Of course, the danger to an Italian ship was not so great, but it was sufficient to affect her market value, to some extent. I think $1,000,000 a fair valuation for the ship, and $83,500 for her cargo. There is no satisfactory method of fixing the freight.

The value of the salvor's property employed, and the danger to which it was exposed—Mr. Hayes fixes the values: Lawrence, $50,000. She was built 1879; thoroughly rebuilt ten years ago. Eugene F. Price, $40,000. Pocomoke, $25,000. Portland, $10,000. Fannie M., $8,000. He gave the length, beam, horse power, etc., of each of the vessels. There was quite a large mass of evidence bearing upon the condition and value of the vessels. The estimate placed upon them by Mr. Hayes impresses me as rather extravagant.

The time and labor occupied:

On Sunday two boats pulled on the Edilio for about two hours. The Portland ran the starboard anchor.

On Monday five boats pulled, during the tide, about two hours. Two boats ran the port anchor, and reran the starboard anchor.

On Tuesday five boats pulled during the tide about the same time. The Fannie M., after the boats were discharged, stood by the Edilio. It is not very clear what service she rendered in doing so.

The items which have given me most concern are: The damage alleged to have been sustained by the boats, claimed by libelants, aggregating $16,325.87, all of which, Mr. Hayes says, was sustained by them in pulling on the Edilio, and running two anchors, and rerunning one of them. This includes $3,400.50 for alleged injury to hawsers, and one anchor chain.

While it is impracticable to set forth the evidence in regard to the hawsers and ropes alleged to have been injured and destroyed, it is sufficient to say that the charge impresses me as exaggerated. Libelants introduce Mr. I. J. Anderton, vice president of the Newport Products Company, owner of the John L. Lawrence and the Price, and lessors of the Fisheries Products Company. He says that he saw these vessels, and the Pocomoke, before they worked on the steamship Edilio, "before they left my charge." Has examined them since they came back, has them under repair. Has a memorandum of an "itemized list" of necessary repairs. "I estimate that the engine of the Lawrence would require approximately $2,700, and the hull $2,225." In the itemized statement furnished by Mr. Hayes, he puts "the actual cost of replacing and repairing" damage to engines, three items, $2,697.60. Mr. Anderton estimates damage to the Price $425 on the condenser, and $1,088 on the hull. Mr. Hayes states that the "actual cost of repairing and replacing" hull is $1.088.60, in eight separate items. Condenser $425, two items. Mr. Anderton estimates the Pocomoke $2,509 on the engine, and $1,228 on the hull. Mr. Hayes says that "the actual cost of repairing and replacing" engine $2,509.60 four items, hull $1,228. Counsel said to Anderton:

"I understand you to say that the figures you have given are your estimates of what it would cost to repair damages done by this salvage operation, as they were reported to you?" He answered: "As they were reported to me."

He says that he did not take into account other repairs for wear and tear. He made the estimate about Christmas, 1916. These estimates are made by the vice president of the owner of the boats, and of the company which was to make the repairs. Mr. Hayes gives, in the statement filed, "detailed account showing damage and actual cost of repairing same to the different steamers while engaged in salving the Italian steamship Edilio at Cape Fear Bar." He does not, in his evidence, say that he had paid out any money for repairs. He says, "The whole thing is attributable to this operation." The testimony was taken March 27, 1917. It does not appear that any repairs have been made, therefore no money paid out for it. The boats were used in fishing, making, as will appear later, large "catches" of fish, during the remaining part of the season, until December 8, 1916.

The claim made by libelants for this item of $16,325.87 and damage sustained, on account of pulling on a ship, in a smooth sea, under the control of the libelants' skilled seamen, for a daily average of two hours, for three days, calls for careful investigation and clear corroboration. This is emphasized when it appears that Jas. S. Williams, with three barges, the Seminole and the Gladiator, lightered and floated the Edilio at a total cost of $11,380.90.

Libelants, as the basis for enlarging the award, files a statement showing an average catch of fish during the months of October and November, 1916, as follows: The five boats caught a daily average of fish, during the month of October, 1916, of 1,240 barrels, which the witnesses testify were worth $4.50 per barrel, making $5,580, from which they deduct average daily expense $609.75, making a net profit per day of $4,970.25.

By a similar process of calculation, the result is reached that the daily profit on the vessels for November amounted to $18,167.26. An analysis of the statement filed shows that between October 18th and 26th, the Price fished one day, catching 87 barrels; on October 26th she caught 127; and October 27th, 390 barrels; October 28th she was not fishing.

The Portland, between the 18th and 26th of October, fished two days, catching 465 barrels. On the 26th she was not fishing, on the 27th she caught 103 barrels, and on the 28th she was not fishing. The Lawrence, between the 18th and 26th, fished two days, catching 787 barrels. On the 26th she was not fishing. On the 27th she caught 260 barrels. On the 28th she was not fishing. The Pocomoke, between the 18th and 26th, fished two days, catching 622 barrels. On the 26th she caught 205 barrels; on the 27th, 27 barrels; on the 28th she was not fishing. This analysis is interesting from two viewpoints. None of the boats were fishing on Saturday, 28th of October. It shows that any estimated average of the quantity of fish boats would catch each day is speculative. It may also explain Mr. Hayes' willingness to engage his boats on a salvage venture, beginning on Sunday. It is noticeable that fishing in November was more than three times as profitable as during the month of October. Notwithstanding the dis-

charge of the vessels on Tuesday afternoon, October 31st, none of them fished on Wednesday, November 1st. It is a little singular that, with their experience, on the three days preceding, in which they are alleged to have sustained damage, amounting to more than $16,000, besides losing heavily on their fishing venture, they lay by the Edilio, on Wednesday, after their relations were so rudely severed, even to the cutting of the hawser. The Price on the 2d and 3d November caught 960 barrels. The Adroit caught 496 barrels. The Portland caught 263 barrels. The Lawrence caught 1,291 barrels. The Pocomoke caught 1,030 barrels. It is significant that five vessels which, it was estimated, on October 29th, 30th, and 31st had sustained damage to their engines and hulls, estimated at $12,928.37, and their hawsers and rope of $3,400.50, caught, in 14 days, without any repairs, during the month of November, a daily average of 4,225 barrels of fish, as against 1,240 during October.

An analysis of the statement for November is interesting. On nine days the boats did not fish on account of "bad weather." The Price, whose engines and hull were estimated to have been damaged by pulling on the ship, $2,263.60, caught between November 17th and 28th, inclusive, 12,050 barrels, fishing six days. The Lawrence estimated to have been damaged, hull, engine, and hawser $6,485, caught between November 15th and 25th, inclusive, 7,600 barrels, fishing four days. The other days the "weather was bad," and Sundays intervened. It is not suggested that they did not fish on account of injuries. The "statement" in regard to the catch of fish is assumed to be correct; the difficulty which I find is in reconciling it with the estimates of the damage to the boats, "the whole of which is attributable to this operation." The claimants' witnesses say that the hawsers were old and of small value. There is evidence raising serious doubts in regard to the character and extent of the alleged injuries to the boats. There is direct evidence that a part of the injury was sustained after one of the boats went to the factory.

It is conceded that the Lawrence was built in 1879, and had been sold by the marshal of this court at public auction November, 1914, for $21,000. The Pocomoke was built in 1902. The Portland 1879, sold by the marshal, at same time, for $2,941. The Adroit 1902, sold at the same time for $2,850. It is true, Mr. Hayes says, that they had been rebuilt, 1911. Certainly by their use in fishing they had sustained some strain, by wear and tear. Mr. Hayes admits that he stated to Capt. Cola that his boats were suited for the work, and that he may have said to him that he was the only person in that section who had the equipment to pull him off, or salve the ship. The estimates, as well as the claim that all of the injuries are attributable to the service rendered the Edilio, are unreliable and unsatisfactory. The burden was on the libelants to show, at least by candid, frank statements, to a reasonable degree of certainty, what damage was actually sustained, which was chargeable to this work. Although the boats continued in active service, fishing and coming daily to the factory near to Wilmington, until the latter part of December, 1916, it does not appear that he called the attention of any disinterested person to their condition, or the character or extent of the damage sustained in the service to

the ship. He waited until they were delivered to their owner at Newport, R. I. There is a striking agreement between the estimates of the vice president and Mr. Hayes, both of whom are interested in placing the cost of repair at large figures.

Many witnesses, with much contradiction, testified in regard to the anchors; their weight, manner in which they were run and planted, danger involved in running, their effect on the ship. Almost every phase of this portion of the service is controverted. Libelants insist that its boats alone had the capacity to run them; no others could have done so; that, in doing so, they and the men engaged in the service were subjected to very great hazard, and that the boats sustained great damage; that the anchors were of very great help in holding the ship in position, and enabling her to come off the shoal—all of which is denied by claimants. There is direct evidence that other boats could have run the anchors.

It is clear, however, that the anchors were run by direction of Capt. Adkins, the pilot. I do not deem it material to inquire whether other boats could have done so, because the pilot directed it to be done by the Portland and the Lawrence. While it is true that the weight of the anchors and chains imposed a strain on the Portland, no complaint was made, on either day, that she was sustaining serious damage. On the contrary, libelants' witnesses testify that "she was specially rigged for running anchors;" and had "been doing it a great many years." She was under the control of her captain and crew, whose duty it was to protect her. Capt. Brown says that he had "run a great many anchors." It is true that running anchors requires skill and experience, and is, from the character of the work, attended with more or less danger to life and limb of the men engaged in the service.

The conditions under which these anchors were run would seem to have reduced the danger to a low degree. The ship was on the sand, sea was smooth, weather fair; every condition conduced to safety and success. There is marked divergence between the witnesses respecting the skill and judgment displayed by the captain and his crew, and the efficiency of the anchors in aiding the ship. It is impossible to reconcile the opinions of witnesses. Either from experience which they had in such work, interest, or other more or less disturbing causes, their minds run along conflicting currents, reaching different conclusions. Capt. Burriss, Capt. Pepper, Mr. L. H. Skinner, Dunbar Davis, and other witnesses, who are disinterested and have experience, think that it was a service requiring a high degree of skill and attended with much danger. The officers on the Seminole think that there is but little danger. Lt. Rhine has had 11 years' experience in coast guard service, now on Seminole, was on her Sunday morning, when she went to Edilio, and each day thereafter. He was asked by the court:

"What is your opinion as to the risk involved to the boat, or to your men, in running an anchor under these conditions?" Answer: "Under the conditions which prevailed at the Edilio there was no risk; I should not have considered that there was any risk"—for which opinion he gave his reasons.

He did not think she would go further ashore; that, from the soundings, it appeared "that there was just as much sand under her bow,

probably a little more, when they were through pulling, as when we started." He read the log of the Seminole, showing operations each day. His testimony is clear, intelligent, and enlightening. He says that, in his opinion, the ship was in no danger, except straining. The controversy, in regard to the anchors, affects the amount of the award from several viewpoints—the danger involved in running them; the effect upon the boats; the skill with which they were run; the judgment exercised in planting them. Their effect upon the ship, both in holding her in position, preventing her going further on the shoal, and the aid which they gave to the Seminole in pulling her off, must be considered in estimating the extent to which they contributed to the success of Mr. Williams in floating the ship. Several of libelants' witnesses are of the opinion that they were of great value, in both respects; that without them she could not have been pulled off by the Seminole. Claimants' witnesses think that they were not properly placed; that they rendered no aid in securing the final result.

Capt. Edgar Williams, a licensed master of steam vessels, engaged in the wrecking business 50 years, who had frequently run anchors for ships, familiar with the position of the Edilio on the shoal, was of the opinion that the ship, as she was upon the shoal, was in no danger, giving his reason therefor. He says that it was worth $300 or $400 to run both anchors—would have done it for that sum. In reply to a question by the court, he said:

"The anchors, the Gladiator, the fishing boats, the cutter, all combined, co-operated to bring about one result; each contributed to the ultimate result."

And herein, probably, is found the truth.

While I do not accept, as conclusive, the opinions of several witnesses that the ship, after being lightered, could not, with the aid of her engines, have been pulled off by the Seminole without the aid of the anchors, I am of the opinion that they contributed, in some degree, to the movement of the ship. Of course, the extent is conjectural. I have found the statements and opinions of Capt. Uberroth and his officers on the Seminole, intelligent, fair, and helpful. They, at all times, did all that was possible to aid the ship and, without bias, have given an intelligent account of the situation and conduct of all persons engaged in the service.

The next and largest item which libelants insist should enter into the award is the loss sustained by the withdrawal of the vessels from fishing. All of the witnesses who heard the conversation testify that Mr. Hayes, on Saturday night, October 28th, told Capt. Cola that his boats were engaged in catching fish and bringing them to the factory; that he was at heavy expense; and "that fish were in abundance along the coast, and it would cost him a lot of money to employ me or employ these boats to work on his steamship." Capt. Cola says that Mr. Hayes said: "Have big factory, and if come with fishing boats obliged to close factory." It was, therefore, in the light of this condition, that Capt. Cola contracted with Mr. Hayes to pull on the ship. The loss sustained by libelants from this cause, if it can be ascertained with a reasonable degree of certainty, should be considered in fixing the

amount of the award. Of necessity, it is impossible to do more than estimate the quantity of fish which each boat would have caught during the two days, not counting Sunday, on which they were engaged in pulling and running the anchors. Counsel for libelants frankly concede that:

"It is not perfectly clear that the fishing boats could have caught anything on Monday or Tuesday, but the evidence seems to show the average catch per day."

I concur with them that "no compensation without taking into account this probable loss would be fair and just." By this, it is not meant that a specific sum can be fixed upon, and charged to the Edilio, but that all of the facts, conditions, reasonable probabilities, should be taken into account—the degree of success or the extent to which the service rendered was of benefit to the ship.

It is not seriously insisted that the position of the ship was appreciably changed, or her removal from the shoal either expedited, or contributed to, by the pulling on her done by the libelants' boats, in connection with the Seminole. While she was moved on Sunday about 20 feet, and on Monday about 135 feet, it is manifest that this was of little, if any, benefit to her, nor did it improve her condition, either in respect to apprehended danger, or going further upon the shoals. Mr. Hayes, together with all of those engaged in the service concurs in this. The log of the Seminole shows that Capt. Uberroth advised Capt. Cola Monday to secure the services of a "wrecking company to send equipment for floating him."

Notwithstanding the opinion of a number of witnesses that the anchors did not contribute to the movement which brought her off the shoal, after being lightered, Mr. Williams says:

"On Friday morning, we began working the engine, and heaving on the anchors, about 12 o'clock. * * * We were surging on the anchors, heaving them up, and when we slacked them down, I knew that the ship was moving."

He does not think the anchors were run properly; but they appear to have been run under the direction of Capt. Adkins, the pilot. He says:

"It was impossible to heave on the anchors when she started off, because she slacked so fast when she started she went right on."

Judge Hughes, whose experience in salvage cases on the Atlantic Coast between Norfolk and Charleston probably exceeded that of any District Judge, and whose opinions evince ability, learning, and labor, in The Sandringham (D. C.) 10 Fed. 556, says that:

"Although * * * this amount lies within the discretion of the" court, yet a judge "is not at liberty to render an arbitrary judgment at his own individual discretion or caprice, * * * but must be governed * * * by the teachings of precedents, and * * * principles of the law of salvage."

Judge Seaman, in The J. Emory Owen (D. C.) 128 Fed. 996, says:

"While the value of the property saved enters into determination of the value of the salvage service, as an essential element, and the maritime law intends encouragement of gallantry and adventure in the relief of distressed

vessels, it is not the policy of that law to grant awards which tend to excite greed or promote unreasonable pretensions on the part of salvors, nor to disregard, in any measure, the interests of the owner of the rescued property."

It is said that, although Sunday was not a fishing day, it was customary for the boats to go out on Sunday afternoon, get up the coast, and be in a position to begin work Monday morning. While the labor performed on Sunday should be considered, the question of loss from this source is too indefinite to enter into the amount of the award. In a case in which a salvor voluntarily, and from a sense of duty to a ship in distress, and without having an agreement, or opportunity to make one, goes to the rescue of a ship in distress, and sustains loss by reason of the withdrawal from fishing and injury to his vessel, such loss of service and injury should be taken into account. When, however, as in this case, the libelant knew the capacity and condition of his boats, and the character of the work which he was undertaking, and enters upon it after negotiation and "chaffering," carefully safeguarding his interests, he should be presumed to have known the extent to which he was voluntarily, and for profit, exposing his property. He should be held to have known the danger to which he was subjecting it. He represented them to Capt. Cola as in proper condition and as having capacity to do the work which he undertook. Assuming that the boats were injured, certainly such injury must, to some extent, have been the result of their age—wear and tear, in fishing. It is difficult to understand how boats, of the value placed upon them by Mr. Hayes, and in excellent condition, as he represented, could have sustained the injury claimed, in the service rendered the Edilio. Capt. Adkins testifies that, at the end of each day, the captains were told that they need not return unless they desired. It is perfectly clear that Mr. Hayes and his captains were not only willing, but anxious to undertake and continue the service, and only left it when compelled to do so by Capt. Cola, and then they "stood by" the ship, hoping for further opportunity to render service to the ship.

The question presented here, in regard to injury to the boats and loss of profits, has been considered by the English Admiralty Courts in several cases cited, in Kennedy on Salvage, 138, who says:

"The effect of these judgments, fairly read together, appears to be as follows: Whilst the amounts of damage, expense, or loss of profits, ought not, under ordinary circumstances, to be taken as 'fixed figures' or 'moneys numbered' to be added to the amount of the reward for actual salvage services, the fact that such damage, expense, or loss has been caused by the performance of the salvage service, is a fact which the court ought never to disregard in assessing the amount of the reward. But all the circumstances, of which this is only one, must be considered together, and it does not follow, necessarily, that because the salvor proves such damages, expenses, or losses, the court should fix the sum awarded high enough to cover them." Rockland & Rockport Lime Co. (D. C.) 175 Fed. 524.

The reasons upon which this conclusion are based are given by the learned author. He further says (page 142):

"The only expenses for which the Court of Admiralty may compensate the salvor in the award are: (1) Expenses properly incurred by the salvor in the furtherance of the salvage service, and before the vessel assisted has been

placed in a position of safety, and (2) expenses directly occasioned by the performance of the salvage service, as the cost of repairing damage, without any fault on the part of her officers or crew, has been caused to the salving vessel. * * * Claims under the first head of expense are closely scrutinized by the court, and must be strictly proven. * * * As to claims under the second head of expense, above mentioned, and also as to damages for detention during repairs, it is to be noticed that, if the repairs are rendered necessary by an injury suffered by the salving ship in the course of the salving service, the court presumes in favor of the salvors, in absence of proof to the contrary, that the injury was due, not to any fault or negligence on their part, but to the necessities of the salvage service. But no allowance will be made for the cost of repairs, or detention during repairs, or for any loss, if the injury is not the proximate result of the service."

It would be manifestly unjust to include in this award, as "fixed sums," the amount claimed to have been lost by reason of loss of profits in the quantity and value of fish, which may have been caught during the time the boats were engaged in the service, amounting to many thousands of dollars, when it is shown that the actual cost of floating the ship, including compensation for all service, was $11,380.

Counsel for libelants say:

"In addition, * * * according to the principles applied in such cases, the libelants should be compensated as though they had done the whole work, and upon a liberal scale, not, of course, exorbitantly."

This contention is based upon the theory that the contract made by Capt. Cola, with Mr. Hayes, entitled the latter to salve the ship and, in doing so, to lighter her. If it had appeared that Capt. Cola wrongfully, capriciously, or for any other improper reason, discharged the fishing boats, while they were in the successful prosecution of the work, and prevented them from completing the service, for which he had contracted, that of pulling on the ship, I should not hesitate to take into consideration such amount as the boats would have earned if permitted to continue, to a successful completion, such service. It is, however, manifest that they would not have done so. This, Mr. Hayes concedes. His complaint is that he was not permitted to lighter the ship. The evidence respecting his ability to do so leaves it in doubt. I think that he was given a full and fair opportunity to complete the service contracted for. If his contention regarding the injury which his boats were sustaining, and the loss, by reason of their not fishing, is correct, it is apparent that the extent of the liability to which the ship would have been subjected by further pulling and lightering would have grown to an enormous amount. With ample equipment, prompt and intelligent action, Mr. Williams was engaged three days in lightering and floating the ship. If, to say nothing of the damage to his boats, Mr. Hayes' company was sustaining a loss exceeding $6,000 a day, because the boats were detained from fishing, it is difficult to see how he was damaged by reason of being relieved of a service which was performed by Mr. Williams for $11,380. It would be to impose hard terms upon the Edilio to require her captain to continue in his service a salvor, at expense of more than $6,000 a day, whose boats were being damaged, as claimed to the extent of $5,000 a day, adding an immense sum to his liability, when an experienced, skilled, and

as the result showed, thoroughly equipped agency, was ready to perform the service, and promptly relieve her, for $11,380. From a viewpoint most favorable to the libelants' contention, it is difficult to perceive how it sustained damage, by reason of the course pursued by the captain of the Edilio and her agents.

The principles by which courts are governed in making salvage awards are well stated by Judge Brawley in The Apache (C. C.) 124 Fed. 913:

"It is the policy of the maritime law to encourage spontaneous services rendered in going to the aid of a ship in distress, by giving some remuneration beyond the value of the work actually done, as an encouragement to induce the salvor and future salvors to incur risk in saving life and property; but this extra remuneration is always proportioned to the risks encountered and the services actually rendered, and it is never the policy of the law, nor in accordance with justice, to allow a situation created by calamity to be converted * * * for extortion."

Mr. Hughes, Admiralty (133) says:

"Each case has its peculiar circumstances, and the amount of a salvage award is largely a matter of judicial discretion, varying with the idiosyncrasies of the judge, and regulated only by certain general rules. These are largely corollaries from the fundamental doctrine that salvage is the outgrowth of an enlightened public policy, and is awarded, not merely on a niggardly calculation pro opere et labore in the special case, but as an encouragement to induce the salvor and future salvors to incur risk in saving life and property."

[4] If, however, as it appears in this case, the service was rendered, not in response to a prompt and generous willingness to relieve distress, to save life and property from imminent danger, but only after negotiation with the parties at arm's length, an insistence on the part of the libelants that the condition of the ship was more dangerous than the facts justified, and an effort to make a hard and fast bargain for salvage, with the amount of compensation left open, the court will be slow to make a large award, based upon alleged voluntary service and heroic conduct. The conduct of Mr. Hayes in this case is not unlike that of the libelant in The Brina P. Pendleton (D. C.) 200 Fed. 848. Before undertaking the service, he was keeping in mind the question of compensation and determined to leave it unsettled, refusing to name a price. An examination of several cases, to which counsel have called attention, will indicate the trend of opinion on the subject. Because of the fact that the vessel was on a shoal near by that on which the Edilio grounded, The Penobscot (D. C.) 103 Fed. 205, is in point. Judge Purnell describes the situation of the schooner and the libelant's boat:

The Wilmington, a passenger boat, "seeing a schooner in, or near, the breakers, where he knew she ought not to be, from his familiarity with the coast, after 25 years' service on this bar, with her flag in the rigging, Union down, libelant put his passengers ashore, and went to the rescue of the schooner. The schooner was found to be on a sand shoal, head on, pounding heavily, leaking; * * * life boat in the water, oars adrift; sails down; some of crew's baggage on deck, and some in the small boat. The vessel was not in the breakers, but the breakers were under her bow. The tide was rising, and at that point the current was west. * * * The wind was blowing the schooner on shore. She was drawing 12 foot water, and her bow

was in about 9 feet of water. Wind was blowing 16 miles W. S. W. and driving schooner onto shoal. * * * The schooner was in imminent * * * peril of being driven ashore and wrecked." No other boat was within call. "There was much danger to the Wilmington in going to the schooner, under the circumstances. * * * There was no contract. When the master of the schooner asked Harper what he would charge to pull her off, Harper replied, in substance, that it was not a matter of charge or contract; that if he did not pull him off there would be no charge."

The value of the schooner and her cargo was $11,750. The amount claimed was $2,500. The court allowed $2,000. The Circuit Court of Appeals reduced it to $1,000. The Penobscot, 106 Fed. 419, 45 C. C. A. 372. The judge said:

"This is not salvage service of a low order, but a service which required experience, bravery, and good seamanship. It involved risk of both life and property."

The facts stated present, more strongly than argument could do, the clearly marked distinction, in almost every respect, from the instant case. The case of The Besnard (D. C.) 144 Fed. 992, presents the distinctive line which separates it from The Penobscot; Judge Brawley states, with his uniform clearness, the facts, and, with evident doubt, he reaches the conclusion that, under the authorities, the service rendered was salvage. There, as here, was an attempt to make a contract. He says:

"The testimony makes it clear that the bark was not in fact in a position of danger, at the time the service was rendered, and there was no reasonable ground to apprehend danger, except such as is incident to all vessels at sea. There was no signal of distress, or request for any other assistance than a tow, and the service rendered was precisely the same in kind and degree as that which would have been required if the vessel had been intact. * * * Her master had never intimated any apprehension of personal danger, or any intention of seeking personal safety; for, even when far out at sea, he had declined offers of passing steamers to take off himself and crew. Any peril that can properly be said to have been impending was inconsiderable, uncertain, and distant, existing rather in the imagination of the putative salvors than in reality. Not one of those elements likely to enhance the claim for liberal remuneration enters here. There was no special skill or dexterity displayed, no fatigue endured, no courage evinced, not the least danger encountered. Even were it conceded that this is a case of a vessel in distress, and therefore a case of salvage, it would be salvage of the lowest [possible] order, and the remuneration justly earned would be little more than compensation pro opere et labore."

The bark had sustained serious injury in a water spout. She was damaged and sold for $8,500. Her freight was $4,200 and her cargo $300,000. The award was $1,000. Judge Brawley reviewed a large number of cases. His opinion is enlightening.

In The Lucia (D. C.) 222 Fed. 1015, the ship, value $300,000, with cargo $30,000, went on shoal or sand bar on Florida Coast. The tug Coney, jettisoned about 200 tons of her cargo, pulled on her two days, when she came off, and proceeded on her own steam. The testimony, in regard to sand, was similar to that found in this case. Judge Cail found that:

The service was salvage, "but of the lowest grade. There was no risk of property, peril to life or limb, unusual expense, gallantry, courage or heroism.

* * * The property saved the Lucia was in a certain amount of danger, for, as has been well said, ships are intended to float, and, when they go aground, there is always danger attendant. She is out of her element. * * * But I fail to find in this case the elements that would authorize a large award for the service rendered."

There, as here, the captain of the tug refused to enter into a contract with the captain of the ship. To the argument stressed there, as in this case, the dangerous character of the coast, and the large awards usually made for salvage service, the judge says: "But in this instant case the considerations that induced these large awards are entirely wanting." This language is applicable to the conditions found here. The court awarded $4,000, cost to be paid from that sum. It will be observed that the service was successful.

In The Planter (D. C.) 217 Fed. 161, for successful service of a low order to a vessel of $23,400 value by a tug of $35,000, an award of $800 and $40 to two members of the crew was allowed.

Judge Dickinson (E. D. Pa.), in The Urko Mendi (D. C.) 216 Fed. 427, gives expression to a state of mind in which I sympathize. He says that:

"In determining the amount of salvage to be decreed, there is no fixed rule nor binding precedent nor practice in admiralty."

For a successful salvage service of a low order, rendered by a tug of the value of $40,000 to a ship and cargo of $112,500, he awarded $500.

Counsel for libelants cite The Sandringham (D. C.) 10 Fed. 583. In that case Judge Hughes, after setting forth the condition of the vessel salved and the character of the service rendered, says:

"The ship herself was in great peril; indeed, her condition was well-nigh hopeless. * * * The task of the wreckers was full of toil and risk, performed, as it was, on a dangerous coast, liable to sudden storms and sea swells. The work was bravely undertaken, * * * faithfully pursued, and successfully accomplished."

The wreckers were awarded 25 per cent. of the value of the ship and cargo. In The Craster Hall (D. C.) 203 Fed. 188, the judge found the condition of the ship dangerous. She was pounding, for a while heavily. The service was "meritorious, and, in view of the promptitude and skill in which it was rendered, highly meritorious." An award of 5 per cent. was made on a valuation of $497,000. The Varzin (D. C.) 180 Fed. 892; The Loch Garve, 182 Fed. 519, 105 C. C. A. 57.

In The Nicholas (D. C.) 147 Fed. 793, Judge Hazel says:

"Some risk, perhaps, was taken by the Amazonas, in backing on the reef and towards the distressed steamer; but, to properly lessen this risk, it should not be forgotten that soundings were properly and skillfully taken, and that there was sufficient depth of water in the immediate locality to insure a reasonably safe undertaking. Neither the sea nor the wind were troublesome."

The ship salved valued at $127,000, the salving ship and cargo $149,000. The award was $1,220. The Peter White (D. C.) 149 Fed. 594.

In The Devonian (D. C.) 150 Fed. 831, Judge Dodge rendered an interesting and enlightening opinion, discussing several elements entering into the award found in this case. The value of the ship salved $800,000, tug $55,000. The award $4,500.

Without further pursuing decided cases, the language of Judge Pardee in The Hesper (C. C.) 18 Fed. 696, is worthy of note, in the light of the evidence in this record:

"The evidence shows that there was no enterprise in going out in tempestuous weather, as the weather was moderate, and the libelants only went out when called upon and employed so to do. The labor and skill furnished were of the ordinary kind, such as libelants' boats were seeking as ordinary employment. Salvage, then, is to be determined entirely by the distress in which the salved property was." To several of the arguments here his language is apposite. "That storms might have come that would have destroyed the vessel; that the salving tug [was] injured herself in tugging at the ship salved, etc. It is true that all encouragement should be given to mariners, ships, and landsmen to save property imperiled on the high seas, but where there is no chance for the exercise of gallantry, heroism, or risk, why should an already distressed and imperiled ship be subject to pay additional expenses for ordinary services, and these expenses be chargeable solely to her calamity? That storms might have come is true, but, from the fact, I am unable to see why a distressed vessel should pay money to those boats that can, of their own volition, seek safety. * * * It is difficult for the court to see why a salved vessel should be compelled to pay, in addition to ordinary salvage, repairs for unseaworthy crafts that may come to her assistance."

There are, of course, several differentiating facts between that, and the present, case, as there are between all cases. The Hesper was valued at $100,000, cargo $6,500, award $4,200, affirmed in 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175. The element of the award in this case, which has given me most concern, is the fact that the services of the boats were contracted for by Capt. Cola, with knowledge of their withdrawal from the enterprise in which they were engaged, resulting not only in the loss of fish, but in closing the factory. The evidence in regard to this phase of the case is not contradicted. The owner of the boats was undoubtedly at large expense in the payment of salaries and wages to its officers and employés. It would be difficult, if not impossible, in view of the conditions under which the business of the libelants' company is conducted—the fact that the season for fishing is only a few months, the necessity of making all of the time possible during the season and other factors—to fix the rental value of the fishing boats for several days, when they are withdrawn from fishing. The only basis upon which any just or fair estimate of the loss sustained, on account of the service rendered, is an approximation, upon the data furnished, of the probable "catch" of fish. I have given the conflicting and, in many respects, contradictory, evidence, anxious consideration. The wide and irreconcilable difference of viewpoints of the parties, and their learned, zealous counsel, imposed the duty of the most careful consideration. I have reached the conclusion that, considering all of the elements which should enter into the award, the sum of $10,000 should be paid by claimants. In fixing this amount, I am not inadvertent to the slight benefit which accrued to the ship from the service rendered by libelants' boats. The principal factor which has controlled my mind is the probable loss sustained by the

libelants' company in the withdrawal of the boats from fishing. Unless the libelants' company can come to an agreement respecting the apportionment of the award, I will direct a reference.

In regard to the cost, I am impressed with the fact that, although Mr. Hayes testifies that the amount of the compensation was to be either agreed upon, or settled by arbitration, before resort was had to the court, he made no effort to come to an agreement, or submit to arbitrators, but, immediately upon the arrival of the ship at Wilmington, and without any demand for an adjustment, libeled the ship for $100,000. He says that he knew that she was to take on a cargo of cotton, which would require some time. He also knew that Alexander Sprunt & Son were her agents. The Edilio was required to give a bond, at a large expense, for $100,000, until reduced by the court to $50,000. In view of the conduct of libelants throughout the transaction, the cost will be apportioned: Each party will pay the cost of subpœna, service, mileage, and per diem, of its witnesses, and of taking and filing each deposition, including the amount paid the commissioners. All other cost, including stenographer, will be divided equally. A decree will be drawn accordingly.

In re SADAR BHAGWAB SINGH.

(District Court, E. D. Pennsylvania. December 11, 1917.)

ALIENS ⊂⊃61—NATURALIZATION—FREE "WHITE PERSON"—HINDU.

In view of the historical significance of the term, and its subsequent development, a member of the Hindu race cannot be admitted to citizenship under the statute which from 1790 to 1875, without change, has provided for the naturalization of free white persons; the term "white person" as used in the statute not necessarily including all Caucasians.

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

In the matter of the naturalization of Sadar Bhagwab Singh. Sur motion for reargument on hearing of application for naturalization. Reargument refused, and application denied.

Robert S. Shaw, of Philadelphia, Pa., for the motion.

Thomas B. Shoemaker, Chief Examiner for Philadelphia, Pa., opposed.

DICKINSON, District Judge. If the answer to the question before us was to be found in the results of the researches of the ethnologists, the conclusions so forcibly and clearly stated in the able argument of counsel for this applicant might well be accepted. The legal question, however, which is the one really involved, is a narrower and more simple one, although perhaps not less difficult to answer.

We restate, for the purpose of giving the statement its utmost emphasis, that the applicant has been accorded a most sympathetic hearing, in which the representatives of the Bureau of Naturalization have shared, and that the objection raised neither expresses nor implies a

denial of the merits of the individual applicant, or of the race to which he belongs. The real question is whether the court has the legal power to admit the applicant to citizenship, and this depends upon the answer to the other question of whether Congress has as yet made any provision for the naturalization of men of his race. If it has not, the reason for the omission is obvious. It is because so few of his race have come to the United States that the question of their admission to citizenship has not become enough of a practical question to be dealt with by legislation.

As has before been remarked, admission to citizenship is a privilege granted, and is neither a right to be demanded nor one to be accorded on the personal or racial merits of the applicant, but, if a right, is one, the title to which is to be traced through some act of Congress. When, however, the conditions of the grant of the privilege are met, the privilege ripens into a right of the individual applicant, which cannot be arbitrarily denied.

This leads us by a short and direct path to the acts of Congress on the subject, but a few general observations may aid us to a clearer view of what is to be there found. It is doubtless true that the naturalization problem has grown in complexity and now presents features which were probably not in contemplation when the first laws on the subject were passed. This fact may demand more or less urgently a modification of the meaning of our laws. Such a demand, if it exists, should not blind us, however, to the line which separates interpretation from legislation. At the same time, the difficulties attending such legislation and the wisdom of avoiding the agitations which would accompany any attempt at legislation warned Congress of the danger of casting its meaning in too rigid a mold, and invites the courts to look for a warrant to give to the language employed by Congress the quality of elasticity. This warrant is found in the fact that Congress at intervals, as great as that between 1790 and 1875, employed the same words to express their meaning, although the meaning of the phrase employed had, in the common speech of the people, undergone a change in the meanwhile. There is at once found in our naturalization laws the thought of a double duty imposed upon the courts. They are commanded to reject some applicants and to admit others. In the performance of this duty they are to apply two tests. The one may be called the individual, the other the class, test. The former is in principle of easy application, and in the present case presents no difficulties. The difficulty in the use of the latter test is not so much in its application as in being sure we are applying the right test. It is clear Congress had in mind to designate by the phrase "free white person" a more or less definite class, and to deny citizenship to all others. The only real problem is to recognize the class, the members of which may be naturalized.

It may be helpful for the interpreter to put himself in the place of Congress for the purpose of forecasting what Congress might have done in order to get a clearer understanding of what it did. Congress might have chosen (and the strict letter of its language suggests this) what has been called the complexion or color test. The utter impracticability of applying such a test and the possible consequences led to

its rejection. Assuming the intention to have been to limit the privilege to those who were like unto themselves in blood, previous social and political environment, laws, usages, customs, and traditions, what has been called the geographical test (for which the representatives of the Bureau of Naturalization contend) might have been inserted in the law. The absence of appropriate words expressive of this intention and the thought that Congress had a vision of what the United States has since become, the melting pot of almost all the nations of the earth, forbids us to take any such meaning from the law. The like absence of philological and ethnological terms compels us to find that such a test was rejected.

By a process of elimination we are thus brought or driven to the only remaining test, which is this: Our people, when the first naturalization act was passed, had a really definite idea of those to whom the privilege of citizenship was to be extended. The difficulty was, not in getting into accord upon the thought, but the difficulty was in finding a word or phrase which would express it. Resort was had, as the only recourse, to the common speech of the people, which provided a phrase ready at hand, which expressed the thought meant to be conveyed. The phrase was "white person." Its meaning was wholly conventional, and the convention evidenced by the meaning which the common man extracted from it. It made no pretense to be a term of science, and was not chosen with a view to scientific definiteness or accuracy of expression. It was at all events the nearest approach to definiteness of expression among all the words which were at the command of the lawmaker. Precision would not be demanded until the expression came to be applied to a particular applicant, and the phrase would be then interpreted as Congress intended it to be. It will thus be seen that the difficulties which confronted the lawmakers were not removed, nor were they surmounted otherwise than by the expedient of transferring them to the interpreter. Our difficulties are indeed increased. Classification is a necessity of speech, because it is a necessity of thought. Very broad and very general classifications are relatively easy. It is very difficult to make them definite. In the end the limitations under which we labor drive us to a real or assumed convention. We more or less arbitrarily label the subject and classify according to the presence or absence of the label. Our language, as is every other, is full of illustrations of conventions thus reached or imposed. Our language is a living thing. Because it is alive, it is ever changing. Words in the process of taking on accretions of meaning and of elimination become in effect different words, and indeed not infrequently come to have a meaning the exact opposite of that which was conveyed by their first use. Even among a people who speak the same language, the same word acquires one meaning in one locality and a different meaning in another. To save the discussion from becoming too academic, this fact has a bearing upon the meaning at different times given to the quoted phrase.

The words were first inserted in our naturalization laws in 1790. As the inhabitants of what was then the United States were a more or less homogeneous people who or whose immediate forbears had come

from what has been termed "Northern Europe," and as the vast territories then known as Florida and as Louisiana formed no part of our national domain, and as our people had been in almost continuous conflict with the French and Spaniards, it is doubtful whether the words "white persons," as used in common speech, originally included any of the so-called Latin races. The events of the Revolution, however, and the gratitude which our people felt toward France, and more especially the large number of French Huguenots who had come to make their homes here, caused instant recognition of the French as having a common heritage with us, and the phrase automatically expanded to include them. The desire to be consistent forced us to include the Spaniards and Portuguese, and later the Italian peoples, and broadly the Latin race. The immigration of persons from Southern and Southeastern Europe brought within the meaning of the phrase which we are construing, Hungarians, Poles, Russians, and many divisions of the Slavic race, as at an earlier period it had been recognized to embrace Hebrews, who have always been recognized as a distinct race, or branch of the Semitic, and who have always demanded such recognition, and through their efforts to preserve the purity of their blood have won it. In consequence, the phrase employed in the legislation of 1790 had a broader scope of meaning than it had in Colonial days, and the same phrase in 1875 commanded a still broader meaning.

This is what has been termed the "historical interpretation," a phrase which itself needs to be interpreted. It does not mean that we are to determine whether a particular applicant is a "white person" by inquiring whether people would have so classified him at the time the law was passed, nor does it mean that the lexicographers can change the law. It means that we are to look for the meaning of the act of Congress, aided by the light shed by history, and not by inquiries made of ethnologists. It means further that Congress did not intend to limit the privilege to peoples then commonly recognized as belonging to the white race, or they would, as they to a practical certainty might readily have done, have enumerated them. It means that Congress chose its word for the purpose of describing, so far as could be done, although in very general terms, and therefore vaguely the class, the members of which might enjoy the privilege of citizenship and imposed upon the courts the duty of determining whether the individual applicant belonged to that class. Its further and final meaning, with which we are now concerned, is that the courts may admit to citizenship any person found to belong to the designated class, but no power, except that of Congress, can enlarge that class. The changes which have been made in the naturalization laws gives confirmation to the thought intended to be expressed. The reader of these laws who was an ethnologist and nothing but an ethnologist would get no meaning at all or the wrong meaning out of them. One familiar with the history of our people would know at once that persons commonly known as negroes may be naturalized, and persons known as Chinese cannot be, and would have no difficulty (except in the case of a person of mixed blood) in applying the law in an individual case. With-

out the aid of the light of history, no one could tell what was meant by "African," "persons of African birth," or "of African nativity," but in that light the motive, purpose and meaning of these laws became absolutely clear. The general meaning of "free white person" is just as clear. No difficulty is presented until we descend from the general to the particular. This historical meaning is the same as that given to the act in many of the adjudged cases in which the word "Caucasian" is used. The gain we get from the use of a synonym is more seeming than real. The aid rendered is much like that afforded by a dictionary in which each of two words is defined in terms of the other. All we really learn is that they have the same meaning. "White" and "Caucasian" have the same meaning, or the use of the latter is wrong. Moreover, not only is there room for difference of opinion whether there is any gain in definiteness by substituting "Caucasian" for "white," but the use of the substitute may lead us away from the right meaning. When the long looked for Martian immigrants reach this part of the earth, and in due course "a man from Mars" applies to be naturalized, he may be recognized as white within the meaning of the act of Congress, and admitted to citizenship; but he may not be a Caucasian. Whether in any application the applicant belongs to the class of persons who may become citizens depends upon the decision reached in his case. Such a decision partakes too much of the rescript character to be wholly satisfactory. It seems more like a decision arbitrarily announced than a reasoned conclusion. This is the best, however, of which the nature of the subject permits, and explains whatever different rulings have been made. The means of reaching a general accord, which our appellate jurisdiction affords, will soon produce the desired result.

The present applicant belongs to the race of people commonly known as Hindus. Our view is that Congress, as already stated, has as yet made no provision for his naturalization, and we are without the legal power to naturalize him, as the present laws cannot be extended so as to include him without usurping the lawmaking powers of Congress.

The conclusion reached is, we think, in accord with the weight of authority as disclosed in the adjudged cases, among which are: Camille (C. C.) 6 Fed. 256; Saito (C. C.) 62 Fed. 126; Kumagai (D. C.) 163 Fed. 922; Knight (D. C.) 171 Fed. 299; Najour (C. C.) 174 Fed. 735; Halladajian (C. C.) 174 Fed. 834; Balsara, 180 Fed. 694, 103 C. C. A. 660; Mozumdar (D. C.) 207 Fed. 115; Alverto (D. C.) 198 Fed. 688; Dow (D. C.) 211 Fed. 486; Id. (D. C.) 213 Fed. 355; Id., 226 Fed. 145, 140 C. C. A. 549.

The reargument is refused.

SEAPLES v. CARD et al.

(District Court, E. D. Washington, N. D. September 23, 1915.)

No. 2257.

1. INDIANS ⟸15(2)—PUBLIC LANDS—PATENTS—STATUTES—RESTRAINT ON ALIENATION.

Where, under Act March 3, 1875, c. 131, § 15, 18 Stat. 420 (Comp. St. 1916, § 4611), declaring that any Indian born in the United States, who is the head of a family, or who has arrived at the age of 21 years, and who has abandoned his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," provided that the title to lands acquired by any Indian shall not be subject to alienation for a period of 5 years from the date patent is issued, an Indian, who had abandoned his tribal relations, applies for and makes final proof on a homestead, paying the fees prescribed, he is entitled to a patent with only a 5-year restriction on alienation, notwithstanding the patent was not executed until after the passage of Act July 4, 1884, c. 180, 23 Stat. 96 (Comp. St. 1916, § 4612), declaring that such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior or otherwise, so locate, may avail themselves of the provisions of the homestead laws as fully as may now be done by citizens of the United States, that to aid such Indians in their selection an appropriation shall be made, and no fees or commissions charged, and that all patents shall declare that the United States will hold the land thus entered for a period of 25 years in trust for the sole use and benefit of the Indians by whom such entry shall have been made, etc., for the latter act was not an amendment or repeal of the first; privileges granted to a certain class by a special act not being affected by inconsistent legislation, unless contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom.

2. INDIANS ⟸15(2)—PUBLIC LANDS—PATENTS—RESTRICTIONS ON ALIENATION.

In such case, where original entry was made May 8, 1885, by an Indian who had abandoned his tribal relations, under the act of 1875, and after his death final proof was made by his surviving widow, pursuant to the act of 1884, no fees being paid, the trust patent to the widow is subject to the 25-year restriction on alienation.

3. INDIANS ⟸15(2)—PUBLIC LANDS—PATENTS—CANCELLATION—RESTRAINT ON ALIENATION.

Where an Indian obtained a trust patent to a homestead under Act July 4, 1884, providing that patents to Indians located on homesteads shall be of legal effect, and declaring that the United States does and will hold the land entered for a period of 25 years in trust for the sole use and benefit of the Indian, the land office is without authority thereafter to cancel the patent and issue a new patent without any restriction, pursuant to Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390 (Comp. St. 1916, § 3951), declaring that every Indian born within the territorial limits of the United States, who has abandoned his tribal relations, shall be a citizen of the United States and entitled to all the rights, privileges, and immunities of a citizen, regardless of whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians, for the conferring of citizenship on Indians did not deprive Congress of the right to impose restrictions on their alienation of homesteads pre-empted.

4. INDIANS ⟸15(2)—PATENTS—CANCELLATION.

In such case, Act May 8, 1906, c. 2348, 34 Stat. 182 (Comp. St. 1916, § 4203), amendatory of Act Feb. 8, 1887, § 6, providing that the Secretary of

the Interior may, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, cause to be issued to such allottee a patent in fee simple, the Land Department having issued to an Indian under Act July 4, 1884, a trust patent to a homestead which imposed a 25-year restriction on alienation, cannot cancel such patent and issue one free from restrictions, the act of 1906 applying to allottees only.

5. INDIANS ⊂=15(2)—PATENTS—AUTHORITY OF LAND OFFICE—ATTACK ON PATENT.

A homestead patent was issued to a nontribal Indian under Act July 4, 1884, which pursuant to the terms of the act declared that the United States held the title in trust for the Indian for a period of 25 years. Thereafter, the Land Department assuming to act either under Act Feb. 8, 1887, § 6, or Act May 8, 1906, amendatory thereof, canceled the original trust patent and issued a new patent, giving the Indian title in fee simple. *Held* that, as the Land Department was at all events still charged with the duty of issuing a further patent which would convey title to the Indian or his heirs, etc., discharged of the trust and free from all incumbrances, and as the issuance of patents was within the jurisdiction of the Land Department, the second patent, though the cancellation of the trust patent and its issuance was erroneous, was not void and cannot be collaterally attacked; the Indian having, after the issuance of the fee-simple patent, disposed of the land.

6. INDIANS ⊂=15(2)—JURISDICTION—RELIEF.

In such case, the Indian, having after the issuance of the fee-simple patent disposed of the land, was not, on the theory that the purchasers were chargeable with notice of her lack of power of alienation expressed in Act July 4, 1884, entitled to recover the land and secure a patent in fee simple, the period against alienation having expired, for the maxims of equity should to an extent be applicable to Indians, and it would be improper to charge a purchaser with notice of laws which the administrative department vested with power of their enforcement misinterpreted.

At Law. Ejectment by Mary Seaples, an Indian, against Ida B. Card and others. On demurrer to answer and counterclaim. Demurrer to certain defenses overruled, and as to others sustained.

Sam R. Sumner, of Wenatchee, Wash., for plaintiff.
Peters & Powell, of Seattle, Wash., for defendants.

RUDKIN, District Judge. This is an action of ejectment to recover possession of certain real property in Chelan county, this state. The right of recovery depends upon the following facts, which appear from the pleadings and an exemplified copy of the records of the General Land Office, which the parties agreed the court might consider in disposing of the demurrer interposed to certain affirmative defenses contained in the amended answer:

On the 8th day of May, 1885, Seaples, an Indian, who was born in the United States and had abandoned his tribal relations, made entry of the land in controversy under section 15 of the act of March 3, 1875 (18 Stat. 420, c. 131 [Comp. St. 1916, § 4611]), which provides that:

"Any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth,

eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: Provided, however, that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor."

The entryman died soon after the entry was made and on the 25th day of March, 1891, the plaintiff as his surviving widow submitted final proof in support of the entry. The proof was accepted and final certificate issued, which was followed by a patent under date of February 18, 1892. The patent contained the recital:

"That the United States of America, in consideration of the premises and in accordance with the provisions of the act of Congress of July 4, 1884, hereby declares that it does and will hold the land above described for the period of twenty-five years in trust for the sole use and benefit of the said Mary Seaples or in case of her decease of her heirs, according to the laws of the state where such land is located, and at the expiration of said period the United States will convey the same by patent to the said Mary Seaples or her heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

The act of July 4, 1884 (23 Stat. 96, c. 180 [Comp. St. 1916, § 4612], referred to in the patent, provides as follows:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof, as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

Although the entry was made after the passage of the act of 1884, the application to enter was made under the act of 1875. This fact appears on the face of the application, and also from the payment of fees and commissions, which was not required under the act of 1884. On the other hand, final proof was submitted under the act of 1884. This fact likewise appears on the face of the record and from the fact that no fees were paid.

On the 15th day of March, 1907, the plaintiff made application to the register and receiver of the United States land office at Waterville, Wash., for a fee-simple patent for the land covered by her original patent, on the ground that she had taken up her residence separate and apart from any tribe of Indians and had adopted the habits of civilized life, and for other reasons not deemed material here. This application was transmitted to the Commissioner of the General Land Office, and under date of April 8, 1907, the Assistant Commissioner canceled

the patent of February 18, 1892, and directed the issuance of a fee-simple patent in lieu thereof. This action was taken under section 6 of the act of February 8, 1887 (24 Stat. 388, c. 119 [Comp. St. 1916, § 3951]), which provides, among other things, as follows:

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

On the 12th day of June, 1907, a fee-simple patent without restrictions or limitations was accordingly issued to the plaintiff, and after its delivery she conveyed a part of the land thus patented to one Leah J. Prowell, and the residue to one W. R. Prowell. The remaining defendants claim title to separate parcels of the land under the Prowells.

Under the foregoing facts the plaintiff contends that the original patent was properly issued under the act of 1884; that the second patent, and the order of the Commissioner of the General Land Office canceling the first patent, are null and void; and that the restriction against alienation still obtains, notwithstanding the cancellation of the first patent and the issuance of the second. The defendants, on the other hand, contend that the patent should have been issued in the first instance under the act of 1875; that the 5-year limitation on the power of alienation had expired long before the issuance of the second patent; and that the plaintiff had full right and authority to convey at the time of the execution of the deeds under which the defendants claim. Other defenses presented by the answer and other questions discussed in argument will be referred to in the course of the opinion.

[1, 2] It has generally been assumed that the act of 1884 is supplementary to and amendatory of the act of 1875. Frazee v. Spokane County, 29 Wash. 278, 69 Pac. 779; Frazee v. Piper, 51 Wash. 278, 98 Pac. 760; Felix v. Yaksum, 77 Wash. 519, 137 Pac. 1037. Indeed, as early as 1888 the Attorney General of the United States said:

"I am of opinion that this act of 1884 was intended to be supplemental to and somewhat in modification of the act of 1875, and that its provisions apply to all entries made under the act of 1875 for which patents had not issued at the time the act of 1884 went into effect." 19 Opinions of Attorney General, p. 166.

This view of the law seems to have been generally followed by the Department, although many Indian patents have been found containing erroneous restrictions, or no restrictions at all. If the question were a new one, the correctness of this view is open to grave doubt. In speaking of these two acts in the well-considered case of Hemmer v. United States, 204 Fed. 898, 905, 123 C. C. A. 194, 201, Judge Sanborn said:

"The arguments in support of the contention that the act of 1884 so amended the act of 1875 as to extend the restriction upon alienation of homesteads

earned under the latter act have now been reviewed, and they seem to present no insuperable legal obstacle to the opposite conclusion. Let us now take up the two acts of Congress, apply to them the indubitable rules for the interpretation of statutes upon the same or similar subjects, and ascertain their true legal effect. The act of 1875 was a special law on the subject of Indian homesteads, limited to a small and specific class of Indians, those who had abandoned or should abandon their tribal relations, and it granted the right to homesteads, to members of this class only under the restriction of 5 years upon their alienation. The act of 1884 was a general law on this subject of Indian homesteads, and it granted to Indians, whether they had abandoned their tribal relations or not, rights to homesteads subject to restrictions for 25 years on their alienation. The first and most impressive characteristic of the latter act, when it is examined to ascertain its effect upon the earlier one, is that it contains no terms or words whatever that indicate any intent on the part of the legislators to amend, modify, repeal, or affect in any way the act of 1875, the restriction upon alienation there imposed, or any of its other provisions. The act of 1884 contains no reference to the act of 1875, or to any of its provisions, and it does not even contain a clause repealing acts or parts of acts inconsistent with its own provisions. Privileges granted to a certain class by a special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule."

I see no escape from the logic of that decision, and if the plaintiff in this case had made final proof and paid the land office fees under the act of 1875 I would feel constrained to hold that she was entitled to a patent under the provisions of that act with only a 5-year restriction upon alienation, and that a transfer made after the expiration of that period would be free from legal objection. But, while the entry was made under the act of 1875, the record shows that final proof was made under the act of 1884, and, having accepted the benefits of the latter act relieving her from the payment of the land office fees, she cannot escape its burdens among which is the restriction upon the power of alienation for a period of 25 years. This view of the law is in entire harmony with the decisions from this state, and with the decision in Hemmer v. United States, supra, because in the Hemmer Case every step up to and including the final proof, was taken under the act of 1875.

[3] Nor can I find any warrant or authority for the subsequent cancellation of the first patent. The land department seems to have assumed that the conferring of citizenship upon Indians who had severed their tribal relations and adopted the habits of civilized life is inconsistent with and abrogated the restrictions on alienation contained in the acts of 1875 and 1884. But there is no inconsistency between the acts of 1875 and 1884 and the act of 1887 in this regard. It was clearly within the power of Congress to grant to the Indians such title as it chose, and with such restrictions as it saw fit to impose, just as it has provided that homesteads are not liable for debts contracted prior to the issuance of patent. The restriction against alienation was imposed to protect the Indian against his own improvidence and the machinations of the white man, and the conferring of citizenship on the Indian neither increased the sagacity of the one nor lessened the cupidity of the other. Indeed, the very act which conferred the boon of citizenship on the Indian in an earlier section imposed restrictions on the

alienation of the allotment of the newly made citizen. Frazee v. Spokane County, supra; Beck v. Flournoy Live Stock & Real Estate Co., 65 Fed. 30, 35, 12 C. C. A. 497.

For these reasons, I am of opinion that the order canceling the patent cannot be sustained for the reasons assigned by the Assistant Commissioner of the General Land Office. Nor, in my opinion, can it be sustained on the other grounds suggested in argument.

[4] My attention was directed to the act of May 8, 1906, amendatory of section 6 of the act of February 8, 1887 (34 Stat. 183, c. 2348 [Comp. St. 1916, § 4203]), providing:

"That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

This act is by its terms limited to Indian allottees and confers no authority upon the Secretary of the Interior to cancel patents issued under the act of 1875 or the act of 1884. Why the Secretary of the Interior should be authorized to remove the restriction on alienation in the case of Indian allottees, and not of Indian homesteaders, under the acts of 1875 and 1884, I do not know, and am not at liberty to inquire. Suffice it to say that Congress has spoken, and has granted the authority in the one case, but not in the other.

[5] If I am correct in these conclusions, the order canceling the trust patent was erroneous; but it does not follow from this that the second, or fee-simple, patent is void, or that the plaintiff is entitled to recover. For, as said by Judge Sanborn in United States v. Winona & St. P. R. Co., 67 Fed. 948, 955, 15 C. C. A. 96, 103:

"A patent issued by the officers of the Land Department of the United States, in a case within the scope of their power or jurisdiction, is dual in its effect: It is an adjudication of those officers that the patentee is entitled to the land under the laws of the United States, and it is a conveyance of the title to that land to the patentee. By Act March 3, 1849 (9 Stat. c. 108, p. 395, § 3; Rev. St. § 441 [Comp. St. 1916, § 681]), the Secretary of the Interior is charged with the supervision of the public business of the United States relating to the public lands; and by Act March 3, 1857, supra, as amended by Act May 12, 1864, supra, the power was conferred and the duty imposed upon him to indicate the lands granted to the Winona Railroad Company by those acts of Congress in all cases. By the act of July 4, 1836 (5 Stat. c. 352, § 1; Rev. St. § 453 [Comp. St. 1916, § 699]), the Commissioner of the General Land Office is required to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government.' The Land Department of the United States, then, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitutes a special tribunal, under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not

the claimant is the beneficiary of the grant, whether or not it has so far complied with its conditions that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. When a claim is made under the homestead or pre-emption laws for a portion of the public domain that is subject to its disposition, that tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws, whether or not the land claimed was subject to pre-emption or to entry for a homestead, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land. Similar questions must be heard and determined by that department whenever any portion of the public land subject to disposition by that tribunal is sold or otherwise disposed of in any way. In every case there must, in the nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land under the acts of Congress. A certificate or patent is the record evidence of the judgment of this tribunal, and it necessarily follows that, when such a judgment is rendered in a case within the jurisdiction of the Land Department, it is, like the judgments of other special tribunals vested with judicial powers, impervious to collateral attack."

In the case of King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29, 31, the same learned judge said:

"The Land Department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them. * * * A patent of land within its jurisdiction, issued by the Land Department, is the judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of the judgment. When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack. The test of the jurisdiction of this tribunal is the true answer to the question: Had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the Land Department had jurisdiction of the case, and the patent which evidences its decision conveys the legal title, and is impervious to collateral attack. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it. Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and land for the disposition of which Congress has made no provision, is not intrusted to the disposition of the Land Department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law. * * * But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decisions, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong. * * * The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. * * * Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions. The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it."

These rules are plainly deducible from the decisions of the Supreme Court, many of which are carefully reviewed in the two opinions referred to. Let us apply these rules to the facts in this case. The Land Department had jurisdiction over this land, and was charged with the duty of determining all claims thereto, and of issuing patents in execution of its judgment to those thereto entitled. This jurisdiction was not lost through the issuance of the first or trust patent. Indeed, it is a misnomer to call that instrument a patent at all. It is a naked declaration of trust, conveying no title. The title still remained in the United States, and the Land Department was still charged with the duty of issuing a further patent, which would convey the fee to the Indian or his widow and heirs "discharged of said trust and free of all charge or incumbrance whatsoever." The Land Department had jurisdiction to determine who was finally entitled to the fee-simple patent and when that patent should issue. In the determination of these questions the Department may have erred, but that error did not affect its jurisdiction or render its patent void. The error, if any, cannot be corrected by a court of law, nor can the decision be attacked in a collateral way. It may be urged that the disability of the Indian was created by statute, and not by the patent, and that the restriction against alienation exists, notwithstanding the form of the patent. This may be true in a measure; but in cases such as this, where there has been a formal adjudication by a competent tribunal that the party is entitled to a conveyance in fee, discharged of the trust and free of all charge or incumbrance whatsoever, that adjudication cannot be set aside or ignored by a court of law.

[6] The claim of the plaintiff is unconscionable and utterly devoid of equity at best. She says in substance that she applied to the Land Department for a fee-simple patent, to which she was not entitled, and obtained it; that she sold this title, and received a full consideration, to which she was not entitled, and still retains it; and now she seeks to again recover a title to which she is not entitled, for, if she recovers here, she recovers the fee, and not a mere possessory right. The government is asserting no claim to the property, and can assert none by reason of the statute of limitations and the lapse of time. I cannot believe that the courts are powerless to prevent such an injustice as would result from a recovery in this case; but, if they are, Congress should at once come to the relief of those who have parted with their money in reliance upon a patent issued by competent authority. It may be said that the defendants are chargeable with notice of the disability under which the plaintiff labors, and this is in a measure true; but it would be indeed a harsh rule that would charge them with a knowledge of the law superior to that possessed by the officers who are specially charged with its administration. The plaintiff, as a citizen of the United States, is subject to the laws of the state, and entitled to all the rights, privileges, and immunities of such citizens; but those who deal with her are entitled to some consideration. The courts have gone far to protect the Indians against their improvidence and the wiles of the whites, and properly so; but as citizens of the United States the Indians are subject to the laws of the state, and the doors of chancery

should not be entirely closed against those who deal with them. The maxims of equity apply to all, and in the slow process of civilization they should acquire some of our virtues along with our vices.

These views are perhaps decisive of the case, so that it will be unnecessary to refer in detail to the different defenses interposed by the answer. Suffice it to say that the demurrer to the first, second, third, and fourth defenses and the counterclaim is overruled, and the demurrer to the fifth and sixth affirmative defenses is sustained.

Let an order be entered accordingly.

JELLISON v. KRELL PIANO CO. et al.

(District Court, E. D. Kentucky. November 24, 1917.)

No. 3112.

1. REMOVAL OF CAUSES ⊜102—REMAND—STATUTE.
Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098 [Comp. St. 1916, § 1019]) § 37, declaring that if in any suit commenced in any District Court, or removed from any state court to a District Court of the United States, it shall appear to the satisfaction of the District Court, at any time after such suit has been brought or removed thereto, that such suit does not involve a dispute properly within the jurisdiction of such District Court, or that the parties to such suit have been improperly or collusively joined to create a case cognizable or removable thereunder, the District Court shall dismiss the suit or remand it to the court from which it was removed, it is improper, a suit to recover $2,900 for services rendered and to enjoin a violation of a copyright having been removed from the state to the federal district court, to remand such suit, the cause of action for the injunction having been dismissed, for the jurisdiction of the federal court, having once attached, could not be ousted because a dismissal of one of the causes of action reduced the amount in controversy below $3,000.

2. COURTS ⊜96(1)—PRECEDENTS—BINDING PRECEDENTS.
The latest decisions of the Supreme Court and the appellate court of a circuit on the question of remanding or dismissing suits in the federal court pursuant to Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (Judicial Code, § 37), are binding precedents which a District Court should follow.

At Law. Suit by Clarence Jellison against the Krell Piano Company and others, begun in state court and removed to the federal court, where one cause of action was dismissed. On motion for remand. Motion denied.

B. F. Graziani, of Covington, Ky., for plaintiff.

S. D. Rouse, of Covington, Ky., and Maxwell & Ramsey, of Cincinnati, Ohio, for defendants.

COCHRAN, District Judge. [1] This cause is before me on motion to remand. It is a suit to recover $2,900 for services rendered as general manager of a musical department and to enjoin violation of a copyright for a method of co-operative player piano playing. Though not set forth in separately numbered paragraphs, two causes of action are thus presented, one for the recovery of money and the other for

an injunction. The ground of removal was diversity of citizenship. The petition for removal alleged that the matter in dispute exceeded, exclusive of interest and costs, the sum or value of $3,000. Since the filing of the transcript here, on plaintiff's motion, the cause of action for the injunction has been dismissed. So that as matters now stand this is a suit to recover $2,900; i. e., a suit not properly within this court's jurisdiction. It was upon such dismissal and because the suit could not have been removed to this court if, when it was removed, it had been as it then stood, that the motion to remand was made. The question is foreclosed by a decision of the Supreme Court and two decisions of the appellate court of this district. They are those rendered in these cases, to wit: Kirby v. American Soda Fountain Co., 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911; Riggs v. Clark, 71 Fed. 560, 18 C. C. A. 242; Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438.

In the Supreme Court case the purchaser of a soda fountain, for which he had exchanged an old one and agreed to pay $2,025 in addition, brought suit in a state court for rescission for fraud and recovery of $2,500 damages. The suit was removed to the federal court on the ground of diversity of citizenship. There the vendor filed a cross-bill seeking to recover the balance of the $2,025 then due, to wit, $1,700, and enforcement of the lien. Thereupon, on plaintiff's motion, the original bill was dismissed without prejudice. This left the cross-bill undisposed of. To this the plaintiff filed a plea to the jurisdiction on the ground that the amount sought to be recovered did not exceed $2,000, exclusive of interest and costs, the then jurisdictional amount. It does not seem that he sought thereby to have the cross-bill remanded to the state court, but to have it dismissed for want of jurisdiction. The plea was overruled, and that on two grounds. One was that notwithstanding the dismissal of the original bill the amount in controversy was still sufficient to give jurisdiction. It is not necessary to pause to explain how this was made out. The other was that, though the amount in controversy was not sufficient, the court had jurisdiction of the cross-bill when it was filed, and that jurisdiction was not ousted by the subsequent dismissal of the original bill. The court, through Mr. Chief Justice Fuller, said:

"It is the general rule that, when the jurisdiction of a Circuit Court of the United States has once attached, it will not be ousted by subsequent change in the conditions."

Again, after showing that the court had acquired jurisdiction by the removal proceedings, he said:

"The jurisdiction thus acquired by the Circuit Court was not divested by plaintiff's subsequent action."

The general rule stated was put as the generalization of the decisions in these five cases, to wit: Morgan v. Morgan, 2 Wheat. 290, 4 L. Ed. 242; Clarke v. Mathewson, 12 Pet. 165, 9 L. Ed. 1041; Kanouse v. Martin, 15 How. 198, 14 L. Ed. 660; Roberts v. Nelson, Fed. Cas. No. 11907; Cook v. United States, 2 Wall. 218, 17 L. Ed. 755.

By the first two it was held that, if jurisdiction of a federal court

was acquired by reason of diversity of citizenship, it would not be ousted by the diversity ceasing to exist in the progress of the case therein. By the other three it was held that, if the amount in controversy was sufficient when a federal court acquired jurisdiction, it would not be divested if plaintiff reduced the matter in dispute to less than the jurisdictional amount. In the case of Chicago v. Mills, 204 U. S. 321, 27 Sup. Ct. 286, 51 L. Ed. 504, the Supreme Court, through Mr. Justice Day, citing that case, said:

"The question of jurisdiction must be decided, having reference to the attitude of the case at the date the bill was filed."

In Riggs v. Clark it was held that a suit to cancel a mortgage for $2,120 should not be remanded after removal, because, by stipulation, the actual amount in controversy was reduced to a sum not over $2,000. The decision in Hayward v. Nordberg Mfg. Co. was to the same effect. The court, through Judge Lurton, said:

"Where a cause is removed to the Circuit Court of the United States by a defendant, and the record at the time of removal shows a dispute or controversy within the jurisdiction of a Circuit Court in respect to amount, the jurisdiction over that case cannot be defeated by the subsequent concession of the plaintiff that the amount he claimed was less than that he had stated in pleadings filed before such removal. Neither would such concession be strengthened by any stipulation as to the real facts of his demand, nor by any other form of concession made after removal."

This case, though not within the facts of these cases, is within the principle applied in them, and hence is governed by them.

The plaintiff relies on these decisions, to wit: Fischer v. Star Co. (D. C.) 227 Fed. 955; Jones v. W. U. Tel. Co. (D. C.) 233 Fed. 301, which was based on section 37 of the Judicial Code (Comp. St. 1916, § 1019). That section is in these words, to wit:

"If in any suit commenced in a District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This provision is exactly the same as section 5 of the act of March 3, 1875, except the last paragraph of that section, which was repealed by the Acts of 1887–88. It originated there. Prior thereto there was no such provision in the federal jurisdictional legislation. In the Fischer Case the suit as brought in the state court was for infringement of a registered trade-mark. It was removed to the federal court because a federal question was involved. After the removal, an amended bill was filed omitting all mention of the registered trade-mark and alleging unfair competition. As there was no diversity of citizenship, the defendant thereupon moved to dismiss the suit. The plaintiff moved to remand it under section 37. The motion to dismiss was overruled, and that to remand sustained. There is room to say that

the action of the court should have been the reverse of that taken. The amended bill set up an entirely new cause of action—one that had not been brought in the state court. By the action taken a suit was remanded to the state court that had not been brought there. The Jones Case was a suit to recover damages for negligence in transmitting and delivering a telegram. Recovery was sought for $2,500 for mental suffering and $550 for expenses incurred and lost services. These two amounts were sought to be recovered in separate counts. The removal was had on the ground of diversity of citizenship. A demurrer was sustained to the first count for mental suffering. Thereupon the suit was remanded. Judge Bledsoe said:

"It would seem proper, therefore, that the court, having determined that no cause of action is stated in the complaint as to any matter of which this court has jurisdiction, suo motu should remand to the state court, the proper tribunal for its trial, the cause of action set forth in the second count of the complaint."

It is on this case that plaintiff mostly relies in support of its motion to remand. This decision also is of doubtful soundness. Thereby the plaintiff was deprived of his right to question the correctness of the court's ruling on the first count in the appellate court, and on the return of the case to the state court there was nothing to prevent it, if it thought the first count good, from setting aside the order sustaining the demurrer and proceeding with it as well as the second count. These two decisions therefore yield very slight support to plaintiff's position.

But it must be admitted that section 37 of the Judicial Code presents some difficulty, and this particularly in view of the decisions of the Supreme Court in the cases of Texas Transportation Co. v. Seeligson, 122 U. S. 519, 7 Sup. Ct. 1261, 30 L. Ed. 1150, and Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. In the Seeligson Case the suit had been removed by one of several defendants between whom and the plaintiff there was diversity of citizenship on the ground of a separable controversy between those two parties, and thereafter, on motion of plaintiff, the suit was discontinued as to such defendant; there being no diversity of citizenship between plaintiff and other defendants. It was held that the lower court properly remanded the suit to the state court upon the discontinuance of the separable controversy. The Torrence Case was of like character, except that there was no formal discontinuance of the suit as against the defendant who had removed. Nothing was done but to file a stipulation between plaintiff and the removing defendant to the effect that their controversy had been settled. It was held that the lower court erred in not remanding the case upon the filing of such stipulation. In each case the basis of decision was section 5 of the act of March 3, 1875. Apparently, at least, if it had not been for that provision the decision would have been different. In the one case, the court, through Chief Justice Waite, said:

"As the suit could only have been removed because of the alleged separable cause of action against Huntington, it was right to remand it as soon as the discontinuance was entered as to him. * * * The court was not required to keep the suit after the discontinuance, simply because it might have been

removed when Huntington was a party. As soon as he was out of the case, it did appear that 'the suit did not really and substantially involve a dispute or controversy properly within' its jurisdiction."

In the other, through Mr. Justice Gray, it said:

"If the controversy between the plaintiff and Brown on the one side and Sorin on the other had been such as to justify a removal, there can be no doubt that after that controversy had been settled, as shown by the stipulation of the parties to it, the suit no longer really involved a dispute or controversy properly within the jurisdiction of the Circuit Court, and should therefore have been remanded to the state court, under section 5 of the act of March 3, 1875."

Numerous cases have been decided by the lower federal courts in accordance with this interpretation of the provision. Such are the cases of Iowa Homestead Co. v. Des Moines N. & R. Co. (C. C.) 8 Fed. 97; Bane v. Keefer (C. C.) 66 Fed. 610; Youtsey v. Hoffman (C. C.) 108 Fed. 699; Cassidy v. Atlantic & C. A. L. Ry. Co. (C. C.) 109 Fed. 673; W. T. Hughes & Co. v. Pepper Tob. Co. (C. C.) 126 Fed. 687; Fischer v. Star Co. (D. C.) 227 Fed. 955; Jones v. W. U. Tel. Co. (D. C.) 233 Fed. 301. The Iowa Homestead Co., Youtsey, and Cassidy Cases are like the Seeligson and Torrence Cases in their facts. In the Cassidy Case it would seem that the court erred in dismissing the suit and in not remanding it. In the Bane Case the removal was had on the petition of one of several defendants between whom and plaintiff there was diversity of citizenship on the ground of local prejudice. It was held that on the dismissal of the suit as to him the suit should be remanded. Judge Baker said:

"The suit does not now really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and therefore it becomes its duty to proceed no further, but to remand the cause to the court from which it was removed."

In the W. T. Hughes & Co. Case the removal was on the ground of diversity of citizenship. The complaint sought to recover $2,250, an amount then within the jurisdiction of the federal court. After the removal, an amendment was filed alleging that there was error in the amount on which the complaint was based of $448.75, thus reducing the amount demanded to less than $2,000, the jurisdictional amount. The suit was thereupon remanded. Judge Purnell said:

"On the face of the complaint the order of removal was properly entered, but on an examination of the whole record it appears now that the controversy between the parties does not involve an amount, exclusive of interest and costs, which would give the court jurisdiction."

Possibly before the decision by the Supreme Court of the Seeligson and Torrence Cases, it was open to claim that this statutory provision required the dismissal or remand of a suit pending in a federal court, only if it appeared at any time in its course that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction when commenced or removed, and not, if, though it then did so involve such a dispute or controversy, it did not do so at a subsequent stage therein because of a change in conditions after the suit was commenced or removed. This, i. e. that the suit does not so involve such a dispute or controversy, is not the only thing whose

appearance at any time in the progress of the suit in the federal court necessitates a refusal to hear and determine it. The appearance of the fact that the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case within its jurisdiction, calls for a similar refusal. This it would seem can appear only in a suit commenced in a federal court, and not in one removed there; though the statute by the use of the alternative "cognizable or removable" seems to contemplate that it can appear in one so removed. This latter thing would seem to have relation to the condition of things at the time the suit is commenced, and not at a time subsequent thereto. And, as to the other thing, it will be noted that the provision is not that, if at any time after the suit has been commenced or removed it shall come not to involve a jurisdictional dispute or controversy, it shall be dismissed or remanded, but that, if at any time it shall appear and that really and substantially so that it does not, such action shall be taken.

This suggests that what, possibly, was had in mind was that a suit which, when it was commenced or removed, did not really and substantially involve a jurisdictional dispute or controversy, might not then appear not so to do, but that subsequently thereto it might so appear, and that the object of the provision was to impose on the court the duty, in such a case, upon its own motion, and no matter how it came about that it so appeared, to dismiss or remand. If such is the true construction of the statute, the statement, in the Mills Case, that the question of jurisdiction is to be decided with reference to the attitude of the case when it comes into the federal court and that, in the Soda Fountain Case, that when jurisdiction has once attached it will not be ousted by a subsequent change of the conditions, are not in conflict therewith. But, if its true construction is that a suit is to be dismissed or remanded if, though when commenced or removed it involved a jurisdictional dispute or controversy, it appears, when the question of dismissal or remand is up for determination, that it then does not so do, because of a change in conditions after the suit was commenced or removed, those statements would seem to be in conflict therewith. The decisions in the Seeligson and Torrence Cases seem to so construe the statute. In each the suit when removed involved a jurisdictional dispute or controversy, and that really and substantially so. It was because, after the removal, there was a change in conditions, brought about by the dismissal in the one case and the settlement in the other, that it was held that the suit should be remanded. It is true that the dispute or controversy left after the termination of the separable controversy, not being between citizens of different states, could not of itself constitutionally have been made removable, but such was not the basis of the decision. The basis thereof was that by a change in conditions after the removal the suit had become one not within the jurisdiction of the court, and the statute required that where such was the case the suit should be remanded. Such being its true meaning, according to these decisions, it would seem to follow that, not merely in cases of that kind, but in any case where a suit after it has been properly commenced or removed be-

comes one not within the jurisdiction of the court, it should be dismissed or remanded.

I therefore find it difficult to reconcile the Soda Fountain Case with the Seeligson and Torrence Cases. And it is to be noted that in that case section 5 of the act of March 3, 1875, and those cases were not referred to, and further that the prior decisions of the court on which the decision therein was based were decided before the enactment of that section of the act of 1875. Likewise the decisions of the appellate court of this circuit referred to took no note of the statute or of those decisions. In the Hayward Case the court based its decisions on those in the following cases, to wit: Fuller v. Insurance Co. (C. C.) 37 Fed. 163; Henderson v. Cabell (C. C.) 43 Fed. 257; Peeler v. Lathrop, 48 Fed. 780, 1 C. C. A. 93; Waite v. Insurance Co. (C. C.) 62 Fed. 769—in addition to its prior decision in the Riggs Case. But it is hard to find support therefor in these four cases from other jurisdictions. In the Fuller Case, the defendant maintained that jurisdiction was ousted by concession on its part of enough of plaintiff's claim to bring the matter in dispute below the jurisdictional amount. Section 5 of the act of March 3, 1875, was relied on to support this claim. The position was denied. Judge Coxe seems to have been of the opinion that that statute covered no case where the suit was within the federal court's jurisdiction when commenced or removed and subsequently became one that could not have been commenced therein or removed thereto, but was limited to cases where the suit was not within such jurisdiction when commenced or removed. He said:

"It is true that under section 5 of the act of 1875 the cause should be dismissed if, at any time during its progress, the court discovers that it has no jurisdiction.

"The discovery, though not made until the end of the suit, relates back to the lack of jurisdiction at the beginning. If the court had no jurisdiction when the suit was begun, there must be a dismissal, even though the fact was not ascertained until the close of the litigation. Surely this section does not mean that a suit, properly brought, may be dismissed because the defendant by admissions or failure to deny reduces the amount in dispute to less than the statutory sum."

Though possibly wrong in this limited view of the section, yet the question before him was properly disposed of, for it is plaintiff's claim, and not the defendant's admission, which fixes the matter in dispute.

In the Henderson Case the amount claimed by the plaintiff at the time of removal exceeded the jurisdictional amount. The plaintiff's position was that, notwithstanding he was claiming such amount, the defendant was estopped to claim that the matter in dispute exceeded the jurisdictional amount because in a previous suit brought in the federal court on the same cause of action defendant had it dismissed because the matter in dispute did not exceed that amount. In the Peeler Case, the suit was originally brought in the federal court. The defendant moved to dismiss the suit because plaintiff was not able to prove that there was due him a sum equal to the jurisdictional amount. This properly so, because jurisdiction depends on amount of plaintiff's claim in good faith, and not on what he may be able to prove. In the Waite Case, the question was as to the effect of the filing of an amendment

in the state court by plaintiff reducing the amount claimed below the jurisdictional amount. It was held that it depended on whether it was filed before or after the filing of the petition for removal. It is thus seen that neither one of these cases has any bearing on the question as to the effect of the plaintiff reducing the amount of his claim below the jurisdictional amount after the suit has been commenced or removed; the amount claimed at the commencement or removal of the suit being the jurisdictional amount. This decision of the appellate court of this circuit has been questioned by Mr. Moon in his work on Removal of Causes. In note 8, section 88, he says:

"The author has serious doubt whether the decision in Hayward v. Nordberg Mfg. Co., supra, is correct; in fact, he is clear that it is incorrect. Although the removal may have been sustainable upon the face of the papers filed in the state court, yet when it clearly appeared in the Circuit Court after removal that the suit did not really involve a dispute as to a sum in excess of $2,000, the case was brought directly within the letter, as well as within the spirit, of the act of 1875, section 5. The plaintiff filed a bill of particulars in the Circuit Court of $1,675, and this limited his claim to that sum."

And in section 200 he says:

"It seems upon principle, although the cases are to the contrary, that a suit in which the sum in controversy is in excess of $2,000 should be remanded upon the dismissal by plaintiff of a part of his claim whereby the sum in dispute is reduced to $2,000 or a smaller sum."

[2] But though the decision of the Supreme Court in the Soda Fountain Case and those of the appellate court of this circuit may be in conflict with the decisions of the Supreme Court in the Seeligson and Torrence Cases and with the true construction of the statute, i. e. section 5 of the Act of March 3, 1875, now section 37 of the Judicial Code, as those decisions were rendered since the enactment of that statute and the rendition of those decisions, I feel that it is my duty to follow them. Possibly, I am in some way blinded so that I am unable to see that there is no inconsistency here. If really so, it may be due to an oversensitiveness to discord and a desire to bring things into harmony, and thus to attain to this measure of truth at least. But so it is; and I have thought best to so develop the matter that others may be led to try their hand at the problem here presented.

The motion to remand is overruled.

SECOND NAT. BANK OF ERIE v. GEORGER et al.

(District Court, W. D. New York. December 4, 1916.)

1. CORPORATIONS ⟸216—LIABILITY OF STOCKHOLDERS—LAW GOVERNING.
In a case involving the contractual liability of a stockholder, the statutes and decisions of the highest court of the state where the company was organized govern and control the controversy.

2. COURTS ⟸342—JURISDICTION OF FEDERAL COURTS—STATE STATUTE CREATING EQUITABLE REMEDY.
The equity jurisdiction of the federal courts is not affected by state legislation providing an equitable remedy for the enforcement of stockholder's liability, but, to authorize relief in such a controversy by a federal court, there must be original ground of equity jurisdiction.

3. COURTS ⟸489(10)—JURISDICTION OF FEDERAL COURTS—SUITS AGAINST STOCKHOLDERS.
Gen. St. Minn. 1913, §§ 6645–6648, providing for recovery from stockholders of insolvent corporations, does not supersede the equitable remedy for the enforcement of such liability, where stock was illegally issued without full payment, and a suit for that purpose in behalf of all such conditions may be maintained in a federal court of equity.

4. ACTION ⟸35—STATUTORY REMEDIES—WHEN NOT EXCLUSIVE.
A statutory remedy for the enforcement of liabilities not created by statute is not exclusive.

5. CORPORATIONS ⟸265(1)—SUIT AGAINST STOCKHOLDERS—PARTIES.
A bill by creditors of an insolvent corporation to recover from a stockholder on the ground that the stock was issued to him at less than par is not defective because it does not join other stockholders, who also acquired their stock for less than par, where it does not disclose that there are such other stockholders within the jurisdiction of the court.

In Equity. Suit by the Second National Bank of Erie against Eugene A. Georger and the Huron Iron Mining Company. On motion to dismiss bill. Denied.

See, also, Courtney v. Croxton, 239 Fed. 247, 152 C. C. A. 235.

Morey, Bosley & Morey, of Buffalo, N. Y. (Joseph H. Morey, of Buffalo, N. Y., of counsel), for plaintiff.

Strebel, Corey, Tubbs & Beals, of Buffalo, N. Y. (Carlos C. Alden and Warren Tubbs, both of Buffalo, N. Y., of counsel), for defendant Georger.

HAZEL, District Judge. This is a suit in equity by a judgment creditor on behalf of himself and certain other creditors of the defendant, Huron Iron Mining Company, a citizen of Minnesota, to recover from the defendant Georger, a citizen of New York, the par value of the capital stock of the mining company acquired by him by subscription for less than par under an agreement that it was to be full-paid and nonassessable. It appears that in the year 1913 the corporation was adjudged bankrupt, and as the assets were insufficient to pay the creditors in full, an action was brought by the trustee in

bankruptcy in this district against Georger to recover the difference between the par value of the stock and the amount paid for it. It was held by this court, however, that the agreement for the sale of the stock at less than par was binding upon the corporation, that the difference in price between the par value and the amount actually paid in was not a corporate asset, and that accordingly the trustee in bankruptcy had no legal or equitable right to maintain such an action. Courtney v. Georger (D. C.) 221 Fed. 504, affirmed 228 Fed. 859, 143 C. C. A. 257. That decision was based upon the Minnesota Revised Statutes of 1905, section 2878 (re-enacted in 1913, section 6193) which provides that:

"No corporation shall issue any shares of stock for a less amount to be actually paid in than the par value of those first issued."

The quoted provision was interpreted in Hospes v. Northwestern Thresher Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, to mean substantially that the liability of a stockholder who subscribes or purchases shares of stock under an agreement with the corporation issuing the stock to pay therefor a less amount than the par value is predicated upon implied fraud as to subsequent creditors, who extended credit in reliance upon full payment of the stock.

The bill alleges substantially that the sale of stock to the defendant Georger was fraudulent and void by the laws of Minnesota, and that he was therefore liable in equity to pay into court for the benefit of those who became creditors subsequent to the alleged acquirement of the stock an amount not exceeding $135,000, the difference between the par value of the stock acquired by him and the $15,000 paid for it.

[1, 2] There was dispute at the hearing as to whether the right of plaintiff herein and the asserted liability of the individual defendant were determinable upon the law and decisions of the state courts of Minnesota, or whether the statute law, sections 6645–6648, G. S. 1913, of that state, alone applied. There is no doubt in my mind that in case of contractual liability of a stockholder, the statutes and decisions of the highest court of the state where the company was organized govern and control the controversy. The United States Statutes provide that state statutes and decisions, in so far as they apply, are to be adopted in federal courts save as to proceedings in equity and admiralty, which are expressly excluded. U. S. R. S. § 914 (Comp. St. 1916, § 1537). While this court is not bound by the decisions of the state courts in the equitable disposition of controversies, I nevertheless think a case is presented for measuring the jurisdiction of this court by that of the state court of Minnesota if the parties were before it. The equity jurisdiction of the federal courts and the mode of administering it are uniform throughout the United States, and are not affected by state legislation providing an equitable remedy for the enforcement of stockholder's liability. To afford relief in such a controversy in this court there must be original ground for equitable relief. Alderson v. Dole, 74 Fed. 29, 20 C. C. A. 280.

[3] The General Statutes of Minnesota, §§ 6645–6648, provide for ascertainment by any creditor, receiver, or assignee of outstanding ob-

ligations of the insolvent corporation, and for a ratable assessment upon stockholders and equitable apportionment of the fund among all the creditors. In such a situation regard is had to the nature of the liability that is to be enforced, i. e., whether it arose from contractual obligations, such as failure to make agreed payment of the stock, or from assessment thereon, or from the dual liability of stockholders by which they are required to pay an additional amount equal to the value of their holdings, as prescribed by statute, or whether the stockholder's liability is separate and independent of other stockholders. In Minnesota, the liability in the latter case is equitable in its nature, and the right to enforce it inures only to those becoming creditors subsequent to the issuance of the stock believing that the stock was fully paid for at its par value. The Minnesota statute does not supersede the equitable remedy for the enforcement of liability arising from the implied fraudulent issue of stock. The right of creditors to proceed in conformity with the principles and practice of a court of equity is not destroyed or affected by it. Northwestern Railroad Co. v. Prior, 68 Minn. 95, 70 N. W. 869; Van Norden v. Morton, 99 U. S. 378, 25 L. Ed. 453; Hornor v. Henning, 93 U. S. 228, 23 L. Ed. 879, cites Hospes, supra.

The decision in the Hospes Case clearly determines that purchase of original stock for less than par is deceptive and fraudulent as to subsequent creditors who were not apprised of the facts. Even though the equitable remedy is of unusual application, as contended, or that similar liabilities are never enforceable in equity in other jurisdictions, owing to different statutory liability, I nevertheless entertain the opinion that the Hospes Case, which was approved in Wallace v. Carpenter, 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530, and in Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652, was declarative of the right to sue in equity in Minnesota for constructive fraud arising from the purchase of stock. And in the courts of the United States it has frequently been recognized that, though a single creditor cannot maintain a suit in equity against the stockholders to enforce assessments or unpaid subscriptions, he may, however, sue for himself and on behalf of other creditors to enforce liabilities of stockholders to corporation creditors where such liability involves a fund for the benefit of all creditors in proportionate shares. Such remedies, according to Horner v. Henning, supra, have always been considered as belonging naturally to a court of equity, regardless of whether or not liability was also fixed by statutory enactment. Alsop v. Conway et al., 188 Fed. 568, 110 C. C. A. 366; Signor Tie Co. v. Monett (D. C.) 198 Fed. 412.

The adjudications of the federal courts, as I read them, are not hostile to the enunciated principle of the Hospes Case, which was based upon Minnesota statutes (section 6193) of 1913, nor at variance with the trust fund doctrine upon which the liability herein is predicated. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203. In Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, the Supreme Court of the United States, speaking of the trust fund doctrine, says:

"Ever since the case of Sawyer v. Hoag, 84 U. S. [17 Wall.] 610 [21 L. Ed. 731], it has been the settled doctrine of this court that the capital stock of insolvent corporations is a trust fund for the payment of its debts; that the law implies a promise by the original subscriber of stock, who did not pay for it in money or other property, to pay for the same when called upon by creditors, and that a contract between themselves and the corporation or that the stock shall be treated as fully paid and nonassessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted."

This holding is certainly similar to that of the Minnesota courts, especially the portion of the opinion which states that the stock is regarded as equivalent to actual property of substantial value, and that "to the extent to which it fails to represent such value it is either a deception and fraud upon the public or an evidence that the original value of the corporate property has become depreciated." See, also, Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Coleman v. Howe, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133; Handley v. Stutz, supra.

[4] The assertions that the purpose of the bill was simply to enforce a statutory remedy, that liability under the Hospes Case would be illogical, and that if liability exists it arises from actual fraud, are unpersuasive and inconclusive. A creditor complainant is not bound to pursue a particular form of remedy or proceeding to enforce liability imposed on a stockholder. Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777. And, moreover, it has often been decided that the statutory remedy for the enforcement of liabilities not created by statute is not exclusive. Pollard v. Bailey, 20 Wall. (87 U. S.) 527, 22 L. Ed. 376; Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; King v. Pomeroy, 121 Fed. 287, 58 C C. A. 209. See, also, Winnebago Paper Co. v. Northwestern Printing & P. Co., 61 Minn. 373, 63 N. W. 1024.

It may be that the sale of the stock at less than par was warranted by equitable considerations which the evidence will disclose, but certainly an original subscription to fully paid stock at a price considerably below its par value, merely as a bonus or gratuity, and not for buying property or raising money to continue the mining operation, creates a trust in favor of creditors who gave credit after the sale of the stock believing that it had been paid for in full.

The point is made that stockholders in mining corporations are not on the same footing with stockholders of other corporations, and are exempted from liability arising from acquiring stock at less than par, but the stock in question was not issued for mining properties, but for cash, and the application of any exemption under the circumstances is questionable.

[5] It is further objected that the bill is defective because of failure to join other stockholders acquiring stock at less than par. If it appeared from the bill that there were other stockholders within the jurisdiction of this court upon whom process might be served, who had also received stock at less than par, or gratuitously, they no doubt could be brought into the case by a cross-bill for the purpose of adjusting

the equities among them. Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476; Equity Rules 25 and 39 (198 Fed. xxv, xxix, 115 C. C. A. xxv, xxix).

The motion to dismiss for want of equity is denied.

GUENTHER v. DENNIS-SIMMONS LUMBER CO.

(District Court, E. D. North Carolina. September 17, 1917.)

1. ADVERSE POSSESSION ⟸58—NATURE AND REQUISITES—HOSTILE CHARACTER OF POSSESSION—"OUSTER."

To constitute an ouster upon which a title based on adverse possession can be sustained, the entry must be hostile in its inception, or, if originally acquired and held in subordination to the title of the true owner, there must be a disclaimer, either by words or acts, of the right derived from the true owner and an actual hostile possession asserted of which he has notice, or which is so open and notorious as to raise a presumption of notice.

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

2. ADVERSE POSSESSION ⟸85(3)—NATURE OF REQUISITES—HOSTILE CHARACTER OF POSSESSION.

In 1853 the owner of a tract of land purchased from the grantor of the state sold and conveyed it to M., reserving the right to cut timber thereon. Afterward he conveyed the same land, with other property, in trust for his creditors, and the trustees sold it to grantees, who were chargeable with actual notice of the deed to M. They afterward obtained a conveyance of this and other lands based on a prior grant, which was later adjudged void and canceled for fraud at suit of the state. At a sale in a partition suit one of such grantees acquired the interests of all the others, and in 1902 his executors sold the land in suit at public auction to defendant corporation, which had no notice of the deed to M. made in 1853, which was probated and registered on the same day defendant's deed was executed. Defendant went into possession, paid taxes on the land thereafter, and cut timber thereon. Its predecessors had also cut timber thereon for many years. Complainant claims through a deed from the administratrix of M. *Held*, that the cutting of timber by defendant's predecessors in title must be considered as having been done under the reservation in the deed to M. and in subordination thereto, but that defendant's possession which was open and notorious was hostile and adverse and operated as a disseisin of the true owner, and that under the North Carolina statute an action to recover the land from defendant was barred in 7 years from the time it took possession.

3. PUBLIC LANDS ⟸164—STATE LANDS OF NORTH CAROLINA—EFFECT OF DECREE CANCELING INVALID GRANT.

An act of the North Carolina Legislature in 1836 (Laws 1836–37, c. 23) created a corporate body, to be known as the "President and Directors of the Literary Fund of North Carolina," and provided that all the swamp land of the state "not heretofore duly entered and granted to individuals" should be vested in said corporation in trust, to be sold for the benefit of the common schools. A grant previously made was afterward held void and canceled for fraud on information filed by the Attorney General.

Held, that the decree did not vest the President, etc., of the Literary Fund with a new title to the land, but that its effect was to adjudge that the land had not been "duly entered and granted," and to remove the cloud upon the title created by the invalid grant, and that it inured to the benefit of the grantors in a grant made in the meantime by the Literary Board.

4. ACKNOWLEDGMENT ⟸53—PROOF OF ANCIENT DEEDS—NORTH CAROLINA STATUTE.
The probate in 1902 of a deed executed in 1853 *held* valid under Revisal N. C. 1905, § 997, which was then in force.

5. DEEDS ⟸194(5)—DELIVERY—PRESUMPTION FROM PROBATE AND REGISTRATION.
The probate and registration of a deed furnishes presumptive proof of its delivery.

6. ADVERSE POSSESSION ⟸112—BURDEN OF PROOF—PRESUMPTION.
One who alleges that he is in the adverse possession of land is required to prove it; the presumption being that he holds in subordination to the true title.

7. ADVERSE POSSESSION ⟸71(3)—NATURE OF REQUISITES—INTENT—"OUSTER."
Where the legal title to land was in one person and to the timber thereon in another, and the latter undertook to convey the land, including the timber, while his deed was ineffective to convey the land, its registration and the taking possession by his grantee was an ouster of the true owner, and its continued possession and paying taxes on the land are proof of an assertion of title adverse to the true owner.

8. QUIETING TITLE ⟸29—RIGHT TO RELIEF—LACHES.
A suit in equity to quiet title to swamp land valuable only for its timber *held* barred by laches, where defendant, on receiving and registering a deed to the land, at once took open possession, listed the land for taxes, and continued to cut timber thereon for a period longer than required to give it title by prescription under the state statute of limitations, and where complainant claims under a deed which was withheld from registration for 50 years, during which time adverse claims were asserted which must have been known to the parties in interest under such deed.

In Equity. Suit by Emil Guenther against the Dennis-Simmons Lumber Company. Decree for complainant in part and for defendant in part.

Small, McLean, Bragaw & Rodman, of Washington, N. C., for plaintiff.

Ward & Grimes, of Washington, N. C., and Harry W. Stubbs and Wheeler Martin, both of Williamston, N. C., for defendant.

CONNOR, District Judge. Plaintiff claims title to a large body of timber lands lying in Martin county and surrounded by Roanoke river, and a creek called Devil's Gut. The island formed, in this way, is known and referred to in deeds and grants as "Devil's Gut Swamp or Pocosin." It is low, swampy land, incapable of drainage and chiefly valuable for the timber trees growing upon it. The controversy embraces several tracts. It will be convenient to follow the course pursued by counsel in their briefs, dealing with the tracts separately.

Tract No. 1.

This tract, as located by the surveyor, contains 1,713 acres. Both parties claim under a common source of title and introduce: A deed

bearing date September 23, 1852, from the Literary Board of North Carolina to John B. Beasley, duly recorded. John B. Beasley to S. S. Simmons, bearing date September 16, 1853, duly recorded. S. S. Simmons to Clayton Moore, bearing date December 20, 1853. Following the habendum, this deed contains the following:

"Saving and reserving to him, the said S. S. Simmons, his heirs and assigns, all the timber upon the said lands and the privilege of working up the said timber into shingles, or cutting canals and building houses for the convenience of his, or their, hands in getting shingles upon said lands."

It also conveys:

"All the land that said Simmons owns upon Cut Cypress Island, lying opposite Bald Gray, and a tract of 1,280 acres in Bertie county."

The deed also contains a covenant that S. S. Simmons will pay "the increase taxes that the land are now subject for, and what they may be subject for while said S. S. Simmons is working said timber." It was admitted to probate and registered November 3, 1902. The consideration set out is $178.

Plaintiff claims under a deed of Hattie A. Thigpen, administratrix of Clayton Moore. For the purpose of showing title out of Clayton Moore, defendant introduced a deed of trust executed by S. S. Simmons to H. G. Spruill, C. L. Pettigrew, and Chas. Latham, bearing date February 21, 1856. This deed conveys to the trustee, for the purpose of bringing to sale, for the payment of the debts of the grantor, a very large number of tracts of land, in several counties, many slaves, and a large quantity of personal property. The descriptive words in this deed are:

"Also the following tracts of land in Martin county: A tract of cypress swamp land, containing six hundred acres, more or less, purchased from John B. Beasley, Spruill and Morse, Wilson Walker, Jackson Walker, Clayton Moore, H. G. Spruill, G. L. and W. F. Moore, trustees of J. H. Bennett and Winthrop and Armistead the tract lying between Devil's Gut and Roanoke river."

In view of the fact that Spruill, less than 3 years prior to the execution of the deed, had conveyed the land purchased from John B. Beasley to Clayton Moore, reserving the timber, it is unreasonable to suppose that he intended to do more than convey the standing timber, with the right to cut and remove it. In view of the fact, shown by the evidence and manifested by the deed, that S. S. Spruill was engaged, on a very extensive scale, in getting timber and making shingles from many large bodies of swamp lands in Eastern North Carolina, and the further fact, as indicated by the terms of the deed, that he was insolvent and intended to retire from business, it is not probable that he intended to reserve the timber on lot No. 1 from the deed of trust.

Looking at the deed from its "four corners," and the facts disclosed in the evidence, I am of the opinion that the descriptive words of the deed include lot No. 1, vesting in the trustee such right, title and interest as S. S. Simmons had therein. Spruill, Pettigrew, and Latham,

trustees, by virtue of the powers contained in the deed of trust, on December 30, 1856, conveyed the lands conveyed to them, by the same description contained in the deed of trust to W. H. Davis, Dennis Simmons, D. D. Simmons & Bro. and C. W. Grandy, except that the deed from Spruill to them calls for "six hundred acres" in Martin county, whereas their deed calls for "6,000 acres." After describing the lands, as they are described in the deed to them, their deed contains the following clause:

"Together with all the right, title and interest of the said swamp land or timber, lying on the Roanoke river, or any of its tributaries."

The chain of title, under which defendant claims, will be set forth later.

Defendant insists that the court should find, as a fact, from the evidence, that the grantees of the trustees of S. S. Simmons, from and after the execution of the deed to them, December 30, 1856, have been in the adverse possession of the land for 7 years, and thereby acquired title, as against Clayton Moore, who died in 1881, and that plaintiff acquired no title by the deed of Hattie A. Thigpen, administratrix. Plaintiff resists this claim, insisting that cutting and removing timber from the land by S. S. Simmons, and his assigns, being in accord with their reserved right to do so, did not constitute possession or, if it did so, such possession was not adverse to Clayton Moore and those claiming under him.

[1] The evidence tends to show that S. S. Simmons cut timber on the land, subsequent to the execution of the deed from him to Moore, and prior to the deed of trust to Spruill, Pettigrew and Latham. Such cutting of timber did not constitute possession—it was the exercise of the right reserved in his deed. To constitute an ouster, upon which a title, based upon adverse possession, can be sustained, the entry must be hostile in its inception, or, if originally held and acquired in subordination to the title of the true owner, there must be, to change the character of the possession and make it adverse, a disclaimer, either by words or acts, of the right derived from the true owner, under which the possession was acquired, and an actual hostile possession asserted, of which he has notice, or which is so open and notorious as to raise the presumption of notice. 1 Am. & Eng. Enc. 798. This statement of the law is sustained by numerous illustrative cases in the North Carolina Reports. Nance v. Rourk, 161 N. C. 646, 77 S. E. 757, where the authorities are reviewed and the reason of the law stated. Mr. Justice Walker says:

"It is a well-settled rule of the law that, when one acquires possession of land by contract or agreement with another and in subordination to his title, he cannot ordinarily dispute that title, until he has surrendered the possession so acquired and placed the one with whom he has thus dealt at arm's length with himself." Quoting Judge Ruffin, in Yarborough v. Harris, 14 N. C. 40: " 'The rule is founded on high grounds of morality and good faith, and at all times ought to be rigidly adhered to, where circumstances require its application.' " And, as said by Judge Dillard in Farmer v. Pickens, 83 N. C. 549: " 'The rule is founded on a principle of honesty, which does not allow

possession to be retained in violation of that faith (and confidence) on which it was obtained or continued.'"

The refusal of the courts to permit one who enters into possession, under a contract of lease, or contract to sell and convey, or license, to deny the title of the owner is based upon the principle of estoppel; hence it is frequently said that a tenant is estopped to deny his landlord's title, and it is held that, before he will be permitted to assert a claim, based upon an adverse possession, he must surrender the possession. In Willison v. Watkins, 3 Pet. 43, 7 L. Ed. 596, Mr. Justice Baldwin says:

"It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself, or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates in its full force to prevent the tenant from violating that contract by which he obtains and holds possession. * * * He cannot change the character of the tenure, by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered on its termination, by the lapse of time, or demand of possession. The same principles apply to mortgagor and mortgagee, trustee and cestui que trust, and, generally, to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title."

[2] If the purchaser of the timber could, during the period given for cutting, by any act on his part, not brought home to the owner of the land, change the character of his entry, and qualified possession, under the contract, into a disseisin and adverse possession, thereby divesting the owner of his title, unexpected and unjust results would follow. The reason upon which the rule is based applies with full force between the owner of the land and one cutting and removing timber therefrom, under a sale, or reservation, with license to do so. Unless, therefore, there be found some fact in the record, taking the case out of the general rule, it must be held that S. S. Simmons and his grantees, with notice of the deed, will be presumed to have cut and removed the timber under the reservation and in recognition of Moore's title. The evidence shows, and the fact is, that after the execution of the deed by S. S. Simmons, and the sale by his trustees, the purchasers and their assigns, with some interruptions, caused by the Civil War, and the condition of the markets, continued to cut and remove the timber from tract No. 1.

Defendant insists that the deed from S. S. Simmons to Clayton Moore, not being registered, conveyed only an inchoate title, and that his trustees took the legal title without notice; that the purchasers from the trustees took, without notice and entered upon and cut timber from the land, under and by virtue of the deed from the trustees to them. It is in evidence, without contradiction, that Dennis Simmons resided in Martin county, and was, at the time of the execution of the deed, the agent and representative of S. S. Simmons, in cutting timber on the land prior to and at the time he executed the deed of trust. Lawrence James says that Dennis Simmons was S. S. Simmons' "over-

head man, or superintendent in the operation there. * * * Dennis Simmons was in charge for Mr. Sam Simmons. * * * He succeeded to the work he was carrying on in the swamp. * * * Mr. Sam Simmons worked clean up to the time he failed." Upon redirect examination, this witness, 84 years old, said that Dennis Simmons, after the sale, "carried on the work for himself, just like he had carried it on before as the superintendent of Samuel Simmons." He was Samuel Simmons' nephew. I should not hesitate to find that Dennis Simmons had knowledge of the execution of the deed to Clayton Moore, and that Samuel Simmons was thereafter cutting timber under the reservation. This fact is of importance at this time on the question of, and explaining the conduct of, Dennis Simmons, and his associates, after the purchase from the trustees of S. S. Simmons.

Defendant insists that, on September 29, 1859, Dennis Simmons and his associates acquired a new, independent, and superior title to the land. This contention is based upon the following facts:

On April 2, 1853, the Attorney General of the state instituted an information against Clayton Moore and others, for the purpose of having a grant issued by the state to one Samuel Smithwick, on November 14, 1800, No. 465, vacated. From the record it appears that, on several dates prior to the date of the grant, Samuel Smithwick, and other persons, made entries on land on Roanoke river in Martin county; that thereafter, by fraudulent methods, in violation of the entry laws, these entries were so surveyed as to include a much larger number of acres than they called for, to wit, about 2,500 acres, including lot No. 1, while the entries purported to cover only about 350 acres, not including said lot.

The Attorney General alleged that the grant No. 465 to Samuel Smithwick was fraudulent and void for the reasons set forth in his information. He also alleged that Samuel Smithwick died, leaving the respondents named in the information his heirs at law; that several of them assigned and conveyed their interests or undivided shares in the land to Clayton Moore, who was made a party to the information. Thereafter the information was amended, and other persons, heirs of Samuel Smithwick, and the purchasers from the trustees of S. S. Simmons, were made parties and process issued for them. Thereafter, and on November 25, 1858, Clayton Moore filed his answer to the information, in which he gave a full account and history of the manner in which he became the owner of the interest of the heirs of Samuel Smithwick. He alleges that he has not, in his possession, the plat attached to the grant, and does not know the exact boundaries thereof; that

"the land conveyed in said grant is believed to lie between Williamston and Jamesville in Martin county, and surrounded by the waters of Roanoke river and Devil's Gut, forming an island, the whole of which contains 8,000 or 10,000 acres, and is chiefly low, boggy, densely thick with reeds, briars, and undergrowth, nearly level with the tidewater, unclaimable by ditching for agricultural purposes, and almost valueless but for the timber thereon and the privilege of hog range," etc. Record, pp. 15, 16.

He further avers that:

"Respondent has gotten no lumber on said land since complainant's bill was filed, nor for 2 years previous thereto, and he does not believe he at any time worked on more than 50 acres of it, and the working was principally, if not entirely, on that portion not included in the grant of the Literary Board to John B. Beasley."

He further states that:

"Since the filing of the information he hath assigned and conveyed, by deed duly executed and registered, to one Samuel S. Simmons and his heirs and assigns, all the right, title, and interest which he at any time purchased from the heirs and devisees of the said Samuel Smithwick, except the privilege of using said land in a certain way specified in said deed of conveyance. This defendant is informed and believes that the said Samuel S. Simmons hath conveyed all his right and interest in the lands embraced in the boundaries of the grant, to Hezekiah G. Spruill and Charles L. Pettigrew and Latham in trust for certain purposes as they have sold and conveyed the same to Dennis Simmons, William Simmons, and C. W. Grandy, associated as Simmons, Davis & Co., who are now the owners of the same. The interest reserved to the defendant by his deed aforesaid is of little value to him, and he doth surrender and release to the state whatever right, interest, or title is reserved to this defendant in and by said deed. Besides this reservation, this defendant has no right whatever in said lands, and if said Simmons, Davis & Co. shall desire or consent to have the said grant vacated and annulled, and the same may be done without prejudice to this defendant and without in any wise making him responsible for any loss or damage which may accrue to Samuel S. Simmons, or those claiming under him on account or by reason of this defendant's conveyance to said Samuel S. Simmons, this defendant will submit that the same may be done, and doth hereby give his assent thereto."

The latter portion of the answer is explained by reference to a deed executed by Clayton Moore to S. S. Simmons, bearing date September 15, 1853, in which he conveys to Simmons, in consideration of $8,000, "'all the right and interest to all cypress timber, both standing and down, on his, the said Clayton Moore's land, lying and being on an island in the county aforesaid, known by the name of Devil's Gut Pocosin, bounded on the east and north by Roanoke river, on the west by Speller's creek and on the south by Devil's Gut,' saving the right to himself and children of getting what cypress they need for shingles, for use on his farm known as Bald Gray." This deed was duly proven and recorded March, 1859. The description covers a large body of land, including lot No. 1. At the date of this deed the title to lot No. 1 was vested in John B. Beasley, by the deed from the Literary Board, dated September 23, 1852. It is manifest that Clayton Moore in his answer was not referring to the land contained in lot No. 1, but to the lands which he claimed under the several deeds from the heirs of Samuel Smithwick, the timber upon which he had sold to S. S. Simmons. His answer is explicit as to this.

Defendant insists that, at the date of the deed from the Literary Fund Board to John B. Beasley, the title to all of the land included within the boundaries of grant No. 465 to Smithwick, was in the heirs of Smithwick and Clayton Moore; that therefore no title passed or vested in John B. Beasley; that the legal effect of the decree of the

Supreme Court in the information rendered at June term, 1859, vacating the grant, vested the title in the state and that, by virtue of the provisions of the act of 1836 (Rev. Stat. c. 67, § 3; Revisal 1905, §§ 1693–94), by which "all the swamp lands of this state, not heretofore duly entered and granted to individuals, shall be vested" in the President and Directors of the Literary Fund of North Carolina, etc., the title vested in the corporation created by that statute; that the deed of September 29, 1859, from the President and Directors of this Fund to Dennis Simmons and others, grantees of Spruill and others, trustees of S. S. Simmons, conveyed to and vested in said Dennis Simmons and others the title to lot No. 1, and that from and after the execution of that deed they and their successors in title held possession under this deed, and therefore adverse to the title which Clayton Moore derived through Beasley. If this contention be sustained, it follows that Dennis Simmons' and his associates' claim of title to the timber was not dependent upon, or in subordination to, the title of Clayton Moore. It appears from recitals found in the deeds in evidence that prior to the rendition of the decree of the Supreme Court, Dennis Simmons and his associates entered into a contract with the President, etc., of the Literary Fund for the purchase of their interest in the land covered by grant No. 465 to Smithwick. This grant, as appears by the map on file in the records in the information, covers a very large body of swamp land, some 2,500 or 3,000 acres, including lot No. 1.

In the light of the fact that the President of the Board had, on September 15, 1852, conveyed a portion of the island by metes and bounds to John B. Beasley, for a valuable consideration, it is not only unreasonable, but a reflection on their good faith, the Governor and two well-known, prominent citizens of the state, to suppose that they intended to invalidate that title. By so interpreting the records, deeds, and the conduct of all of the parties and concluding that they were referring to, and dealing with, that portion of the Devil's Gut Pocosin, or Island, not covered by the deed to Beasley, we reconcile their dealings with admitted conditions, facts, and perfect good faith. They were all men of intelligence and character. Their conduct should be explained in the light of, and consistently with, that fact. I conclude, and find as a reasonable inference, that it was not their purpose to call into question, or disturb, the title of any of the parties to lot No. 1, and that the deed of September 29, 1859, was not intended to affect the title of Clayton Moore thereto. It would seem that the President, etc., of the Literary Fund would be estopped by their deed to John B. Beasley to deny that they had title to the land conveyed to him.

[3] There is, however, another view of the question which leads to the same result. The Legislature, by act of 1836, created and declared to be incorporated into a body politic and corporate "a board of literature" to be denominated and called the "President and Directors of the Literary Fund of North Carolina." The Governor of the state, by virtue of his office, was made president, and the other members to be nominated and appointed by the Governor, under and with the advice of his council. Section 3 of the act provides that:

"All the swamp land of this state, not heretofore duly entered and granted to individuals, shall be vested in the said corporation and successors, in trust, as a public fund for education and the establishment of common schools."

The board was authorized to have the swamp lands surveyed and reclaimed, to sell them, etc. If the land covered by the Smithwick grant No. 465 had not been "duly entered and granted," the title to it was, by virtue of this act on, and after, its passage, in the President, etc., of the Literary Fund, and their deed to Beasley conveyed a perfect title. The Attorney General, in his information, alleged a number of reasons why, under the statute, the grant was "void and ought to be repealed, rescinded, and annulled, and that the enrollment thereof in the office of the secretary of state may be canceled." The decree recites the invalidating facts set out in the information, and decrees that the grant be annulled, vacated, and canceled. The legal import and effect of this decree is to adjudge that the land has never been "duly entered and granted" ; hence, the vacation and cancellation of the grant does not create in the state or the President of the Literary Fund a new title from, and after, its rendition, but operates to remove the cloud upon the title, created by the invalid grant. This decree inures to the benefit of those holding the title under the deed to Beasley. Manifestly, this was known to, and understood by, the Governor of the state, a former judge, and Mr. Moore, a lawyer of more than usual learning. I am therefore of the opinion that no new or independent title vested in Dennis Simmons and his associates by the deed of September 29, 1859, from the President of the Literary Fund.

On February 2, 1859, W. H. Davis conveyed to his associates, D. D. Simmons, William Simmons, C. W. Grandy, and Dennis Simmons all of his right, title, and interest, being two undivided fifths, in all of the lands and negroes, and other personal property conveyed to them by the trustees of S. S. Simmons. He conveys "also the said Davis' interest in the Devil's Gut Pocosin, contracted to be purchased from the Literary Board of North Carolina, title to which is to be made upon the payment of a note to said Literary Board of North Carolina of $2,000.00." It is not clear to what land this clause refers. It is probable that it referred to the land involved in the information pending in the Supreme Court. In a later clause Davis conveys "all his right, title and interest in the following law suits, viz.—a suit now pending in the Supreme Court of North Carolina to vacate a grant conducted by B. F. Moore, attorney at law." This, of course, refers to the information.

As the deed from the Literary Board of September 27, 1859, to Davis, Simmons & Co., did not change the relation created by the deed from S. S. Simmons to Clayton Moore, reserving the timber, nor the character of such possession which Dennis Simmons and his associates had under, and by virtue of, the reservation in that deed, it follows that they continued to cut and remove the timber under the license or authority conferred upon them, and in subordination to the title to the land vested in Clayton Moore.

No change was made in the status of Dennis Simmons and his associates, towards the title to the timber, until April 1, 1895, when Dennis Simmons instituted in the superior court of Martin county a special proceeding, making C. W. Grandy, and a number of other persons, defendants, alleging that he, together with said defendants, were the owners and in possession of a tract of land in said county, known as the Simmons, Grandy & Company Swamp, a description of which is set out, containing 5,000 acres. He prays that a decree may be entered, directing a sale of the land for partition, etc. Due proceedings being first had, the land was sold by Wheeler Martin, commissioner, to Dennis Simmons, at the price of $2,000, the sale confirmed, and a deed executed November 25, 1895. The description includes lot No. 1 within the boundaries of the 5,000 acres, known as the Simmons, Grandy Company Swamp. This deed is registered December 31, 1895.

It appears from recitals in other deeds that Dennis Simmons thereafter conveyed a one-half undivided interest in the land to C. W. Grandy and A. H. Grandy, of Norfolk. Thereafter Dennis Simmons died, leaving a last will and testament, appointing John D. Biggs and Dennis S. Biggs executors, who, on November 3, 1902, conveyed to defendant, Dennis Simmons Lumber Company "a one-half, undivided interest in that tract of land on Devil's Gut in Martin county, known as the Simmons and Grandy Swamp, said tract of land is fully described in deed from Wheeler Martin, commissioner."

[4] Counsel for defendants strongly stress the fact that the execution of the deed from S. S. Simmons to Clayton Moore was not proven in accordance with the provisions of section 981, Revisal 1905 (Acts 1885, c. 147). The certificate conforms to the provisions of sections 997, 998, Revisal 1905. These sections are codified from Acts 1899, c. 235; they are substantially the same as the provisions of the Code 1883. It will be observed that section 981, being section 2, c. 147, Acts 1885, introduced a new and additional method of probating deeds, executed prior to 1855, amended by Act 1905, c. 277, to apply to deeds executed prior to 1870. This provision was made in view of the change in the registration law, introduced by Acts 1885, c. 147, to enable those who, relying on the law existing prior to that time, had neglected to have their deeds proven and registered, when the maker and witnesses were dead, or could not be found, in which case the person holding, or claiming title under such deeds, were enabled, upon making affidavit in the form prescribed, to have their deeds admitted to probate and registration, without proof of the handwriting of either. This statute did not repeal the existing statutes, permitting deeds to be registered upon proof of the handwriting of the maker, or witnesses when they were dead. It simply provided an additional method of proving deeds, when executed, 30 years prior to the passage of the statute. Sections 997 and 998 of the Revisal of 1905 are the same as the act of 1899 (chapter 235), which was in force November 1, 1902, when the probate of the deed from S. S. Simmons to Clayton Moore was taken. As a guaranty that the ancient deed was in the custody of some person interested in the title to the land, section 981 required that it be produced by some person

holding such deed, or claiming title thereunder. The further, and very wise, provision was inserted in 1905 that the person producing the deed make affidavit that he believed it to be genuine. This provision is held to be mandatory in Allen v. Burch, 142 N. C. 524, 55 S. E. 354.

[5] I am of the opinion that the probate is valid, under section 997. The grantee, Clayton Moore, died in 1881, leaving as executor and trustee his son, James E. Moore, a lawyer of large practice, residing at Williamston, N. C., within a few miles of the land and familiar with the use to which it was being subjected. He was also one of the devisees. Mrs. Hattie E. Thigpen, administratrix d. b. n. of Clayton Moore, who sold the land and the witnesses who proved the handwriting of the maker of, and witness to, the deed, are dead. The original is not produced nor accounted for. The executors of Dennis Simmons are dead. There is no suggestion as to what became of the deed after registration, or in whose possession it is now. Defendant insists that the court should find, as a fact, that the deed was never delivered. That the length of time elapsing between its execution and registration, coupled with other facts, are sufficient to rebut the presumption of delivery raised by its registration. It is settled that probate and registration of a deed furnishes presumptive proof of its delivery. Buchanan v. Clark, 164 N. C. 66, 80 S. E. 424. While there is an unfortunate want of evidence, explanatory of the retention of the deed from registration for 50 years, it is manifest that no one, other than the representatives of Clayton Moore, were interested in causing it to be proven and registered. I think that the presumption, based upon experience, should prevail, and that the court must assume that the deed was delivered to Clayton Moore.

On November 10, 1905, Mrs. Hattie E. Thigpen, administratrix and trustee, conveyed to John T. Lynch 10 tracts of land in Bertie and Martin counties, described by reference to the deeds to Clayton Moore, including the deed from "S. S. Simmons, dated December 20, 1853, and recorded in Deed Book J. J. T., page 109 Martin County Registry." The consideration named in the deed is "ten dollars and other valuable considerations." Mr. Lynch says that he paid for the lands conveyed something like $5,000.

The evidence, or the weight of it, shows that, for many years after the Civil War, Dennis Simmons, for himself and his associates, cut large quantities of cypress from Devil's Gut Pocosin. The Dennis Simmons Lumber Company had a mill at a place indicated on the plat or map as "Astoria," which appears to be the "old field landing" referred to in the deed, conveying the timber by Clayton Moore to S. S. Simmons, of September 15, 1853. The timber was sawed by this mill. The deed from Wheeler Martin, commissioner, did not change the relation of the parties. The proceeding for partition had no other effect than to extinguish the title of the defendants in the proceeding and vest it in Dennis Simmons.

The deed made by John D. Biggs and Dennis Biggs, executors of Dennis Simmons, deceased, to the Dennis Simmons Lumber Company, of November 3, 1902, brought a new party into connection with the

land, and title. There is no evidence fixing either the executors, or the corporation, with notice of the Clayton Moore deed, except from its registration, November 3, 1902, being the same day upon which the executors conveyed the land to the defendant. The deed from the executors describes the land as the tract, "lying on Devil's Gut in Martin county, known as the Simmons Grandy Swamp." It was sold at public auction at the courthouse door in Williamston, N. C. The deed from the executors was put to registration November 5, 1902, and the grantee, the Dennis Simmons Lumber Company, began cutting, not only cypress, of which there was but a small quantity then on the land, but ash and gum. It listed the land for taxes, and has paid tax thereon each year since. The legal title after the death of James E. Moore, executor and trustee, was in Mrs. Hattie E. Thigpen, administratrix c. t. a. d. b. n. and trustee under Clayton Moore's will. She was substituted by decree of the superior court after the death of James E. Moore. If the execution of the deed by the executors of Dennis Simmons, and the entry by the grantee, claiming under it, operated as an ouster of Mrs. Thigpen, trustee, she had a complete cause of action against the defendant corporation, and if such ouster was followed by adverse possession, she and those claiming under her were barred of their action at the end of 7 years. Mrs. Hattie E. Thigpen conveyed to John T. Lynch and Robert E. White November 10, 1905. The deed to the Dennis Simmons Lumber Company was then, and had for 2 years been, registered.

The definition of a disseisin, which will give to the disseisor a right of action, is elementary. A possession to be adverse must be actual and open, under an assertion of title, and the intention to hold such possession against the true owner. "There must concur, at the same time, the factum—possession, and the intention—a claim of ownership, as it is said. 'The fact of the possession, and the intention with which it was commenced and held are the only tests' of whether a possession be adverse." Sedgwick and Wait, Trial of Title, § 754; Parker v. Banks, 79 N. C. 480. The intention must be ascertained as a fact from the relation of the parties, and from the character of the possession, and acts of ownership. If these are sufficiently definite, open, and exclusive, it will be presumed that they are done with the intent to appropriate the land. By such acts, it is said that party proclaims to the public that he asserts an exclusive ownership over the land.

"An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under a claim and color of right, it is an ouster; otherwise it is a mere trespass, in legal language the intention guides the entry and fixes its character." Ewing v. Burnet, 11 Pet. 53, 9 L. Ed. 624. "Neither actual occupation, cultivation or residence are necessary to constitute actual possession; * * * when the property is so situate as not to admit of any permanent useful improvement: and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." Id.

[6] It would be to run counter to the manifest truth to infer, as a fact, that the defendant, Dennis Simmons Lumber Company, took the title to and cut the timber from the land in subordination to the title of the representative of Clayton Moore. Presumptions are indulged by the courts, in the absence of evidence, throwing light upon the question to be decided. He who alleges that he is in the adverse possession of land is required to prove it—the presumption is that he holds in subordination to the true title. When, however, his conduct is inconsistent with such presumption and is of such open, notorious character as to exclude reasonable doubt, the court should find the fact in accordance with what it believes to be the truth.

[7] There is room for doubt whether the reservation of the timber made in the deed from S. S. Simmons to Clayton Moore included any other than the cypress. The terms are "saving and excepting and reserving to him, the said S. S. Simmons, his heirs and assigns, all the timber on the said land and the privilege of working up said timber into shingles and making roads and cutting canals and building houses for the convenience of his, or their, hands, in getting shingles upon said land." All of the witnesses say that it was, at the date of its execution, and for many years thereafter, known as a "shingle swamp" or a "cypress swamp." S. S. Simmons was engaged in making shingles. Its value as a "gum swamp" is of recent date. Notwithstanding this, the defendant, maintaining a mill near the land, cut large quantities of ash and gum from the land, until the mill was burned about 4 or 5 years ago. The fact that the Clayton Moore deed was put on the record the same day that the defendant purchased is strong evidence that its officers knew of its existence, and asserted that they had the better title, making manifest their claim, by listing the land and paying the tax thereon, and cutting and removing ash and gum, as well as cypress timber therefrom.

It is held in this state that the execution of a deed by one tenant in common, purporting to convey title to the entire tract, followed by the exclusive possession of the grantee, does not create an ouster of the other tenant. Day v. Howard, 73 N. C. 1; Caldwell v. Neely, 81 N. C. 114. This is not in accordance with the decisions of other courts. The law, as held by the Supreme Court of the United States, and many of the state courts, is thus stated by Sedgwick and Wait:

"When the grantee has obtained a conveyance of the whole estate from one of the cotenants, entry made under such title is a disseisin of the other cotenants. This is just and reasonable, for the grantee does not intend to hold under the other cotenants. His entry is adverse." Section 287.

In Bradstreet v. Huntington, 5 Pet. 402, 8 L. Ed. 170, it is held that if one tenant in common undertake to convey the whole and the grantee enter into the actual possession, intending to claim the whole, he is not precluded from setting up his possession thus acquired, as a bar under the statute of limitations. Judge Johnson says:

"The fact to be determined is whether the party holds possession for himself, or for another; and this can only be determined by evidence, or circumstances to prove the one or the other. It is the inquiry into the 'quo animo.'

In all these cases there is no intimation found that the adverse possession may not be set up; the only point maintained is that the 'quo animo' must be established as well as the fact. But in finding the quo animo, the jury must of course be left to their own view of the effect and sufficiency of the evidence. Actual ouster is clearly not requisite, either to be presumed or proved."

In Clymer v. Dawkins, 3 How. 677, 11 L. Ed. 778, Judge Story, quoting from a very early English authority, says:

"That where there are two coparceners of a manor, if one enters and makes a feoffment in fee of the whole manor, this feoffment not only passes the molety of such coparcener, which she might lawfully part with, but also the other molety of the other coparcener, by disseisin. This decision was fully confirmed and acted on, in the recent case of Doe d. of Reed v. Taylor, 5 Barn. & Adolph. 575, where the true distinction was stated that, although the general rule is that, where several persons have a right and one of them enters generally, it shall be an entry for all; for the entry generally shall always be taken according to right; yet that any overt act, or conveyance, by which the party entering, or conveying, asserted a title to the entirety, would amount to a disseisin of the other parties whether joint-tenants, or tenants in common, or parceners," citing Jackson v. Smith, 13 Johns. (N. Y.) 406, and Bigelow v. Jones, 10 Pick. (Mass.) 161, and concluding: "The reason of both of these latter cases is precisely the same as in the case of a feoffment, the notoriety of the entry and possession, under an adverse title to the entirety of the land."

While a deed made by one tenant in common for the entire title to the whole tract of land is not strictly analogous to the facts in this case, the principle upon which the conclusion is based would seem to be the same—assertion of title to the land, followed by an entry. Assuming that the legal title to the land was in the representatives of Clayton Moore, and the timber standing upon it in Dennis Simmons, neither he, nor his executors, could, by their deed, convey any larger interest in the land than they owned; hence the deed of the executors, purporting to convey the land, which included the timber, was inoperative to convey the land. When it was registered and the grantee entered, claiming to own the land under the deed, it was an ouster of the true owner, a refusal to recognize her right. The registration had the same effect as to the notoriety of the claim, as the ceremony known by the common law, as livery of seisin. Revisal 1905, § 979. The entry, under such circumstances, was an assertion of ownership—it repudiated the allegiance which had existed between S. S. Simmons and Clayton Moore—it was an ouster and worked a disseisin. This was followed by listing the land and payment of taxes, which the courts recognize as an act denoting the character of the claim under which possession is held.

The fact that the representative of Clayton Moore put his deed to registration on the same day upon which the land was sold publicly is very strong evidence that they knew that their title was denied. Up to that time they may have assumed that Dennis Simmons knew that he was cutting timber under the reservation in the deed, as he did as the representative of his uncle, S. S. Simmons, from 1853 to 1856. His executors were now repudiating such claim and selling the land.

It is difficult to understand why Mrs. Thigpen, the executor and trustee, under the will of her father, for two years thereafter, remained inactive. As appears of record, she had counsel learned in the law. She was put upon notice that the defendant had entered upon and was asserting ownership of the land, under a deed purporting to convey, not the timber, but the land.

I am of the opinion that, whatever presumptions may have been indulged in regard to the relations of the parties up to this time must be abandoned, and that the defendant, purchaser, and grantee of the executors of Dennis Simmons must be regarded as claiming the land adversely to the representatives of Clayton Moore, and that the entry—cutting and removing timber, registering its deed, listing the land for taxes, and paying taxes thereon, operated as a disseisin—an ouster of those claiming under Clayton Moore. There is no other reasonable or satisfactory explanation of the conduct of defendant.

[8] Was defendant in the adverse possession of the land for 7 years from and after November 3, 1902? The evidence tends to show that defendant Dennis Simmons Lumber Company had two mills at Astoria, one for sawing pine logs, and one for sawing the cypress, ash, and gum logs; that for some years prior to the death of Dennis Simmons, he had, by hired hands, or under other contracts, kept a force in the swamp, cutting logs, which were delivered to, and cut by, the mill. There was but little demand for gum timber prior to 1902; the witnesses concur in saying that it became profitable to cut gum about 15 years ago. It appears from the testimony that but a small quantity of original growth of cypress was then in the swamp; there was considerable "buck cypress," a second growth.

John T. Lynch says that he first knew of the land in controversy "about 1890"; that he took an option on it from Mrs. Hattie E. Thigpen—he does not give the date of the option—it is not introduced in evidence; that when he began to cut the gum, the president of defendant company sent for him, and notified him that he claimed to own the land. They made an agreement to have it surveyed. He employed Mr. Ange to do so, but he never made the survey. He cut no timber on the land thereafter. He says that he stayed around Williamston several years. It appears from deeds and mortgages in evidence that Lynch and White conveyed to W. C. Manning, trustee, November 10, 1905, for the purpose of securing the payment of a bond executed by them to Mrs. Hattie E. Thigpen, administratrix and trustee, for $3,500. This deed was registered November 23, 1905. By successive conveyances, such title as vested in Lynch and White passed to and vested in the plaintiff, Emil Guenther, March 10, 1913. Mrs. Thigpen, administratrix, listed and paid the tax on 3,000 acres of land in Jamesville township, listed as "Devil's Gut," for the years from 1901 to 1905, inclusive. In 1906 and 1908 the land was listed only by Dennis Simmons Lumber Company. During the years 1909 to 1915, inclusive, it was listed by the Jamesville Lumber & Pulpwood Company; this company held the Lynch and White title, during those years. Plaintiff has listed the land and paid the tax since 1915. The records of Martin

county were destroyed during the year 1885; hence it does not appear who, if any one, listed the lands prior to that date. There is nothing to indicate that James E. Moore, executor of Clayton Moore, listed the lands in controversy. It thus appears that since 1900, the lands have been listed by those claiming under Clayton Moore, and since 1902 by defendant.

John T. Lynch says that "to the best of his knowledge" the swamp "has not been operated at all in the past 12 or 14 years;" that he has "been over it nearly every year to some extent." He resides in Rochester, N. Y., but says that he employed Mr. Warrenton to watch it for him. It appears from the deeds and the evidence that Lynch and the corporations with which he was associated, owned other timber, swamp lands on the Roanoke river, on the Bertie side. Warrenton says that he never guarded the Devil's Gut Swamp for Lynch. He did guard, for him, the land on the Bertie side of the river. Has never known of any one guarding Devil's Gut Swamp for Lynch. This appears to be the only evidence of any act or assertion of title, other than taking and recording the deed, listing and paying the taxes, on the part of Lynch and his associates.

Defendant introduced several witnesses, who testify that they cut timber, ash, cypress and gum, on the land for the defendant, Dennis Simmons Lumber Company, from 1902, until the mill was burned about 4 years ago; that the timber was cut at the mill situate at Astoria.

Augustus Moore, 62 years old, says that he cut timber from the land during Dennis Simmons' life, and since his death, for defendant. He says:

"There never was any time but what somebody was doing something in there until the last few years, since they stopped. About 4 years, I think. They had a mill, and they manufactured gum and pine lumber. They had both a gum mill and a pine mill, and both got burned. Since then they stopped manufacturing anything but pine. I wouldn't say positively how long ago it was."

He was asked:

"How long since you have done any work on this land for the Dennis Simmons Lumber Company?

—to which he responded:

"Just before the mill was burnt; cannot fix the exact date. Q. The Dennis Simmons Lumber Company also claimed the timber outside of what was called, or what is called now, the Clayton Moore land? A. They claimed to own about 5,000 acres in there, was my understanding. They worked the timber at different times all over that swamp from the White Cypress Swamp to that Shaw Swamp, we called it, through the David Smiddick line."

Modlin says that he has cut timber in the swamp for Dennis Simmons, John D. Biggs, and "the other owners." He is asked, "You feel compelled to testify that the Dennis Simmons Lumber Company were working cypress during all that period?" He answered, "Yes, sir; was cutting cypress and ash—the mill was burned 4 years ago."

Henry Spruill, an old colored man, preacher, 72 years old, says: That he began working in the swamp for Dennis Simmons 1855.

Worked for Simmons Grandy Company until the war commenced. After the war he returned to work, and continued until Mr. Simmons died. Continued working there until the mill was burned. Has known as many as 50, 60, or 100 working in the swamp, around the head of Lower Dead Water. That Dennis Simmons Lumber Company worked from Speller's creek to Lower Dead Water. There was "a big mill and a small one at Astoria. Cut pine, cypress, gum and ash." "Floated timber there before the mill burned, contracting for the Dennis Simmons Lumber Company." Saw signs where the gum had been cut away "very largely."

Leary says that he cut timber in the swamp 40 years ago. "I have cut on Lower Dead Water, Upper Dead Water, and also up the north side, what is known as the Shaw Swamp for the Dennis Simmons Lumber Company."

Coltrain says: "We cut generally. Thought all belonged to the Dennis Simmons Lumber Company."

Griffin says that he is well acquainted with the swamp. Has worked on it for the Dennis Simmons Lumber Company—handled cypress and ash—until the mill was burned.

Sexton says that he worked the swamp for the Dennis Simmons Lumber Company. Worked at the pine mill. Has seen gum logs come from the swamp. "Has measured many a one—measured 3 or 4 years. Can't hardly say how much. Have seen 75,000 to 100,000 feet of it on the yard at a time piled up; not many times. There was a big quantity of it cut, 10,000 to 30,000 at a time. Have seen more than that on the river. Sawed gum there two or three years. Began 12 or 14 years ago. They didn't saw gum regular—not that much all the time. Think they cut for a year or two from 5,000 to 8,000 a day." He says the gum did not come into demand until some time after he commenced working for the Dennis Simmons Lumber Company, about 13 or 15 years since they commenced cutting gum first. There was not much demand at first. They cut it for a factory they had at Williamston. After they quit cutting for that factory, they went to cutting a good lot of it—about 13 years ago. Cut out the large ash—there was more gum than there was ash. It was a "gum cypress swamp."

W. L. Moore says that the Dennis Simmons Lumber Company got about all the gum they could reach, that was convenient. They didn't care who knew it.

Gardner says that he worked in the swamp "about 10 or 12 years ago. Mr. Biggs told me to cut 25,000 feet of sweet gum. I cut it between the mouth of Speller's Creek and the place known as the Flood Place on the south side of Devil's Gut. Have cut gum on Upper Dead Water—brother cut there. Went to Dennis Simmons Lumber Company mill."

Calloway says that he began working for the Dennis Simmons Lumber Company, 1903. Worked until 1912. They commenced cutting gum in Devil's Gut Pocosin about 15 years ago, and piled it on the yard. For a year or two they cut nothing in the little mill but gum. Capacity 18,000 or 20,000 feet a day. Worked on the river. Got logs

down on the water. Gum has been taken up the swamp "a good, long time, 12 or 13 years that I can remember about. Cut ash too. The last raft I cut was in 1912."

Lilley says that he worked in the swamp for Dennis Simmons Lumber Company. Upper and Lower Dead Water. "Somebody has been at work there all the time." Got cypress, ash, and gum. Handled more ash and cypress than gum—some gum went to the Astoria mill—burned 4 or 5 years ago.

Modlin says that for many years he has seen men working in the swamp. "You mean working for the Dennis Simmons Lumber Company?" "Yes, sir." "What have you known about anybody pretending to exercise any authority over that land for Mr. Lynch?" "No, sir; I haven't known anybody to, for them. All I have known has been for the Dennis Simmons Lumber Company. All the money that I got, I got from that company." Worked cypress, ash, and some gum.

It appears that Lynch, or the corporation claiming under him, cut timber from land on the Bertie side of the river, near to the land in controversy. I have endeavored to analyze the testimony regarding the possession of the Dennis Simmons Lumber Company since the execution of the deed by the executors of Dennis Simmons. The witnesses, who are men who worked in the swamp, agree in respect to the location of the work, indicating the extent of the cutting.

In view of the character of the land, the growth upon it, and the use to which it is capable of being subjected, I am of the opinion that the defendant, Dennis Simmons Lumber Company, has been in the open, exclusive, adverse possession of tract No. 1 for more than 7 years from and after, the registration of the deed from the executors of Dennis Simmons November 21, 1902.

This being a suit in equity to quiet plaintiff's title and remove cloud therefrom, I am of the opinion that the plaintiff, and those under whom he claims, has been guilty of such laches as will bar his suit for equitable relief.

Without reviewing the complicated transactions developed in this case, it is difficult to avoid the thought that, although aided by learned and diligent counsel, it is impossible, after so long a time since the various deeds were executed and transactions took place—all of the parties to them being dead—to reach a satisfactory conclusion.

Clayton Moore lived 28 years after the execution of the deed to him from S. S. Simmons, with the fact called to his attention, by the information that S. S. Simmons had undertaken to convey the land to his trustees, and that they had conveyed to Dennis Simmons and his associates, whose deeds were promptly registered. He failed to put his deed to registration. His son, James E. Moore, his executor, and named as trustee, was a learned, and, for many years the most prominent, lawyer of the county. He survived his father 17 years, and failed to register the deed. Although the General Assembly of the state, 1885, enacted a statute requiring all deeds to be registered, to validate them as against purchasers for value, this deed was not registered. In 1895, three years before Mr. James E. Moore's death, Den-

nis Simmons instituted a proceeding in the superior court of Martin county against a large number of persons, alleging that they, together with himself, were the owners and in possession of the land in controversy. It was sold at public auction and purchased by Dennis Simmons. The deed from the commissioner, setting out the boundaries, was registered. It is difficult to avoid the conclusion that Mr. Moore had knowledge of this proceeding and sale. It was an assertion by Simmons of ownership of the land. Mr. Moore does not cause the deed to be registered, or make any claim to be the owner of the land. It is not until gum timber becomes of value that Mrs. Hattie E. Thigpen, who succeeded her brother, James E. Moore, as the representative of Clayton Moore, puts the deed to registration. The original deed is not now produced, nor its absence accounted for. Thus plaintiff's title is dependent upon a deed withheld from registration for 50 years, until every person who could possibly have known of the circumstances under which it was held is dead. The witnesses by whom the handwriting of the maker and attesting witness could have been proven are dead. It is singular that Mr. Lynch, who must have known of the sale by the executors of Dennis Simmons, and the deed to the Dennis Simmons Lumber Company, and as shown by his own evidence, notified by its president that the company claimed to own the swamp, takes no action to assert title. The land has been, during the 11 years intervening between 1902 and 1913, conveyed to several corporations, neither of which has attempted to cut any timber, or by any other act assert ownership. These facts, all of which are uncontroverted, bring the case within the well-recognized principle announced by the Supreme Court in Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718, in which it is said:

"Independently of any statutes of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. 'A court of equity' * * * has always refused to aid stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence."

In Jenkins v. Pye, 12 Pet. 251, 9 L. Ed. 1070, it is said:

"Lapse of time, and the death of parties to the deed, have always been considered, in a court of chancery, entitled to great weight, and almost controlling circumstances," in this case. Naylor v. Foreman-Blades Lumber Co. (D. C.) 230 Fed. 658.

We are thus brought to a consideration of the evidence in regard to the other tracts in controversy.

Tract No. 2.

This tract shown on the map as the "William Gardner, or Rayner, tract" is covered by a grant from the state March 23, 1820, to William Gardner. This grant took the title out of the state, and is not affected by the fact that a part of it is covered by grant No. 465 to Samuel Smithwick, which was vacated by the decree rendered in the information referred to, discussing the title to tract No. 1. The title

never vested in the Literary Board; hence its deed of 1859 to Simmons, Davis & Co. did not vest any title in the grantees.

I do not find in the evidence any deed from William Gardner. Plaintiff introduced a deed from Kenneth Rayner to Clayton Moore, dated September 3, 1847, reciting that it "is the same land conveyed by Samuel Williams and Ambrose Gardner to my father, Amos Rayner, as by reference to said deed will more fully appear." This recital is competent only as against parties claiming under Kenneth Rayner, but is no evidence against strangers, who do not claim under him. If, however, the recital be taken as true, it does not show that William and Ambrose Gardner had the title of William Gardner, nor does it show title in Kenneth Rayner; it simply recites that William and Ambrose Gardner conveyed to Amos, the father of Kenneth Rayner.

Plaintiff introduced a deed from William Gardner, dated March 21, 1820 (being six days prior to the date of the grant to him), in which Gardner conveys to Horace Ely a portion, by metes and bounds, of the 500 acres, for which he held warrants Nos. 137–259, containing 200 acres. While Gardner had only a warrant at the date of this deed, when he obtained the grant March 27, 1820, for the entire entry, Ely's title was perfected by estoppel. While Mr. Peel, the surveyor, locates the grant according to the calls, he does not locate the 200 acres conveyed out of it to Ely. Samuel Sheppard, sheriff of Martin county, July 23, 1836, executed a deed conveying Horace Ely's part of the Gardner grant to Eugene Burruss. This deed recites an execution in the hands of the sheriff against Ely and sale thereunder. The records of Martin county are destroyed. The recitals, in view of the length of time elapsing, may be taken as true.

Burruss, on September 27, 1837, conveyed to Joshua Robertson, "every description of real estate to which the said Burruss has any right, title or interest, lying either in the county of Martin or Bertie." This deed conveyed to Robertson, in trust to sell the property and pay certain debts, etc. Joshua Robertson, trustee, on January 13, 1838, conveyed the same land which Gardner had conveyed to Ely, by particular description, to Clayton Moore. All of these deeds were duly registered, within a short time after their execution. They put 200 acres of the Gardner tract No. 2 in Clayton Moore; the remainder, so far as appears, is in the representatives of William Gardner.

Unless the title of Clayton Moore to the 200 acres has been divested, it passed to Lynch by the deed of Mrs. Thigpen, November 20, 1905, and by mesne conveyances vested in the plaintiff. The only deed which could give to defendant, or to Dennis Simmons, color of title to this land is that of Wheeler Martin, commissioner, of November 25, 1895. It will be noted that Clayton Moore, on November 4, 1847, conveyed to Edmund S. Moore, the William Gardner land, or the interest therein "which he acquired under the Kenneth Rayner deed." The deed from Martin, commissioner, expressly excepts, in the boundary, the E. S. Moore land. See Exhibits D 21 and D 8.

It is manifest, therefore, that defendant took no part of this tract under the deed from the executors of Dennis Simmons. Whatever interest was vested in Clayton Moore, at his death, passed to Lynch

and belongs to plaintiff. While I am unable to fix this interest, it will be decreed that, as against the defendant, the 200 acres of this tract, owned by Clayton Moore, is in plaintiff. The deed from Clayton Moore to E. S. Moore is confined to the interest of William and Ambrose Gardner; that which he acquired under the Robertson deed is not affected.

Tracts 3–8.

Without pausing to inquire whether the deed from S. S. Simmons to Spruill, Pettigrew and Latham, trustees, covered the smaller tracts, as located on the map, and their deed to Dennis Simmons, and his associates, covered them, it is clear that the deed from Wheeler Martin, commissioner, to Dennis Simmons of November 25, 1895, does include them in its boundaries. The calls in this deed begin at A and, excluding the E. S. Moore (Gardner tract), run to B, C, D, E, F, G, H, I, J, K, L, M, N, to A, and, as will be seen by an examination of the plat, or map, include the tracts numbered from 3 to 8; inclusive. The description contained in the deed from the president, etc., of the Literary Fund to Dennis Simmons and his associates covers all of this land. As to such portion of it as is included in the Samuel Smithwick grant No. 465, which was vacated, this deed vested in the grantees a perfect title, unless it had been granted to other grantees, prior to the date of the Smithwick grant No. 465.

Tract No. 3 was granted to Edmund Smithwick by grant, November 10, 1784, and to Samuel Smithwick, December 20, 1791.

Tract No. 4 was granted to Samuel Smithwick December 20, 1791.

Tract No. 5 was granted to Edmundson Smithwick November 10, 1784.

Tract No. 6 was granted to Samuel Smithwick December 20, 1791.

As title to these tracts was out of the state prior to the act of 1836, by "grants duly issued," and not dependent upon the Samuel Smithwick grant No. 465, the decree vacating that grant did not affect or invalidate the title to the grantees. The deeds introduced by plaintiff appear to put the legal title to these tracts in Clayton Moore, prior to September 15, 1853. In so far as his title was supported by deeds based upon grants issuing prior to November 4, 1800, such title was not divested by the decree, the legal effect of which was to vacate and cancel the grant to Samuel Smithwick, No. 465, although it appears from the survey to include lands covered by other and prior grants. This decree did not affect tracts granted prior to November 4, 1800. Assuming that Clayton Moore was the owner of these tracts, he conveyed to S. S. Simmons, on September 15, 1853, "all of the cypress timber, both standing and down, on his, the said Clayton Moore's land, lying and being on an island in the county aforesaid, known by the name of Devil's Gut Pocosin, bounded on the east and north by Roanoke river, on the west by Speller's creek and on the south by Devil's Gut." This description includes all of the land included in Devil's Gut Pocosin, then owned by Clayton Moore. It will be observed that this land never belonged to S. S. Simmons. The description calls for "the following tract of land in Martin county—a tract of cypress swamp lands, con-

taining 600 acres, more or less, purchased from * * * Clayton Moore." While it was doubtless the intention of S. S. Simmons to convey to his trustees "the cypress timber" purchased from Clayton Moore, his deed does not aptly describe it. The trustees conveyed to Dennis Simmons and his associates by the same description. It would seem, therefore, that the cutting of cypress timber by Dennis Simmons and his associates from 1856 until the death of Simmons was without any right to do so. That the title to the cypress timber remained in S. S. Simmons. However that may be, it is clear that Dennis Simmons asserted ownership, and possession, of the land from and after the deed from Wheeler Martin, commissioner, November 25, 1895. His executors sold and conveyed it to the Dennis Simmons Lumber Company, November 31, 1902. The evidence of acts of possession and claim of ownership, in respect to the portion of the swamp covered by these tracts, is the same as that in regard to tract No. 1. The defendant has been in the open, exclusive possession of tracts Nos. 3 to 8, inclusive, for more than 7 years, thus ripening its title thereto, as against plaintiff, claiming under Clayton Moore. Of the many controversies growing out of the confusion of title and boundaries of the swamp lands in Eastern North Carolina, which by reason of the rival claims growing out of the increased value of cypress and gum, none have presented more difficult and doubtful questions of law and fact. I have given the evidence and the helpful arguments and briefs most anxious consideration. It is impossible to exclude doubts from the mind in regard to the correctness of the conclusion reached. If the plaintiff fails to secure the property which, I am sure, he purchased in good faith, the result must be attributed to the policy of the law, based upon experience and the purpose to quiet title, which requires those whose legal rights are invaded to assert and enforce them, within the period fixed by the Legislature, or be forever barred.

The tracts, which are not in controversy, marked on the map, are as follows: "Clayton Moore to Jesse Sawyer," the portion of Devil's Gut Swamp lying west of the line G to H and tracts 9 and 10. Such disposition of them will be made in the decree, as the parties may agree upon. In drawing the decree, a reduced copy of the plat, known as "Peel's Survey," will be attached and made a part of the record. A certified copy of the decree will be registered in the office of the register of deeds of Martin county. Each party will pay their witnesses; the stenographer's compensation will be divided equally. The plaintiff will pay the court cost.

PRESTON v. WESTERN UNION TELEGRAPH CO.

(District Court, E. D. Pennsylvania. November 1, 1917.)

No. 4154.

DEATH ⊂=39—ACTION FOR WRONGFUL DEATH—LIMITATION.

Under the Pennsylvania statute giving a widow a right of action for the wrongful death of her husband, to be asserted within a year after the death, such an action is not barred by the fact that an action by the decedent for the injury would be barred by limitations.

At Law. Action by Mary E. Preston against the Western Union Telegraph Company. Sur motion by defendant for a new trial. Motion granted.

Hugh Roberts, of Philadelphia, Pa., for plaintiff.
Wm. B. Linn, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. As this case must be retried, the usual rule of refraining from a discussion of its merits further than to indicate the reasons for making the present rule absolute, so far as may affect the course of the retrial, will be followed.

1. The plea of the statute of limitations. Whether the requirement of the Pennsylvania statute that suit be brought within a year of the death be viewed as a statute of limitations or as one of the conditions of the grant of a right of action, the statute is no bar to the action because its provisions have been complied with.

The corollary, and we think the real question (in this aspect of the case) of whether the right of action given the widow is given only if at the time of death the decedent himself had an unasserted right of action for the injury is dependent upon the meaning of the statute. The cases which so rule were ruled under the Indiana and other statutes which so expressly provide. The Pennsylvania statute does not so provide and Nestelle v. Railroad (C. C.) 56 Fed. 261, supports the doctrine that the right of action given to the widow to be asserted within two years of the death is not barred by a statute which required ex delicto actions to be brought within two years of the date of the injury. The plea of the statute of limitations in this case is therefore ruled to be no defense to the present action.

2. The release. The issue having been raised of whether the release was executed by the decedent, this must go to the jury to be determined. Hogarth v. Grundy, 256 Pa. 451, 100 Atl. 1001.

3. Was death due to the negligence of the defendant? This is a vital and may be found to be the controlling question in the cause. The artificial aid of some time limit between cause and effect—negligence and death—such as that established in indictments for homicide, pleas of death, inquisitions of deodands, and the like is denied to us. Railroad v. Clarke, 152 U. S. 235, 14 Sup. Ct. 579, 38 L. Ed. 422.

The finding of negligence as the cause of death by tracing the death back along an unbroken and connected chain of causes to the negligence with no independent cause intervening becomes a necessity. In

the absence of any intervening cause and of the great lapse of time which is here present, the links in such chain might be found in negligence resulting in an electric shock, with or without an accompanying fall, causing physical injuries, producing insensibility or unconsciousness, which was recurrent at short intervals so as to be almost continuous, this condition developing convulsions which in turn developed epilepsy, causing insanity and death. Brashear v. Traction Co., 180 Pa. 392, 36 Atl. 914; McCafferty v. Railroad, 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690; Guckavan v. Traction Co., 203 Pa. 521, 53 Atl. 351.

The length of time, however, which did elapse between injury and death and other features of the facts of this case which bear upon the intervention of other causes makes the call for expert opinion evidence almost imperative. The basis of such opinion evidence may be facts within the knowledge of the expert, to which he may himself testify, or may be a hypothetical statement of facts established by other evidence. Whatever the basis is, it should be made clear and kept in view, as the value of the opinion evidence depends wholly upon the establishment of these basic facts. Unless this care is observed, any verdict rendered is without support and no judgment can be entered upon it. The practical importance of this is enhanced by the conditions under which trials are had in the room in which the case was tried. The acoustics of the room are so bad that it is difficult at times to hear the testimony, and the impressions received at the time are required to be confirmed by a reference to the stenographer's notes.

The complaint is made by the defendant that the verdict was based in part upon the impression that two physicians had testified to the opinion that the death of the plaintiff's husband was due to an electric shock, and that in fact no such opinion was expressed by one of the witnesses, and the opinion of the other was based upon a statement of fact made to him which had no support in the evidence. This complaint we feel constrained to find is in part well founded. At least there was a failure on the part of the plaintiff to fulfill the duty of making the basis of the expert opinions sufficiently clear to enable the value of the opinion to be properly appraised.

4. Negligence and damages. The principles controlling the determination of the question of negligence are too well settled to require discussion, and there is no controversy over the measure of damages.

The motion of defendant is allowed, and a new trial is granted.

SCOTT, Collector of Internal Revenue, v. WESTERN PAC. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. December 3, 1917.)

No. 2950.

1. RECEIVERS ⟸112—AUTHORITY OF—INSTRUCTIONS.
Receivers are officers of the court, and may properly ask instructions concerning the administration of the property in their charge, and so it is their duty, if they believe a tax to be unlawful, to apply for instructions whether to pay the same.

2. RECEIVERS ⟸112—INSTRUCTIONS—ENJOINING TAXES.
Despite Rev. St. § 3224 (Comp. St. 1916, § 5947), declaring that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained, receivers, as officers of the court, may, where they deem the property or income from the property in their charge not to be subject to tax, as contended by collecting officials, apply to the appointing court for instructions as to payment.

3. INTERNAL REVENUE ⟸7—INCOME TAXES—PROPERTY IN CHARGE OF RECEIVER.
Act Oct. 3, 1913, c. 16, § 2, A to N, inclusive, 38 Stat. 166, making detailed provision for the imposition and collection of income taxes from individuals and corporations, joinst-stock corporations, or associations organized for profit and having a capital stock represented by shares, omitted the word "receivers." Prior to the adoption of such statute it had been held, under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, which also omitted reference to receivers, that excise taxes could not be imposed upon a receiver of a corporation. *Held*, in view of such construction, and of the fact that Income Tax Act Sept. 8, 1916, c. 463, pt. 2, § 13, subd. "c," 39 Stat. 771 (Comp. St. 1916, § 6336m), provided for payment of income taxes by corporate receivers, that no income tax could be assessed on income collected by receiver of an insolvent corporation, the reference in Act Oct. 3, 1913, § 2, subds. "d" and "e," to receivers showing that the term was used with respect to receivers of individuals.

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 the Equitable Trust Company of New York, a corporation, against the Western Pacific Railroad Company and others. On application by Frank G. Drum and another, receivers, for instructions whether to make a return under the federal Income Tax Act of 1913. The receivers were directed to make no return (236 Fed. 813), and Joseph J. Scott, as Collector of Internal Revenue of the United States, First Collection District of California, appeals. Affirmed.

John W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

A. R. Baldwin, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In accordance with the Income Tax Law of October 3, 1913, 38 St. at Large, 166, c. 16, the receivers of the Western Pacific Railroad Company filed a return of the net income of the

road for 1915. The report showed no taxable income. The Treasury Department officials, being of the opinion that certain deductions from the gross income received were not actual disbursements, disallowed certain interest deductions and ordered an assessment upon $1,408,034.99. The receivers, who had been appointed by the District Court of the United States for the Northern District of California, in an action entitled "Equitable Trust Co. of New York, Plaintiff, v. Western Pacific Railroad Co. et al., Defendants," filed a petition in the District Court, setting up that the assessment was illegal, and praying that a citation issue to Joseph J. Scott, collector of internal revenue, directing him to appear and show cause why the statement filed by the receivers should not be accepted. The collector appeared through the United States attorney and moved to dismiss the petition for lack of jurisdiction and other reasons going to the merits. After a hearing the court ordered the receivers to make no payments of income tax and dismissed the order to show cause. The collector has appealed from this order.

[1, 2] Counsel for the United States contend that the court exceeded its jurisdiction in making the order complained of and cite section 3224 of the Revised Statutes of the United States (Comp. St. 1916, § 5947), which provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. But we regard that statute as inapplicable, and for the reason that this is not a suit to restrain the assessment or collection of a tax. Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. High on Receivers, § 188; Grant v. Phœnix Life Insurance Co., 121 U. S. 118, 7 Sup. Ct. 849, 30 L. Ed. 909. That the question presented to them involves payment of taxes does not change the rule. In Ex parte Chamberlain (C. C.) 55 Fed. 704, the receiver of a railway property petitioned the court for necessary orders to prevent the enforcement of the payment of certain local taxes which had been imposed. The Circuit Court, Judges Goff and Simonton sitting, held that the property in the hands of the receiver was in the custody of the court, and that, while it was the duty of the receivers to pay lawfully imposed taxes without asking the sanction of the court, on the other hand, they were not bound to pay a tax, which in their judgment was unlawful, without an order of the court, and that it was their duty to apply to the court either for instruction or protection when they believed the legality of the tax questionable. Upon review the Supreme Court affirmed this view (Ex parte Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689), saying that the usual course pursued was by intervention pro interesse suo, as in the instance of sequestration, and that no reason was perceived why the tax collector should not bring his claim to the attention of the court, and that it was the clear duty to do so if he contended that the taxes are illegal. "If found valid, they must be paid; if invalid, the court will so declare, subject to the review of the appellate tribunals." Ledoux v. La Bee (C. C.) 83 Fed. 761; Pennsylvania Steel Co. v. New York City Railway Co. (C. C.) 176 Fed.

477; Id. (C. C.) 193 Fed. 286, affirmed in 198 Fed. 775, 117 C. C. A. 556; see, further, United States v. Whitridge, 231 U. S. 144, 34 Sup. Ct. 24, 58 L. Ed. 159; Brushaber v. Union Pacific Railroad Co., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414; Spencer v. Babylon R. Co. (D. C.) 233 Fed. 803. We believe there was jurisdiction to make the order complained of.

[3] The next question is whether the act of Congress of October 3, 1913, applies to receivers of corporations. References to parts of the law, section II, A to N, inclusive, of the act of Congress which is generally called the Income Tax provision, shows no express language providing for the imposition and collection of any tax upon corporations in the hands of receivers. Detailed regulation is made for the levy and assessment upon the net income of every corporation, joint-stock company, or association, and every insurance company organized in the United States. These are substantially the same expressions found in section 38 of the Income Tax Law of August 5, 1909, where it was provided that:

"Every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business."

The omission in section II of the Act of August 5, 1909, of the word "receivers," opened the way to litigation as to the intent of Congress. One of the principal cases is Pennsylvania Steel Co. v. New York City Railway Co. (C. C.) 176 Fed. 477, where the receivers of the defendant road asked instructions as to what action they should take in the matter of paying excise taxes. Judge Lacombe, in the Circuit Court at New York, held that, as the act contained no provisions as to receivers, Congress did not intend to include bankrupt corporations with no net income, whose properties were being administered by a court, and that if, at the time fixed for making returns, a statement was filed with the proper officers showing that the roads were in the hands of receivers it was sufficient. Upon careful re-examination of the question, Judge Lacombe again held that the statute did not authorize the imposition of a tax upon the income realized from the assets of a bankrupt corporation, where the property had been taken over by a court. Pennsylvania Steel Co. v. New York City Ry. Co. (C. C.) 193 Fed. 286. Later the Circuit Court of Appeals for the Second Circuit, in Pennsylvania Steel Co. et al. v. New York City Railway Co. et al., 198 Fed. 774, 117 C. C. A. 556, affirmed the decisions of Judge Lacombe, and held that omission to impose a tax on business done and income received by receivers was not inadvertence, but intentional, and that it could not be held that an act which nowhere mentioned income received by receivers, and yet which in every paragraph dealt with corporations and joint stock companies, actually engaged in business, could be made to cover the business temporarily undertaken of conserving the property of a corporation in the custody of the court for the benefit of its creditors and the public. The Supreme Court

affirmed the decision of the Circuit Court of Appeals, and held that the act of 1909 did not impose a tax upon the income derived from the management of corporate property by the receivers in the case. United States v. Whitridge, supra.

That the omission in the act of October 3, 1913, to include property held by receivers was intentional, is to some extent further shown by referring to the Income Tax Law of September 8, 1916. By section 10 of the act (39 St. at Large, 765, ch. 463 [Comp. St. 1916, § 6336j]) provision is made for the levy, assessment, and payment of a tax on the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company, or association, or insurance company, in the same manner that, under the act of 1913, a tax was imposed on the net income of such associations, corporations, or companies. But, while the act of 1913 omits reference to receivers of corporations, the act of 1916 expressly provides for the inclusion of property held by such receivers, and how receivers shall make returns. Subdivision (C), section 13, part II, Act of 1916, so far as material, is as follows:

"In cases wherein receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, * * * subject to tax imposed by this title, such receivers, trustees, or assignees shall make returns of net income as and for such corporations, * * * in the same manner and form as such organizations are hereinbefore required to make returns, and any income tax due on the basis of such returns made by receivers, * * * shall be assessed and collected in the same manner as if assessed directly against the organizations of whose businesses or properties they have custody and control."

We have not overlooked the fact that there are in the law of 1913 certain provisions relating to the imposition of taxes in certain instances where there are receivers. "D" and "E" headings, section II, are to be noticed. "D" provides that guardians, trustees, agents, receivers, and others specified shall make returns of net income for the person "for whom they act subject to this tax," and that they shall be subject to all provisions of the section which apply to individuals. It would seem that the tax referred to is the tax imposed upon individuals referred to in the headings, and the person subject to the tax is one required to make return, a person (D) of lawful age, except as specially provided, and having a net income of $3,000 or over for the taxable year. The use of the word "receiver," in heading "E," has further to do with fiduciaries who are acting under heading "D" by providing that they shall withhold at the source the normal tax imposed on the individual and make the payments as prescribed of the amounts so held out.

Our conclusion is that there are no clear and express words which provide for the imposition of the tax upon property held by receivers appointed by the court, and that, without certainty as to the meaning and scope of language imposing the tax, doubt must be resolved in favor of the receivers. Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; Eidman v. Martinez, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697.

The order appealed from is affirmed.

BOSTON, C. C. & N. Y. CANAL CO. v. STAPLES TRANSP. CO.

(Circuit Court of Appeals, First Circuit. November 5, 1917.)

No. 1283.

CANALS ⊜29—OPERATION—INJURY TO VESSEL NAVIGATING—HIDDEN OBSTRUCTIONS.

Respondent undertook to take libelant's tug and barge in tow through the Cape Cod Canal, of which respondent was owner. It provided a helping tug and also a pilot, who had sole charge of the navigation of all the vessels. During the passage libelant's tug struck an obstruction and was sunk. The obstruction was a rocky peak on a shoal, which had not been removed when the canal was dug, and which extended to within 7 feet of the surface at low water. The draft of the tug was 12 feet. The canal was not completed, but had been opened by respondent for the passage of vessels of 15 feet draft or less, and the main channel was of sufficient depth. The rock was somewhat out of such channel on the sloping bank, but where the water should have been of sufficient depth for the tug. Its presence was not in fact known to respondent or its pilot. *Held*, that respondent, having undertaken, not only to provide a safe passageway for libelant's vessel, but also the duty of piloting them, was bound to know of and guard against any existing obstructions, that the grounding raised a presumption of its negligence, and that, in the absence of proof of negligence or fault on the part of libelant's vessels, it was liable for the loss.

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

Suit in admiralty by the Staples Transportation Company against the Boston, Cape Cod & New York Canal Company. Decree for libelant, and respondent appeals. Affirmed.

Edwin H. Abbot, Jr., and Samuel H. Pillsbury, both of Boston, Mass. (Currier, Young & Pillsbury, of Boston, Mass., on the brief), for appellant.

Edward E. Blodgett, of Boston, Mass. (Albert T. Gould and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., on the brief), for appellee.

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

DODGE, Circuit Judge. When they received the injuries for which the District Court has awarded damages, the appellee's tug and barge were passing northward through the appellant's canal.

Not only were they in the canal and using it as above by the appellant's invitation, but, in consideration of the agreed tolls, the appellant had also undertaken to pilot them through the canal. Its pilot was in charge of them, in performance of said undertaking. He was in sole control of their movements. The officers and crew of each vessel were for the time being acting under his orders. We find no error in the conclusions of the District Court to this effect. The evidence does not support the appellant's contention that his control was shared by or exercised jointly with the mate of the tug or any one else. One of the

appellant's tugs, also under said pilot's sole control, was assisting in the operation of taking the appellee's tug and barge through the canal. No sailing vessel was at the time being permitted to go through unless towed, and no tug to go through with a tow unless under charge of a pilot whose license included navigation of the canal.

Of the existence or location of the obstruction in the canal which occasioned these damages no person who took any part in the operation of getting them through the canal, whether in the appellee's employ or in that of the canal company, is shown to have had any actual knowledge. The obstruction was under water, unmarked in any way, and invisible. There was no negligence going to the extent of failure to avoid an actually known obstruction, either on the part of said pilot or of any one else. Whether or not the canal company is liable for the damage inflicted by or due to the presence of said obstruction is the question presented by the appeal.

So far from being of recent origin, or accidental or temporary in its nature, we see no reason to doubt that this obstruction was permanent and had been left in the bottom when the canal was dug, or that it consisted of a shoal extending about 25 feet up and down the canal and about 41 feet from its northerly bank at low water, having near its end farthest from said bank a sharp, rocky peak not over 7 feet below the surface at low water, and nearer the surface than any part of the shoal between it and the bank. The danger from such an obstruction, to a vessel drawing 12 feet of water, which was the draft at the time of the appellee's tug, is obvious. The rocky peak caught the tug's port bilge, so damaging her bottom as to make her fill and sink. Her sudden stoppage caused the barge, to whose port quarter she was made fast, to break away and run aground upon the south bank of the canal, somewhat farther to the eastward.

While not an insurer against all damage by defects or obstructions in its canal, if the canal company knew or ought to have known that such an obstruction existed therein, it is undoubtedly liable for injuries caused by its presence to vessels using the canal, as these were, by its invitation and without warning of the danger to be apprehended from said obstruction, unless contributing fault on their part is shown. The rule here applicable is the same as that which has been so often applied in suits for damage to vessels by obstructions or defects in docks which they have been invited to occupy. Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756, may be referred to; also Union Ice Co. v. Crowell, 55 Fed. 87, 5 C. C. A. 49, decided by this court; and, in the Massachusetts District Court, The John A. Berkman, 6 Fed. 535; The Calvin P. Harris, 33 Fed. 295; The Annie R. Lewis, 50 Fed. 556.

The Massachusetts statute authorizing construction of the canal (Acts 1899, c. 448) required it to have, when constructed, a depth of not less than 25 feet at mean low water, a width of not less than 100 feet at the bottom, suitable slopes, and a surface width of not less than 200 feet. At the time of this accident the construction of the canal was not complete, but it had been announced to the public, in December, 1914, as open for vessels of 15 feet draft, and under. When so

opened it had an average, substantially uniform, surface width of 210 feet between the Bourne and Sagamore highway bridges, which crossed it at a distance from each other of 4.25 miles; and it was in the section of the canal between these two bridges that the accident occurred. In almost all places throughout this section there was a channel at least 100 feet wide at the bottom, having at least 15 feet of depth at mean low water, and substantially corresponding with the middle of the apparent waterway; from each side of which channel the bottom sloped upward to the surface.

Of the above facts those in charge of the tug and of the barge may be taken to have had notice when they entered the canal. The master of each acknowledged the receipt, before they entered, of a printed copy of "General Information and Regulations" issued by the canal company, wherefrom these and other facts regarding the canal could be learned. A statement therein made was, that the steepest side slope was "one vertical on two horizontal." If the responsibility for their navigation through the canal had rested upon them, instead of being assumed, as above stated, by the canal company, it might well have been negligence on their part to allow themselves to get into any part of the canal where water deep enough for a vessel drawing 12 feet, as was the tug at the time, could not reasonably have been expected; in view of the above facts brought to their notice.

These vessels were passing through the canal soon after low water, upon a flood tide which had been running for some time and was causing a 2½-knot current through the canal in the direction in which they were going. Whether the water level at the time of the accident varied materially from that of mean low water, and how much if at all, cannot be very clearly ascertained from the evidence; but it does not appear that there would have been less than 12 feet depth where the obstruction was encountered had no obstruction beyond the normal slope of the bank been there; nor is any such claim made on the canal company's behalf. But even if this had been the case, the responsibility for letting the tug get so far out of the 15-foot channel and over the sloped bank could be placed upon the tug only by proof that she got there through her failure to obey the directions of the canal company's pilot. Having undertaken not only the duty of having the canal free from defects or obstructions likely to injure these vessels, whose presence therein was or ought to have been known to it as above, but also the further duty of piloting them safely through, the canal company was bound to provide a pilot having not only all necessary knowledge as to the various depths of water in the canal at various stages of the tide, where it contained no defects or obstructions, but also all such knowledge regarding existing defects or obstructions below the surface as the canal company itself had or ought to have had. If either of the vessels under its pilot's charge got to a point too far out of the 15-foot channel or too near the bank to be safe, for want of sufficient depth, or if either encountered there an obstruction of whose presence the canal company knew or ought to have known, it cannot under these circumstances say either that they were not invited to use that part of the canal, or that they got into it through their own fault, without prov-

ing that they got there in disregard of his orders. Except as thus limited, the full responsibility for the safety of the canal as regarded these vessels, and of all parts thereof into which the pilot allowed them to go was upon the canal company.

The fact that while being thus conducted through its canal by the canal company's pilot, the tug was allowed to strike an obstruction under water, of the above character and in the above location, raises a presumption of negligence on the canal company's part, and casts upon it the burden of accounting for the apparently unnecessary grounding. The same rule applies which has been applied in cases where a tug has undertaken to provide safe towage through a given channel, and has failed to get the tow safely through. It must excuse its failure to perform its undertaking by showing that the failure was not caused by any obstruction in the channel which was or ought to have been known to its officer in control. Burr v. Knickerbocker, etc., Co., 132 Fed. 248, 65 C. C. A. 554; The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83; The Wyomissing, 228 Fed. 186, 142 C. C. A. 542; Great Lakes, etc., Co. v. Shenango, etc., Co., 238 Fed. 480, 485, 151 C. C. A. 416; Great Lakes, etc., Co. v. American, etc., Co., 243 Fed. 849, 852, —— C. C. A. ——.

The canal company had taken cross-sections of the canal, by soundings upon lines across it at fixed stations 50 feet apart throughout its length, and these soundings had been repeated at regular intervals. The shoal and rocky peak had not been discovered by any of these soundings, because they happened to come between two of said fixed stations. It had also "swept" the 15-foot channel in the previous July, in search of obstructions therein, and had tried to "sweep" the slopes also, but without success, for want of a practical method of sweeping applicable to them. We are, nevertheless, of opinion that it has not excused its confessed ignorance of the existence of the obstruction which caused this accident. The evidence satisfies us, as it did the learned District Judge, that the obstruction was one not removed from the bottom, as it ought to have been, when the canal was dredged. The dredging, it is true, was done, not by the company here appellant, but by the Canal Construction Company, a different corporation, under contract. The latter company was also made a defendant in this libel, but as against it the libel has been dismissed, the remaining parties thereupon stipulating that if either of said companies is liable for these damages, the present appellant is alone liable. We agree with the District Judge that those in charge of the construction company's dredges and shovels must have known that the obstruction which caused the tug's injuries had not been removed when that part of the canal was dug; and this we consider sufficient to charge the canal company with knowledge that it was there when these vessels were admitted to use the canal. Its pilot ought, therefore, to have known and avoided the danger to them involved in its presence where it was; and for failure to avoid such danger due to his admitted want of such knowledge it cannot escape liability. We find no error, therefore, in the finding of the court below that the canal company was negligent in failing to discover the obstruction and to mark or remove it.

We think it clear from the evidence that the sole cause of the accident was the pilot's want of knowledge regarding the obstruction. He was trying, when it occurred, to get the vessels past a dredge anchored in the canal on its southerly side, so as to project into the limits of the 15-foot channel and thus leave considerably less than its full width open at that point. Supposing, as he did, that there was no reason forbidding him to do so, and in order to keep these vessels at a safe distance from contact with the dredge, he permitted them to get near enough to the north bank to bring the tug far enough outside the limits of the 15-foot channel to strike the obstruction, which was, as has appeared, only a few feet outside said limits.

We agree with the conclusions of the District Court that the evidence shows neither failure on the tug's part to obey the pilot's orders regarding the course she was to steer, nor that she got outside the limits of the 15-foot channel and nearer the north bank because of such failure.

The canal company's tug which was assisting in towing the appellee's tug and barge was preceding them at the time. One of the canal company's regulations required tugs navigating the canal with a tow astern to proceed only against the current. The same regulation also provided that if a tug was towing boats abreast, their total width must not exceed 40 feet. The total width of the appellee's tug and barge, which were abreast each other, as has been stated, was over 57 feet. The fact that its own pilot was in control, however, and could have refused to proceed except in compliance with the above provisions, debars the canal company, in our opinion, from asserting noncompliance with its regulations as a defense.

We find no error in the decree appealed from, all the assignments of error being in effect disposed of by what has been said.

The decree of the District Court is affirmed, with interest, and the appellee recovers its costs of appeal.

CAPITAL SAVINGS BANK & TRUST CO. v. INHABITANTS OF TOWN OF FRAMINGHAM.

(Circuit Court of Appeals, First Circuit. November 5, 1917.)

No. 1301.

1. MUNICIPAL CORPORATIONS ⟸908—NOTES—VALIDITY.

The inhabitants of a Massachusetts town voted that the treasurer should be authorized to borrow in anticipation of taxes such sums of money as might be needed, giving the note or notes of the town therefor, signed by the treasurer and countersigned by at least a majority of the selectmen. Rev. Laws Mass. c. 27, § 6, declares that cities and towns may by a majority vote incur debts for temporary loans in anticipation of taxes for the municipal year for which such debts are incurred and expressly made payable therefrom by vote, and such loans shall be payable within one year after date incurred. Section 9 declares that a city or town, which has incurred a debt within the limitations as to

amount and time of payment prescribed, may issue notes signed by its treasurer, and if issued by a city countersigned by its mayor, or if issued by a town countersigned by a majority of its selectmen. St. Mass. 1904, c. 153, § 1, declares that notes of a city issued under the provisions of Rev. Laws, c. 27, § 6, or section 10, may or may not bear interest, and, if they do not bear interest they may be sold at such discount as the maker or its treasurer deems proper. The by-laws of the town declared that whenever it should be necessary to execute any deed conveying land, or any other instrument required to carry into effect the vote of the town, the same should be executed by the treasurer. *Held*, that notes incurred for temporary loans under Rev. Laws Mass. c. 27, § 6, must, in view of section 9, be signed by the treasurer and countersigned by the mayor, or a majority of the selectmen, according as they are city or town notes, and hence notes authorized by the vote of the town were invalid, both under the statutes and the vote, where not countersigned by a majority of the selectmen.

2. MUNICIPAL CORPORATIONS ⟸908—NOTES—VALIDITY—ESTOPPEL.
In such case, as the notes were not the notes of the town, because not countersigned by a majority of the selectmen, though forged signatures of the selectmen were appended, the town was not estopped, as against a bona fide holder, to deny a recital on the face of the notes that they had been duly executed, which recitals preceded the signature of its treasurer, for the countersignatures of the selectmen being essential to the due execution of the notes, it was their right and duty to ascertain the necessary precedent facts and in conjunction with the treasurer, if a certification was to be made on the notes, to certify to those facts.

3. MUNICIPAL CORPORATIONS ⟸908—NOTES—ESTOPPEL.
A recital on the face of a note, made by the officers of a municipality charged with the duty of ascertaining the existence of necessary facts precedent to its valid issuance, will estop the municipality from showing the nonexistence of such facts against a bona fide holder.

4. MUNICIPAL CORPORATIONS ⟸920—NOTES—INDORSEMENT—AUTHORITY OF OFFICIALS.
Negotiable Instruments Act (Rev. Laws Mass. c. 73) § 59, declaring that, where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation, and may be negotiated either by the indorsement of the bank or corporation or indorsement of the officer, has no application to municipal corporations, and does not authorize the treasurer of a town to indorse a note.

5. MUNICIPAL CORPORATIONS ⟸920—OFFICIALS—AUTHORITY OF TREASURER.
A Massachusetts town treasurer has no general authority to bind the town by his indorsement of a note, having no power by virtue of his office to make the town responsible on commercial paper.

6. MUNICIPAL CORPORATIONS ⟸920—NOTES—TREASURER—IMPLIED AUTHORITY.
Though it was customary for Massachusetts towns to make notes payable to the treasurer, and notes so made could not be put in circulation without the indorsement of the treasurer, that practice did not authorize a treasurer to indorse a note payable to his order, so as to bind the town, the names of a majority of the selectmen who were required to countersign to give the note validity, having been forged, for such practice could not give the treasurer authority in excess of that conferred by statute, and the indorsement would leave the notes merely as if they had been made payable to the municipality and indorsed in blank.

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Action by the Capital Savings Bank & Trust Company against the Inhabitants of the Town of Framingham. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Charles F. Choate, Jr., of Boston, Mass. (Ralph A. Stewart, Edmund S. Kochersperger, of Boston, Mass., and Choate, Hall & Stewart, all of Boston, Mass., on the brief), for plaintiff in error.

Alfred Hemenway, of Boston, Mass. (Frederic H. Hilton, of Framingham, Mass., Thomas W. Proctor, of Boston, Mass., Walter Adams, of So. Framingham, Mass., and Edwin H. Abbot, Jr., of Boston, Mass., on the brief), for defendant in error.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a writ of error from a judgment of the United States District Court for Massachusetts in favor of the town of Framingham, a Massachusetts municipal corporation, in an action at law brought by the Capital Savings Bank & Trust Company, a Vermont corporation, seeking to charge the town as maker and indorser upon two promissory notes, one for $20,000, dated May 20, 1909, and payable to the order of its treasurer in one year from date, and the other for $25,000, dated June 10, 1909, also payable to the order of its treasurer in one year from date. Both notes bear the indorsement, "John B. Lombard, Treasurer, Town of Framingham." The form of the notes is the same; they differ simply in the amounts, dates and time of maturity, and the statement as to the total sum borrowed pursuant to a vote of the town, which in the note of May 20 is stated to be $80,000, and in that of June 10 to be $105,000. The note of May 20 reads as follows:

[First Page.]

[Printed Seal of the Town of Framingham.]

Town Treasurer's Office.

$20,000.00. Framingham, May 20, 1909.

The town of Framingham, in the county of Middlesex and state of Massachusetts, for value received, promises to pay to the order of its treasurer twenty thousand dollars, on the twentieth day of May, 1910, at Boston, Mass.

This note is issued by the town for its lawful uses, and was duly authorized by a vote of the town duly passed by the voters present and voting at a town meeting for the purpose, duly warned and held. It is hereby certified that every requirement of law has been duly complied with in the issue hereof, and that the debt created hereby is within every limit prescribed by law and by the votes of the town.

In witness whereof, the said town of Framingham has caused this note to be signed in its behalf by its treasurer, and countersigned by a majority of its selectmen, this twentieth day of May, 1909.

The Town of Framingham,
By John B. Lombard, Treasurer.

Exempt from taxation in Massachusetts.

We hereby countersign this note, and we also certify that this note is issued under authority of the above-described vote, and that it conforms to the requirements thereof, and that the total sum borrowed to date, under the said vote, including this note, is $80,000.00. William J. Walsh,
Roger H. O'Brien,
A Majority of the Selectmen of the Town of Framingham.

[Impression of the Seal of the Town of Framingham]

[Second Page.]

Pay to the order of the Capital Savings Bank and Trust Company of Montpelier, Vt. John B. Lombard, Treasurer, Town of Framingham.

Pay to the order of any bank or banker for collection, to the credit of The Capital Savings Bank & Trust Co., Montpelier, Vt.

[Third Page.]

At a legal meeting of the inhabitants of the town of Framingham, duly warned as required by law, and held March 10, 1909, under the following article in the warrant for calling the same, to wit:

Article 8. To see if the town will vote to authorize the town treasurer to borrow money temporarily in anticipation of the taxes for the year 1909, and to give the note or notes of the town therefor, fix the limit to which the treasurer may borrow as aforesaid, pass any vote or take any action relative thereto, or to the subject-matter of this article.

Voted, that the town treasurer be authorized to borrow, in anticipation of taxes for the year 1909, such sums of money as may be needed, from time to time, for the current expenses of the town, not exceeding altogether one hundred twenty thousand dollars, paying therefor the current market rate of interest, giving the note or notes of the town therefor, signed by the treasurer and countersigned by at least a majority of the selectmen, to be paid from the taxes to be raised in the year 1909, and said sums so borrowed are hereby expressly made payable therefrom. And I further certify that John B. Lombard is treasurer of the town of Framingham, duly elected and qualified.

Frank E. Hemenway, Town Clerk.

John B. Lombard was treasurer of the town, and signed his name as treasurer at the end of the testimonium clause, as it appears on the above note. William J. Walsh and Roger H. O'Brien were a majority of the selectmen of the town, but their signatures upon the note were forged. The name of "John B. Lombard, Treasurer," appearing on the second page of the note, is his signature. The words "Pay to the order of the Capital Savings Bank & Trust Company of Montpelier, Vt.," were written by the president of the bank after it received the note, and before it was sent to Boston for collection. Frank E. Hemenway was the town clerk, and the name appearing on the third page of the note, at the end of the vote and certificate, is his signature. What has been stated as to the note of May 20 applies in every material respect to the note of June 10, except as above stated.

The defense made as to both notes was that the countersignatures of William J. Walsh and Roger H. O'Brien were forged, and the jury so found. The plaintiff was a purchaser for value without notice of any defect in the signatures, having purchased the notes from the American Banking Company, of Boston, before maturity. The town never received any consideration for the notes.

The questions raised by the assignments of error and relied upon by the plaintiff (plaintiff in error) are: (1) Were the signatures of Walsh and O'Brien necessary to the due execution of the notes? (2) If their signatures were necessary, is the town estopped by the recitals appearing on the notes to show that the countersignatures of Walsh and O'Brien were forged, and that the notes were not duly executed? And (3) is the town bound as an indorser and warrantor of the genuineness of the signatures preceding the indorsement?

[1] The plaintiff's contention as to the first question is that the coun-

tersignatures of the selectmen were not necessary to the due execution of the notes. In support of this contention it calls attention to the provisions of chapter 27 of the Revised Laws of Massachusetts, and particularly to section 6 of that chapter; to section 1 of chapter 153, Laws of Mass. 1904, and to article 9 of the by-laws of the town which was in force at the time the notes were given.

Section 6, chapter 27, R. L. Mass., provides:

"Cities and towns may by a majority vote incur debts for temporary loans in anticipation of taxes for the municipal year for which such debts are incurred and expressly made payable therefrom by such vote. Such loans shall be payable within one year after the date of their incurrence, and shall not be reckoned in determining the authorized limit of indebtedness."

The material portion of section 1, chapter 153, of the Laws of Mass. 1904, provides:

"Notes of a city or town issued under the provisions of section 6 or of section 10 of chapter 27 of the Revised Laws, may or may not bear interest. If they do not bear interest they may be sold at such discount as the maker or its treasurer or other officer authorized to sell the same deems proper."

Article 9 of the by-laws of the town reads as follows:

"Whenever it shall be necessary to execute any deed conveying land, or any other instrument required to carry into effect any vote of the town, the same shall be executed by the treasurer in behalf of the town, unless the town shall vote otherwise."

The defendant's contention is: That the notes were not duly executed. That section 6 of said chapter simply authorizes cities and towns by majority vote to incur debts for temporary loans in anticipation of the taxes for the year in which the loans are made, and fixes the time within which such loans must be paid, and does not authorize, either expressly or by implication, the issuance of notes therefor. That authority for issuing notes for debts so contracted is expressly provided for in section 9 of said chapter, which provides:

"A city or town which has incurred a debt within the limitations as to amount and time of payment prescribed by this chapter may issue * * * notes * * * therefor, properly denominated on the face thereof, signed by its treasurer and, if issued by a city, countersigned by its mayor, or if issued by a town, countersigned by a majority of its selectmen, with interest payable semiannually at such rate as it deems proper, and may sell said * * * notes, * * * at not less than par, at public or private sale, or may use the same in payment of such debts."

And that section 1, chapter 153, above quoted, relates simply to notes of a city or town issued for debts incurred for temporary loans under the provisions of section 6 or section 10 of chapter 27 and the rate of interest to be paid therefor, and is not an authorization for the issuance of notes by a city or town. In support of its position it calls attention to Brown v. Newburyport, 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B, 495, and Franklin Savings Bank v. Framingham, 212 Mass. 92, 98 N. E. 925. In both of these cases the loans for which the notes were given were temporary loans made in anticipation of taxes under section 6, and in both it was held that such notes must be signed by the

treasurer and countersigned by the mayor or a majority of the selectmen, as required by section 9.

In regard to article 9 of the by-laws above quoted, the defendant says (1) that the words "or any other instrument," as used therein, do not relate to notes, but to instruments of the character of those previously mentioned in the article; (2) that, if they do relate to notes and their execution, the article is invalid as being in conflict with section 9 of chapter 27 of the R. L. Mass.; and (3) that if they do include notes, and the article is a valid by-law, the vote of the town under which the notes in question purport to have been executed expressly requires that they be signed by the treasurer and countersigned by at least a majority of the selectmen, which is the same requirement as that contained in section 9 of the statute.

The plaintiff's reply to this is that a debt incurred by a city or town under section 6 is not such a debt as is referred to by the language used in section 9 as being incurred "within the limitations as to amount and time of payment prescribed by this chapter"; that the Court of Appeals for this circuit, in passing upon this question in the case of Citizens' Savings Bank v. City of Newburyport, 169 Fed. 766, 768, 95 C. C. A. 232, held that section 9 related only to notes issued for the permanent indebtedness of a municipality and not to notes for temporary loans made under section 6. That case was decided in 1909, prior to the decisions of the Supreme Court of Massachusetts in the cases above referred to. The ruling by the Court of Appeals was not material to a determination of the question whether the note there under consideration was duly executed or not, for it was signed by the city treasurer and the mayor, in compliance with section 9, and consequently there could be no question as to its due execution. The order or vote of the city council of Newburyport, authorizing a debt to be incurred by a loan in anticipation of taxes and then before the court, did not expressly require that the note to be given therefor should be signed by the mayor as well as the city treasurer, and the Court of Appeals evidently regarded the order or vote as complying with the provisions of chapter 27, as construed by it; but the Supreme Court of Massachusetts, in Brown v. Newburyport, supra, in considering this same order or vote, said:

"The order itself was not strictly in compliance with the statute, in that it did not require the countersigning of the note by the mayor. This, however, was necessarily implied."

And it had to be implied in order to render the order or vote valid from the viewpoint of the Massachusetts court, because, under its holdings, the city had no authority to execute notes except they were signed by the treasurer and countersigned by the mayor, as required by section 9.

After giving due consideration to the arguments of counsel, the conflict, actual or apparent, between the above decision of this court and the Massachusetts decisions, and the necessity for a uniform ruling upon the question, we are of the opinion that the fair and reasonable meaning of the language of section 9, when read in connection with the other provisions of chapter 27, is that notes given for debts incurred for temporary loans under section 6 must be signed by the treasurer and

countersigned by the mayor or a majority of the selectmen, according as they are city or town notes. Loans made under the provisions of section 6 are expressly limited as to time of payment, and, being made in anticipation of the taxes of the municipal year in which the debt is incurred and payable therefrom, are impliedly, if not expressly, limited to an amount not exceeding the taxes for that year. Consequently, such loans fall within the language of section 9, and, this being so, notes issued therefor by the municipality must be executed as there required. The notes in question, therefore, were not duly executed, either under the statute or the vote of the town.

[2, 3] The countersignatures of a majority of the selectmen being requisite to the due execution of the notes, the next question is whether the town is estopped to deny the recitals on the face of the notes preceding the signature of Lombard, the treasurer, and, if so, whether the language of the recitals is such as to fairly and reasonably give the plaintiff, who was a bona fide purchaser, to understand that the countersignatures of Walsh and O'Brien were genuine; for, if the treasurer alone was authorized to certify to the recitals, and the language employed in them fairly gave the plaintiff to understand that the signatures of the selectmen were genuine, the town would be estopped to show that they were not. Presidio County v. Noel-Bond Company, 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402.

It has been many times held by the Supreme Court of the United States that a recital on the face of a note, made by the officers of a municipality charged with the duty of ascertaining the existence of necessary facts precedent to its valid issuance, will estop the municipality from showing the nonexistence of those facts as against a bona fide holder of the note. Coloma v. Evans, 92 U. S. 484, 23 L. Ed. 579; Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146; Anthony v. County of Jasper, 101 U. S. 693, 25 L. Ed. 1005; Gunnison County v. Rollins, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760. And the question is whether the treasurer alone, under the statutes of Massachusetts and the vote of the town, was charged with the duty of ascertaining the necessary facts precedent to the execution and issuance of the notes, or whether, in view of the statutes and vote of the town, the certification of a majority of the selectmen also as to such facts was essential to work an estoppel against the town. As we have above pointed out, the notes were not the notes of the town, for the reason that they were not countersigned by a majority of the selectmen as required by the vote of the town and the statutes of the state. The countersignatures of the selectmen being essential to the due execution of the notes, it was the right and duty of these officers to ascertain the necessary precedent facts, and, in conjunction with the treasurer, if a certification was to be made on the notes, to certify to those facts. This duty involved the exercise of discretion and judgment on the part of the selectmen as well as the treasurer, and the selectmen never having been permitted to exercise the right of determining the existence or nonexistence of the facts, and never having certified to them, the town cannot be held to have made a recital as to the valid execution

of the notes, which would be binding upon it. This was the conclusion reached by the Massachusetts court in considering a like question in Brown v. Newburyport and Franklin Savings Bank v. Framingham, supra, in both of which cases the provisions of the statute were the same as those here under consideration, while in one case the vote was the same, and in the other it was construed to mean the same.

The plaintiff, however, says that it was held in Citizens' Savings Bank v. City of Newburyport, 169 Fed. 766, 95 C. C. A. 232, that the certificate of the treasurer alone was sufficient to bind the town. But in that case it is to be remembered that the court was of the opinion that the town was authorized, under section 6, chapter 27, R. L. Mass., to issue notes signed by the treasurer alone, and that, inasmuch as the ordinance or vote of the city council did not expressly provide that the note should be countersigned by the mayor, although it was in fact so countersigned, the treasurer alone had the right and was charged with the duty of ascertaining the necessary facts precedent to certification, and, having certified to those facts in a written statement accompanying the note, the authority under the statute and vote of the city was properly exercised and the city estopped. But, as we have held that the construction there placed upon section 6 is erroneous, the conclusion is inevitable that the recitals in the notes in question are not binding upon the town.

[4] It remains to be considered whether the town under the circumstances of this case is bound as an indorser and warrantor of the genuineness of the signatures preceding the indorsement. As to this question, the plaintiff's contention is (1) that under the Negotiable Instruments Law as found in chapter 73, R. L. Mass., the defendant municipality was bound as a warrantor; and (2) that, if the Negotiable Instruments Law does not apply to negotiable instruments of a municipal corporation, it is bound as a warrantor under the law merchant.

As to the Negotiable Instruments Act, the Supreme Court of Massachusetts has held that it confers no authority upon a town treasurer to impose upon his town the liability of an indorser, and that the word "corporation," as used in Revised Laws, chapter 73, section 59, of that act, does not include cities and towns. Franklin Savings Bank v. Framingham, 212 Mass. 92, 95, 98 N. E. 925. We see no reason to question the correctness of this holding.

[5] It was also held in that case that a town treasurer has no general authority to bind a town by his indorsement of a note; that "his authority to impose a financial obligation by way of incurring indebtedness is strictly limited by the statute"; and that he has "no power by virtue of his office as treasurer to make the town a responsible party on commercial paper."

[6] But the plaintiff contends that, inasmuch as the statutes of the state and the vote of the town did not prescribe the form of note, and it was customary for Massachusetts towns to make notes payable to the treasurer, and notes so made could not be put in circulation without the indorsement of the town or treasurer, from the necessity of the case Lombard had implied authority to make the indorsement and bind the town as a warrantor of the genuineness of prior signatures. But this question was disposed of in Citizens' Savings Bank v. City

of Newburyport, supra, where the note was of like form and similarly indorsed. It was there said:

"Although, under some circumstances, with such a signature it might be that Felker [the city treasurer] was personally liable on the notes, yet it is plain his name was used only to give the notes currency; and it is settled in the federal courts that his indorsement has no other effect. Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266. Therefore the notes in suit were in substance the same as though they had been made payable to the city of Newburyport in terms, and indorsed by it in blank before they were negotiated. By the law merchant this makes them notes payable to bearer, which pass by delivery without any indorsement or any form of assignment."

As we understand this, it means that the instrument, until the indorsement was placed upon it, was not a note, and the indorsement simply perfected its execution; for to give it any other effect would be in contravention of the statutes of the state, and to confer upon the treasurer an authority which he did not possess. Furthermore, if it could be said that from the necessity of the case the treasurer has implied authority to indorse a note made in this form, still the necessity and consequent right to exercise such authority would not arise until a note so drawn was duly executed by the treasurer and the selectmen in compliance with the statutes of the state and the vote of the town, which is not the case here.

The decision in Warren-Scharf Asphalt Paving Co. v. Commercial National Bank, 97 Fed. 181, 38 C. C. A. 108, on which the plaintiff relies, is not applicable to the facts in this case. There England, the party who indorsed the check, had express authority to indorse and sign checks for the Warren-Scharf Company.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers its costs in this court.

UNION PAC. R. CO. v. SYAS (two cases).

(Circuit Court of Appeals, Eighth Circuit. November 2, 1917.)

Nos. 4810, 4811.

1. TRIAL ⊂⊃4—PRACTICE—STATUTE—"CASES IN EQUITY."

Under Judicial Code (Act March 3, 1911, c. 231) § 274b, as added by Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, § 1251b), declaring that in all actions at law equitable defenses may be interposed by answer, plea, or replication, without the necessity of filing a bill, equitable relief may be granted in an action at law, but, in view of Const. art. 3, § 2, declaring that the judicial power shall extend to all cases in law and equity, the act did not in any way, except as to procedure, change the essential distinction between law and equity, cases in equity being those which in the jurisprudence of England were so called, as contradistinguished from cases at common law at the time of the framing of the Constitution; and hence, when equitable relief is asked in an action at law, the case for equitable relief should be tried as a case in equity and first disposed of before proceeding in the action at law.

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

2. CANCELLATION OF INSTRUMENTS ⟸32—SETTING ASIDE RELEASE—EQUITABLE PROCEEDING.

A proceeding to rescind a release on the ground that it was obtained through fraud is essentially an equitable proceeding.

3. TRIAL ⟸3—PROCEEDINGS—SUBMISSION OF ISSUES TO JURY.

In an action for damages for personal injuries, where defendant set up a release, which plaintiff attacked as having been procured by fraud, it is improper, though equitable relief is allowed in an action at law, for the court to submit the question of fraud to the same jury trying the action for damages, even though the question of fraud may be submitted to a jury for an advisory verdict.

4. APPEAL AND ERROR ⟸1046(4)—REVIEW—HARMLESS ERROR.

In an action at law for damages for personal injuries, where defendant set up a release, which plaintiff attacked as having been procured by fraud, the submission to the jury trying the action at law of the question of fraud for an advisory verdict to the court sitting as a chancellor was prejudicial error, for the jury might well have been swayed in their determination of the question of fraud by sympathy for plaintiff's injuries; the jury having been informed by the instructions that there could be no recovery until the release was set aside.

5. APPEAL AND ERROR ⟸1046(1)—HARMLESS ERROR.

An error in procedure cannot be treated as harmless, on the theory that the judgment was just, where the error was such that the trial was not according to due process of law.

6. APPEAL AND ERROR ⟸3—REVIEW—MODE OF REVIEW.

Under Act Sept. 6, 1916, c. 448, § 4, 39 Stat. 727 (Comp. St. 1916, § 1649a), declaring that no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, it is immaterial whether the method of review of actions at law where equitable defenses are interposed, pursuant to Judicial Code, § 274b (section 1251b), are brought by appeal or writ of error.

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

Action by James Syas against the Union Pacific Railroad Company. There was a judgment for plaintiff, and defendant brings error and appeals. Reversed and remanded, with directions.

John Q. Dier, of Denver, Colo. (N. H. Loomis, of Omaha, Neb., and C. C. Dorsey and R. L. Stearns, both of Denver, Colo., on the brief), for plaintiff in error and appellant.

Omar E. Garwood, of Denver, Colo. (William W. Garwood and George O. Marrs, both of Denver, Colo., on the brief), for defendant in error and appellee.

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

CARLAND, Circuit Judge. James Syas, hereafter called plaintiff, commenced this action to recover of the railroad company, hereafter called defendant, damages for personal injuries received by him through the alleged negligence of the defendant. Among other defenses pleaded by the defendant was a release and satisfaction executed

by the plaintiff of all claims for damages growing out of personal injuries received. In his reply to this defense the plaintiff alleged:

"With reference to the allegations contained in the fifth affirmative defense of said answer, this plaintiff says: He denies that on or about the 5th day of March, 1915, or at any other time, he made any settlement of his claim against the defendant, or that he made, executed, or delivered to the defendant any valid written release in full settlement or discharge of his claim, or at all, and denies that he ever released or discharged the defendant of any claims or demands whatsoever, either on account of said accident or otherwise; and he denies that the defendant's liability for said accident has in any way been extinguished, but, on the contrary, he avers that the defendant fraudulently, and with intent to deprive the plaintiff of his legal remedies on account of said accident, took advantage of the plaintiff when he was suffering from his injuries, and when he was sick and in great distress of body and mind, and wrongfully and fraudulently promised and assured the plaintiff, and gave plaintiff to understand, that if he would sign a certain paper, the contents of which were and are to him unknown, but which he is informed and believes, and so avers, is substantially the same as that set out in the fifth defense of defendant's answer, the defendant would give him lucrative employment for the remainder of his life, in which employment he could earn a livelihood, and at the time of signing said paper the defendant's claim agent positively stated to the plaintiff that the signing of said paper was a mere formality, and that the defendant company would, without fail, give him regular employment in which he could earn a livelihood, and he signed said paper relying upon such assurances, and believing that the defendant would not fail to give him employment from which he could earn a livelihood, and it was not until some time thereafter that plaintiff learned that the defendant never intended to give any employment, or to enable him to earn a livelihood from any employment with the defendant. Plaintiff admits that he received the consideration mentioned in said instrument, but he avers that the same was wholly inadequate and unconscionable, and was given to plaintiff only for actual expenses incurred in the treatment and care of his injuries."

On the filing of the reply counsel for defendant petitioned the court that all issues both of law and fact arising out of the pleadings with reference to the release should be heard and determined upon the equity side of the court prior to the trial of the other issues in the case arising on the complaint, answer, and reply. This petition was denied, and an exception allowed. The case subsequently came on for trial, and counsel for defendant again at the opening of the trial requested that the court, sitting as a chancellor, determine the equity issues raised by the pleadings with reference to the release prior to the trial of the case at law for damages. This request was refused, and an exception allowed. The case was then tried to the court sitting with a jury upon all the issues made by the pleadings, both legal and equitable. After the close of all the evidence counsel for defendant filed a written request that the court sitting as a court of chancery make findings of fact and law, and enter a decree thereon disposing of the issues raised by the pleadings in relation to the release, in favor of the defendant; said request being accompanied by specific findings. This request does not seem to have been formally ruled upon, except by the court submitting the equitable issues to the jury. The court, in charging the jury, among other things said:

"Now, the defendant insists that that raises an equitable issue—the question as to whether or not the release is voidable for fraud—to be tried only by

the court, and in that the court at the request of the defendant acquiesces; but it has a right to present to you for its guidance as advisory to the court only that issue, and take from you your verdict on that issue, and therefore this case presents itself to you, as it will be submitted to you by the court, in a double aspect—that is, there are two issues. The first, the validity or invalidity of that release, and that you must determine first; and if that release is held valid and binding and, was not obtained by fraud, as the plaintiff claims, that is the end of this case—he cannot recover. If, on the other hand, as already said to you, it should be determined by the court that that release was obtained by fraud on the part of White, the agent who got it, then it does not stand in the way of his right to recover damages here; it will be set aside, and you can then consider whether or not, and how much, he is entitled to recover in the way of damages; and thus on the first issue, on which I take your verdict as advisory to the court, there will be submitted to you two forms of verdict, one of which is in this language: 'We, the jury, on our oath do say we find that no fraudulent representations or promises were made by defendant which induced him to agree to and sign the release offered in evidence.' If you should so find he cannot recover, I take it that you will then sign a verdict in favor of the defendant, the form of which is attached to this same verdict: 'We, the jury, find the issues in favor of the defendant.' On the other hand, if on that issue you should find to the contrary, you will use this form of verdict: 'We, the jury, on our oath do say we find that plaintiff was induced to execute the written release, offered in evidence, by fraudulent representations and promises made to plaintiff by the witness White; that said representations and promises were material, were believed and relied on by the plaintiff, and induced the plaintiff to sign the release; and that he would not have agreed to and signed said release but for his belief and reliance on said representations and promises.' If you find that verdict, I assume, necessarily, that you will then find in favor of the plaintiff on the question of damages. You may or you may not, but that we will consider later. In that event there is a form of verdict in favor of the plaintiff. Insert the amount of damages which you decide, if you find in his favor, that he should recover. * * *

"Counsel for plaintiff has said in his argument that, if you find for the plaintiff, you will deduct from the gross sum, which you find constituted damages, the $750 which he has already received. You are instructed, on account of the request of the defendant that the equitable feature of this case be kept separate from the law feature, not to do that. If the release is held to be fraudulent, and judgment entered in the records of the court setting it aside for that reason, that judgment will provide that the plaintiff must pay back that $750 to the defendant. If you find a verdict in his favor, for instance, $5,000, he will have a judgment for $5,000, and then the $5,000 judgment in his behalf will be satisfied to the extent of $750 in behalf of the defendant. So, if you find for the plaintiff, you will state in your verdict the full amount, regardless of the $750 which he has received, that in your judgment, under the evidence in this case, you believe he is entitled to recover."

Counsel for defendant, after the charge was given, again excepted to the refusal of the court to try the equitable issues as requested. The jury returned two verdicts, as follows:

"We, the jury, on our oath do say we find that the plaintiff was induced to execute the written release, offered in evidence, by fraudulent representations and promises made to plaintiff by the witness White; that said representations and promises were material, were believed and relied on by the plaintiff, and induced the plaintiff to sign the release; and that he would not have agreed to and signed said release but for his belief in and reliance on said representations and promises."

"We, the jury in the above-entitled case, upon our oath do say we find the issues herein joined in favor of the plaintiff, and assess his damages at the sum of ($7,500.00) seven thousand five hundred dollars."

Upon which verdicts the following judgment was rendered:

"And thereupon the court, sitting as a chancellor, adopts as its findings the finding of facts made by the jury as to the fraudulent representations and promises made to plaintiff by which he was induced to sign the release and settlement of date March 5, 1915, and set up as a fifth defense in the answer herein, and finds that said release and settlement was fraudulently obtained as alleged and pleaded in the reply to said answer.

"Wherefore it is considered by the court that the release and settlement made, executed, and delivered by the plaintiff to defendant on the 5th day of March, A. D. 1915, under and by which the plaintiff accepted the sum of seven hundred and fifty dollars ($750.00) in full satisfaction of his claim for damages against the defendant, sued upon in his complaint herein, be, and the same is hereby, vacated, set aside and for naught held; but upon the condition, nevertheless, that the plaintiff pay to the defendant the said sum of seven hundred and fifty dollars ($750.00), together with interest thereon at the rate of 8 per cent. per annum from the 5th day of March, A. D. 1915—said payment, however, to be made by crediting the defendant with said sum and interest on its payment of the judgment herein rendered against it for the damages assessed to the plaintiff for the injuries by him sustained.

"It is further considered by the court, upon the verdict of the jury herein, that the plaintiff do have and recover of and from the defendant the sum of seven thousand five hundred dollars ($7,500.00), his damages by him sustained by occasion of the premises in his complaint herein set forth and alleged in form aforesaid assessed, together with his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor."

The defendant has brought the case here both by writ of error and appeal.

[1] The state of the pleadings below, so far as they mingle legal and equitable issues, is justified no doubt by section 274b of the Judicial Code (Act March 3, 1915, c. 90, 38 Stat. 956 [Comp. St. 1916, § 1251b]), which is in these words:

"That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

This statute brings into the federal courts the procedure that has long prevailed in many of the states where Codes of Civil Procedure have been adopted. The statute is intended to prevent a circuity of action by allowing the rights of either party to an action at law, whether legal or equitable, in respect to one subject-matter, to be determined in one action; but, while the statute permits the granting of equitable relief in an action at law, Congress did not intend, in our opinion, to change in any way, except as to procedure, the essential distinction between law and equity. Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452, and Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800. Congress legislated with full knowledge of the grant of jurisdiction contained in section 2 of article 3 of the Constitution, to the effect that "the judicial power shall extend to all cases, in law and equity." The Supreme

Court has decided that the words "cases in equity" mean those cases which in the jurisprudence of England were so called as contradistinguished from cases at common law at the time of the framing of the Constitution. Robinson v. Campbell, 3 Wheat. 212, 4 L. Ed. 372; United States v. Howland, 4 Wheat. 108, 4 L. Ed. 526; Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Fenn v. Holme, 21 How. 481, 16 L. Ed. 198. Therefore it will not be presumed that Congress intended to make any serious change in the constitutional classification, even if it could do so. Heine v. Levee Commissioners, 19 Wall. 655, 22 L. Ed. 223. Moreover, the law in terms preserves the distinction by declaring:

"Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea."

We are clearly of the opinion that, when equitable relief is asked in an action at law under the statute above quoted, the case for equitable relief should be tried as a case in equity, and that the great weight of authority is in favor of the practice of trying the case in equity first, for this practice serves to keep the equitable matter distinct, and to prevent what must otherwise frequently ensue—confusion and embarrassment in the progress of the action. Thayer v. White, 3 Cal. 228; Lestrade v. Barth, 19 Cal. 671; Basey v. Gallagher, supra; Quinby v. Conlan, supra; Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; Cornelius v. Kessel, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; Arguello v. Edinger, 10 Cal. 150; Estrada v. Murphy, 19 Cal. 248; Weber v. Marshall, 19 Cal. 447; Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119; Rosierz v. Van Dam, 16 Iowa, 175; Van Orman v. Spafford, 16 Iowa, 186; Allen v. Logan, 96 Mo. 591, 10 S. W. 149; Peterson v. Philadelphia Mortgage & Trust Co., 33 Wash. 464, 74 Pac. 585; Hotaling v. Bank, 55 Neb. 5, 75 N. W. 242; Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205; 7 Enc. Pleading and Practice, 810, 811.

The case of Hancock v. Blackwell, supra, is quite in point. The suit was for slander. The defendant pleaded a written release. Plaintiff admitted the execution of the release, but alleged the same had been procured from her through fraud. When the case was called for trial the defendant demanded that the issues on the release be first tried and determined by the court, which the court refused to do, and proceeded to try the case with a jury. The trial resulted in a verdict and judgment in favor of the plaintiff. The Supreme Court of Missouri, in reversing the case for the refusal of the trial court to try the equitable issues with reference to the validity of the release, said:

"In such circumstances the issue of fraud should be tried by the court; and the evidence in order to justify setting aside the release should be clear and satisfactory, 'such as will preponderate over presumption or evidence on the other side.' 1 Bigelow on the Law of Frauds, p. 123. By proceeding this way the burden of proof rests on the plaintiff to establish the fraud by clear and satisfactory evidence, while in trying such an issue before a jury a preponderance of evidence is only required to set aside the release. The plaintiff should not, under the circumstances, be permitted to ignore the release, and prosecute her action at law, without first having the release set aside by a proceeding in equity for that purpose, either by original bill or, as the offer

to refund the money was made before the commencement of this suit, by amending her petition so as to embrace a count for that purpose."

[2] The proceeding to rescind the release in this case, whether by original bill or as permitted by the statute, was essentially an equitable proceeding. U. P. R. R. Co. v. Harris, 63 Fed. 800–803, 12 C. C. A. 598; Pacific Mutual Life Insurance Co. v. Webb, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752; U. P. R. R. Co. v. Whitney, 198 Fed. 784–788, 117 C. C. A. 392; Standard Corporation v. Evans, 205 Fed. 1, 125 C. C. A. 1. Justice Field, when a member of the Supreme Court of California, wrote many of the California decisions cited, and again announced the same views in two of the cases cited from the Supreme Court of the United States, which, of course, are controlling so far as this court is concerned.

[3] In the case before us, and all others like it, where it appears that no damages can be recovered until the release is out of the way, orderly procedure and a due regard for the rights of the parties demands that the equitable issues should be first tried by the court sitting as a court of equity. It is true the chancellor may take the advice of a jury, but in such cases the issues to be passed upon by the jury should be carefully framed, and the jury should not be the one which also tries the action at law, as the desire of the jury to render a verdict in the law action in favor of plaintiff or defendant may so cloud their judgment as to render their advice unsafe to follow. We are of the opinion that the failure of the trial court to try the equitable issues raised by the pleadings as a court of equity prior to the trial of the action for damages, as requested by counsel for the defendant, was prejudicial error, in view of the character of the evidence and the charge of the court.

[4] The plaintiff was seriously injured, and the same jury which the court had impaneled to advise it with reference to the issues in regard to the release was also to say whether the plaintiff should recover damages from the defendant. The nature of plaintiff's injuries, as is usual in such cases, was such as to excite the sympathy of the average man. In this condition of the case the jury were told by the court that they could not return a verdict in favor of the plaintiff in the action for damages until the release was out of the way; that they must pass upon the validity of the release before proceeding to the action for damages, but at the same time they were also in effect told that the $750, which the plaintiff was obliged to return to the defendant, in order to have the release set aside, could be obtained by rendering a verdict against it for damages in the law action. This instruction for all practical purposes permitted the jury to find a verdict against the defendant in the case for damages, in order that money might be obtained to pay to the defendant the $750 required to be paid to it before the release could be avoided. It would seem that a duty was imposed upon the jury by the court that was impossible in the nature of things for it to perform, and at the same time follow the court's charge in other respects. But, whatever may be said, this was not the trial in a court of equity of the equitable issues to which the defendant was entitled and which it demanded. The trial court was of the opinion that

he had tried the equitable issues as a chancellor, using the verdict of the jury on those issues as merely advisory. The trouble with this view of the case is that the trial court adopted the finding of the jury upon the equitable issues as its own.

[5, 6] Counsel for plaintiff urges that the judgment rendered was just, and ought not to be reversed for error in procedure, if any. But no judgment is just, if not obtained by due process of law; otherwise, courts could enter judgments without trial. This court has not yet adopted any rule as to how cases under section 274b of the Judicial Code shall be reviewed, but under section 4 of an act to amend the Judicial Code, approved September 6, 1916 (chapter 448, First Session, 64th Congress, page 726 [Comp. St. 1916, § 1649a]), and under said section 274b it would seem to be immaterial whether the case was brought here by appeal or writ of error.

We are satisfied, however, that we ought not to review the errors of law, properly assigned, arising in the case for the trial of damages, or to try de novo the equitable issues raised by the pleadings, until a trial is had below in conformity to what we believe to be the proper practice. We are further of the opinion that the defendant was prejudiced in regard to both the equitable issues and the legal issues by the manner in which the case was tried. We therefore reverse the judgment below as to the equitable issues, and also the judgment for damages, and remand the case, with instructions to proceed therein in conformity to the views expressed in this opinion.

DEAN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1917. Dissenting Opinion November 28, 1917.)

No. 3084.

1. CRIMINAL LAW ⊜1159(1)—APPEAL—REVIEW—VERDICT.
   Where there was sufficient evidence to take a case to the jury, the verdict cannot be reviewed.
2. POST OFFICE ⊜50—OFFENSES—ALTERATION OF MONEY ORDER—QUESTION FOR JURY.
   In a prosecution for altering a postal money order in violation of Penal Code (Act March 4, 1909, c. 321) § 218, 35 Stat. 1131 (Comp. St. 1916, § 10388), evidence *held* sufficient to carry the case to the jury.
3. POST OFFICE ⊜27—ALTERING MONEY ORDER—PRINCIPALS.
   One who knowingly aided or assisted another or others to alter a money order, by raising it from $1 to $21, in violation of Penal Code, § 218 (Comp. St. 1916, § 10388), may, under the direct provisions of section 332 (section 10506), be convicted as a principal.
4. CRIMINAL LAW ⊜369(15)—TRIAL—EVIDENCE OF OTHER OFFENSE.
   In a prosecution for altering a postal money order, where accused claimed that the order was not issued to him and that he was not at the place of issuance at that time, testimony by the agent of an express company, at the city where the order was issued, that he recollected seeing accused at that place on the day the order was issued, because a few days after he was called to testify against accused for raising an express money order, is not objectionable, because referring to another prosecution against accused; the evidence being admissible as ground of identification.

5. CRIMINAL LAW ⊂=1043(3)—APPEAL—RECEPTION OF EVIDENCE—OBJECTIONS.
In such case, accused cannot complain in the appellate court on the ground that the language of the witness implied he was guilty of the charge of raising the express money order, where the objection was not made on that theory.

6. CRIMINAL LAW ⊂=1169(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
The erroneous admission of improper evidence is cured, where defendant subsequently introduced evidence to the same effect.

7. CRIMINAL LAW ⊂=363—EVIDENCE—RES GESTÆ.
In a prosecution for altering a postal money order, the application on which the money order was issued is admissible as part of the res gestæ.

8. PROPERTY ⊂=9—PRESUMPTIONS—OWNERSHIP—POSSESSION.
Possession of an article raises a prima facie presumption of ownership.

9. CRIMINAL LAW ⊂=316—PRESUMPTIONS OF OWNERSHIP.
In a prosecution for raising a postal money order, where it was desired for purposes of comparison of handwriting, a notebook taken from the possession of accused, who surrendered it without denying ownership, is presumptively accused's property; the jury from such facts being warranted in inferring ownership.

10. CRIMINAL LAW ⊂=737—OWNERSHIP—JURY QUESTION.
Where accused denied ownership of a notebook taken from his possession, the question, in view of the presumption of ownership arising, is for the jury.

11. POST OFFICE ⊂=49—ALTERING MONEY ORDER—EVIDENCE—ADMISSIBILITY.
In a prosecution for altering a postal money order issued at Macon on Saturday, December 26th, where accused denied that the order was issued to him, or that he was in Macon on that day, an entry in a notebook taken from his possession, "Macon 45 Sat. 12/26," was at least slight evidence that accused was in Macon on the day the order was issued.

12. CRIMINAL LAW ⊂=491(2)—OPINION EVIDENCE—COMPARISON OF HANDWRITINGS.
Under Act Cong. Feb. 26, 1913, c. 79, 37 Stat. 683 (Comp. St. 1916, § 1471), providing that, in any proceeding where the genuineness of the handwriting of a person may be involved, any admitted or approved handwriting of such person shall be competent evidence as a basis of comparison, proof of the genuineness of the handwriting admitted as a basis of comparison may be made either directly or by inference; hence, in a prosecution for altering a postal money order, where accused claimed that the order was not issued to him and that he did not alter it, a notebook containing entries of a personal nature, taken from accused's possession, is admissible as a basis of comparison of handwriting, though accused denied that the book was his.

13. CRIMINAL LAW ⊂=491(1)—EVIDENCE—COMPARISON OF HANDWRITING.
In a prosecution for altering a postal money order, accused claimed that the order was not issued to him, but was issued to one B., who employed accused and W., the payee, and that the postal order and express order were sent to accused and W. by B. A memorandum book, taken from accused's possession and containing entries, was offered as a basis of comparison of handwriting on the question of who signed the application. *Held* that, though accused claimed the book belonged to B., yet, as accused could be convicted as a principal if he knowingly assisted others to raise the order, the book was properly received in evidence.

14. CRIMINAL LAW ⊂=444—DOCUMENTARY EVIDENCE—AUTHENTICATION.
In a criminal prosecution, a letter and memorandum book, both of which accused admitted having seen before, were properly received in evidence against him, though he claimed they belonged to another, where the officer arresting him testified that on the morning after the arrest

the officer in charge of the patrol wagon which took accused to jail delivered the same to him; it appearing that the owners of the book and letter were never in custody.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Albert H. Dean was convicted of having altered a postal money order, in violation of Penal Code, § 218 (Comp. St. 1916, § 10388), and he brings error. Affirmed.

Harrison Jones and Stiles Hopkins, both of Atlanta, Ga., for plaintiff in error.

Hooper Alexander, U. S. Atty., and W. Paul Carpenter, Asst. U. S. Atty., both of Atlanta, Ga.

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

GRUBB, District Judge. The plaintiff in error was convicted in the District Court for a violation of section 218 of the Penal Code, in having altered a postal money order, issued at Macon, Ga., on December 26, 1914, for the sum of $1, payable to Charles A. Wells at Atlanta, Ga.; the alteration consisting of raising it from $1, as issued, to $21, by writing the figure "2" before the figure "1" on the face of the money order, and by writing the word "twenty" before the word "one" where it appeared on the face of the order and its coupon.

The errors assigned and argued with earnestness and ability by counsel assigned by the District Judge to defend the plaintiff in error are based upon the alleged admission of illegal evidence and upon the insufficiency of the evidence to support a conviction. The facts in the case, briefly stated, follow:

The evidence of the plaintiff in the court below tended to show that the defendant was in Macon on December 26, 1914, and that on the morning of that day an application was made to the postmaster at Macon for a money order in the sum of $1, payable to Charles A. Wells at Atlanta, by some one who signed the name of M. M. Clark to the application. The application itself was introduced in evidence by the plaintiff. The postmaster was unable to identify the person who applied for and to whom the money order was issued. An agent of the Southern Express Company at Macon identified the defendant as a person whom he saw in Macon on the morning of December 26, 1914, and again in Atlanta in his trial in the state court a few days thereafter. The evidence of the plaintiff next accounted for the defendant in Atlanta on the evening of December 26, 1914, between 5 and 9 o'clock, at the place of his arrest, where he attempted without success to pass a Southern Express money order on a merchant named Jacobs. After leaving Jacobs' place of business, he was placed under arrest by a detective named Vickery, and, on request, he turned over to this officer the express money order, the letter and the envelope, under which it was inclosed, purporting to be addressed to the defendant at Atlanta and mailed from Macon at 11 o'clock in the morning of December 26, 1914, by M. M. Clark. He also turned over to the officer a

personal memorandum book, which he took from his pocket with the other documents, and which was introduced in evidence by the plaintiff along with them. The book contained, among others, this entry "Macon 45 Sat. 12/26." In addition, the plaintiff introduced in evidence the postal money order, on which the prosecution was based, together with a letter purporting to be dated at Macon, Ga., December 26, 1914, addressed by M. M. Clark to Charles Wells, reciting the inclosure of a money order in payment of addressee's last week's work for the writer, and the envelope inclosing it, postmarked at Macon, December 26, 1914, at 11 a. m., and addressed to Charles A. Wells, General Delivery, at Atlanta, returnable to M. M. Clark, at Macon, if not delivered to addressee within five days. The plaintiff's evidence tended to show that these documents were delivered by one Brazelton, who was dead at the time of the trial in the District Court, to the witness Vickery on the morning succeeding the arrest of the defendant the preceding night. The evidence of the plaintiff also tended to show that Brazelton was the officer, who had charge of prisoners, who were taken to the station in the city patrol wagon, and that the witness Vickery had turned the defendant over to Brazelton on the night of his arrest, to be taken to the police station in the patrol wagon. The defendant's counsel objected and excepted to the introduction of all the documentary evidence mentioned. The evidence of the plaintiff also tended to show that a train left Macon at about 1:30 p. m. of December 26, 1914, and arrived in Atlanta on the evening of the same day at about 5 p. m.

The defendant introduced evidence tending to show that on the night of December 26, 1914, after 11 p. m., a man passed a Southern Express money order for $23 on one L. Austern in Decatur street, Atlanta, representing himself to be Charles A. Wells, in payment of an overcoat purchased by him from Austern. The witness Austern testified that he saw the defendant a few days after this occurrence, and that the defendant was not the man who passed the Southern Express money order on him. The defendant, testifying in his own behalf, said that he met one M. M. Clark in Jacksonville on December 14, 1914, and was employed by him to help him take orders and put up signs with gold letters, a sample of which he exhibited in court; that he worked on a 50 per cent. commission basis in Waycross on December 21st and 22d, in Macon on December 23d and 24th, and took $43 in orders, of which his share was $21.50; and that during the same time a man named Charles A. Wells also worked for Clark in the same way, and earned, on the same basis, during the same period, $23; that Wells and the defendant left Macon on Christmas Day at 1:30 p. m., and arrived in Atlanta at 5 p. m. the same day, leaving Clark in Macon, with a mutual understanding that Clark was to meet the defendant and Wells at the post office in Atlanta on the evening of December 26, 1914, at 6 p. m.; that Wells and the defendant were there at the appointed time, but Clark failed to meet them, and that they then each asked for mail at the general delivery window of the Atlanta post office, and each received a letter from Clark; that the defendant received the express money order for $21.50, which he presented afterwards to Jacobs for payment; that Wells received an express money order in his letter for

$23, and also a postal money order for $1, the purpose of which was not disclosed, nor any mention made of its presence in the letter of inclosure. The defendant denied that he ever had the letter addressed to Charles A. Wells, or its inclosures, in his possession, and asserted that his only connection therewith was to see them in the possession of Wells at the Atlanta post office. The defendant denied that he made the application for the post office money order and that he was in Macon on the day it was issued, or that he had anything to do with its alteration, or knew that it had been altered. The defendant admitted that the memorandum book was in his possession, when arrested, but denied that it was his, or in his handwriting, asserting that it was Clark's, and that he borrowed it from Clark, while on the train, and tore from it a leaf to write a letter, and forgot to return it to Clark, and knew nothing about the entries in it. The defendant testified that the express money order, which he attempted to pass on Jacobs, was originally drawn for $1.50 and raised to $21.50, and that the postal money order, which was the basis of the prosecution, was originally drawn for $1 and raised to $21. The defendant testified that he had no connection with the raising of any one of the three money orders.

[1] The facts are stated with fullness, because of the earnest contention of the counsel for plaintiff in error, presented with ability to the court, that, conceding that all evidence that went to the jury was admissible, still there was not sufficient evidence to support the verdict of conviction. In the case of Crumpton v. United States, 138 U. S. 361, 362, 11 Sup. Ct. 355 (34 L. Ed. 958) the Supreme Court said:

"It is clear that the question, whether the verdict was contrary to the evidence, which is the first error assigned, is not one which can be considered in this court, if there were any evidence proper to go to the jury in support of the verdict."

And again, after setting out the evidence, the court said (138 U. S. 363, 11 Sup. Ct. 356 [34 L. Ed. 958]):

"There is no doubt that this testimony was sufficient to lay before the jury, and it would have been improper to direct a verdict for the defendant. The weight of this evidence, and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant, were questions exclusively for the jury, and not reviewable upon writ of error. If the verdict were manifestly against the weight of the evidence, defendant was at liberty to move for a new trial upon that ground; but that the granting or refusing of such a motion is a matter of discretion is settled in Freeborn v. Smith, 2 Wall. 160 [17 L. Ed. 922]; Railway Co. v. Heck, 102 U. S. 120 [26 L. Ed. 58], Lancaster v. Collins, 115 U. S. 222 [6 Sup. Ct. 33, 29 L. Ed. 373], and many other cases in this court."

The question, therefore, is whether there is any evidence in the record in support of the verdict, and not whether the jury reached a right conclusion from it. The time at which this determination is to be made is at the conclusion of all the evidence—that of plaintiff and defendant.

[2] The alteration of the postal money order is established. The circumstances tending to connect defendant with the alteration of the postal money order, as they appear in the government's evidence, are: (1) The fact (denied, however, by defendant) of his presence in Macon

on the morning when the application was made and the order issued. This, of itself, is obviously insufficient. (2) The fact that the postal money order is testified to have been received on December 27th by the witness, who produced it on the trial, from the person who, the evidence tends to show, was in charge of the defendant on his trip to the police station in the patrol wagon from the place of his arrest. (3) The documents introduced as standards of comparison of the handwriting on the application with that of the person who wrote the documents, who was shown by a tendency of the evidence to have been the defendant.

If the jury found that the entries in the memorandum book, introduced in evidence by the plaintiff, were in the handwriting of the defendant; that the handwriting of such entries and that of the application for the postal money order were identical, the jury might well infer that the defendant wrote both the entries in the book and the application for the money order, and, finding that the handwriting of the money order was his, might well infer that the money order was issued to him, and, in that event, the inference might reasonably be indulged that the person to whom the postal money order was issued was the person who altered it. If the documents are to be considered as evidence in the case for the purpose of comparison of handwritings, then they constitute some evidence before the jury to connect the defendant with the raising and alteration of the postal money order.

These are the items of evidence in the plaintiff's case. It is not worth while considering whether of themselves they are sufficient to connect defendant with the alteration, as they are properly to be considered along with the evidence introduced by the defendant. The defendant's evidence consisted of his own testimony and that of the witness L. Austern. The latter adds no strength to the case of the government, and weakens it to the extent that it has for its basis that the defendant and Wells were one person. The evidence of the defendant in his own behalf does establish a connection between the defendant and the postal money order. The defendant's evidence is not a general denial of all knowledge of the existence of such a money order. He admits having seen it, as he says, in the post office at Atlanta in Wells' possession and before it was altered. He denies, however, having any other or further connection with it. In weighing the effect of this denial is to be considered the evidence tending to show that it was recovered from a source that might have indicated to the jury that it continued in the defendant's possession till after his arrest. His denial is also to be considered, in view of his explanation of how he came to see the postal money order, and the reasonableness of his story, which limited his connection to this momentary glance. That story was that he and Wells had worked for Clark in Macon and Waycross, and had preceded him to Atlanta, and had his promise to meet them there in person and pay them for the work they had done. He failed to so meet them. They immediately resorted to the general delivery, though there was no understanding with or advice from Clark to that effect, and each claims to have received separate letters from Clark, inclosing their wages in the form

of express company money orders (one of which, at least, is admitted to have been raised), with no explanation as to why the sender had failed to meet them in person, or why he could have anticipated that, in default of such meeting, they would inquire for letters from him.

[3] It is also to be considered that defendant testified that the letter to Wells inclosed a postal money order for $1, for the sending of which to Wells by Clark neither defendant nor Wells could rationally account then, and as to which the defendant offered no reasonable explanation on the trial. It is also to be considered that the two express company money orders, one of which was admittedly raised, were presented for payment at places other than the post office on which they were drawn and to persons theretofore unknown to the holders. It is also to be considered that the existence of Wells and Clark was supported only by the testimony of defendant, though two years had elapsed between the occurrence and the trial; also it is to be considered that the judge and jury in the court below had the advantage over this court of seeing the defendant and judging from his demeanor. If, as the plaintiff contended, there were no such persons as Wells and Clark, the inference is irresistible that defendant altered the money order himself, since there would then have been no other concerned in it. If Wells and Clark were actual persons, then, in view of the record, it was certainly for the jury to say whether they and the defendant were confederates, or whether or not the defendant's story of his innocent connection with them, and with the postal money order through them, was reasonable. If they concluded that he knowingly aided or assisted Wells or Clark, or both, to alter the money order, though the change was not made by him, he would be guilty of violating section 218, and could be held guilty under an indictment charging him as a principal, under section 332 of the Penal Code. We think, for the reasons assigned, that there is evidence in the record to support the verdict, and, that being true, within the rule laid down by the Supreme Court in the case of Crumpton v. United States, supra, we have no power to revise the verdict of the jury, upon this writ of error.

[4-6] The first assignment relating to the admission of evidence claimed to have been improper is based on the testimony of the Southern Express Company's agent at Macon that he recollected seeing defendant at Macon in the early forenoon of December 26, 1914, "definitely, because a few days after that I was called to Atlanta to testify against this man, Dean, for raising a Southern Express Company money order." It is contended that the mention of the case against defendant in the state court was prejudicial to the defendant in this case. The witness, to fortify his identification of the defendant on trial with the person he saw in Macon on December 26, 1914, was, however, entitled to state on what other occasion thereafter, and before the trial in the court below, he had again seen the defendant. For this purpose it was proper for him to testify that he again saw defendant in the state court when on trial there. If his language implied that Dean was guilty of the charge on which he was there tried, which seems doubtful, the objection was not made upon that ground, but upon the ground that the evidence was immaterial, and the court would doubtless have cor-

rected any such implication, if its attention had been directed to it. The error, if any, in the admission of this evidence, was cured by the subsequent testimony of the defendant himself with reference to his former trial in the state court.

[7] The second assignment, relating to matters of evidence, is based upon the court's permitting the original application for the postal money order to be given in evidence. The prosecution being based on the alleged alteration of the money order, it was competent for the government to introduce the application, upon the authority of which it was issued, as part of the res gestæ of the transaction, and without first proving that the application was in the handwriting of the defendant on trial.

[8-11] The third assignment of error is based on the admission in evidence of the memorandum book, which the defendant took from his pocket and surrendered to the arresting officer, together with the express company's money order, at the time of his arrest. The book was submitted to the jury for two purposes: (1) As evidence tending to show that defendant was in Macon on December 26, 1914; and (2) for the purpose of forming a basis of comparison of the handwriting of the defendant with the handwriting on the application for the postal money order. The defendant objected to it for all purposes, and asked the court to limit its effect, so as to exclude it as a basis of comparisons, and excepted to its admission generally and to the refusal of the court to so limit it.

The evidence with relation to it consists in the undisputed fact that defendant had it in his pocket when arrested; in the character of the book itself, and of the entries contained in it, and of the defendant's denial that the book was his, or the entries in his handwriting, and of his explanation of how he came by it. The contention of the defendant is that the fact that the book was in his possession was evidence neither (1) that it was his, nor (2) that, if his, the entries were in his handwriting.

As to the first point, we think that possession in a case like this should be considered prima facie evidence of ownership, so as to shift the burden of showing the contrary to the defendant, found in possession. The general rule in civil cases is that possession is some evidence of ownership. In criminal cases, where the defendant's evidence is not constitutionally available to the government, the need for and reason of the rule is more evident. If there is nothing on the face of the article that negatives the presumption of ownership, arising out of possession, we think the proper rule to be that the jury is authorized, if they see fit, to infer ownership from the fact of possession unexplained. The explanation, when given, and its reasonableness, is a question for the jury, and does not affect the admissibility of the evidence, unless it shows without conflict that the ownership was elsewhere than in the possessor. The inference of ownership would be strengthened, when the article was surrendered voluntarily by the possessor and without denial of ownership, and when it was, like a pocketbook or a diary, of a kind ordinarily carried on the person of the owner, as was true in this case. We think the inference of ownership might have been drawn in this case from the possession of the memorandum book. If it was de-

fendant's book, then the entry, "Macon 45 Sat. 12/26," was, at least, slight evidence that the owner of the book was in Macon on December 26, 1914, which was Saturday in that year. For this purpose, the book was admissible.

[12] The court below also permitted the jury to consider it as a basis of comparison as the defendant's handwriting. This implied that it was proven to be in the defendant's handwriting. The act of Congress approved February 26, 1913 (37 Stat. 683), provides that in any proceeding before a court or judicial officer of the United States, where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis of comparison by witnesses, or by the jury, court, or officer conducting such proceedings, to prove or disprove such genuineness. There was no evidence of the identity of the writer of the entries, other than the character of the book and the fact that it came from the person of the defendant. The defendant contends that no inference of authorship can be indulged from these facts. It is certainly true that mere possession of a writing does not necessarily imply authorship. Letters addressed to the possessor would be inferred to be in the handwriting of another than the possessor. The room for such an inference depends upon the character of the book or document containing the writing. When the book containing the entries is a personal memorandum book, such as the owner customarily keeps in his own handwriting, such as a diary or an order book, or a memorandum of a personal itinerary, we think the character of the book and the custom of the owner of such a book to write the entries in it himself circumstances sufficient to go to a jury, and from which they may infer, if satisfied of it, that the owner or possessor of the book made the entries in it. The principle should apply only to the class of documents or books which are customarily and of common knowledge kept personally by the owner. The original memorandum book, introduced in the court below, has been sent up to this court, and an inspection of its contents and entries and of the book itself convinces us that it was of this class, and that the court did not err in refusing to restrict the purpose of its use by the jury, so as to exclude it as a basis of comparison of defendant's handwriting.

The case of McCombs v. State, 109 Ga. 496, 34 S. E. 1021, concerns the finding of two letters on the accused, and it does not affirmatively appear from the report of the case that they were letters of such a nature as would have customarily been written by the possessor. The case of Van Sickle v. People, 29 Mich. 61, concerns a diary, and would seem to oppose the view we have taken. Every case must depend on its own facts, so far as those facts depend upon the nature of the document and the circumstances of its possession by the accused. Handwriting, admitted to be used as a basis of comparison under the act of Congress, is not required to be proven genuine in any other way than is any other document offered in evidence. Proof of genuineness, under the act of Congress, may arise from inference, providing the inference is convincing beyond a reasonable doubt, when the case is a criminal one. Direct evidence is a mode, but not the exclusive mode, of proof. Inference from the admitted facts that only one person had ac-

cess to a paper, originally blank, and on which writing was afterwards discovered, that such person was the writer, would be irresistible and sufficient. We do not think it can be said that the genuineness of a writing, for use as a basis of comparison under the act of Congress, must be proven by any peculiar mode of proof, or that it cannot be inferred from possession, where the circumstances and character of the possession and of the instrument itself are persuasive enough of its authorship. The defendant's constitutional privilege of refraining from giving evidence against himself by word of mouth, or by furnishing specimens of his handwriting, is an additional reason for not construing the act of Congress so as to require a different degree or kind of proof than that ordinarily required to prove the genuineness of handwriting.

[13] If the memorandum book, as claimed by defendant, was Clark's, and in his handwriting, it was properly admitted, as there was evidence tending to show that Clark and the defendant were confederates, and that defendant may have knowingly assisted Clark to alter the money order, though Clark applied in person for it. The defendant could have been convicted as a principal under the indictment for so knowingly assisting. Penal Code, §§ 218 and 332. It was competent to offer the memorandum book as a basis of comparison with the handwriting of the application, whether the handwriting of each was that of Clark or that of the defendant.

[14] The last assignment, relating to the admission of evidence, is based upon the admission of the envelope, letter, and post office money order, on which the prosecution is based. The evidence as to them consists of the statement of the witness Vickery that they were turned over to him, according to his best recollection, by Brazelton, who, according to his best recollection, was in charge of the defendant, while he was conveyed to the station in the patrol wagon, on the morning after defendant's arrest, and that of the defendant himself, who testified that he saw them for the first and last time in the possession of Wells at the Atlanta post office, on the evening of Saturday, December 26, 1914, at 6 p. m. The defendant, according to his own admission, had previous to his arrest seen the documents. His limitation of his connection with them to sight, while in the possession of another, may not have found credit with the jury. Wells was never arrested, was never in the patrol wagon, or in charge of Brazelton, and had no opportunity to confer possession of the documents on Brazelton. Possession of them, by the defendant's testimony, once lay in a sense with Wells and defendant. The defendant had ample opportunity to place Brazelton in possession of them. Wells had none. The documents are traced to the possession of Brazelton, and shown to have been produced on the trial from it. We think this justified the action of the court in admitting them in evidence.

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

BATTS, Circuit Judge (dissenting). If in a criminal case it is claimed that the verdict is against the weight of the evidence, it is within the discretion of the trial judge to determine whether it shall be set aside, and his action will rarely be reviewed on appeal. If,

however, there is an absence of conflict in the testimony, or if, assuming the truth of all the evidence adverse to defendant, the evidence is insufficient to establish his guilt, a failure of the trial judge to direct a verdict, or to set aside a verdict of guilty, is error for which the judgment should be reversed. The guilt of the defendant should be established by competent evidence beyond reasonable doubt, and to permit a verdict based upon evidence from which guilt cannot be inferred is to approximate an error of law.

The defendant in this case was convicted, and the District Judge refused to set aside the verdict. All of the facts adverse to the defendant may be thus summarized: (1) He was at Macon, Ga., on December 26, 1913. (This fact he denied.) (2) On that day an application for a money order for $1 was made by a person signing his name M. M. Clark; payee, Charles A. Wells. (The postmaster testified that the application was for $1.50.) (3) The money order was issued in accordance with the application. (4) At 6 o'clock defendant saw Charles A. Wells at the post office at Atlanta, with the money order for $1 in his possession. (5) The defendant was arrested between 5 and 9 o'clock on that day. (6) He was taken to the jail in a patrol wagon. (7) At the time of his arrest he delivered to the arresting officer a small book, originally a blank book, in which was writing, and a letter, which purported to be signed by M. M. Clark, to the effect that the writer had sent to the defendant an express money order, the envelope postmarked "Macon." (8) The book, application for money order, and money order said to have been raised were introduced in evidence.

In addition to these facts, either proved satisfactorily or assumed to be true for the purposes of this opinion, the witness Vickery testified that, at a date which, to the best of his recollection, was the 27th of December, 1913, he received, to the best of his recollection, from one Brazelton, who, to the best of his recollection, was in charge of the prisoner while he was in the patrol wagon after arrest, the money order. There was no evidence as to the condition of the money order at the time it was received by him, and no evidence that it was in the same condition at the time of trial as when he first saw it.

All the other evidence in the case was either favorable to the defendant, or was without probative force. It is detailed in the opinion of the court. The facts summarized are, of course, insufficient to establish the guilt of the defendant. In addition to this, however, the jury had before them the handwriting in the application, in the money order, and in the book given up by defendant. There was no expert testimony with reference to handwriting. An examination of the book referred to suggests the possibility that the entries were in the hands of more than one person. The jury, however, may have concluded that all of the writing in this book, the application for the money order, and the word "twenty," assumed to have been inserted in the money order after issue, were in the same handwriting. Assuming the handwriting the same, facts established and assumed are still insufficient proof of the guilt of defendant.

There is no proof that any of the writing was in the hand of the defendant. To sustain the conviction this process is indulged: The

book is a memorandum book found in possession of defendant; it is therefore his book; it is his book and has writing in it; the writing is therefore in his hand. From possession, ownership is inferred; from ownership, handwriting is inferred; from similarity of handwriting, guilt is inferred; or, if guilt is not inferred from the handwriting, it is assumed from facts entirely insufficient as proof. Among all the inferences and assumptions there is one presumption that should not have been ignored—the innocence of the defendant.

The book used as the basis for comparison of handwriting was a small pocket blank book, belonging, defendant testified, to M. M. Clark. On alternate pages throughout the book was writing in ink, as follows:

Donin Adr. Co. 23
Norfolk, Va. Lumberton, N. C.
To
F. 246. A Burt
no blanks. 6 qts. $1.00
.15
.85

There were a number of names and addresses of individuals. There were in ink two lists of names of cities with dates following, as:

Waycross 15 Thurs; Maccon 45. Sat 12/26; Atlanta 160. Tues; Lynchburg, 35 Sat 1/16; Memphis 140 Sat 2/6.

The book was primarily introduced to establish that the defendant was in Macon on December 26th. It was no more proof of that fact than of the fact that he was at Lynchburg on the 16th of January, when, according to the testimony, he was in jail at Atlanta. If, however, it was not erroneous to introduce the book as evidence of something which it had no tendency to prove, its use by the jury should have been confined to that purpose, when objection was made to its use as a basis for the comparison of handwriting.

The federal law has liberalized the rule with reference to the standard to be used in comparison of handwriting, but it is still necessary that the standard be proved or acknowledged. This requirement has not been met. The only authority brought to our attention distinctly so holds. Van Sickle v. People, 29 Mich. 61.

If the view expressed to the effect that, where the evidence against the defendant is accepted as true, but is insufficient to establish guilt, an appellate court should reverse the action of the trial judge in refusing to set aside the verdict of guilty, is erroneous, this case should, nevertheless, be reversed for the error in permitting the use of the memorandum book as the basis for a comparison of handwriting.

Witnesses for the government, over the protest of earnest and capable attorneys appointed by the court to defend the accused, injected into their testimony the fact that defendant had been convicted of raising an express money order. It may be suggested that any resulting error was cured by the fact that defendant felt impelled to, or did thereafter, make a statement concerning this conviction. But, whether there was error or not, the fact of conviction, while it did not prove the present charge, doubtless had much effect in inducing

a verdict inadequately supported by the evidence. Defendant was a stranger, without friends, without funds, with a prison record. The conditions peculiarly called for care on the part of the prosecuting officers and the court in the preservation of his rights; and few rights are more substantial than that which arises from a presumption of innocence until guilt is established by competent evidence beyond a reasonable doubt.

I dissent from the judgment of affirmance.

UNION STOCKYARDS BANK OF WICHITA, KAN., v. HAMILTON et al.

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

No. 3015.

1. COURTS ⟸366(1)—PRECEDENTS—FEDERAL COURTS.
The construction of a state statute by the highest court of a state is a binding precedent, which will be followed by the federal courts.

2. CHATTEL MORTGAGES ⟸90—REGISTRATION—"TRUE" COPY.
Under Gen. St. Kan. 1909, § 5224, declaring that every chattel mortgage or conveyance intended to operate as such, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing mortgaged, shall be absolutely void as against the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property is at the time, a copy of a mortgage of cattle, which described the animals as 74 head of coming two year old native steers, 90 per cent. red, balance mixed colors, average weight about 680 pounds, branded W on right hip, which omitted the letter W, though reciting that they were branded on the right hip, is a true copy of the mortgage, the expression not requiring a literal copy, but one substantially true, and, where duly deposited with the register of deeds, will give the mortgagee priority over subsequent purchasers in good faith, the description of the copy being sufficient to enable an indentification of the cattle.

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

3. CHATTEL MORTGAGES ⟸282—FINDINGS—INCONSISTENT FINDINGS.
In a suit by a chattel mortgagee of cattle to enforce the mortgage against a purchaser of the cattle, the lower courts found that the cattle covered by the mortgage were branded, that they were kept together and separate from other herds until driven to a railroad station for shipment to the point where purchased by defendants, that they became mixed with other cattle before shipment, and probably further mixed after reaching the yards, and that only six of the cattle embraced in the complainant's mortgage and branded were among the cattle bought and shipped by defendants. *Held*, that there was no inconsistency in the findings, and complainant, being entitled to recover, could recover from defendants only for the value of such six cattle.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit by the Union Stockyards Bank of Wichita, Kan., against Fred Hamilton and others. From a decree for defendants, complainant

appeals. In part affirmed, and in part reversed, and decree entered for complainant.

The opinion of the trial court is as follows:

The plaintiff, under date of November 11, 1914, took the note of Roy E. Westbrook for $3,265.25, due at four months, with a clause for the precipitation of its maturity under certain conditions which have arisen. Payment of the note was secured by a mortgage on 74 head of cattle described in that instrument, and which were then in Westbrook's possession. Subsequently they were moved from place to place in Kansas, until at last they reached Peabody, in that state, whence, late in December, 1914, they with other cattle of Westbrook, or of one Fawley, were shipped to Kansas City, Mo., for sale in the open market there. As clearly shown by plaintiff's witnesses, Westbrook, Jeorg, and Gray, the 74 head had been kept separately from others, but when they reached the railroad station at Peabody, Kan., for shipment to Kansas City, they were mixed with other cattle of Westbrook or Fawley. It is by no means certain that there was not a further mixing up with other cattle at the yards in Kansas City. The 74 head had all been branded with the letter W on the right hip, while those with which they were mixed were either variously branded or not branded at all. One hundred and seventy-five head of cattle were purchased by defendants from commission houses in the open market in Kansas City on December 28, 1914, and were shipped thence to Owensboro, Ky., where they reached the defendant on December 30, 1914, and were then all paid for.

On January 15, 1915, this action in equity was brought by complainant, which claims that among the 175 head of cattle thus bought by defendants and shipped to them were the 74 head covered by the mortgage Westbrook had given to plaintiff, and recovery of their value by the mortgagee is sought upon that ground. It is alleged by the complainant in its bill that the mortgage was duly executed and duly recorded in the proper county and office in Kansas. The defendant's answer has controverted the material averments of the bill, thus putting upon complainant the burden of proving them. The principal questions to be considered grow, first, out of certain requirements of the laws of the state of Kansas, which phase of the case will be treated more in detail further along; second, out of the plaintiff's claim that 74 head of the cattle bought by the defendants were those which are covered by the mortgage; third, out of the claims by the defendants that they purchased in good faith 175 cattle in the open market for value then paid, that none of the cattle thus purchased were covered by the mortgage, and that no one of the defendants had any knowledge of the mortgage until about a week before this action was brought, nor had either of them any notice either actual or constructive of the mortgage; and fourth, out of the two other defenses made by defendants, to wit: (a) That the plaintiff's debt had been paid; and (b) that the plaintiff, by consenting that Westbrook might remove the cattle from the state of Kansas and sell them in the open market in another state, has estopped itself from asserting its claim against the defendants.

We think it quite unnecessary to notice further either the question of the payment of the debt or that of the alleged estoppel, inasmuch as we think there is no adequate testimony to support either of those defenses. The other questions involved have received our careful consideration after reading the diffuse and needlessly extensive testimony offered. Reduced to its essential features, we find that the testimony clearly establishes the following facts:

(1) That the 74 cattle covered by the mortgage were each and all branded on the right hip with the letter W, and not otherwise.

(2) That they were kept together, and separate from other herds, until about December 26, 1914, when, after being driven to the railroad station in Peabody, Kan., for shipment to Kansas City, Mo., they became mixed with other cattle before shipment, and probably further mixed with others after reaching the cattle yards in that city, and that, while so mixed with other cattle, the 74 head claimed by plaintiff to have been included in the 175 bought by defendants were bought by the latter and carried to Owensboro, Ky.

(3) That only 6 of the 74 head embraced in plaintiff's mortgage and branded

on the right hip with the letter W were among the cattle bought and shipped by the defendants.

(4) That the value of the 6 was $360.

(5) That at the time of the purchase neither of the defendants had any knowledge of the plaintiff's mortgage, nor had either of them, at or before that time, any actual notice thereof, nor any constructive notice thereof, unless the plaintiff's mortgage had previously been duly and properly recorded in Kansas in such manner as the laws of that state require in order to bind innocent purchasers in good faith, without notice.

(6) That the defendant paid full value for the cattle purchased by them in the open market, and were innocent purchasers thereof in good faith and for value.

It will be seen that the question of the right to recover the $360, value of the 6 head of cattle embraced in the mortgage, will depend upon the law of Kansas. The contracts, including, the mortgage between the plaintiff and Westbrook, were made in the state of Kansas, and must, of course, be considered with reference to the law of that state. The statutory provision about to be quoted must be construed according to any decisions of the Supreme Court of Kansas bearing upon the present case. These general propositions are perfectly well settled and understood.

The Kansas statute (Gen. St. 1909, § 5224) is as follows: "Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds, in the county where the property shall then be situated, or if the mortgagor be a resident of this state, then of the county of which he shall at the time be a resident."

The mortgage describes the cattle in this language: "Seventy-four (74) head of coming two (2) year old native steers. Ninety per cent. (90%) are reds; balance, mixed colors. Average weight 680 pounds. Branded W on right hip. All the above described cattle are now located on the northwest quarter of section 16, township 22, range 4 east, in Peabody township, Marion county, Kansas, where they are to remain during the life of this loan."

The copy of the mortgage filed in the office of the register of deeds of Marion county, Kansas, and which filing of a copy is the Kansas mode of recording such instruments, describes the cattle thus: "Seventy-four (74) head of coming two (2) year old native steers. Ninety per cent. (90%) are red; balance, mixed colors. Average weight 680 pounds. Branded on right hip. All of the above described cattle are now located on the northwest quarter of section 16, township 22, range 4 east, in Peabody township, Marion county, Kansas, where they are to remain during the life of this loan."

The copy of the mortgage filed being otherwise correct, the question is whether the latter is a "true copy" of the former—in other words, was the omission of the letter "W," used in connection with the word "Brand," a material omission, in view of the clause of the statute providing that (not merely a copy but) a "true copy" shall be filed in the office of the recorder of deeds in order that the mortgage shall be valid against a subsequent purchaser in good faith. The question, being whether the copy filed in this instance met the requirements of the law of Kansas, was ably argued, and many cases were cited to which we have no access, as the citations were not from official reports. Prominent among the authorities cited were Mills v. Kansas Lumber Co., 26 Kan. 575, Cattle Co. v. McLain, 42 Kan. 680, 22 Pac. 728, and Central National Bank v. Brecheisen, 65 Kan. 807, 70 Pac. 895.

In the first of these cases no allusion is made to the statute we are considering, there was no question as to the accuracy of the copy of the mortgage filed with the register, and consequently no construction of the statute was made. It was "an action of replevin," and the question discussed was the identity of the property sought to be recovered and the testimony heard thereon. The second case was also an action of replevin, and what we have said of the

first is almost equally applicable to the second. Neither affords present help. The third case was also an action of replevin, but one issue made was whether a true copy of the chattel mortgage on live stock had been deposited with the register of deeds in compliance with the Kansas statute. The original mortgage described the location of the property as follows: "Said cattle to be kept and fed on the Brecheisen farm, viz., southeast quarter of section 34, township 16, range 16, in Valley Brook township, Orange county, Kansas." The copy described the location in similar terms, except that it gave the township and range as number 11, instead of 16, as in the original. There was no range or township numbered 16 in Orange county. The court below rejected the copy as not a true copy, and this was held to be an error upon the ground that "without the township and range, the remainder of the description was sufficient to *identify the location* of the mortgaged property." (Italics ours.)

Undoubtedly the mistake as to the mere locality where the cattle were herded might well be regarded as "immaterial," because there was a plain and open way to find that locality and the cattle thereon in spite of the error, and from the court's opinion we get the teaching that "the use of the words 'true copy' in the statute relative to the recording of chattel mortgages does not require that a literal and verbatim copy of the instrument must be filed, but a copy substantially true, so that creditors of the mortgagor or subsequent purchasers in good faith may not be misled to their detriment." The substitution of the "11" for "16" in the copy in that case was not regarded as a material error under the facts there disclosed. The court held that it is not essential to a true copy that it shall be a literal copy. The mere misspelling of an ordinary word in the copy does not nullify the mortgage. So it was ruled that a copy "substantially" true is all that is required, doubtless meaning that, if the copy accurately covers the "substantial" things agreed to in the mortgage, it will suffice, and we gather from the opinion that it was the court's construction of the statute that, if the copy contained the "substantial" and "material" things, it would protect the mortgagee. While this is true, the Supreme Court of Kansas had not instructed us *how* always to determine what *is* a *substantial and material* error in the copy. It did not there supply the want we feel in this case. Consequently we are left to determine for ourselves the question now presented, and to do so in the way that strikes us as being right. In our case the error was not in giving the *place* where the cattle could be *found*, but in giving the brand by which they could *severally* be identified, whether found at the *place* named in the mortgage or elsewhere. The brand made definite and certain what, without it, would be doubtful and uncertain.

Many illustrative cases have been cited. A rule very applicable to this case is given in Ely v. Carnley, 19 N. Y. 497, where it is said: "It is important to creditors to know the amount of liens as well as their existence. Hence the act requires the filing of the instrument or of a true copy. A compliance with the act will give the creditor full information as to the property mortgaged, the amount of the debt or condition of the mortgage, and to what extent the property can be made available for the payment of his debt. When the paper filed fails to accomplish these purposes, it falls short of the requirement of the statute. In this case the paper filed did not show the amount of the debt. The referee, therefore, correctly held that it was not a true copy. The defendant's counsel insists that, as it was a mistake of the copyist and there was no fraud intended, the error in the copy should be disregarded. The statute will not permit such a construction. When a judgment creditor claims the property in hostility to the mortgages, the inquiry is: Has the mortgagee complied with the statute? If not, the statute makes his mortgage void. The cause of the omission is wholly immaterial, whether by accident or design. Any other rule would destroy the protection the Legislature intended to secure by the act. A trifling mistake in the copy filed might not vitiate, upon the principle that the law will not regard trifles. But the objects of the statute must be regarded, and any attempt at compliance, not attaining those, held a nullity."

In Johnson v. Des Moines Life Ass'n, 105 Iowa, 273, 75 N. W. 101, the court said: "It must be so exact and accurate as that, upon comparison, it can be

said to be a true copy, without resorting to construction. If, upon comparison, it may be said that the copy is conformable to the facts, and in accordance with the actual state of things appearing in the original, then it may be said to be a true copy; but if the differences are such that construction must be resorted to, to determine whether the meaning and proper effect of the copy are the same as the original, then it cannot be said to be a true copy."

The Kansas statute intended in the first place to protect the mortgagee, and did this by giving him leave, when taking a mortgage (which, of course, was of itself good between him and his debtor), if he wanted it to protect himself against creditors of the mortgagor or subsequent purchasers in good faith, to file a "true copy" thereof in the office of the register of deeds. If a mortgagee wants the benefit of the statute, he must comply with its conditions. The duty is upon him, because he is the only person who can or should do it, as he is the one to be benefited. In that way he can save himself. If he neglects it, he, and not the innocent purchaser, loses by his carelessness.

Here the subject of the mortgage was a herd of red native cattle, about two years old. Under such conditions all red two year old cattle will look pretty much alike. If they remain separate from other cattle in a given locality or field, they can be easily identified by that fact; but they may be moved about or be sent to market or other locality, and thus comes the need of care. It has no doubt been the judgment of cattlemen generally that branding is the best and most reliable means of identification, for a long period if the brand is in the skin, and for a shorter time if on the hair. Brands are as various as the taste of the men who have them put on. Here the brand was the letter W, and it was put upon the right hip of each one of the 74 cattle covered by the mortgage. The place where the cattle were located was described in the mortgage. In general terms, the age, weight, and color of the cattle were stated; but these terms were general, and might be equally as well applied to thousands of other similar cattle. The specific and really the distinguishing mark upon these cattle was the brand in the form of W on the right hip. The other characteristics of age, weight, and color might be applied promiscuously, and might change; but the brand was specific and distinguishing. If one man had taken the original mortgage, and another had taken the copy left with the recorder, and had separately gone to the cattle after they had been removed from the locality named in the mortgage and mixed with others, would they have equal chances to select and accurately identify the 74 head? is a most important inquiry. Let this supposition follow the cattle to Kansas City; would not the purchaser with the copy have selected just as readily cattle with any sort of brand on the right hip, especially if they looked better? He certainly would have nothing to lead him to the cattle with the W on the right hip, any more than he would have to lead him to the miscellaneous lot of brands on the right hip of the cattle when they go to market. Hence his means of identification would be imperfect, and would lead to the detriment of the purchaser.

We think these suggestions clearly demonstrate that the brand W on the right hip, as stated in the mortgage, was a substantial and material part of the description, and that the omission of the W from the copy of the mortgage rendered it not a true copy within the meaning of the Kansas statute. It was clearly calculated to mislead. We think the following sentence in the brief of defendant's counsel is very suggestive. He says: "At the outset, it will be seen that the copy is ambiguous. From the failure to fill the blank space left for the brand, one might naturally infer that no brand was intended. On the other hand, one might conclude, from the fact that this space was left blank, that the parties meant to convey the idea that the cattle *were* branded on the right hip, but that there was a variety of brands, and that they did not, for this or other reason, intend to describe the particular kinds of brands."

If the mortgagee would protect himself, he must at his peril see to it that at least a substantially accurate copy is left with the recorder—that is to say, a copy from which nothing material or substantial is omitted. When the mortgagee has done that he is safe. Otherwise (as all cattle are likely to be sold) innocent purchasers in good faith might be deceived, as in this case they would have been, had they looked at the copy only. They could not, with the

copy only, have looked over the 150 cattle of Westbrook or Fawley at Peabody, and have picked out those that were mortgaged, when seeing, as they would, various brands on the right hip on other cattle in the bunch. Still more difficult might it have been if picking them out had been attempted at Kansas City.

After very careful study of the subject, we have concluded, first, that none but 6 of the cattle claimed were covered by complainant's mortgage; and, second, that as the so-called copy of that instrument filed with the register of deeds was not a "true copy," within the language, meaning, and purpose of the statute, the defendants, who are innocent purchasers in good faith and for value of the 6 cattle last referred to, occupy a better position than does the plaintiff, which owed it to itself to see that the copy was accurate if it desired to be protected against such purchasers. As to the defendants, the mortgage is void under the law of Kansas.

We have not gone into the question of the conspiracy alleged against Westbrook, Fawley, and others, but we are not at all sure that they stand in any better attitude than that imputed to them. If plaintiff was swindled in this instance, they did the job.

It results that the bill should be dismissed, with costs.

E. B. Anderson, of Owensboro, Ky., for appellant.

W. P. Sandidge, of Owensboro, Ky., for appellees.

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

McCALL, District Judge. This is a suit in equity to enforce a chattel mortgage. The court below denied the relief prayed and dismissed the bill, and the defendants appealed. Several errors are assigned, but only two were urged at the hearing. One presents a question of law, the other a question of fact. We shall consider them in the order stated.

The question of law arises on the construction of section 5224, chapter 82, article 2, of the General Statutes of Kansas of 1909, which is as follows:

"Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated, or if the mortgagor be a resident of this state, then of the county of which he shall at the time be a resident."

We are concerned now only with the words "a true copy thereof." The Supreme Court of Kansas, in the case of Central National Bank of Topeka v. Brecheisen, 65 Kan. 807, 70 Pac. 895 (a case very similar to the present one), in considering the statute in question said:

"The use of the words 'true copy' in the statute relative to the recording of chattel mortgages does not require that a literal and verbatim copy of the instrument must be filed, but *a copy substantially true*, so that creditors of the mortgagees or subsequent purchasers in good faith may not be misled to their detriment." (Italics ours.)

And the court held that the copy of the instrument deposited with the register of deeds, which described the live stock covered by the mortgage as being in township 11, range 11, was a substantially true

copy of the original, wherein the stock was described as being in township 16, range 16, and met the requirements of the statute. To like effect are Gillespie v. Brown, 16 Neb. 457, 20 N. W. 632, Payne v. King, 141 Mo. App. 246, 124 S. W. 1066, and National Register Co. v. Slater, 156 Mo. App. 733, 137 S. W. 13, in construing similar statutes in those states.

[1] The construction and interpretation of a statute of a state, made by the highest court of that state is binding on federal courts. Duncan v. McCall, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219; Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; Norton v. Shelby Co., 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178. In so far, therefore, as the construction of section 5224 of the Statutes of Kansas and its application made in Central National Bank v. Brecheisen, 65 Kan. 807, 70 Pac. 895, is applicable here, we must follow it.

[2] The undisputed facts relating to the question now being considered are substantially as follows: On November 11, 1914, one Westbrook executed and delivered to the plaintiff a chattel mortgage, on 74 head of cattle, to secure the payment of a promissory note of even date for $3,265.25, due March 11, 1915. It carried a clause providing for the precipitation of its maturity under certain conditions which arose. An instrument purporting to be a true copy of the original mortgage was filed with the register of deeds for Marion county, Kan. Westbrook, the mortgagor, resided in, and the cattle mortgaged were in, Marion county. The cattle were described in the original mortgage as follows:

"Seventy-four (74) head of coming two (2) year old native steers. Ninety per cent. (90%) are red, balance mixed colors. Average weight about 680 pounds. Branded W on right hip. All of the above-described cattle are now located on the northwest quarter of section 16, township 22, range 4 east, in Peabody township, Marion county, Kansas, where they are to remain during the life of this loan."

As a part of the description in the original mortgage, it is stated that the cattle were "branded W" on the right hip. In the copy filed with the register of deeds the letter W does not appear, and the sentence reads "branded on the right hip."

Considering in its entirety the description of the cattle in the original, the question arises—is the copy that was filed a substantially true copy of the original, notwithstanding the letter W does not appear therein, "so that creditors of the mortgagor or subsequent purchaser in good faith may not be misled to their detriment?"

The question of "true copy" aside, we think the description given in the copy filed is sufficient to have enabled one of ordinary intelligence and reasonably conversant with the cattle business to have readily found and identified the cattle intended to be covered therein, at the date of its execution, and if the description of the property is sufficient to give notice of the identity of the cattle to one who had actual knowledge of the contents of the mortgage, then it is, when registered, sufficient constructive notice to strangers.

In Gillespie v. Brown, supra, the Supreme Court of Nebraska, in considering a very similar statute, said:

"The evident object and purpose of the statute in requiring a copy to be filed is to give notice of the existence of a mortgage, together with its terms and conditions"

—and this for the information of creditors, purchasers, and lienholders.

We are of the opinion that the discrepancy was immaterial, and that the instrument filed with the register of deeds was a true copy of the original mortgage within the meaning of the statute. This conclusion leads to the result that the plaintiff is entitled to a decree for the value of all the cattle purchased by the defendants, branded W on the right hip, that were in their possession at the time the suit was brought.

[3] It is alleged in the bill that there were 74 head of cattle so branded, and covered by the mortgage, in the possession of the defendants. This allegation is denied in the answer, and much evidence was taken on the issue. Judge Evans, in his finding of facts, said:

"(1) That the 74 cattle covered by the mortgage were each and all branded on the right hip with the letter W, and not otherwise.

"(2) That they were kept together, and separate from other herds, until about December 26, 1914, when, after being driven to the railroad station in Peabody, Kan., for shipment to Kansas City, Mo., they became mixed with other cattle before shipment, and probably further mixed with others after reaching the cattle yards in that city, and that, while so mixed with other cattle, the 74 head claimed by plaintiff to have been included in the 175 bought by defendants were bought by the latter and carried to Owensboro, Ky.

"(3) That only 6 of the 74 head embraced in plaintiff's mortgage and branded on the right hip with the letter W were among the cattle bought and shipped by the defendants.

"(4) That the value of the 6 was $360."

It is insisted for the plaintiff that the third finding is inconsistent with the findings 1 and 2. We think the finding not fairly subject to this criticism. The court found that the 74 cattle covered by the mortgage were all branded W on the right hip; they became mixed with other cattle, and the 74 head claimed by plaintiff to have been included in the 175 bought by defendant were so bought and carried to Owensboro, Ky., but that, of the 74 so bought by defendants, only 6 in fact were branded W on the right hip.

We agree with the lower court in its finding on this issue, and to this extent the decree below is affirmed; in other respects it is reversed, and a decree will be entered for the plaintiff for $360, the value of the 6 head of cattle, and costs.

NATIONAL ELEVATOR CO. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 6, 1917.)

No. 4795.

1. COMMERCE ⊂⊃89—INTERSTATE COMMERCE COMMISSION—ACTION FOR EXCESSIVE CHARGE—JURISDICTION OF FEDERAL COURT.
Where the claim of a shipper against a railroad company to recover freight paid involves the construction of the tariff schedule, to determine what rate applied to the shipment, and not any question of the reasonableness of rates, the jurisdiction of the Interstate Commerce Commission is not exclusive, but an action may be maintained in this instance in a District Court.

2. CARRIERS ⊂⊃30—RAILROAD TARIFFS—CONSTRUCTION—INTERMEDIATE STATIONS.
Tariff Circular 18A of the Interstate Commerce Commission, effective March 31, 1911, provides that a tariff shall contain an alphabetical index of the points from and to which it applies, and, further, that "this is not to be understood as prohibiting the incorporation in a tariff of a rule for the affirmative and definite application of the rates or fares named in that tariff to or from points not indexed, and which are distinctly intermediate on the same line with points that are indexed." A tariff published by a railroad company provided that "between stations * * * rates to or from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named." *Held*, that such provision must be construed in connection with the circular under which it was issued, and that it had no application to points which were indexed, and to or from which specific rates were named.

3. CARRIERS ⊂⊃30—TARIFFS—"INTERMEDIATE."
In a railroad tariff, fixing rates to and from stations named, and also providing for the rates to apply to "intermediate stations," the word "intermediate" refers to stations between those named.

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action at law by the National Elevator Company against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed

Harold G. Simpson, of Minneapolis, Minn. (Lancaster, Simpson & Purdy, of Minneapolis, Minn., on the brief), for plaintiff in error.

F. W. Root and N. J. Wilcox, both of Minneapolis, Minn., and J. N. Davis and H. H. Field, both of Chicago, Ill., for defendant in error.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

SMITH, Circuit Judge. The defendant in the District Court, which is also the defendant in error, is a corporation organized under the laws of Wisconsin, and was engaged in interstate commerce and maintained a system of railroads extending generally from Chicago, Ill., to the Pacific Coast. The line extends from the eastern boundary of South Dakota, south of the south line of North Dakota, to a point about 100 miles east of the Montana line, and crosses into North Dakota and proceeds west to Montana. At Andover, S. D., it has a branch which extends north into North Dakota to Harlem, about 55½

miles long. The first station south of Harlem is Cogswell, at which point the branch is crossed by the line of the Minneapolis, St. Paul & Sault Ste. Marie Railway, commonly known as the "Soo Line." Cogswell, N. D., is between 7 and 8 miles north of Brampton, N. D., and between 12 and 13 miles north of Newark, S. D., all of which are on the defendant's branch line. The plaintiff in the District Court, which is also the plaintiff in error, is a corporation organized under the laws of Minnesota engaged in buying, shipping, and selling grain, and owns and operates among others an elevator at Newark, S. D.

The complaint alleges that the plaintiff shipped 72 carloads of wheat, 4 of barley, 1 of oats, and 2 of flax seed from Newark, S. D., to Duluth, Minn.; that the defendant took and carried said grain under the agreed and lawful rates for such transportation, as shown by the published tariff of the defendant; that the company's published tariff fixed the rate for all of said shipments, except flax seed, at 14 cents per 100 pounds and upon flax seed at 15 cents for the same quantity, but the defendant compelled the plaintiff to pay 15 cents per 100 upon all said grain, except flax seed, and 19½ cents per 100 upon the flax seed; that the company extorted from plaintiff upon said shipments in excess of the proper rates the sum of $601.99 on or before the 1st day of December, 1913; that plaintiff has demanded refund of said sum, which has been refused, and the plaintiff asks judgment for $601.99 and interest, costs, and disbursements.

The answer alleges that the defendant charged plaintiff for transportation of the grain referred to its lawful tariff rates, and denies that plaintiff has ever paid more.

The parties filed a written stipulation, waiving a jury, and the cause was tried to the court, and a judgment was rendered for defendant, and the original plaintiff sued out this writ of error.

It appears the tariffs filed by the defendant, so far as material, were substantially as follows:

From	To	Rates in Cents per Hundred Pounds.	
		Flax Seed	Wheat, Barley and Oats.
Cogswell, N. D.	Duluth	14	14
Brampton, N. D.	"	14	14
Newark, S. D.	"	19½	15

Attached to the tariff is the following:

"Between stations on the C., M. & St. P. Ry. rates to or from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named."

The sole question is whether the last provision is applicable to the rates from Newark to Duluth, and thus its rates are fixed the same as from Brampton, notwithstanding the rates specifically fixed from Newark in the table.

[1] The defendant insists that the case should have been brought before the Interstate Commerce Commission for reparation, and the District Court had no jurisdiction. It is expressly stated in plaintiff's

brief that it is not claimed that the rate charged was illegal under the eighth section of "An act to create a Commerce Court, and to amend the act entitled 'An act to regulate commerce,' approved February 4, 1887, as heretofore amended, and for other purposes" (Act June 18, 1910, c. 309, 36 Stat. 539, 547 [Comp. St. 1916, § 8566]); and it may be added that there is no claim that the rates charged are in and of themselves unjust, unlawful, unjustly discriminatory, preferential, or prejudicial. The plaintiff simply contends that the general clause in question fixed the rates lower than the specific rates given; that there were two rates fixed for the same service, and the shipper is entitled to the benefit of the lower rate.

Under such circumstances, we think that the District Court had jurisdiction to construe the tariffs, and determine what rates were applicable under them to given shipments under section 9 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379, 382 [Comp. St. 1916, § 8573]), and section 22 of the same act (24 Stat. 379, 387 [Comp. St. 1916, § 8595]). Pennsylvania R. R. v. Sonman Coal Co., 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188; Penna. R. R. Co. v. Puritan Coal Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; Hite v. Central R. of New Jersey, 96 C. C. A. 326, 171 Fed. 370 (this decision was by the Circuit Court of Appeals of the Third circuit); Barrett v. Gimbel Bros., 141 C. C. A. 379, 226 Fed. 623 (this opinion was by the same Circuit Court of Appeals, and affirmed the case as reported in the District Court under the title of Gimbel Bros. v. Barrett [D. C.] 215 Fed. 1004); National Pole Co. v. Chicago & N. W. Ry. Co., 127 C. C. A. 561, 211 Fed. 65 (opinion of the Circuit Court of Appeals of the Seventh Circuit). The last two cases seem to us to be clearly in point and decisive.

The following state court cases are cited to sustain the same position: Hardaway v. Southern Ry. Co., 90 S. C. 477, 73 S. E. 1020, Ann. Cas. 1913D, 266; Kansas City Southern Ry. Co. v. Tonn, 102 Ark. 20, 143 S. W. 579; Southern Pacific Co. v. Fry & Bruhn, 82 Wash. 9, 143 Pac. 163; Western, etc., & Co. v. White Prov. Co., 142 Ga. 246, 82 S. E. 644; Eastern Ry. Co. v. Littlefield (Tex.) 154 S. W. 543; Mulberry Hill Coal Co. v. Illinois C. R. Co., 257 Ill. 80, 100 N. E. 151. But, inasmuch as this is a question of federal law, we rest our opinion wholly upon the federal cases cited. We do not mean to hold that the Interstate Commerce Commission did not have concurrent jurisdiction. Laning-Harris Coal & Grain Co. v. St. Louis & San Francisco Railroad Co., 13 Interst. Com. Com'n. R. 148; Chicago, B. & Q. R. Co. v. Feintuch Co., 191 Fed. 482, 112 C. C. A. 126. But we do hold that the District Court correctly ruled it had jurisdiction.

[2] The questions must therefore be decided whether the specific rates fixed from Newark, S. D., to Duluth, were in conflict with the general provision quoted, and whether under the general provision Newark was entitled to a lower rate, and, it being conceded that the specific rates fixed from Newark to Duluth were collected, whether the plaintiff is now entitled to recover. It will be conceded that, if the tariffs have two distinct and conflicting rates for the same shipment, the shipper is entitled to the benefit of the lower of these rates. It is

well understood that railroads accept shipments from switches and sidings not treated as stations. A solution of the questions in this case will largely depend upon what was meant by "intermediate stations," as used in the note in question.

Webster's International Dictionary defines "intermediate" as:

"Lying or being in the middle place or degree; between extremes or limits; coming or done between; intervening; interjacent; as, an intermediate space; intermediate colors. Something intermediate; a term, member, or quality intervening between others of a series. To come between; to intervene; to interpose."

The Century Dictionary defines it as:

"Come between; act as a mediator, that is, between; to act intermediately; intervene; interpose. I; a. Situated between two extremes; coming between; in either position or degree; intervening; interposed; generally followed by between when the extremes are mentioned, as an intermediate space; intermediate obstacles."

The word "intermediate" is not given a legal meaning in any law lexicon, and we have found no cases which define it in approximately the same sense here used, except Davis & Hooks v. Atlantic Coast Line R. Co., 145 N. C. 207, 59 S. E. 53; Wall-Huske Co. v. Southern Ry. Co., 147 N. C. 407, 61 S. E. 277; Brooks Manufacturing Co. v. Southern Ry. Co., 152 N. C. 665, 68 S. E. 243; Hollingworth v. State of Ohio, 29 Ohio St. 552.

There is a matter not yet stated which tends to elucidate it. Tariff Circular 18A, issued by the Interstate Commerce Commission, reissued effective March 31, 1911, provides:

"4. Tariffs in book or pamphlet form shall contain in the order named: * * * (d) An alphabetical index of points from which rates apply, and an alphabetical index of points to which rates apply, together with names of states in which located."

"34. Tariffs shall contain, in the order named: * * * Alphabetically arranged and complete index of points from which the tariff applies, and alphabetically arranged and complete index of points to which the tariff applies, together with the name of state in which located."

"64. * * * (Issued January 7, 1908.) Paragraph (d) of rule 4, and paragraph (c) of rule 34, provide that a tariff shall contain complete alphabetical indexes of the points from and to which it applies. This is not to be understood as prohibiting the incorporation in a tariff of a rule providing for the affirmative and definite application of the rates or fares named in that tariff to or from points *not indexed* and which are directly intermediate on the same line with points that are indexed."

This clearly gave authority to make such rates as prescribed in the note in question to or from points not indexed; but the points here in question, Newark and Duluth, were both indexed. "Expressio unius est exclusio alterius." In Merrill & Bro. v. I. C. R. R. Co., 36 Interst. Com. Com'n. R. 523, the Commission had before it a clause which read:

"The rate to apply from a point of origin or to a point of destination *not shown* herein which is directly intermediate with a point from or to which a specific rate is published will be the rate from or to the next more distant point from or to which a specific rate is published herein."

This was better language to convey the meaning now contended for by the defendant than that used by it in this case. The Commission, of course, held that that clause did not apply to places indexed. Conceding that that case was plainer than this one, and the language here chosen was not as clear as that chosen by the Illinois Central, we think that Newark, a point named in the tariff, was not an intermediate station within the meaning of the note.

It is notorious that the rates from the Pacific Coast to Chicago are many of them much lower than the rates over the same road from the intermountain country to Chicago. If we assume a similar note here added to the tariff from the Pacific Coast and intermountain points to Chicago under this clause, would every point where the rates are higher than they are from the Pacific Coast to Chicago be entitled to claim the Pacific Coast rates?

[3] It is manifest that the word "intermediate" refers to rates from points intermediate betweeen stations named, or intermediate between the extreme limits of the defendant's road, whether named or not. We have reached the conclusion that it refers to intermediate points between the stations named. There can be but one legal rate on a given commodity between two points. Laning-Harris Coal & Grain Co. v. Missouri Pacific Ry. Co., 13 Interst. Com. Com'n. R. 154

Plaintiff, therefore, could not recover, and the judgment of the District Court is affirmed.

UNITED STATES FARM LAND CO. v. JAMESON.

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

No. 4876.

JUDGMENT ⇐570(5)—RES JUDICATA—JUDGMENT OF DISMISSAL.

Under Gen. St. Minn. 1913, § 7825, which provides that "an action may be dismissed without a final determination of its merits * * * (3) by the court where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his cause of action or right to recover," and the established rule of practice thereunder in Minnesota, which by the conformity statute is made the rule of the federal courts in that state, an order of dismissal, without more, made on motion of defendant and over the objection of plaintiff, is not a final determination of the merits, and does not bar a second action; but a judgment entered by the court on a verdict for the defendant directed by the court, on the motion of defendant made at the proper time, determines the merits, and is a bar to a second action. At the close of plaintiff's evidence in the case defendant moved for a dismissal on the merits, which motion was opposed, and the court entered an order "that this action be and the same is hereby dismissed." Plaintiff brought error, and the case was contested in the appellate court and affirmed. *Held*, that the order made, under the statute and practice and as presumably intended by the court, did not determine the merits nor bar a second action; that defendant. not having sought its modification, but, on the contrary, having defended it through the appellate court, was bound by it as to its legal effect, and was not entitled to an injunction to restrain a second action against it on the same cause of action.

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

Suit in equity by the United States Farm Land Company against A. Y. Jameson. Decree for defendant, and complainant appeals. Affirmed.

O'Brien, Young & Stone, of St. Paul, Minn. (E. T. Young, of St. Paul, Minn., on the brief), for appellant.

M. H. Boutelle and A. M. Higgins, both of Minneapolis, Minn., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. This appeal challenges a decree of dismissal of a suit to enjoin the defendant, A. Y. Jameson, from prosecuting an action he brought against the United States Farm Land Company, a corporation, in the state of Arizona on September 16, 1915, on the same cause of action which he litigated in the action he brought against that company in Minnesota on January 24, 1912. The cause of action in each case is for the recovery of $214,000 for the breach of a contract. The Minnesota case was tried to a jury in the court below. After Mr. Jameson had introduced all his evidence and had rested, the Land Company made a motion to dismiss the action on the merits, and on May 22, 1912, the court ordered "that this action be, and the same is hereby, dismissed." A writ of error was sued out to reverse that judgment, it was affirmed on July 10, 1913 (Jameson v. United States Farm Land Co., 206 Fed. 889, 124 C. C. A. 549), and the petition for a rehearing was denied on January 28, 1914 (210 Fed. 885, 127 C. C. A. 495). The theory of the suit now in hand for the injunction is that the judgment of dismissal was a final determination of the merits of the first action, which rendered the issues therein res adjudicata and constituted a bar to the prosecution by Jameson of another action for the same cause, that the action he has brought in Arizona is in defiance and derogation of that judgment, and that the court below should issue its injunction against the prosecution by Jameson of his second action, in aid and enforcement of its judgment of dismissal of his first action.

According to the statutes of Minnesota and the rules of practice and proceeding in actions at law in the courts of that state, which prevail in such actions in the federal court below under the act of conformity (Revised Statutes, § 914 [3 U. S. Comp. Stat. 1916, § 1537]), the settled rule is that a judgment of dismissal on the motion of the defendant at the close of the plaintiff's evidence, against the latter's objection or protest, does not constitute a bar to another action by the plaintiff against the same defendant for the same cause, although a judgment of dismissal on a verdict for the defendant, directed by the court on the motion of the defendant made at the proper time, constitutes such a bar. General Statutes of Minnesota 1913, § 7825; Craver v. Christian, 34 Minn. 397, 398, 26 N. W. 8; Andrews v. School District No. 4, 35 Minn. 70, 71, 27 N. W. 303; McCune v. Eaton, 77 Minn. 404,

80 N. W. 355; Woods v. Lindvall, 48 Fed. 62, 70, 1 C. C. A. 37, 45; Hammergen v. Schurmeier (C. C.) 3 Fed. 77, 78, 79; Oscanyan v. Arms Co., 103 U. S. 261, 264, 26 L. Ed. 539; Board of Com'rs v. Home Savings Bank, 200 Fed. 28, 35, 118 C. C. A. 256, 263.

At the close of Mr. Jameson's evidence in the first action, therefore, the Land Company had the option to move, at the proper time, for a directed verdict and the consequent bar of a second action for the same cause, or for a dismissal and the consequent judgment thereon that would not constitute such a bar. It moved for a dismissal on the merits. If that motion was not the equivalent of a motion for a directed verdict at the proper time, the Land Company then elected to take a judgment that would not be a bar to a second action for the same cause. If, as is now asserted, that motion was the equivalent of a motion for a directed verdict, it imposed upon the trial court the duty to decide whether a judgment that should constitute a bar, or a judgment which should not constitute a bar, to another action, should be rendered upon the motion, and it decided, and entered neither a judgment on a directed verdict nor a judgment of dismissal on the merits, but its order was simply "that this action be and the same is hereby dismissed."

Through many years of practice as a lawyer in the courts of Minnesota, and many years of honorable service on the bench of the court below, the learned judge who made that order was perfectly familiar with the difference in the effect upon the second action for the same cause of this judgment of dismissal without more and a judgment of dismissal on a directed verdict, and there can be no doubt that he intended that the dismissal he ordered should not bar a second action. It is certain that by its terms the judgment he entered did not do so, and the Land Company, if reasonably diligent, could not have failed to know that fact, for it had moved for a dismissal "on the merits," and the court had refused such a dismissal, and had granted a mere dismissal without more, which, in its legal effect, did not bar another action for the same cause. Nevertheless the Land Company took no exception to the order or judgment. It made no motion to modify its form or effect. It sued out no writ of error to reverse or modify it; but from the day of its entry, on May 22, 1912, it strove through this court and the Supreme Court to sustain it as it was written until it had been finally affirmed. Thereafter, on March 21, 1916, for the first time, by the commencement of this suit for an injunction against the maintenance of a second action, it sought to transform that judgment of dismissal, which does not bar a second action, into a final determination of the issues of that action, which should have that effect. If there was any mistake or error of the court in the rendition of the judgment in question, the failure to move to modify it and to except to its entry, or to challenge it by writ of error, or otherwise, for nearly four years, discloses a striking lack of reasonable diligence on the part of the Land Company. If, on the other hand, as the presumption is, and as the court is confident the fact is, the court below, without mistake or misunderstanding, thoughtfully considered the motion of the Land Company and deliberately decided that it would not render a judgment

which should be a bar to another action for the same cause, and deliberately rendered a judgment of dismissal, which does not do so, there is no ground for the issuance of the injunction. In either case there is no equity in the bill of the complainant, and it was rightly dismissed.

The court has thoughtfully considered the arguments of counsel that the second action upon the same cause cannot be maintained under the statute and practice in Minnesota, because the merits of the case were involved, considered, and decided on the motion to dismiss the first action, and the authorities cited to the effect that a judgment of dismissal on a stipulation of the parties that such a judgment on the merits shall be rendered conclusively determines the issues presented by the pleadings in the action (Cameron v. Chicago, M. & St. P. Ry. Co., 51 Minn. 153, 158, 53 N. W. 199); that a judgment of dismissal, based on the pleadings, the trial of the cause, and upon the findings of fact and conclusions of law, is a judgment on the merits (Winnebago Paper Mills v. Northwestern Printing & Publishing Co., 61 Minn. 373, 63 N. W. 1024; Boom v. St. Paul Foundry & Mfg. Co., 33 Minn. 253, 256, 22 N. W. 538); that a judgment of dismissal of a suit in equity at the close of the plaintiff's case is a final decree on the merits (Worrell v. Kemmerer, 192 Fed. 911, 913, 114 C. C. A. 351, 353; Thomas v. Joslin, 36 Minn. 1, 3, 29 N. W. 344, 1 Am. St. Rep. 624); that the dismissal of a writ of mandamus on the merits is a bar to a subsequent proceeding for a like writ on the same ground (State of Minnesota v. Hard, 25 Minn. 460); that where, at the close of the evidence of both parties, a court, on motion for judgment "on the pleadings and evidence," grants the motion and renders the judgment without directing the jury to render a verdict, the judgment is conclusive, because the moving party was entitled on the evidence to such a direction, and the court had the power to render the proper judgment without consulting the jury (Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 232, 44 N. W. 2); that when, at the close of a trial, the court directed a jury to return a verdict for $1,262, and it did so, this amount was found by the court before the entry of the judgment to have been about $400 less than the amount actually due, and the court so found, and then rendered the judgment for the just amount, it had power to do so (Mouat v. Wells, 76 Minn. 438, 441, 79 N. W. 499); that in the case of the mere dismissal of an action the record furnishes no basis for review on appeal of the decision of the trial court upon either the facts or the law; and that where the trial is by the court it is error for the court to dismiss the action on the merits, without making findings of fact and conclusions of law, unless the evidence is such that it would not sustain a verdict or finding for the plaintiff (Tharalson v. Wyman, 58 Minn. 233, 235, 59 N. W. 1009; Herrick v. Barnes, 78 Minn. 475, 476, 81 N. W. 526, and other decisions less relevant to the question here at issue). They have, however, failed to persuade that the conclusion above announced is erroneous. None of the decisions rules that a second action between the same parties for the same cause cannot be maintained, where the first action is dismissed at the close of the plaintiff's evidence against the objection and protest of the defendant under the established rule of practice in Minnesota and this statute:

"Section 7825. *Dismissal of Action.*—An action may be dismissed, without a final determination of its merits, in the following cases:

* * * * * * * * * *

"3. By the court where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his cause of action or right to recover.

* * * * * * * * * *

"All other modes of dismissing an action are abolished. * * * In all cases other than those mentioned in this section, the judgment shall be rendered on the merits."

The first action in the case in hand was dismissed by the court under this statute at the close of the plaintiff's evidence, because he had failed to substantiate his cause of action, or right to recover. It is the judicial duty of a court, according to the rules and practice in the courts of Minnesota, to order such a dismissal when the plaintiff fails to prove any or all the essential facts of his cause of action by evidence sufficient to sustain a verdict in his favor. McCormick v. Miller, 19 Minn. 443, 446, 447 (Gil. 384); Volmer v. Stagerman, 24 Minn. 434; Merriman v. Ames, 26 Minn. 384, 4 N. W. 620. In every case in which such a motion is granted, the court necessarily determines the case presented by the evidence upon its merits, and in by far the greater number of cases it determines the entire case on its merits; for in nearly all the cases so determined the plaintiff introduces all the evidence he has and can procure in support of his cause of action before the motion to dismiss is made. But the statute declares that such a dismissal of an action shall be "without a final determination of its merits," and the established rule and practice in Minnesota is, not that such a dismissal bars another action between the same parties for the same cause, when in granting the motion the court considers and determines the merits of the case, and that it does not bar a second action when the court does not consider and determine the merits of the case, but that such a dismissal shall not bar another action for the same cause in any case, whether the court in granting the motion determined or failed to determine the merits of the case, and this because the statute declares that any such dismissal of an action may be made "without a final determination of its merits." It is therefore irrelevant to the issue whether or not the dismissal in this case bars a second action, whether or not in granting the motion to dismiss the first action the court actually considered and decided the merits of the case. Nor is it material to that issue that in suits in equity a decree of dismissal without more evidences a final determination of the merits of the case, because such is the immemorial form of a final decree for the defendant in equity, and a specific declaration therein that it is without prejudice to another suit or action, or that the dismissal is on the ground of lack of jurisdiction, is indispensable to the preservation of the right to bring the second action. Indian Land & Trust Co. v. Shoenfelt, 135 Fed. 484, 487, 68 C. C. A. 196, 199; Francisco v. Chicago & Alton R. Co., 149 Fed. 354, 360, 79 C. C. A. 292, 298, 9 Ann. Cas. 628; Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 612, 73 C. C. A. 260, 262.

Conceding that the court had the power to dismiss the action under section 7825, or to direct a verdict for the defendant, the fact re-

mains that it did not direct such a verdict, and that it did order a dismissal of the action in the form which, under the statute and the rule of practice in the courts of Minnesota, is not a final determination of the merits of the action, or a bar to a second action by the plaintiff for the same cause. There is no evidence, no pleading, and no reason to believe that the court entered this judgment of dismissal through any mistake or inadvertence, and for the reasons stated in the earlier part of this opinion there is no equity in the bill of the complainant to enjoin Mr. Jameson from prosecuting his second action against the Land Company upon the same cause to a final determination of its merits.

The decree below is accordingly affirmed.

FIRST NAT. BANK OF McGREGOR v. EISEMAN et al.

(Circuit Court of Appeals, Fifth Circuit. November 17, 1917.)

No. 3032.

APPEAL AND ERROR ⊜1010(1)—REVIEW—FINDINGS OF FACT.

A finding by a trial court that an instrument conveying a homestead was not a mortgage, but an absolute and unconditional conveyance of the title, *held* not so unsupported by evidence as to warrant an appellate court in setting it aside.

Appeal from the District Court of the United States for the Western District of Texas; Henry D. Clayton, Judge.

Suit in equity by F. B. Eiseman against the First National Bank of McGregor and another. Decree for complainant, and defendant bank appeals. Affirmed.

D. A. Kelley and Allan B. Sanford, both of Waco, Tex., for appellant.

J. D. Williamson, of Waco, Tex., for appellee Eiseman.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The success of the claim asserted by the appellant in this case is dependent upon its supporting allegations to the effect that a conveyance made by John F. Gulledge of his homestead property was not absolute and unconditional, as, on its face, it purported to be, but was made to secure an indebtedness owing by him to his grantee. The trial court made a finding that the instrument in question was not a mortgage, but was an absolute and unconditional conveyance of Gulledge's title and interest. Our conclusion is that the evidence is not such as to warrant this court in setting aside that finding. To say the least, it is not clearly made to appear that that finding was an improper one.

The decree appealed from is affirmed.

PACKAGE MACHINERY CO. v. JOHNSON AUTOMATIC SEALER CO.

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

No. 2987.

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—PACKAGE-SEALING MACHINE.

The Ferguson patent, No. 1,066,193, claims 1, 2, 3, 9, and 10, for a package-sealing machine, for use in connection with a wrapping machine, in view of the prior art, and of disclosures made to the patentee by the customer for whom the first machine was built, *held* void for lack of patentable invention. Claim 7 also *held* not infringed, conceding its validity.

2. PATENTS ⊂⊃35—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

Favorable public reception of a patented device is not important, where lack of invention is plain.

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

Suit in equity by the Package Machinery Company against the Johnson Automatic Sealer Company. Decree for defendant, and complainant appeals. Affirmed.

Archibald Cox and Robert W. Byerly, both of New York City, for appellant.

F. L. Chappell and Otis A. Earl, both of Kalamazoo, Mich., and R. H. Parkinson, of Chicago, Ill., for appellee.

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

KNAPPEN, Circuit Judge. Suit by appellant for infringement of United States patent No. 1,066,193, to Ferguson, applied for February 5, 1909, issued July 1, 1913. The patent relates to a machine for sealing the flaps and overlapping ends of a package-wrapper impregnated with paraffine or other readily fusible substance. The operation consists in melting the wax at the overlapping parts by heating, and causing them to adhere through pressure. The defense assails the validity of the claims in suit, as well as Ferguson's inventorship.

[1] The alleged invention grew out of the construction by Thomas F. Condon & Co., of New York, of a package-wrapping and sealing machine for one of the Chicago factories of the National Candy Company. Both Plate, who was the Candy Company's factory manager, and Ferguson, who was Condon & Co.'s mechanical engineer, applied for a patent. Upon an interference, there was concession of priority in Ferguson, under an arrangement between the parties by which the Candy Company was given a shop right to use the machines in the factory in question. The patent had previously been assigned to Condon & Co., and was later assigned to appellant.

When hearing was first had below, the correspondence relating to the order for the construction of the machine was not to be found. In its absence, the District Court credited Ferguson's claim to inventorship as against Plate, found invention, and directed entry of inter-

locutory decree in plaintiff's favor. Before the decree was entered the correspondence was found in the office of the attorneys who had represented Ferguson in the interference proceeding, and by motion and stipulation the case was reopened for the admission of the correspondence and certain other testimony. Upon a reconsideration of the case decree was entered finding the claims in suit void for the reason that "the patentee did not conceive the idea embodied in the improvement."

The argument here has covered a wide range, embracing not only the subject of inventorship, as between Plate and Ferguson, but also questions of anticipation and invention. Reference to the prior state of the art and to the circumstances attending the ordering and construction of the machine should be helpful.

The Candy Company had been putting out rectangular packages of popcorn wrapped in paraffine paper. The wrapping was done by hand; the sealing also by hand—by rubbing first the upper side and then the ends, one by one, upon the upper surface of a steam chamber laid flush with the surface of the table at which the wrapping was done. A temperature of 135 to 140 degrees was enough to fuse the wax. The air of the room cooled and hardened it.

Condon & Co. had been putting out an automatic wrapping machine —a complicated, but successful, mechanism. Plate learned of the machine through its use by certain leading soap manufacturers, and it occurred to him that it would be an easy matter to have the wrapping machine also seal the packages. He accordingly wrote Condon & Co. that the Candy Company (in whose name he wrote) was "looking for a machine which will wrap the inner package in paraffined paper, and, after wrapping the same, continue the operation under and between surfaces heated by means of steam, in order that the paraffine may melt, and the package, being continued under gentle pressure through a covered chute, will come out at the end hermetically sealed, through the paraffine being melted during the period that it took to pass between the heated plates." The writer inclosed one of the Candy Company's packages, which the letter stated illustrated "just what we want to do and what we are now doing by hand"; called attention to the fact that "one side and both ends are sealed," that contact with heat was necessary on but one side and the two ends, and that Condon & Co. would thus doubtless understand "just what we mean when we say that this package, after being wrapped, is to pass under and between hot plates." Then followed this statement:

"As, no doubt, the cakes of soap, or packages, or whatever your machine is wrapping, pass into a trough, or on a belt, it would be a very easy matter to have this belt, or trough, convey the wrapped package in question to, between, and through such heated plates, and then, by a continuation of this trough, the sides of which would firmly hold the ends of the package and the top, by the trough being covered with either metal or wood, would only require a very gentle pressure to hold the paper firmly together until the paraffine has an opportunity to set."

A visit by Ferguson to the candy factory was had, to enable him, as stated in Condon & Co.'s letter, "to get some additional information in reference to the wrapping of your packages that will help him to

decide whether an attachment to our wrapping machine for sealing the package can be perfected." There, for the first time, Ferguson saw paraffine wrappers placed around cartons; Plate's letter had given him the first information of their use. He had, however, seen carton-sealing machines for pasting packages, with passages and conveyors to carry off the cartons. He had himself employed an endless belt running in a channel for delivering the wrapped soap from the machine; the sidebars, and the bars supporting the belt, being of wood. Indeed, a walled passageway or chute for such delivery was at that time common everyday experience in wrapping machines. When Ferguson saw how Plate was sealing the sides and ends of the paraffined package, it was perfectly clear to him that the same work could be accomplished by heating the surfaces of the channels. There was built a standard wrapping machine, with an attachment at its discharge end consisting of a table composed of four angle irons, a chain conveyor with flights, for carrying the wrapped packages under and between steam boxes, intended to be attached to the sides of the table; the cooling of the top sealing being effected by a cold plate which held the top flap in position, that of the ends by contact with the angle bars. It differed from the ordinary soap conveyor only in using a chain with flights for carrying the package, instead of a belt; in having metal side rails the full height of the channel (instead of wooden sidebars), together with provision for the attachment of heaters and the top cooling plate. As furnished to the Candy Company it lacked the steam boxes and the pipes therefor, which were to be, and were, supplied by the Candy Company, and for which no patterns were furnished—their location being indicated on a drawing furnished by Ferguson. The regular price of the wrapping machine alone was $1,800; the price charged for the wrapping machine plus the sealing attachment (and minus the heating appliances) was $1,900.

The machine disclosed by the patent in suit (developed in connection with a later construction for another customer) departed in some respects from the Chicago construction. Its differences, however, so far as here important, were principally in providing a hot roller and cold pressure rolls, instead of hot and cold upper plates, and lateral pressure devices in the form of blade springs (to keep the end flaps in position), instead of direct contact with the metal side rails. But it is clear that unless the construction of the Candy Company's machine involved invention, there is none in the broad claims in suit. Those involved are the first, second, third, seventh, ninth, and tenth. The first and ninth claims are printed in the margin;[1] the second, third, and tenth contain nothing calling for their reproduction.

[1] "1. In an apparatus for sealing articles wrapped in fabric impregnated with a readily fusible substance, the combination of a conveyor on which the articles are carried and adapted to continually advance the packages, sealing devices arranged to operate on the articles in their travel on the conveyor, means for heating said devices, and a cooling and pressing means arranged to bear on the heated portions of the articles after the same have been acted on by the heating devices, as set forth."

"9. In a machine of the character described, the combination of a package conveyor adapted to continuously advance the packages, means to en-

On a careful consideration of undisputed evidence, we are of opinion that the broad claims in suit involve no invention on Ferguson's part. The wrapping machine itself is not involved, but merely the sealing apparatus, which the patent says "can be used in conjunction with a wrapping machine, or the wrapped articles can be delivered to it by hand, as desired." The idea of heating paraffine for sealing purposes, to exclude air and moisture, was generally known, not only in the specific art but in ordinary household economy. Heating the sides and tops of the passage or chute for pasting packages was old, as already said, although the heating was for drying and not for melting. There had been in successful use, for about 25 years, the so-called "Greene machine" for sealing the top and end flaps of paraffine wrapped packages. In that machine, as aptly described by the District Judge:

"A package of popcorn was folded in waxed paper by hand and the flap edges at the side were stuck together by paste applied by hand with a brush. The packages in this form and so partially wrapped were then placed by hand into the machine, which machine, being operated by the foot, folded the waxed paper at the end of the package of corn, and the package was then kicked or forced along on a stationary metal plate, between other metal plates, which latter metal plates were heated by gas flames, causing the waxed paper at the ends of the package to liquify and by the pressure of succeeding packages it was kicked or forced on away from the heated portion and against the cooler and cooling portions of the plates, which caused the ends of the package to cool and become hermetically sealed."

The Candy Company's letter inviting the construction of the machine not only stated the result desired, but described generally the method of producing that result. Whether or not Plate's conception amounted to invention, and whether, if there was invention, the latter, as between Plate and Ferguson, should be deemed the inventor (questions we find unnecessary to decide), we are of opinion that in view of the prior art, including especially the Greene machine, and the existence of the discharge mechanism of the standard wrapping machine, in connection with the disclosures made to Ferguson, not only by Plate's letter, but by what Ferguson saw of the hand operation at the Candy Company's factory, the addition of the sealing device to the wrapping machine, whereby the upper side and both ends were sealed (instead of the ends alone, as in Greene), involved only the skill of the mechanic trained in the art. Railroad Supply Co. v. Elyria Iron, etc., Co., 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136; Hart Steel Co. v. Railroad Supply Co., 244 U. S. 295, 37 Sup. Ct. 506, 61 L. Ed. 1148. True, the Greene device was not entirely automatic; it required action by the operator in the use of the treadle, and the sealing of the upper flap was effected only by paste, which was not as effective as by heating the paraffine. But heating and sealing three surfaces, instead of two, did not, in the then state of the art, amount to invention. Dunbar v. Myers, 94 U. S. 187, 194, 24 L. Ed. 34. True, also, Plate's disclosure did not amount to a complete anticipation, and there remained for

gage and heat the overlapped portions of the waxed wrappers of the packages transported by said conveyor whereby to soften the wax of said wrappers, and means of less temperature than said heating means adapted to bear against said heated overlapped portions to cause their adherence together."

Ferguson to work out the composition of the table, the suggested location and method of supporting the steam chests in the table, the selection of pattern of chain conveyor, the ascertainment of the amount of room the machine would take up, the proper position of the countershafts, the adjustment of the parts, the proper timing of the movement of the packages in their relation to the heating and cooling devices, and the particular form of the side guides; the assembling, testing, adjusting, and completing of the details occupied perhaps a month after the delivery of the machine at the Candy Company's factory. But we think the disclosures made to Ferguson, by Plate's letter and in connection with the visit to the candy factory, furnished sufficient information to enable a skilled mechanic to work out the details mentioned, which in other words, were in our opinion merely matters of mechanical engineering skill; and it does not appear that the time taken for working them out was unusual, in view of the fact that the machine had to be specially constructed to meet the specific requirements of the customer and its shop conditions. The steam plates used in the machine were substantially what had been used in the Candy Company's hand-operated machines; the upper steam and cooling plates formed pro tanto a covering for the chute.

[2] Favorable public reception of the device is not important, where, as here, the lack of invention is plain (Gould v. Cincinnati Shaper Co. [C. C. A. 6] 194 Fed. 680, 115 C. C. A. 74; Cincinnati Traction Co. v. Pope [C. C. A. 6] 210 Fed. 443, 449, 127 C. C. A. 175); and the large saving of labor accomplished by the machine is due in considerable part to the wrapping feature. The fact that the machine was sold under a guaranty of what it would do does not appreciably affect the question of invention as distinguished from mechanical skill. In this view, the effect of award of priority on interference becomes immaterial.

The only respect in which the seventh claim calls for special mention is that the means adapted to bear against the ends of the package after leaving the heated part are specified as "blade or leaf springs." Defendant does not employ this specific device. In the first form of its construction the inner sides of two delivery belts are pressed inwardly towards the package by "resiliently supported pressure plates"; in the other form the package passes along two side plates which are extensions of the side heaters, and thus serve to keep the end flaps in close contact. Plate's letter had suggested a "gentle pressure" for this purpose. But resilient side plates for the purpose stated were not new; it is enough to refer to Greene's device, by which the ends of the packages were held during the cooling operation by resilient extensions of the thin brass side plates whose forward ends were heated. Even were there invention in the specific adoption of the "blade or leaf springs"—which we do not hold—we think it clear that defendant does not infringe. The second construction mentioned is practically that of Greene. The first construction cannot be considered the equivalent of the "blade or leaf springs" of the patent, in view, not only of the prior art, but of their specific mention in the seventh claim, as compared with the more general "cooling and pressing means" of the first and second claims, the "means arranged to bear on the said wrappers" of the third claim, the "pressure devices at the

side of the conveyor" of the eighth claim, and the "means of less temperature than said heating means and adapted to bear," etc., of the ninth and tenth claims. See Railroad Supply Co. v. Elyria Iron Co., supra; Hart Steel Co. v. Railroad Supply Co., supra.

The decree of the District Court is affirmed.

WAGNER et al. v. MECCANO LIMITED.

(Circuit Court of Appeals, Sixth Circuit. November 16, 1917. On Rehearing, January 14, 1918.)

Nos. 2977, 3014.

1. PATENTS ⟸70—ANTICIPATION—PUBLICATION.
An inventor's own publication of the device for which he seeks a patent more than two years prior to the application is a disclosure, within Rev. St. § 4886 (Comp. St. 1916, § 9430), and precludes the patenting of his invention.

2. PATENTS ⟸21—"INVENTION"—"MECHANICAL SKILL."
The adaptation to metal mechanical toys of previously disclosed inventions used in wooden toy-building blocks does not amount to "invention," but is a mere exercise of "mechanical skill."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention; First Series, Mechanical Skill.]

3. PATENTS ⟸19—"INVENTION"—WHAT CONSTITUTES.
The mere improvement of a well-known device without substantial change in either means or result does not amount to invention.

4. PATENTS ⟸20—"INVENTION"—WHAT CONSTITUTES.
A device, simply uniting two parts of a previously known device into an integral construction, does not amount to invention, particularly where the two parts had previously been joined mechanically.

5. PATENTS ⟸328—"INVENTION"—ANTICIPATION—"MECHANICAL SKILL."
Hornby patent, No. 1,079,245, for rectangular plates and so-called sectors for use in connection with mechanical building toys, consisting of many strips with slotted holes which could be united to form ingenious devices, as limited by the prior art, *held* not to show "invention" disclosing only "mechanical skill."

6. COSTS ⟸60—ALLOWANCE—DEPOSITION.
Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), declares that by demand served 10 days before trial either party may call on the other to admit in writing the execution or genuineness of any document, letter, or other writing, saving all just exceptions, and if such admission be not made within five days after such service, the cost of proving the document shall be paid by the person refusing to make such admission, unless the trial court shall find that the refusal was reasonable. Complainant called on defendants to admit in writing the execution and genuineness of documents to be used in evidence. Defendants' counsel refused to make admission, and later they notified complainant's counsel that they would stipulate the matter when the two should meet in the town where one of the depositions was to be taken. Complainant by telegram declined to accept the stipulation except on defendants' payment of costs and expenses incurred to date. No response was made to complainant's answer, and at the taking of depositions complainant's counsel stated that, as no reply had been received to such telegram, the taking of depositions on behalf of complainant would be resumed. *Held*, that despite defendants' contention that complainant was in control of the documents and might have proved them in the ordinary course, the allowance to complainant

of costs incurred in proving such documents was not an abuse of the trial court's discretion.

7. Costs ⊂=13—Equity—Allowance.

Apart from court rules, the taxing of costs in equity cases is within the sound discretion of the trial court.

Appeals from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by the Meccano Limited against F. A. Wagner, trading as the American Mechanical Toy Company, and the Strobel & Wilken Company, who counterclaimed. From a decree for complainant (234 Fed. 912), and an order denying a request to dismiss the appeal, remand the record, and on the granting of such request to reopen the case, defendants appeal. Affirmed in part, and in part reversed, and causes remanded, with directions.

See, also, 235 Fed. 890, 149 C. C. A. 202; 239 Fed. 901. 153 C. C. A. 29.

H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for appellants.

Healy, Ferris & McAvoy, of Cincinnati, Ohio (Reeve Lewis and Ralph L. Scott, both of New York City, Wm. B. Kerkam, of Washington, D. C., and Mauro, Cameron, Lewis & Massie, of New York City, of counsel), for appellee.

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

WARRINGTON, Circuit Judge. The Meccano Limited, a British corporation, is engaged in the manufacture and sale of outfits which are adapted to ready and repeated assembling of parts into a variety of mechanical toys; and with each main outfit it supplies a manual of instructions and illustrations for use in building the toys. The corporation brought suit in the court below against Francis A. Wagner, trading as the American Mechanical Toy Company, and against the Strobel & Wilken Company, charging defendants with acts of unfair competition consisting, in effect, of sales of outfits substantially identical in parts and in appearance, shape, and dimensions with those of plaintiff, and accompanied by manuals of instructions in which defendants copied, counterfeited, and simulated the appearance and arrangement, illustrations and language, of plaintiff's manuals, particularly those on which copyright registrations had been secured; also with acts of infringement of plaintiff's copyrights, consisting in substance of copying and counterfeiting plaintiff's Meccano Royal Book of Instructions, No. 291,375, June 22, 1911, and Meccano Manual of Instructions, No. 294,670, August 14, 1911; and also with infringement of plaintiff's certain letters-patent. The defendants answered, admitting that Wagner, under the trade-name mentioned, manufactures outfits known as the "American Model Builder," and that he and his codefendant sell such outfits accompanied by manuals of instructions, alleging that by reason of anticipation and the prior art the

patent sued on is void, and denying the allegations of unfair competition and of infringement alike of the copyrights and patent in suit; and by counterclaim they sought damages against plaintiff for alleged unfair competition on its part. The case was heard below on its merits, and decree was rendered in favor of Meccano Limited on all the issues, save only as to one feature of certain of the patent claims, with the usual order of injunction and accounting; and the counterclaim was dismissed. Defendants appealed, and will hereafter be referred to as appellants. Subsequently, and before the statement of evidence had been settled in the court below and so before the transcript had been filed in this court, appellants obtained an order here empowering the court below, if it should deem proper, to reopen the case and to receive further evidence, including an alleged newly discovered anticipation of the patent in suit. Later, appellants moved the trial court to certify to this court a request to dismiss the appeal and remand the record, and, upon the granting of such request, to reopen the case, vacate the injunction and decree, and allow a hearing upon the alleged newly discovered evidence. The trial judge regarded the evidence as insufficient to warrant a change of his previously expressed views of the case, and so denied the motion. Appeal was also taken from this order.

[1-5] The opinion below is reported in (D. C.) 234 Fed. 912, and the facts presented before the first appeal are there considered. We approve the court's conclusions upon the issues joined, except the one in relation to the patent in suit. This patent, No. 1,079,245, was issued by the United States to Frank Hornby, a British subject, November 18, 1913, and on the same day was assigned by him to Meccano Limited. The title selected to indicate the nature and design of the claimed invention is "Perforated Plate," and in the specification the patentee states that he had "invented certain new and useful improvements in perforated plates." He further states:

"This invention relates to improved elements, and combinations of such elements with other elements or parts, to be used in the construction of toys or working models of machinery, structures, or similar mechanisms."

The specification also, in effect, states that there was then an existing system for making up toys from "perforated elements, embodying also the use of gear wheels, pulleys, spindles, and the like," [1] that the various members were adapted to be assembled and mounted in these perforated parts and connected by bolts and nuts, and that it had been found desirable, in order to secure greater rigidity in the structures and to avoid the use of many small strengthening strips, "to

[1] The specification does not in terms state the origin of or distinctly describe the "perforated elements" embraced in the existing system so referred to, yet so far as those elements, standard parts, are shown in the drawings or mentioned in the specification, they and the method of assembling them were old in the prior toy-building art. Hornby U. S. patent, No. 810,148, January 16, 1906; Von Leistner British patent, No. 14,442, November 9, 1895; Jenss British patent, No. 10,040, June 22, 1895; Walters U. S. patent, No. 262,863, August 15, 1882; Lilienthal German patent, No. 46,312, April 8, 1888; Wing U. S. patent, No. 916,243, March 23, 1909; Walther German patent, No. 153,854, June 4, 1903.

provide perforated flanged plates and angle brackets." And thereupon the specification states:

"The present invention relates to certain forms of perforated sheet metal elements for use as aforesaid. In all the forms the plates having perforated flanges, preferably integral, are an essential feature of the invention."

The perforated plates so referred to are illustrated by accompanying drawings; there are two of these plates, Fig. 1 showing in perspective a "sector shaped plate," its width tapering toward one end, and Fig. 4 a "rectangular shaped plate." They consist of sheet metal with apparently integral flanges along their sides and at right angles to the bodies of the plates. The body of the rectangular plate has several rows of perforations equally spaced both ways, and each flange a single row, equally spaced and disposed lengthwise of the flange. The body of the sector plate has a single row of perforations extending lengthwise and in the center of the plate, with a similar row transversely disposed near each of its ends, and each flange has a similar row disposed lengthwise—all uniformly spaced. There are still other drawings representing a number of different toys which may be built up by associating one or both of these plates with perforated metal strips, perforated angle brackets, clips, wheels, and ropes, and by suitably disposing the parts and fastening them with bolts and nuts. It is to be inferred from the specification and certain of the claims, that the parts thus named, other than the plates, are but a portion of "standard parts" which may be used in combination with the plates. However, no specific parts except only the plates are called for by any of the claims; and hence the standard parts may be safely eliminated from the consideration of the patent except as an undefined class adapted to toy building in combination with the plates. Thus the two plates and their qualities are controlling features as respects the question of patentable invention. There are ten claims, and all are in issue. The first eight are each limited to a metal flanged plate containing perforations and, except 7 and 8, "adapted for use in the attachment of other parts," while 9 and 10 are combination claims each embracing a perforated plate with a "plurality of other perforated mechanical elements." The differences in claims may, for the purpose of this opinion, be fairly illustrated by claims 1, 7, 8, and 10, which are copied in the margin.[2]

[2] "1. A flanged metallic plate for use in the construction of working models, toys or the like, comprising a plate or main body portion, and two flanges extending along said body portion at an angle thereto and each having therein a row of perforations disposed along the same in the direction of the body portion of the plate and adapted for use in the attachment of other parts."

"7. A sheet metal flanged plate for use in the construction of working models, toys or the like, comprising a plate or table having perforations therein, flanges on the longitudinal edges of said plate having perforations therein, all of the perforations being equally pitched.

"8. A sheet metal flanged plate for use in the construction of working models, toys or the like, comprising an elongated plate having its longer edges relatively inclined and provided with a central series of perforations, and transverse series of perforations along its shorter edges, and flanges

It is to be observed that some of the claims are broader than others; as, for instance, claims 1 and 10 do not call for any perforations at all in the body portions of their respective plates, though they do in the flanges, while claims 7 and 8 call for perforations in both the body portions and the flanges of their several plates. It is also to be remembered that the object of the perforations is to adapt the plates for use in attachment of other and well-known parts. We have then two simple channel plates whose perforations were predetermined by other and standard perforated elements, also a previously known, if not an old, plan of building up toy structures by the use of perforated elements, in connection with gear wheels, pulleys, spindles, etc., and also a declared purpose to use these perforated channel plates as a means to diminish the number of parts and "to produce greater rigidity in the structures."

We thus come to the question whether there is any disclosure amounting to patentable invention. There are a number of reasons why we think there is not. In the first place, the manual copyrighted by the Meccano Limited in 1910 shows perforated rectangular plates with integral, though solid, flanges, one of them having also an attached perforated flange (called in the manual an angle bar or girder); and these disclosures were regarded by the learned trial judge as anticipating the patent "so far as the language of the claims is applicable to the rectangular plate" (D. C.) 234 Fed. 924, 925. The manual was a prior "printed publication" within the meaning of section 4886, Rev. Stat. U. S. (Comp. St. 1916, § 9430); and its effect upon the patent in suit is in principle the same as if the manual had been put out by a stranger. James v. Campbell, 104 U. S. 356, 382, 26 L. Ed. 786; Schieble Toy Novelty Co. v. Clark, 217 Fed. 760, 766, 133 C. C. A. 490 (C. C. A. 6). Further, as pointed out in the opinion below, the rectangular plate in issue finds close analogy in the perforated rectangular blocks shown in the patent to Quackenbush, September 25, 1877, No. 195, 689. That patent, it is true, was for an improvement in wooden toy-building blocks associated with wheels, spindles, and the like; but the idea of a change from wood to metal in adapting old elements to other structures in order as here to make them more rigid is well within the scope of mechanical skill (Wise Soda Fountain Co. v. Bishop-Babcock-Becker, 240 Fed. 733, 736, 153 C. C. A. 531 and citations [C. C. A. 6]); besides, the use of perforated metal parts in the construction of toys was, at the date of the patent in suit, well known to the patentee, Hornby, through his earlier United States patent, January 16, 1906, No. 810,148.

on the inclined edges of said plate having perforations therein, all of the aforesaid perforations being equally pitched."

"10. The combination, in a working model, toy or the like, of a flanged metallic plate comprising a plate or main body portion with flanges at an angle to said body portion along two opposite edges thereof, said flanges having therein a series of perforations extending in the direction of the body portion of the plate, one or a plurality of other perforated mechanical elements, the perforations in said element or elements and in the flanges being equally pitched, and means engaging perforations in said element or elements and said flanged plate for fastening the parts together."

In the next place, the sector plate in issue cannot be differentiated from the rectangular plate save only in its shape; and this difference is not enough to conceal the obvious identity in functions of the two plates. Since the declared object in effect was to substitute these plates for old and standard parts in order to make the toy structures more rigid, it is perfectly plain that the nature of the old structures themselves would suggest to the skilled mechanic the shape as well as the use of contrivances calculated to strengthen them. Further, the prior art in toy building is replete with shapes and forms adapted to the erection of many varieties of toys. Burton in his patent, No. 604,708, May 24, 1898, shows sector blocks for toy arch building; while Annin's patent, No. 305,879, September 30, 1884, discloses a sector-shaped bottom for the tray of his wheelbarrow. Annin's construction it is true was not a toy, but there is striking resemblance between the sector-shaped bottom of his invention and the bottom of a toy wheelbarrow which is represented by one of the drawings accompanying the present patent in suit. And it is worthy of remark, moreover, that on February 4, 1911, more than a year and a half prior to his application for the patent in suit, Hornby applied for design patents on both his sector plate and rectangular plate, and the respective plates there shown are the same as those represented in the present drawings. Both applications were denied on the grounds in substance that they were devoid of artistic merit, and that they also failed to present anything patentably novel over the state of the art as shown by the examiner's citations. These citations, however, do not appear in the present record. Although efforts were made to overcome the objections of the examiner, yet they failed, and nothing further appears to have been done.

It results that the present patentee has substituted one toy element that was old and another that was plainly its mechanical equivalent, if not itself old, for perforated parts of a previously existing system of toy building, and with the object above stated. Moreover, the employment of perforations and disposing them involved only the detail of providing openings in the plates that would register with existing perforations contained in "standard parts" of the structures so sought to be strengthened. We cannot think this was anything more than mechanical skill. It may be that firmer toy building was thus obtained; but this was not to accomplish a new result within any accepted meaning of invention. Lemley v. Dobson-Evans Co., 243 Fed. 391, 398, — C. C. A. — (C. C. A. 6). Indeed, whether the substituted parts with their adaptation to other and old parts, be considered by themselves or in combination with "one or a plurality of other perforated mechanical elements," for example as stated in claim 10, this was a mere carrying forward of the original idea, a change in form, an improvement in degree, without substantial change in either means or result, and so was not invention. Market Street Railway Co. v. Rowley, 155 U. S. 621, 629, 15 Sup. Ct. 224, 39 L. Ed. 284; Railroad Supply Co. v. Elyria Iron Co., 244 U. S. 285, 292, 37 Sup. Ct. 502, 61 L. Ed. 1136; Star Hame Mfg. Co. v. United States Hame Co., 227 Fed. 876, 883, 142 C. C. A. 400, and citations (C. C. A. 6). This is not to overlook the insistence

for appellee that it was invention to convert the rectangular plate with a perforated flange mechanically attached into a single structure. It is, however, settled that simply to unite two parts into an integral construction does not constitute invention (Howard v. Detroit Stove Works, 150 U. S. 164, 170, 14 Sup. Ct. 68, 37 L. Ed. 1039; Standard Caster & Wheel Co. v. Caster Socket Co., 113 Fed. 162, 166, 51 C. C. A. 109 [C. C. A. 6]); and this principle is especially applicable here, since the two parts so converted into a unitary structure could have no different relation to each other, or to other perforated parts with which they might be combined in toy building, from that which they bore when they were simply mechanically attached (Gould & Eberhardt v. Cincinnati Shaper Co., 194 Fed. 680, 685, 686, 115 C. C. A. 74 [C. C. A. 6]; Sheffield Car Co. v. D'Arcy, 194 Fed. 686, 692, 116 C. C. A. 322 [C. C. A. 6]; D'Arcy v. Staples & Hanford Co., 161 Fed. 733, 742, 88 C. C. A. 606 [C. C. A. 6]). It must follow that the patent is void because of the lack of invention.

[6, 7] A question of costs remains under the first appeal. A judgment was entered against appellants and in favor of appellee for $470.26, as costs fixed by the court under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), to reimburse appellee for expenses incurred in obtaining the depositions of two witnesses. Appellee called on appellants to admit in writing the execution and genuineness of certain documents to be used in evidence in appellee's behalf. Appellants' counsel declined to make any admission within the time prescribed by the rule. Later, however, they notified appellee's counsel by telegram that they would "stipulate the Read incident when we meet in Marietta, Tuesday," where one of the depositions was to be taken. Answer by telegram was made to this, stating that all arrangements had been "made and considerable expense incurred," and declining to accept stipulation except on appellants' payment of full expenses to date. No response was made to this telegram. Counsel for both sides met later at Marietta, Ohio, and obtained the deposition of one of the witnesses; and it is to be inferred from the record that at the close of the deposition counsel for appellee stated, apparently in the presence of opposing counsel, that:

"As no reply has been received to the telegram just quoted [the last telegram above alluded to], the taking of depositions on behalf of complainant [appellee] is now adjourned to be resumed * * * at Bloomington, Ill. * * *".

It is insisted for appellants that appellee was in possession or control of the documents; that they were provable in the ordinary course of procedure; that certain of the letters had theretofore been proved and introduced into the case, and consequently that rule 58 did not apply. We think the applicable portion of the rule is the last paragraph, and appellants' failure to respond to appellee's offer to accept payment of the expenses then incurred seemingly justified the course pursued by the latter. The decisions relied on by appellants appear to relate to other portions of the rule. Our attention has not been called to a decision construing the last paragraph, and yet similar pro-

visions, and the course pursued under them are familiar to practitioners. It is a general principle, apart from rule 58, that the taxing of costs in equity cases is within the sound discretion of the court (Du Bois v. Kirk, 158 U. S. 58, 67, 15 Sup. Ct. 729, 39 L. Ed. 895); and upon the facts here disclosed we find no abuse of discretion on the part of the trial court in this matter.

As to the evidence offered upon the second appeal, the court seems to have considered it with reference to the facts involved under the first appeal and the opinion rendered thereon; and, as before pointed out, the court concluded that the newly discovered facts were not sufficient to warrant a change in its previously expressed views of the case. It is argued that this evidence renders untenable the conclusion upon the issue of unfair competition. It might be conceded that portions of the new evidence would require modification of some of the views expressed in the court's opinion on that issue, as, for instance, the origin of parts of the business system said to have been first introduced by Hornby; but this would not affect the soundness of the conclusion reached upon such issue. Appellants do not seem to appreciate the true effect of other features of the evidence upon which the court evidently rested this conclusion (D. C.) 234 Fed. at pages 917 to 919. And although the two Von Leistner United States patents, the first, No. 525,221, August 28, 1894, and the second, No. 543,580, July 30, 1895, constitute part of the new evidence, yet they could affect in material degree only the patent in suit, and so are not important in view of our ruling upon the patent. Hence we cannot say that the evidence considered as a whole does not fairly sustain the conclusion reached below upon the issue of unfair competition.

The decree in No. 2977 must be reversed so far as it adjudges the patent in suit to be valid or is otherwise dependent on that ruling; the decree in No. 3014 will be affirmed; and both causes be remanded, with direction to enter in the suit from which these appeals were taken a single decree not inconsistent with this opinion.

On Rehearing Petition for Certain Instructions.

Appellants' "rehearing petition" for "instructions regarding the extent of the reversal of the lower court" is denied; no instructions are necessary, since the opinion approves the conclusions reached below upon the issues joined, except the one in relation to the patent in suit, and the patent in suit describes the two perforated plates as its only features of patentable novelty. Hence no perceivable difficulty can arise from the adjudged invalidity of the patent; in principle the situation here does not differ from the one involved in Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 605, 608, et seq., 128 C. C. A. 203, L. R. A. 1915F, 1107 (C. C. A. 6), where the trade-mark claimed was held invalid while the charge of unfair competition was sustained. See, also, Saalfield Pub. Co. v. G. & C. Merriam Co., 238 Fed. 1, 10, 151 C. C. A. 77 (C. C. A. 6).

UNITED STATES v. HOLLIS et al.

(District Court, D. Minnesota, Fourth Division. March 14, 1917.)

No. 1079.

MONOPOLIES ⊂⊃29—ANTI-TRUST ACT—COMBINATION OF RETAIL LUMBER DEALERS.

Defendants were members of a voluntary membership association of retail lumber dealers which adopted the practice of making on the first of each year a "customers' list" according to the following plan: By means of circular letters a list was obtained from each member of the manufacturers and wholesalers with whom such member dealt. From such lists was compiled a list of all the customers of each such manufacturer and wholesaler within the association. By exchange with other associations the lists were extended to their territory. The secretary, through reports from members and otherwise, obtained information of "unethical" or "irregular" shipments by such manufacturers or wholesalers, to consumers, co-operative associations or mail order houses and notified their customers, who took the matter up direct with the offending dealer. Information so obtained was also furnished to and published in trade papers. The result, as intended, was to prevent such sales and shipments to outside parties to a large extent. *Held*, that such action on the part of the association and its members was in restraint of interstate commerce, and that defendants were chargeable with conspiring to restrain such commerce in violation of Anti-Trust Act, Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1916, § 8820).

In Equity. Suit by the United States against Willard G. Hollis and others. Decree for the United States.

Blackburn Esterline and Clark McKercher, Sp. Asst. Attys. Gen., George N. Murdock, of Monmouth, Or., and C. C. Haupt, U. S. Dist. Atty., of St. Paul, Minn. (Frank M. Locke, of Ashdown, Ark., and F. H. Watson, of Detroit, Mich., of counsel), for the United States.

Lancaster, Simpson & Purdy, of Minneapolis, Minn., and C. D. Joslyn, of New York City (C. C. Boyle and Boyle & Howell, all of Kansas City, Mo., of counsel), for defendants.

BOOTH, District Judge. This is a suit in equity for an injunction brought by the United States against the defendants under the Sherman Anti-Trust Act.

Plaintiff alleges that the defendants at the time of the filing of the bill were, and for several years had been, engaged in an unlawful conspiracy and combination unduly, unreasonably, and directly to restrain certain described trade and commerce among and between the several states and territories of the United States, in lumber and lumber products, in violation of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The bill alleges, and the answer admits, that the lumber trade is, and for many years prior to the filing of the bill has been, divided into the following classes: (1) Manufacturers who operate at various points in the United States, receive logs from the forests, and saw them into

various sizes and lengths of timber and lumber required by the trade for building and manufacturing purposes, and ship such products from the points of manufacture by railroad or steamship lines through and into the states of the United States to the various markets where such lumber products are required, and specifically through and into the states of Minnesota, North Dakota, South Dakota, Iowa, and Nebraska. (2) Wholesalers who deal in lumber and lumber products, and are usually located at or near large markets or centers of trade. In some cases the wholesaler maintains a yard for receiving and storing the lumber purchased by him from the manufacturer; in other cases, the wholesaler does not maintain a yard, but handles the manufactured product through orders from customers transmitted by the wholesaler to the manufacturer. (3) Retailers, located in towns and cities, who receive and store lumber purchased either from wholesaler or manufacturer, and sell for building or manufacturing purposes in the city or town where such retail yard is located. (4) Consumers, who are divided into various classes, generally, as follows: (a) The constructing builder. (b) The converter or manufacturer. (c) The United States government, and sometimes municipalities and railroads. (d) The small consumer of lumber for small building, construction, and repair work.

In addition to the foregoing are: (1) Mail order houses, who buy either from wholesalers or manufacturers and sell to all classes of customers. (2) Co-operative associations, who buy for the benefit of their own members only. The latter classes are regarded by some as retailers, by others as consumers, and by still others as separate and distinct classes.

The government charges that the defendants in pursuance of the alleged conspiracy, by various means and methods, have arbitrarily fixed and maintained divisions and classifications of the lumber trade in interstate commerce, whereby such commerce is unreasonably restrained and competition unreasonably prevented; that the purpose and effect of the acts of the defendants, pursuant to said conspiracy, are: (1) To unreasonably eliminate or restrict competition, except as between retail yards, for the trade of (a) contractors and builders, (b) mail order houses, (c) co-operative yards, (d) the ultimate consumer, except possibly some consumers, such as the United States government, railroads, grain elevators, etc. (2) To force the ultimate consumer to buy at retail prices from regularly established and organized retail lumber merchants, recognized by retail associations. (3) To force the ultimate consumer to buy from the regular and recognized retail merchant who is operating a yard in the vicinity where such lumber is to be used. (4) To prevent any wholesale dealer or manufacturer from quoting prices, or selling and shipping to consumers.

The main question in the case is whether at the time of the filing of the bill the defendants were engaged in a conspiracy in restraint of interstate commerce as charged in the bill. The government claims that the conspiracy was formed long before the filing of the bill, and that it has been a continuing one, with activities thereunder, differing in kind at various periods, but all directed to the same unlawful ends.

The defendants by their joint and several answers deny the existence of any conspiracy amongst the defendants at any time, and while admitting certain declarations and activities on the part of some and perhaps all of the defendants prior to 1907, which might be considered of doubtful legality, nevertheless claim and allege that, since the adoption of the new constitution by the Northwestern Lumbermen's Association in January, 1907, not only no conspiracy has existed between the various defendants or any of them, but there have been no acts or declarations on the part of the defendants or any of them the legality of which can be called in question.

In the view I take of the evidence it will not be necessary to determine the question what relief, if any, could be granted if it should be found that defendants or some of them were guilty of conspiracy as charged and with activities as charged, prior to 1907, but if it should be also found that there were no activities under such conspiracy since 1907, but merely the continued existence of the conspiracy potential in restraint of trade, but not actually so. The record does not present that situation.

No review of the thousands of pages of testimony and exhibits introduced in the case will be attempted, but it may be useful to state some of the salient facts disclosed by the evidence.

The Northwestern Lumbermen's Association organized in 1890 is a voluntary membership association, having as members retail lumber dealers in the states of Minnesota, Iowa, North Dakota, South Dakota, and part of Nebraska. In the earlier years wholesale dealers were admitted as honorary members. In the original constitution is found the following:

> The title of this association shall be the Northwestern Lumbermen's Association, and it shall have for its object the protection of its members against sales by wholesale dealers and manufacturers, to contractors and consumers, and the giving of such other protection as may be within the limits of the co-operative association.

And in section 3 of the by-laws is found the following, referring to sales by wholesale dealers to consumers:

> If the manufacturer or wholesale dealer refuse to abide by the decision of the board of directors, it shall be the duty of the secretary to notify the members of the association of the name of such wholesale dealer or manufacturer. If any member continues to deal with such wholesaler or manufacturer, he shall be expelled from the association.

Also the following:

> It shall be contrary to the spirit of this organization for one retailer who may be a member of this organization to ship lumber in car lots into the territory of any other retailer who may also be a member of this association.

Also:

> The secretary shall prepare and cause to be published every three months, a list of all the members of this association, both active and honorary, and mail the same to all retailers. Also the list of all wholesale dealers and manufacturers of lumber who shall refuse to comply with the rules prescribed in section 3 of the by-laws, and mail one of each of such lists to the members of this association.

Also:

It shall be competent for this association to exchange its black list for a similar list of wholesale dealers who may be reported, as provided for in section 3 of these laws, with any other association, which may have a membership in whole or in part in the territory covered by this organization. The spirit of this section being that there shall be reciprocity between associations whose object shall be the protection of retailers against wholesalers selling to contractors and consumers.

Changes in the constitution and by-laws were made from time to time.

In 1895 in a declaration of principles occurs the following:

We seek to establish the equitable principle that the retailer shall not be subjected to competition with the parties from whom he buys, that a fair opportunity shall be offered the man who invests his time and money in the retail business, and assumes the risk which such business inevitably involves, to earn an adequate remuneration for his labor and the use of his capital. We also seek to promote that spirit of harmony in the trade which shall prompt every retail dealer to maintain friendly relations with his competitors at home, and his brother retailers everywhere.

Among the by-laws at this time are the following:

The secretary shall prepare and cause to be issued as often as once each month, what shall be known as the "original bulletin" which shall contain a record of the facts in connection with all claims which shall come to his office. The "official bulletin" shall be mailed under sealed covers only to active members of this association for their private and confidential use, and no case shall be reported therein until the shipper is first given a reasonable opportunity to explain his position in the matter. The "official bulletin" shall also contain a list of those not in harmony with this association as provided in section 3 of these by-laws, a list of those against whom there are unadjusted complaints and a complete list of members of this association, both active and honorary.

The secretary shall also send a complete list of the members of this association to all manufacturers of or wholesale dealers in lumber who ship into the territory covered by this association as often as shall be deemed necessary by the board of directors.

In the constitution of 1897 the following appears:

"It shall be contrary to the spirit of this association for any of its members to make or cause to be made shipments into the legitimate territory of members of other associations of retail lumber dealers, and members who shall so offend shall be subject to such discipline as may be provided in the rules of this association.

Any person or persons, whether carrying a stock of lumber or not, making a practice of quoting prices, selling or shipping (to other than regular dealers) lumber, sash, doors, etc., into territory under the protection of this association. where said person or persons have no yards, shall be designated as "poachers." When said poachers are reported in the membership list and notification sheet they will be considered as consumers at points other than where they may own yards, and any wholesaler or manufacturer, or their agents, making sales or shipments to said parties into the territory of any member of this association after being thus reported, will be considered as having sold or shipped to a consumer.

In 1901, a new constitution and declaration of principles was adopted containing the following:

We recognize the right of manufacturers and wholesalers to sell in whatever market, to whatever purchaser, and at whatever price they may see fit.

We claim for ourselves, both individually and collectively, the right to buy of such manufacturers or wholesalers or their agents, as we may prefer, and to refrain from buying of those who disregard the equities of the trade to our injury and the demoralization of the retail lumber business. * * *

The sole purpose and object of this association shall be to keep its members constantly informed of those manufacturers and wholesalers who may persist in selling at retail in competition directly or indirectly with any member of this association, to the end that members hereof may refrain from dealing with such manufacturers and wholesalers and their agents, if they or any of them so elect or desire.

Membership.

Any person, firm or corporation within the territory of this association regularly engaged in the retail lumber trade, carrying an assorted stock of lumber, sash. doors and other building material, reasonably commensurate with the demands of his community, shall be considered a retail lumber dealer and be eligible to membership in this association.

Further changes were made in the constitution in 1903. In this constitution, in article VII, appears the following:

Reports to Secretary.—Any member of this association having knowledge of a sale by a manufacturer or. wholesale dealer or his agents, to a consumer, within the territory of such member, may notify the secretary of this association in writing, giving as full information in reference thereto as practicable. * * *

Upon receipt of such written notice, the secretary shall immediately verify such report so far as practicable, and under the direction of the board of directors, shall notify the members of the association of such sale or sales or shipment by such manufacturer or wholesaler.

In the constitution of 1903 appear also the following provisions:

Article III. Limitations and Restrictions.

Section 1. No rules, regulations or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices, or pooling profits.

Sec. 2. No coercive measures of any kind shall be practiced or adopted toward any retailer, either to induce him to join the association, or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this association be used or allowed against any retailer for the reason that he may not be a member of this association, or to induce or persuade him to become such member.

Sec. 3. No promises or agreements of any kind shall be requisite to membership in this association, nor shall any penalties be imposed upon its members for any cause whatsoever.

Whether these latter provisions were seriously intended to substantially change the aims and purposes or the methods of the association may well be doubted in view of the activities which the evidence shows were still carried on under this constitution. One of the secretary members of the Lumber Secretaries Bureau of Information (one of the defendants herein), in writing to a brother secretary in May, 1903, in reference to certain similar changes in the constitution of his association, uses the following quaint language:

A number of our members have asked me what we propose to do since we wiped out all penalties and obligations, and I have answered all of them that every dealer in lumber who is a member of the association has been in business long enough to know just what the object of the association is, and that we propose to protect our members in the same old way as we have

been doing, and that it is not necessary to put it down in black and white in our constitution and by-laws, and I have found that they have all been satisfied with the change and feel a good deal freer since we have wiped out all semblance of anything that might be construed by a prejudiced judge as in conflict with the anti-trust laws of our several states.

In 1906–07, the constitution was amended by striking out from the membership clause above quoted the words "considered a retail lumber dealer, and be."

In 1906–07, the constitution was further amended by eliminating article VII relating to "Reports to Secretary."

In the declaration of purpose occurs the following:

We also recognize the disastrous consequences which result to the legitimate retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition where any exists.

And recognizing and appreciating the advantage of co-operation in securing and disseminating any and all proper information for our mutual convenience, benefit or protection, we have organized this association. and have adopted the following articles for the government of our affairs.

Among the articles is the following:

The object of this association is and shall be to secure and disseminate to its members any and all legal and proper information which may be of interest or value to any member or members thereof in his or their business as retail lumber dealers.

A consideration of the provisions of the several constitutions and by-laws of which portions are quoted above, in connection with other evidence in the case, leads to the conclusion that among the purposes of the association, at least prior to 1907, were the following: To eliminate competition, except as between retail yards for the trade of the consumer; to force the consumer to buy from a regularly organized retail dealer operating a yard in the vicinity where such lumber was to be used, and to prevent the wholesale dealer or manufacturer from selling direct to the consumer.

Various means and methods to bring about the desired results were tried during the period prior to 1907. Expulsion of members, black lists of offending wholesale dealers, fines and penalties for offending members; co-operation with other similar associations and the exchange of black lists and other information; furnishing of information to lumber credit agencies touching the status of various persons, firms or corporations, whether they should be classed as retailers, co-operative yards, consumers, or otherwise; publication, alone or in co-operation with other similar associations, of a handbook for the lumber trade, containing among other things a list of manufacturers who sold to consumers direct, and other nonethical dealers; formation of the Lumber Secretaries' Bureau of Information for the purpose of co-operation between the different associations of retail lumber dealers, in carrying out the aims and purposes above enumerated.

The defendant the Lumber Secretaries' Bureau of Information was incorporated in 1902. It grew out of a prior voluntary association known as the Secretaries' Association. Its membership consisted of the secretaries of the various retail lumber associations as representing

the associations themselves. During this period the membership increased until 15 associations were represented. The Northwestern Lumbermen's Association was included from 1902 to 1906, and from 1909 continuously.

Article III of the constitution of said bureau is as follows:

> The object for which this bureau is formed is to supply its members with any and all information which may legitimately come into its possession which may be of value or interest to said subscribers.

In December, 1902, a series of resolutions was recommended by said bureau for adoption by the constituent members of the several Retail Lumber Dealers' Associations. Among said resolutions were the following:

> Whereas, there are certain manufacturers and jobbers in lumber who seek our trade, and whom we have patronized liberally who are also seeking the trade of, or are supplying the so-called "poachers" who are invading our territory with catalogues and other demoralizing literature, and who make a business of selling direct to the consumers; and
>
> Whereas, some manufacturers and jobbers in lumber habitually ship lumber to their customers to points where said customers have no yards, and who in fact are "peddlers"; and
>
> Whereas, some manufacturers and jobbers in lumber, with no regard for the interests of the retail lumber trade, sell and ship direct to consumers, and also to aggregations of consumers organized as so-called "co-operative yards"; and
>
> Whereas, we do not consider such practices to be good ethics, and the lumber trade in general is not in any manner benefited thereby:
>
> Be it therefore resolved, that we, the undersigned, in convention assembled, together with any other of our members who may indorse these sentiments and sign with us, do hereby request the secretary of this association as often as once in every sixty days, or at such periods as may be found to be the most practicable, either through his own office or through the Lumber Secretaries' Bureau of Information, to notify us of all such cases as may come to his official notice, that we may thereby be kept fully informed and better enabled to distinguish foes as well as friends.
>
> And be it further resolved. that our secretary be requested to co-operate with the secretaries of all other state and interstate retail lumber dealers' associations, through the Lumber Secretaries' Bureau of Information, to the end that we may have this information from all retail territory.

Among the activities of the Lumber Secretaries' Bureau of Information was the publication of a bulletin or report published and distributed as outlined in the above resolution. This publication began as early as 1903, and continued as late as 1908.

In December, 1903, said bureau adopted further resolutions, and, among others, the following:

> To co-operate with the Eastern States Retail Lumber Dealers' Association, an eastern body corresponding to the Lumber Secretaries' Bureau of Information.
>
> To approve the plan of use of "customers' lists" proposed by the said Willard G. Hollis, as hereinbefore described.
>
> To secure reciprocity agreements with the Sash and Door Manufacturers' Association and with the National Lumber Manufacturers' Association.

Statement has been made by counsel for defendants that the Lumber Secretaries' Bureau of Information has since the commencement of this suit terminated its existence. Attention has not been called

to anything in the record establishing such to be the fact, and the government has not admitted it. If deemed advisable, evidence on the matter may be offered before entry of final decree.

In 1890, the Mississippi Valley Lumberman, a weekly newspaper published in Minneapolis, was made the official organ of the Northwestern Lumbermen's Association, and this paper continued to be such official organ, though without formal vote after the first one, until January, 1894, when the Northwestern Lumberman, a Chicago publication, was made the official paper for that year. By arrangement made with the latter paper, the association was entitled to one page per week in said paper over the signature of the secretary for such official communications to members as he might choose to make.

The effect of these various activities during the period prior to 1907 is shown. Among other evidence are the statements made from time to time by the members of the association and the Lumber Secretaries' Bureau. In 1903, the president of the association in his annual address said:

> We are to-day acting in unison with fifteen other retail associations representing 5,000 yards, making with our own a total of 7,200 yards, covering territory extending from the western slope of the Alleghenies on the east to the eastern slope of the Rockies on the west, and from Winnipeg down to the "Sunny South by the Sea." In this vast territory it is estimated that of all the lumber used in the building trades, 94 per cent. of it is confined to its proper channels, reaching the consumer through the retail yards. Possibly this estimate is too high, but it is beyond doubt that the great bulk of irregular shipments have been cut off through the well-directed forces of united effort. * * *
>
> The idea that in union there is strength has crystallized fifteen retail associations into one central organization. (The Lumber Secretaries' Bureau of Information.)

In 1905 Mr. Ewing at the annual meeting said:

> I have been on the board for a number of years, ever since the organization of the association. * * * I want to say, gentlemen, that if this association would go out of existence to-day our whole territory would be covered with men selling lumber to consumers from all the markets of the northwest direct. You could not keep on your feet. This association has given you more protection than you have ever dreamed of. You want to make it still stronger. We can if you will do your duty and not buy lumber from men that are not in sympathy with us.

Indeed, it is not necessary to go outside of the pleadings to determine the purposes of the defendants, the methods employed by them, and the effect produced during the period prior to 1907.

The answer admits the substance of the allegations of the bill as to these matters; but, though making this admission, defendants deny that there was a conspiracy amongst the defendants or any of them.

A careful consideration of the record, however, leads to the conclusion that if suit had been brought in 1906, and the same admissions and evidence been introduced that are now before the court touching the period prior to 1907, the government would clearly have been entitled to injunctive relief.

It is but fair to add that the adoption of its original constitution by the Northwestern Lumbermen's Association was prior to the passage

of the Sherman Anti-Trust Act; and that many of the activities of this earlier period were thought to be sanctioned by the decision in Bohn Mfg. Co. v. Hollis et al., 54 Minn. 223, 54 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.

Turning next to the period subsequent to the adoption of the 1907 constitution:

As heretofore noted, certain changes are found in the constitution of 1907. The definition of who should be considered retail lumber dealers has been eliminated. Article VIII of the constitution as it existed in 1903, relating to reports to the secretary of the association by members thereof, touching sales by manufacturers and wholesalers direct to consumers, is also eliminated. In fact, if the constitution of 1907 be considered by itself alone, it affords no substantial basis to sustain the charge of conspiracy alleged in the bill.

Turning now to the activities of the defendant association subsequent to the adoption of the constitution of 1907, it is found that certain of the activities of former years are no longer continued. Expulsion of members, penalties imposed upon members for offenses contrary to the provisions of the constitution or by-laws, are eliminated, so far as the defendant association is concerned.

It is claimed on the part of the government, however, that with the discontinuance of certain activities others were introduced to take their place, and that these new activities should be considered, not merely with reference to the new constitution, but in the light of the whole prior history of the defendants; and that, when so considered, the new activities are found to be inspired by the same purposes, directed to the same ends, and effective to a substantial extent in accomplishing those ends.

Among the activities subsequent to the adoption of the 1907 constitution are the uses made of certain lumber trade publications. "The Scout," a trade publication of Detroit, Mich., is one of these. This publication was made the official organ of the defendant Northwestern Lumbermen's Association for the year 1909. In its columns were published by the secretary of the association lists of wholesalers and manufacturers who made sales which were considered unethical or irregular. In May, 1909, the secretary of the association, in writing to an alleged unethical manufacturer, recites some of the various means theretofore employed in advancing what he calls "the association idea." Among other things, he mentions: (1) Honorary membership for wholesalers and manufacturers in the retail association. (2) Buyers' guide for distribution among the members of the retail association containing advertisements of the manufacturers. (3) The sending of a monthly sealed letter. (4) Establishment by the Mississippi Valley Lumberman of its publicity department. (5) The plan of using the Scout as a medium of conveying to the membership of the association information regarding sales to mail order houses and to others not regular retail dealers. This use of the Scout was discontinued after a trial of one year.

In May, 1908, a conference between certain representatives of the various branches of the lumber trade was held at Tacoma. The Northwestern Lumbermen's Association was represented, and a call was

issued for a subsequent national conference to be held at Minneapolis in June, 1908, immediately following the convention of the National Lumber Manufacturers' Association. This lumber trade congress was held, and delegates from 30 lumber associations were present, including those from the Northwestern Lumbermen's Association. At this congress a code of ethics was adopted, which was thereafter also adopted by said Northwestern Lumbermen's Association. Among the articles in the new code of ethics appeared the following:

> It should be the duty of the manufacturer and wholesaler to take an active interest in the marketing of their products through regular channels only. * * * It is the sense of the conference that the widest trade publicity be given for the purpose of making known irresponsible, irregular and unscrupulous dealers and manufacturers.

This last provision was changed in 1909, by substituting the word "unethical" in place of the word "irregular." This code of ethics continued in force without material change at the time of the commencement of the present suit.

The evidence also shows that during this period the secretary of the Northwestern Lumbermen's Association from time to time furnished information and advice to the lumber credit agencies in reference to the classification, not only of members of the association itself, but of other dealers, as to whether they should be classified as co-operative yards, retail dealers, consumers, or otherwise. It is to be borne in mind, in this connection, that the lumber credit agencies lists were in constant use by wholesalers and manufacturers.

The issuance of an official bulletin or official report by the Lumber Secretaries' Bureau of Information continued during the years 1907 and 1908. The method of its compilation and use was as follows: A retail lumber dealer, learning of a sale by a wholesaler to a consumer, would make complaint in writing to the secretary of the association to which the retailer belonged. The secretary would thereupon take the matter up, ascertain the facts in regard to the matter complained of, and submit his report to the board of directors of the Lumber Secretaries' Bureau of Information. This body determined whether the matter should be reported in the next issue of the bulletin, and instructed the secretary accordingly. The bulletin when issued was distributed among the members of the several associations. It should be noted, in connection with this matter of the bulletin, however, that the secretary of the Northwestern Lumbermen's Association resigned from the Lumber Secretaries' Bureau of Information in the spring of 1906, and did not again become a member of said bureau until 1909.

Among the activities of the Northwestern Lumbermen's Association during the period subsequent to 1907 was the use of "Customers' lists." This was a plan apparently originating with the secretary of this association, and suggested by him to the secretaries of other similar associations through the Secretaries' Bureau, and adopted by other secretaries to a greater or less extent. Briefly, the plan was this: The secretary of the association at the beginning of each year would send a circular letter to the members of the association, asking for a

list of wholesalers or manufacturers with whom the retailer dealt, and in reference to whom he desired to be kept informed. Upon receiving such lists, the information was rearranged and compiled upon a card index, so as to show the customers of the various manufacturers and wholesalers in the territory covered by the association; and by exchange of lists the information upon this card index would be extended, so as to cover the territory of other associations. Information was then obtained by the secretary of the association as to irregular or unethical shipments by such wholesalers or manufacturers. The two principal sources of such information to the secretary were communications from the members of the association as to irregular or unethical sales which came to their notice in their vicinity, and reports by detectives hired by the association from time to time to make investigation and report to the secretary. The defendant Boyce was largely employed in this work.

Upon the receipt of such information, the secretary would notify customers of the offending wholesaler or manufacturer in regard to the specific unethical or irregular sale. Whether such notice by the secretary should be sent to a few or to many of the customers of the offending wholesaler or manufacturer rested in the discretion of the secretary. In one extreme instance it was sent to 1,200 customers. The customers receiving such information would then take up the matter with the offending wholesaler or manufacturer, protesting against such unethical or irregular shipments. There is no dispute as to the existence and operation of this method, but it is denied by defendants that it was carried out in pursuance of any conspiracy or agreement. It is further strenuously urged that the various members of the association receiving notices from the secretary of unethical or irregular sales by any particular wholesaler or manufacturer were under no obligation or agreement to take any action whatsoever, but the evidence is conclusive that action was taken by the individual members upon receiving the information. In the earlier years of the use of customers' lists, the secretary of the association would himself write directly to the offending wholesaler or manufacturer. This plan was later changed for the one above outlined. The change in method was made for two reasons, according to the testimony of the secretary: First, on account of a decision of the Supreme Court of the state of Nebraska in the case of State v. Adams Lumber Co., 81 Neb. 392, 116 N. W. 302; secondly, because many of the manufacturers resented receiving such communications from the secretary.

A careful consideration of the evidence has convinced me that these two activities, the use of the bulletin and the use of the customers' lists, are not substantially different from the use of the "official report" under consideration in the case of Eastern States Lumber Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. The court in that case said:

> The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the District Court, but it directly tends to prevent other retailers who have no personal grievance against him and

with whom he might trade from so doing; they being deterred solely because of the influence of the report circulated among the members of the associations.

While, as above noted, the secretary of the association mentions, among other methods used to effect desired ends, the establishment of the "publicity department" in the Mississippi Valley Lumberman, "in which Mr. Walker undertook to give fair notice to all the trade of the operations of various pirates and buccaneers in the lumber business," he does not claim that this effort was under the authority or by the direction of the association; nor does the evidence warrant a conclusion that the "publicity department" of the Mississippi Valley Lumberman was under the management or control of the association. It is admitted in the answer, however, that during said period the secretary did from time to time furnish to the Mississippi Valley Lumberman various items of information showing shipments of lumber and lumber products from manufacturers and wholesalers direct to consumer. Also, it is admitted that both the secretary and the defendant Walker knew and intended that such items should be published in said paper and circulated therein as items of interest to the subscribers of said paper. But it is denied that this was done in furtherance of any conspiracy or combination.

During a portion of this period there appeared in the Mississippi Valley Lumberman in the "publicity department" the standing announcement:

Selfish Dealers. That the trade can have an opportunity to become thoroughly familiar with the names of the retail lumbermen who buy from manufacturers who are known to be supplying catalogue houses with material, we reproduce the list once more—followed by a list of dealers.

Also the following announcement:

We again reproduce the list of those who have signed the affidavit certifying that they do not sell to catalogue houses, nor solicit trade of the consumers in the territory of the legitimate dealers.

The evidence is convincing that the defendant Walker during this period was zealous in his efforts to carry out the same aims as the association in respect to the lumber trade, that he received from time to time from the secretary of the association information which had been collected by the use of the customers' lists, and that such information was used in the columns of his paper. The fact that he independently gathered other information is not material here.

It is claimed by counsel for defendants that there is nothing in the record indicating that the use of customers' lists interfered in the slightest way with the channels of interstate commerce. This claim, in my judgment, is not sustained by the record. The purpose and effect of the use of the customers' lists were to coerce wholesalers and manufacturers to refrain from selling direct to consumers. The evidence of the secretaries themselves is quite persuasive. The secretary of one of the associations writes to the secretary of the defendant association:

I have sent little or nothing to the Scout for a good many months for, like yourself, I feel that the customers' lists is by all odds the most effective; at least we have always found it so.

The secretary of defendant association replies:

Noting what you say about the effectiveness of the use of the customers' list, I want to say that I quite agree with you that it is by far the best method which has ever been applied.

Again a secretary of one of the allied associations writes:

We have perfected a customers' list now for the last three years at the beginning of the year, and have used it very effectively whenever it was necessary. I am of the opinion that no better results can be obtained than for the Northwestern, Southwestern, Western, and possibly the Illinois Association, to fully perfect a customers' list, so that we can exchange information from time to time. Others will fall in line as time goes on, and I think the very best results will then be accomplished in a quiet and effective way.

The secretary of the Northwestern Lumbermen's Association testified in reference to this matter as follows:

Q. At the time that this customers' list—you were using it in 1908 and 1909 and 1910—when a manufacturer who had been shipping to the consuming trade paid no attention to the letter of the retailer, did you do anything further in the matter? A. I don't recall a single case where a manufacturer did not pay some attention to it.

Q. What do you mean by paying some attention to it? A. Well, he answered the letter, and either explained it in a satisfactory way to this dealer, in a way which satisfied the dealer who had made the complaint, or he indicated that it was a mistaken step on his part and he intended not to do it again and would not do it again, and that was the end of it.

But this is not all. A mass of evidence in the record bears out these statements of the secretaries. The testimony and admissions of manufacturers and wholesalers, of persons connected with mail order houses, of retail dealers, and of consumers, show that these efforts of the defendants were successful to a very considerable degree in restraining such interstate commerce as was considered unethical or irregular, and in restricting interstate commerce to so-called regular channels; that is, from wholesalers and manufacturers to the retailer, and from the retailer to the consumer.

It is true that many of these witnesses as well as others testified that, notwithstanding the efforts of the defendants, they were able to provide themselves with such lumber as they needed, and it is claimed on the part of counsel for defendants that, this being the case, the restraint of interstate commerce, if any, by reason of the methods of the defendants, was merely negligible. In my judgment, this contention is not sound. The test is, not whether by alleged methods carried out in pursuance of a conspiracy some portion of interstate commerce is annihilated, but whether such commerce is substantially interfered with or restrained.

The responsibility of those who unlawfully place substantial obstacles in the legitimate channels of interstate commerce is not lessened by the fact that some of the persons engaged in such commerce are

able by superior agility to surmount the obstacles, and that others by strength are able to break them down.

The court will not feel itself compelled to adjudicate in mathematical terms the extent of the restraint of interstate commerce, if the evidence shows that it is substantial. Nor is it material here that the motives of the defendants in carrying out the activities above described were of the best, and that the acts were inspired by an honest belief that the interests, not only of those engaged in the lumber trade, but of the community at large, would be best served by having lumber and lumber products distributed solely through so-called regular channels. Such matters might very properly be considered by Congress in determining the propriety of enacting proposed legislation. The sole inquiry here before the court at this time, however, is whether the facts disclosed by the record make out a case within the statute already enacted.

In Eastern States Lumber Ass'n v. United States, the court uses the following language:

> The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. Addyston Pipe Co. v. United States, 175 U. S. 211, 241–242 [20 Sup. Ct. 96, 44 L. Ed. 136].

In my judgment, the government has clearly made out a case within the statute, as interpreted in Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, and Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, and is entitled to relief by way of injunction.

It is proper to add that the defendants have, each of them, activities other than those above criticized, of wide range and considerable importance, in reference to which no complaint is made.

The injunction should therefore be against the several defendants, but directed specifically toward the illegal activities heretofore and at the time of the filing of the bill carried on by them in interference with and restraint of interstate commerce, to wit: The use of customers' lists in collecting, compiling, and distributing information, whether to the members of the association, to trade publications, or other newspapers, to credit agencies or to the public at large, as to sales by wholesalers and manufacturers direct to consumers, including mail order houses and co-operative yards.

Decree may be prepared accordingly.

WEST END ST. RY. CO. v. MALLEY, Collector.

MALLEY, Collector, v. WEST END ST. RY. CO.

(Circuit Court of Appeals, First Circuit. December 10, 1917.)

Nos. 1248, 1249.

1. INTERNAL REVENUE ⟸9—CORPORATION TAXES—"ENGAGED IN BUSINESS."
A street railway corporation, which leased its lines and property to another corporation in 1897 and had not since operated them, was not in 1913 "engaged in business" within Corporation Tax Law of Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, so as to be subject to the tax imposed by such law.

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

2. INTERNAL REVENUE ⟸7—"INCOME" TAXES—CORPORATIONS—LIABILITY.
Where a street railway company demised its lines and property to another company, under an agreement that the lessee should on stipulated dates in each year pay to the persons holding shares of stock, and certified by the lessor as entitled to dividends, stipulated sums per share, the total amount so paid by the lessee was income of the lessor street railway corporation and was subject to tax under Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 166, 172, for the lease was made by the corporation only, and the stockholders had no interest in the demised property entitling them to rent, but they received their payments merely by virtue of their holding of the stock, and the lessor company could by suit in its own name, without joining the stockholders, recover the agreed payments if withheld.

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

3. CORPORATIONS ⟸204—STOCKHOLDERS—RIGHTS OF.
Where a corporation demised all of its property under an agreement that the lessee should make payments to the stockholders, the stockholders are not the lessors, and can assert no rights as such, but the corporation itself by suit in its own name may in case of nonpayment recover rents due.

4. COSTS ⟸22—RIGHT TO.
Where plaintiff prevailed on the first count of its declaration though unsuccessful on the second, it was, having recovered more than $500, entitled to costs under Rev. St. § 968 (Comp. St. 1916, § 1609), providing for allowance of costs where a party recovers in excess of such sum.

Aldrich, District Judge, dissenting.

In Error to the District Court of the United States for the District of Massachusetts; Geo. H. Bingham, Judge.

Action by the West End Street Railway Company against John F. Malley, Collector. There was a judgment in part for plaintiff, and plaintiff brings error, while defendant also brings error. Affirmed.

Thomas Hunt, of Boston, Mass. (Gaston, Snow & Saltonstall, of Boston, Mass., on the brief), for West End St. Ry. Co.

George W. Anderson, U. S. Atty., of Boston, Mass., for John F. Malley, Collector.

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

DODGE, Circuit Judge. These two writs of error, brought by the plaintiff and defendant, respectively, in a suit to recover back taxes paid under protest to the internal revenue collector, seek the reversal of a judgment below in the plaintiff's favor for $2,608.17. The District Court, having heard the case by consent without a jury, on agreed facts, found for the plaintiff in the above amount under the first count of its declaration, but found for the defendant collector under the remaining second count thereof.

The plaintiff, a street railway corporation, having leased its lines and property to the Boston Elevated Railway Company in 1897, has not since operated them itself. They have been operated by the lessee, which has regularly made rental payments called for by the lease, for the right to operate said road thereunder. This lease is before us in full, as part of the agreed facts. It was made years before the enactment of either statute hereinafter considered.

[1] 1. The taxes in question under the first count were assessed under section 38 of the Corporation Tax Law of 1909 (36 Stats. 112), for the period January 1—February 28, 1913. The District Court held that the plaintiff was not "a corporation engaged in business" during said period, within the meaning of that statute, and therefore not subject to the tax imposed by it. The question thus presented we regard as controlled against the government's view by the reasoning and result in New York Central, etc., Co. v. Gill, 219 Fed. 184, 134 C. C. A. 558, decided by this court in 1915, the subsequent decisions cited by the District Court in its opinion in the present case, and the following still later decisions: McCoach v. Continental, etc., Co., 233 Fed. 976, 47 C. C. A. 650; Jasper, etc., Co. v. Walker, 238 Fed. 533, 151 C. C. A. 469. We find nothing in the agreed facts now before us which we can regard as sufficiently distinguishing this case from those dealt with in said decisions to warrant us in holding the District Court's conclusion erroneous.

[2, 3] 2. The taxes in question under the second count were assessed under the later Income Tax Statute of 1913 (38 Stats. 166, 172) for the period March 1—December 31, 1913. In accordance with provisions in the lease, the lessee company paid, on stipulated dates in each year, to the persons holding shares of the plaintiff's stock and certified by it as then entitled to dividends, certain stipulated sums per share held. The District Court held that the total amount so paid by the lessee during the above period was income of the plaintiff corporation as lessor, and did not cease to be such because not paid directly to it. The plaintiff contends that said amount was not properly taxable as its income under the statute.

The payments made to stockholders as above were made by the lessee for its use of the corporation's property, not of the stockholders' property. Though they have each an interest in said property, they have no direct interest such as makes them its owners.

The property has been put into the lessee's hands by the lessor corporation, and the payments to be made by the lessee for its use have been agreed on, not between the lessee and the lessor's stockholders, but between it and the lessor corporation to which the property belongs.

That agreement expressly refers to and treats these payments to stockholders as part of the agreed rent for the property. Under it no stockholder could assert rights as lessor, for want of any such interest in the leased property as would have enabled him to lease it or agree upon a rent for it.

No benefit to the lessee, beyond that which would result to it from the lease if all the rental payments called for were thereby made payable directly to the lessor, is secured to it by the provisions of the lease that it shall divide this part of the rent among those who may be the lessor's stockholders from time to time. Those agreements are effective only to spare the lessor the trouble and expense of making the division itself. The lessee's assumption of this trouble and expense is part of the consideration to the lessor agreed upon for the use of its property.

That the lessor railroad could recover the agreed payments to its stockholders by suit in its own name is undisputed. Whether the individual stockholders have rights of action therefor in their own names is at least uncertain. If they have such rights, they are not founded upon any title of the stockholders' own, but upon that of their corporation only. We agree with the opinion of the District Court that the total of these so-called dividends was, within the meaning of the statute, "income arising or accruing" to the corporation. The District Court's conclusion is supported by a Court of Appeals decision. Anderson v. Morris, etc., Co., 216 Fed. 83, 90, 132 C. C. A. 327. Though it was the Corporation Tax Act of 1909 which was there under consideration, a question passed upon was whether or not such dividends paid to stockholders by the lessee were part of the lessor's "entire net income * * * received by it from all sources" during the year; and the court in effect held that it was. The inquiry in this case is whether such dividends are part of the lessor's "entire net income * * * arising or accruing from all sources" to it during the year. So far as the difference in phraseology is of any significance, it favors a more, rather than a less, inclusive construction. This decision having been followed by Judge Ray in the same circuit, since the decision here appealed from, Rensselaer, etc., Co. v. Irwin (D. C.) 239 Fed. 739, in a case arising, like this, under the Income Tax Statute of 1913, we are unable to find sufficient reason for a refusal to follow it in this circuit.

[4] 3. The District Court ordered that costs should not be allowed to either party, and this ruling is assigned as error by the plaintiff West End Company. Having prevailed on its first count, though unsuccessful on its second count, we think it was entitled to its costs, according to the usual rule in cases where the prevailing party recovers less than he claims, in a suit at law, but not less than the $500 necessary to carry costs under Rev. Stats. § 968 (Comp. St. 1916, § 1609). No question as to items of the taxation is before us.

The judgment of the District Court is affirmed, except so far as it denies costs to the plaintiff, to which extent it is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion. Each defendant in error recovers its costs in this court.

ALDRICH, District Judge (dissenting). There are several questions, but I disagree with the majority opinion only upon the single

question raised by the West End Railroad which relates to a tax assessed upon supposed income under the Income Tax Statute of October 3, 1913 (38 Stat. 172).

Under the power conferred upon Congress by the Sixteenth Amendment of the Constitution of the United States to lay and collect taxes on incomes, from whatever source, the corporation income tax of 1913 was enacted without the limitation phrase of the statute of 1909, "organized for profit," and, so far as domestic corporations are concerned, omitting the other phrase of limitation, "engaged in business."

It is, of course, manifest that Congress, by virtue of the power conferred by the constitutional amendment, intended to create the right to lay an income tax, not only upon individuals, but to broaden the provisions of the statute of 1909, at least in respect to domestic corporations, no matter how created or organized. This case, however, does not require a discussion of the general question as to what kind of corporations are touched by the act of 1913 which were not within the operation of the act of 1909, because it is clear, regardless of the question whether it is engaged in business, that the West End is a corporation subject to the income tax, provided it is receiving an income within the meaning of the statute of 1913. Thus it would follow that the tax was properly levied and is enforceable, provided the income in question arose and accrued to the corporation; in other words, provided it was the income of the West End Railroad.

The West End strongly contends that the income in question was not its income, but was the income of its shareholders, arising or accruing to them under the business operations of the Elevated Railroad and by virtue of the provisions of the lease or contract between the West End and the Elevated.

No one now questions the general and familiar rule that, when controversies arise as to whether particular statutes were directed against property upon which the tax is levied, the provisions will not be extended beyond the clear import of the language used, and, as taxes are a burden imposed by a government, that it must be clear that they apply to the situation in question. Gould v. Gould (November 19, 1917) 38 Sup. Ct. 53.

There are a number of cases which discuss the question whether the remaining activities of corporations which had leased or transferred their business to others were sufficient to bring them within the meaning of the statutory provision in respect to corporations carrying on business. But, after all, as said by the Supreme Court in Von Baumbach, Collector, v. Sargent Land Co., 242 U. S. 503, 516, 37 Sup. Ct. 201, 61 L. Ed. 460, the decision in each case must depend upon the particular facts before the court, and the same idea would hold in a case of this kind, because the real question is whether, under the particular circumstances of this case, the income was the income of the West End Railroad, received in its capacity as a corporate entity or in its corporate right, and so clearly so as to make the corporation subject to the income tax provision in respect to corporations. Can it be said that Congress clearly intended to subject a corporation, situated as the West End is, to the income tax created by the act of 1913? I think

not. The income, under the circumstances, was not the income of the corporation, but of those who, under the lease, succeeded to the right of the corporation to receive an upset or stipulated sum for the use of its property.

The lease in question is dated December 9, 1897, and is for the period of 24 years, 8 months, and 9 days, and by its terms the West End granted and transferred its railway, and property of every description, reserving to itself only an obligation created in its favor under the lease whereby the Elevated was to pay yearly $7,500 (later $8,600) in order that the West End might maintain an office and an organized existence for certain limited purposes. The West End, in every practical sense, turned over to the Elevated its railway system and its right to operate and do the business contemplated by its charter, and thus became a mere shell, taking no part in the actual operations of the system, and expressly limiting its income to the $7,500, or the $8,600, provided under the lease for special purposes. Under the lease arrangement the shareholders were provided for and protected by a provision whereby each holder of common stock was to receive for each share direct from the Boston Elevated $1.75 each year during the continuance of the lease, and each holder of preferred stock $2 per share each year. Neither the income of the individual shareholder of the West End nor the obligation of the Elevated to pay depended at all upon earnings; and, so far as doing business for profit was concerned, the activities of the West End had ceased as the result of the lease transferring the right to operate. Here is a perfectly legitimate income status created before the law, in which it is not only contemplated, but expressly provided, that certain and stated sums which are not to be affected by earnings, or by statutory methods and deductions prescribed for the ascertainment of taxable corporate income, shall be paid directly to the shareholders.

In view of such complete transfer of the corporate right to do business and to receive income based upon operations and earnings, and in view of its complete surrender and transfer to the shareholders of its right to receive income as a corporate entity, either from its operations or under the lease, it seems extremely fictional to say that the money paid to the shareholders under the terms of the contract was the income of the West End Railroad within the meaning of the statutory provision in question. It is a significant fact that the sum paid to the shareholders is not a sum necessarily based upon the income from the operations of the West End system by the Boston Elevated, nor is it to be ascertained by the contemplated and prescribed statutory method of deducting from the gross amount of income the ordinary and necessary expenses of maintenance and operation of its business, but it comes as an arbitrary sum established by contract, and the shareholders are apparently entitled to have it without regard to whether the operations of the West End by the Boston Elevated under the lease results in net profit or income; and, indeed, without regard to the question whether the operations result in loss. The fact that the statute carefully prescribed the manner in which corporate income, against which the law was intended to be directed, should be ascertain-

ed, has a very important bearing upon the question whether it was intended that the act, in respect to corporate tax liability, should operate upon definitely established income to shareholders who succeed to the income rights of the corporation, and whose rights under such succession are to receive a definitely established sum under the contract.

There has been some discussion of the question whether these sums received by the shareholders are income in the nature of profits resulting from operations, or whether they are rents. The lease treats the payments to the shareholders as payments of rent, but, in the statutory sense, whether it is rent based upon profits or not is of little consequence. Under the stipulation the income arises or accrues directly to the shareholders, and this is so regardless of whether it is strictly rent, or income based upon profits, and quite independent of the question whether the operations under the lease result in profit or loss.

Though shareholders receive corporate fruits through dividends, they are in every substantial sense real owners of corporate rights and properties, and under proper limitations and adjustments are entitled to the fruits of the corporate business. Whenever a corporation in its artificial corporate capacity under statutory creation receives profits from the earnings of a system, it receives something which it holds in trust for the benefit of the shareholders; and it is difficult to see any reason why it may not transfer the right to receive income or profit to the real owners. And it is difficult to discover that the lease in question created agency relationship between the West End and the Elevated in respect to the payments to the shareholders, as that was something done by the Boston Elevated to discharge an obligation created in their favor by the lease and was payment of money which the shareholders were entitled to receive under their own enforceable right from the Boston Elevated.

The shareholders do not, in any sense that I can see, receive the stipulated sums from the Elevated as an agent of the West End; but rather in their own right as owners of stock. True enough, when the entity is in control of the property by consent of the shareholders, managing for business purposes, and for purposes of income and dividends, the corporation may be taxed for the income; but when, within the scope of its corporate agency, it turns over its management to another, and creates rights in the shareholders to receive stipulated sums because they own certain shares of stock which represent the property, it creates for them, as owners, property rights as principals, quite independent of any agency relationship between the lessor and lessee.

The rights of the shareholders must be enforceable by them under the obligation created in their favor (Penn. Steel Co. v. New York City R. Co., 198 Fed. 721, 747–751, 762–765, and cases cited, page 762, note 22, 117 C. C. A. 503, p. 544, note 22; Forbes v. Thorpe, 209 Mass. 570, 581, 95 N. E. 955), because in every substantial sense they are the beneficiaries entitled to receive the fruits of the corporate property.

The whole scheme of the lease transaction was, first, to put the management of the corporate property, together with its income resulting from operation, out of the hands of the West End and into the hands of the Elevated, and, second, under the transfer, to create a definite income in favor of the shareholders, which was to be not only definite in amount, but definite in the right of the shareholder to receive it directly; and thus the income received by the shareholders from the Elevated was their own income and not the income of the West End, which had transferred its right to receive it from the operations of road to the Elevated, and had created a distinct right in the shareholders to receive it by virtue of the lease.

In this case, as in the case of Rensselaer & S. R. Co. v. Irwin (D. C.) 239 Fed. 739, the lease was executed long before the enactments of the statutes in respect to corporate income, and therefore it can be said here, as there, that no fraud on the law was intended.

The Rensselaer Case was decided upon the theory that the payments provided for by the lease were based upon profits and were payments as rents, and, though paid direct to the stockholders, that they were in legal effect received by the plaintiff corporation, and were the corporation's net income within the meaning of the statute. This reasoning was apparently based upon the idea that, if any other view was held, corporations would escape payment of an income tax by leasing their properties and providing for the payment of their surplus earnings direct to the stockholders, and that few corporations would pay an income tax.

It is not apparent that the danger pointed out justifies the extreme fiction involved in holding that actual payments to stockholders in a contract situation like the one here, and one involving good faith, were in legal effect, contrary to the fact, payments to the corporation. It is not necessary to say whether such danger, if a real one, would justify the fiction, because it may be said that the apprehended danger is not real, and this is so because, when a corporation sees fit to go out of the practical management of its system and transfer its earning capacities to another corporation, which operates for profit and income, that corporation would doubtless become a corporation subject to the income tax, because it would be bound to pay the statutory tax on net income arising or accruing from all sources, and this is so because, whenever profit results from the rightful operation of the leased system, it would be a source of income contemplated by the statute creating the tax.

And, again, as the West End Railroad, as an artificial entity, had ceased its business activities and turned over to the shareholders the right to receive an income based upon a contract right, not to be affected by the contemplated statutory calculations and deductions, it is not plain to see why the shareholders would not be subject to tax after the income had actually reached them.

It is, of course, not a question here whether the Elevated is liable to be taxed, or whether the individual shareholders of the West End are so liable because they are not parties. The precise question is whether the payments to the shareholders of the stipulated definite sums

named in the lease were an income of the West End as a corporation within the meaning of the statute, and the supposed question in respect to the liability of the Elevated and that of the individual shareholders to be subjected to a tax, are only referred to as illustrations which tend to solve the question of the liability of the West End.

In a situation like this, speaking generally, the income from the operations of the West End first inures to the lessee operating under the lease, and then, under the terms of the lease, to the shareholders in the lessor corporation. It is difficult to see why the earnings of the West End, less the operating expenses, the amount paid to the shareholders, under the contract, and other proper deductions, if any, are not income of the Elevated under the lease as income within the statutory meaning of "income from all sources," and it is difficult to see why the dividends deducted by the Elevated from the earnings of the West End, when paid to the shareholders, should not become the income of the individual shareholders and taxable to them as such. This would not be double taxation, because the amounts of the dividends were deducted from the gross earnings under the lease, but, if taxed to both the shareholders and the West End as income, it would be double taxation in respect to the same business, something which, as said in McCoach v. Minehill, 228 U. S. 295, 304, 33 Sup. Ct. 419, 57 L. Ed. 842, could not have been contemplated.

Anderson v. Morris E. R. Co., 216 Fed. 83, 132 C. C. A. 327, furnishes very little, if any, support to the claim that the contemplated and stipulated payments to the shareholders under the circumstances of this case were the income of the West End. That was a case where the reasoning had reference to the question whether the corporation was engaged in business within the meaning of the law of 1909, and it was there said that the fact that the payments were by the lessee to the stockholders would not prevent the act—meaning, of course, the act of 1909—from applying to the money so paid, if the other conditions of the act make its terms applicable, meaning, as it would seem, that it would be considered, among other things, upon the question whether the corporation was doing business. The court in that case could not and did not determine that income paid to stockholders, under circumstances like those existing in the case now under consideration, was income of the leasing corporation. And that is so because that court had neither such a question nor the statute of 1913 before it.

In McCoach v. Minehill R. Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, the corporation was leased, and the lessor maintained its corporate existence to collect and distribute to its stockholders the rental from the lessee, and also dividends from investments; yet it was held that it was not doing business within the meaning of the Corporation Tax Act of 1909.

The case of Lewellyn v. Pittsburg, B. & L. E. R. Co., 222 Fed. 177, 184 (137 C. C. A. 617), in its reasoning as to the question whether the leasing corporation was doing business, among other things, says:

"The plaintiff railroad corporations received no income from railroads operated by themselves, and expended none in the operation of railroads or for any other purpose. Receiving no income and disbursing none, there was, of course,

no gross income from which to determine net income, and no means to measure an excise tax as provided by the statute. Therefore, in being without income from operating their railroads, the lessor railroad corporations to this extent at least were outside of the scope of the statute."

While the reasoning of these cases has no direct bearing upon the question here, yet, by holding that the corporations under the dividend status with which they were respectively dealing were not doing business within the meaning of the statute to which the cases relate, it does through analogy sustain the idea that the West End was out of business, and that it had transferred the income under the lease to the shareholders.

The West End was not operating. It was, in fact, receiving no income either from its own operations or from the operations of others. It had bodily transferred its property, and its management, and the right to receive income, and it is difficult to find how it can reasonably be said that they have a gross income from which the statutory deduction can be made in order to get at the measure of net income contemplated by the statute of 1913.

BOARD OF COM'RS OF MUDDY BOTTOM SWAMP LAND DIST. NO. 1, TIPPAH COUNTY, MISS., v. EQUITABLE SURETY CO.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1917. Rehearing Denied January 24, 1918.)

No. 3139.

1. APPEAL AND ERROR ⊂=1099(8)—REVIEW—LAW OF CASE.
The reversal on writ of error of a judgment for defendant, on the ground that the refusal of requested instructions submitting issues of defense was erroneous, does not on retrial warrant the direction of a verdict for defendant; the defenses not being established by the uncontroverted evidence.

2. TRIAL ⊂=140(1)—PROVINCE OF JURY—CREDIBILITY OF WITNESSES.
The credibility of a witness is a question for the jury.

3. PRINCIPAL AND SURETY ⊂=162(2)—ACTIONS—EVIDENCE—JURY QUESTION.
In an action on a contractors' bond, the question whether the surety was induced to become such by defendant's misrepresentations as to the amount the contractors were to be paid *held* for the jury.

4. PRINCIPAL AND SURETY ⊂=162(2)—ACTIONS—EVIDENCE—JURY QUESTION.
In an action on a contractors' bond, the question whether the losses for which the surety was sought to be made responsible resulted from plaintiff paying to the defaulting contractors amounts which the contract did not authorize it to pay *held* for the jury.

In Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Action by the Board of Commissioners of Muddy Bottom Swamp Land District, No. 1, Tippah County, Miss., against the Equitable Surety Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

See, also, 231 Fed. 33, 145 C. C. A. 221.

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

Thomas E. Pegram, of Ripley, Miss., Lester G. Fant, of Holly Springs, Miss., and Wm. M. Hall, of Memphis, Tenn., for plaintiff in error.

C. L. Sivley, of Memphis, Tenn. (Sivley & Evans, of Memphis, Tenn., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

WALKER, Circuit Judge. [1] This case was formerly before this court on a writ of error sued out by the defendant to obtain a review of a judgment in favor of the plaintiff. Equitable Surety Co. v. Board of Commissioners, 231 Fed. 33, 145 C. C. A. 221. The pending writ of error presents for review a judgment in favor of the defendant, rendered on a verdict which the court directed. What is now complained of is the giving of the instruction just mentioned. The action of this court on the former writ of error was based upon the trial court's refusal in the first trial to give some of the instructions which had been requested by the defendant. The effect of those instructions was to submit to the jury evidence tending to support special defenses set up by the defendant to the claim asserted by the declaration based upon alleged breaches of the bonds or contracts sued on, one a $5,000 bond and the other a $2,500 bond, whereby the defendant became the surety of contractors for the performance of work contracted to be done for the plaintiff. The special defenses relied on were, in substance: (1) That the defendant was induced to become the surety of the contractors by the plaintiff's false representation that the contractors were to be paid $19,500 for the work they were to do, the fact being that the work was to be done for $18,000; (2) that the losses for which the defendant was sought to be made responsible resulted from the plaintiff paying to the defaulting contractors amounts which the contract did not authorize it to pay, and the payment of which was not contemplated; and (3) that the making by the defendant of the $2,500 bond sued on was induced by a false representation authorized by the plaintiff and for which it was responsible.

Nothing stated in the opinion rendered when this case was here before indicates that the view was entertained that the two first mentioned defenses were sustained by undisputed evidence. The reversal of the judgment was not based upon the ground that the refusal of the defendant's request for an instructed verdict was erroneous. The holding was that the evidence adduced on the first trial to support the special defenses mentioned should have been submitted to the jury, pursuant to the defendant's requests to that end. It was conceded in argument that in the trial now under review the third above mentioned defense was not established by uncontroverted evidence. Plainly the giving of the instruction for a verdict for the defendant was not justifiable on the ground that that defense was so made out as to require a finding for the defendant. The issues raised, including those tendered by the defendant, were for the determination of the jury, unless one of the two first above mentioned defenses was sustained by practically uncontroverted evidence.

[2, 3] What was said in the opinion rendered when the case was here before makes it quite plain that it was then recognized that it was requisite, for the first mentioned defense to be sustained, that it be shown, not only that the alleged representation was false, but also that it was made at the instance or with the knowledge of the defendant. Under evidence adduced on the trial now under review, it was permissible to find that the defendant was free of any responsibility for the only representation in regard to the price of the work the contractors were to do which there was any evidence tending to prove was made to the plaintiff and relied on by it, and that the representation that the price of that work was to be $19,500 was not a false one. The defendant undertook to support its allegations as to the making of the alleged misrepresentation by testimony to the effect that, when it was applied to, several weeks before the contract for the work was entered into, to become the contractors' surety, it was furnished with an unsigned draft of the contract subsequently made. There was affirmative testimony to the effect that the plaintiff, prior to the delivery to it of the bonds sued on, had no kind of communication or dealing with the defendant in regard to the latter becoming the contractors' surety. The only testimony having the slightest tendency to prove that any representative of the defendant even knew of the furnishing to the plaintiff of a draft of the contemplated contract was that of one of the contractors. Material parts of the testimony of this witness were in sharp conflict with that of other witnesses. Certainly the question of his credibility was a matter for the determination of the jury. There was evidence tending to prove the following state of facts: The contractors bid for the work to be done at the price of $19,500. They also agreed to take at par an issue of $24,000 of bonds, part of the proceeds of the sale of which was to be used in paying for the work contracted for. They made an agreement with a bond company under which the latter, in consideration of a discount or commission of $1,500, was to pay the $24,000 bid for the issue of bonds. The defendant lent the contractors $1,500 with which to pay the discount or commission, and received from the bond company the $24,000 bid for the bonds. The defendant charged the $1,500 against the contractors, not against the work contracted for, but did not reduce by that amount the price for which the work was to be done, as it was stated in the contract. The contract for the work might well be regarded as truly stating that $19,500 was the price to be paid for it, though the contractors by a contemporaneous and not wholly unconnected transaction became indebted to the plaintiff in the sum of $1,500. The existence of that indebtedness was not necessarily inconsistent with the price for the work being what it was stated to be in the contract. We think enough has been said to show that on the evidence adduced the jury would have been warranted in finding against the defendant on the first mentioned defense.

[4] We understand that the former ruling of this court in regard to the second above mentioned defense was to the effect that the bonds sued on did not impose upon the defendant any liability for amounts paid by the plaintiff to the contractors in violation of provisions of

the contract which the defendant, the contractors' surety, had a right to rely on, and did rely on, when it entered into its contract of suretyship. It is to be noted that the instruction dealing with this defense, the refusal of which was held to be error, hypothesized a finding by the jury from the evidence that no part of the amount for which the defendant was sought to be made liable was paid for work contracted for after that work had been done. The evidence adduced in the last trial showed that the plaintiff's demand was based in part on payments the making of which violated no provision of the contract, being for work called for by the contract which had been done and completed before it was paid for. We do not construe any ruling made when the case was here before as negativing the existence of a right in the plaintiff to recover of the surety the amount of losses resulting from payments made to the contractors under circumstances which the surety, when it made the bonds sued on, understood or contemplated would justify the plaintiff in making such payments. As to an item of $4,500, which was mentioned in one of the pleas interposed and was discussed in the opinion formerly rendered, there was evidence on the last trial which was not adduced on the first trial. That amount was advanced by the plaintiff to the contractors to enable the latter to pay the price of a dredging machine needed for doing work contracted for. In the matters of the applications for the bonds sued on and putting them into effect the defendant was represented exclusively by J. J. Morrison, its general agent at Memphis. He was a witness for the defendant in the last trial. Whatever information in regard to the terms of the proposed contract the defendant had before it made the bonds sued on was imparted to Morrison by the unsigned draft which accompanied the contractors' first application. In the course of his cross-examination testimony was elicited which indicated that he understood the provision of the contract the meaning of which was disputed, and which was construed by this court, as making it permissible for the defendant to advance or pay to the contractors amounts required to pay the price of and the freight on machinery or implements needed by the contractors to enable them to do the work contracted for. A finding that the defendant's sole representative so understood the proposed contract hardly would be reconcilable with one that the defendant, in consenting to become the contractors' surety, was influenced by the consideration that the contract protected it from liability for losses resulting from payments or advances made by the plaintiff to the contractors for such a purpose. However that may be, evidence above mentioned of payments to the contractors for work contracted for made after that work was done was enough to make it a question for the jury whether the contractors' abandonment of the work before it was completed entailed upon the plaintiff a loss which was chargeable against the defendant, the contractors' surety. In view of that evidence, the second above mentioned defense cannot be regarded as having been so made out as to justify the giving of the instruction complained of.

What has been said we think sufficiently indicates the grounds relied on to support the conclusion reached that the issues raised by the defenses mentioned were for the determination of the jury. In our opin-

ion the record does not disclose any tenable ground upon which the action of the court in instructing the jury to find for the defendant is sustainable. It follows that the judgment should be reversed; and it is so ordered.

Reversed.

BRAWNER v ROYAL INDEMNITY CO.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1917.)

No. 3120.

1. INSURANCE ⊜659(2)—ACCIDENT POLICY—ACTION—EVIDENCE—ADMISSIBILITY.

Where an accident policy excepted liability for death resulting from suicide, evidence that insured, whose death resulted from a pistol shot, had, because of his business troubles and the failure of a bank and companies in which he was interested, contemplated suicide, was admissible, even though the remarks of insured relative to suicide were made some time before his death, which occurred while he was alone and at a time when he was faced by a new crisis in his troubles; the fact that his financial condition remained the same rendering his previous statements germane.

2. WITNESSES ⊜150(1)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED—"SURVIVOR."

Gen. St. Fla. 1906, § 1505, declares that no party to an action, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest, or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person. In an action on an accident policy, the beneficiary having introduced a renewal certificate countersigned by one who at the date of the certificate was a duly authorized agent of the company, the company introduced as a witness such agent, who testified that the insured had not paid the premium recited in the renewal certificate, and that he declined to renew the policy. *Held* that, as the beneficiary's rights under the policy did not accrue until the death of the insured, she could not be deemed his survivor, and the testimony of the agent as to the transactions with the insured was properly received, notwithstanding it was testimony as to a transaction with a deceased person.

3. INSURANCE ⊜145(3)—ACCIDENT POLICIES—DELIVERY OF RENEWAL CERTIFICATE.

The delivery by the insurer of a renewal premium receipt without payment by the insured of a premium due on an accident policy about to expire is merely an offer on the part of the insurer to enter into a new contract, and, if the offer is refused when tendered by the agent of the insurer, such refusal will be presumed to continue.

4. APPEAL AND ERROR ⊜1066—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where there was no evidence tending to show that deceased changed his mind and decided to accept a renewal certificate of an accident policy after the expiration of the policy in force when it was tendered, that part of an instruction on the renewal of the policy which required the insured to accept the same before the expiration of the old policy was harmless, if erroneous.

In Error to the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Action by Carro A. Brawner against the Royal Indemnity Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

This was an action by the plaintiff in error (hereinafter called the plaintiff), the beneficiary under a policy of accident insurance issued by the defendant in error (hereinafter called the defendant), originally in force for the term of one year ending September 21, 1914, which it was alleged was continued in force for 12 months ending September 21, 1915. The plaintiff sought to recover the sum agreed by the policy to be paid in the event of the death of the insured, Frank Eugene Brawner, if "caused solely and directly by violent external and accidental means, excluding suicide or any attempt thereat, whether sane or insane." The declaration alleged that on October 14, 1914, the death of the insured was caused "by violent external and accidental means, exclusive of all other causes, to wit, the accidental discharge of a loaded revolver and the entry of a ball or bullet therefrom into the head of said Frank Eugene Brawner." For defenses to the suit the defendant set up that the insured came to his death by suicide, and that the policy sued on was not in force at the time of his death. The evidence showed that the insured was killed by the discharge of a pistol. There was no eyewitness of the occurrence, which happened in the deceased's place of business in Pensacola at about 11:30 in the morning. There was evidence having some tendency to prove that the discharge of the pistol may have been accidental. Other evidence of circumstances attending the discharge of the pistol furnished support for the conclusion that Brawner committed suicide. On a verdict for the defendant, a judgment in its favor was rendered.

John P. Stokes, of Pensacola, Fla., and D. C. Campbell, of Jacksonville, Fla., for plaintiff in error.

A. C. Blount, Jr., of Pensacola, Fla., and Shepard Bryan, of Atlanta, Ga. (Bryan, Jordan & Middlebrooks, of Atlanta, Ga., and Blount, Blount & Carter, of Pensacola, Fla., on the brief), for defendant in error.

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

WALKER, Circuit Judge (after stating the facts as above). In December, 1913, the Pensacola State Bank, of which the insured was president, failed. This was followed by the failure of the Brawner-Riera Company and the Pensacola Investment Company, both of which were enterprises in which the insured was interested. In consequence of disclosures which followed the failures, a criminal charge of embezzlement was made against Brawner, on the trial of which he was acquitted. Another consequence was that Brawner expressed apprehension that he would be prosecuted for certain overdrafts made by the Brawner-Riera Company on the failed bank. The failures were also followed by the assertion by Mrs. Claudia B. Brawner, the widow of a deceased brother of Brawner, of a claim or demand that the latter settle with or reimburse her for $11,000 ($7,000 of which was insurance money collected after her husband's death), which had been deposited to her credit in the bank of which Brawner was president, and which, without the knowledge or authority of the depositor, was paid out on checks signed, "Claudia B. Brawner, per F. E. Brawner." Pri-

or to Brawner's death, he had not satisfied his sister-in-law or come to any settlement or understanding with her in regard to the claims she made against him. In the morning of the day of Brawner's death, she reached Pensacola, and, a few minutes before his death, stated to him over the telephone that she had come for a final settlement, a final understanding, and that she would like very much to see him and talk with him, and asked him to come to her hotel and see her. He replied that he would probably come at noontime.

[1] Over objections made by the plaintiff, the court permitted a witness for the defendant to state that Brawner, in a conversation with the witness in the spring or summer of 1914, said that "he had had so much trouble and he had been so hard pressed that it would have been better for him and his family if he could have got out of this trouble some time before, when he was in better shape than he was at this time in a financial way"; and permitted another witness to testify that Mr. Brawner, referring to the failure of the bank and the trouble and worry he had suffered on that account, said he felt very blue over the situation, and, one morning in the bank just after its failure, told witness he had gone to his desk once or twice and laid his hand on his revolver. The defendant's counsel asked another witness the following question:

"Had you any conversation with Mr. Brawner during the year previous to his death with reference to his business affairs? Since the failure of the Pensacola State Bank?"

The plaintiff objected to the admission of the testimony called for "unless connected up and brought down to the time propounded, and because the time inquired about is too remote." The objection was overruled, and the answer of the witness was:

"I had conversations at various times. I was his family physician, dated back prior to the failure of the bank, when this real estate question or slump—I can't tell you when this was, but it dated back beyond the time of the failure of the bank, and at various times up to the time of his death. He seemed in these conversations to be worried a good deal. Like a good many other people, he had real estate holdings bought on a high market, and he could not get rid of them; you all know how that is. He did say something about the failure of the Pensacola State Bank, but I don't know the times. I didn't jot it down or keep a memorandum of it. The result was that he was very melancholy, very much depressed, spoke of everything in a blue mood. That was up to a short time before his death. I had a conversation with him out to his house in the summer or fall, and he told me he was very much depressed, felt very blue over business. That was during the summer before his death."

Exceptions were reserved to the rulings just mentioned.

We are not of opinion that those rulings were erroneous. The evidence was such as to furnish support for the conclusion that the disturbing and harassing effect upon Brawner of the situation in which he was placed in consequence of the failure of the business enterprises in which he had been engaged continued up to the time of his death. Certainly, not the least troublesome feature of that situation was the assertion by Brawner's sister-in-law of her grievance because of the loss of her fortune, due to her misplaced confidence in him and in

the bank of which he was president. Just before he came to his death he was confronted with the necessity of dealing at once with that grievance, and it may be inferred that he was much disturbed as to the probable outcome of his sister-in-law's visit. Her statement over the telephone that she had come for "a final settlement, a final understanding," might well have been regarded by him as indicating a culmination of one of the troubles by which he was harassed, when, some time before, he indicated that he harbored the thought of self-destruction. There can be no reasonable doubt about circumstantial evidence indicating suicide being strengthened by proof that there was a motive for the deceased taking his own life and that he had manifested a purpose or inclination to do so. The fact that threats or intimations of suicide were made some time prior to the death in question does not make evidence of them inadmissible, when it is fairly inferable from circumstances disclosed that immediately prior to the death the deceased was subjected to a depressing influence which was the same as or similar to the one by which he was affected when, not very long before, the incidents testified to occurred. As above stated, it was inferable from other evidence adduced in the instant case that the cause of the gloomy and despondent mood or state of mind, as to manifestations of which the witnesses referred to testified, had not ceased to exist at the time of Brawner's death. This being so, the conclusion is that those incidents are not to be regarded as being too far removed in point of time and sequence from his death to justify the consideration of them in connection with other circumstances throwing light upon the question of his death being accidental or suicidal. The evidence was admissible because of the light it was capable of shedding upon the motives or intentions of one whose death occurred under circumstances making it questionable whether it was due to accident or suicide. Sharland v. Washington Life Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Klein v. Knights and Ladies of Security, 87 Wash. 179, 151 Pac. 241, L. R. A. 1916B, 816 and note.

[2] The plaintiff introduced in evidence a renewal certificate or receipt, dated August 15, 1914, signed by an officer of the defendant company and countersigned by J. E. Daniels, who, on the date just stated, was an authorized agent of the defendant. This paper, after stating the number of the policy set out as an exhibit to the declaration and the name of the insured, stated that:

"In consideration of fifty and 00/100 dollars ($50.00) the above numbered policy is, subject to all its terms and conditions, continued in force for twelve months ending September 21st, 1915, at noon (standard time)."

J. E. Daniels was examined as a witness for the defendant. At the time of the trial he had ceased to be an agent of the defendant and was not then in any way connected with it. He stated that he mailed the renewal receipt in evidence to Brawner in the latter part of August or early in September, 1914, which was prior to the date when the defendant's liability under a previously issued renewal certificate or receipt expired. Over objections made in behalf of the plaintiff he was permitted to testify to the effect that Brawner, after the renewal receipt came into his possession, stated to the witness that he

was not able to pay the $50 it called for, and declined to renew the insurance; that on that occasion witness left the renewal receipt in Brawner's possession, with a request that he consider further the matter of renewing the insurance; but that Brawner never agreed to renew the insurance, and never paid or promised to pay the renewal premium. The objection to the competency of the witness to give this testimony was based upon the following Florida statute:

"No person, in any court, or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto: Provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party, or interested person, derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence." Florida Gen. Stat., § 1505.

It may be assumed, without being conceded, that the witness was "a person interested in the result" of the suit, within the meaning of the statute quoted, though he was not connected with the defendant at the time he gave his testimony, and though whatever interest he had was adverse to that of the party in behalf of which he testified. The statute does not forbid an interested person testifying in regard to a transaction or communication between such witness and a person at the time of such examination deceased unless he is examined as a witness "against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person." The claim made in behalf of the plaintiff is that she was a "survivor of such deceased person," within the meaning of those words as used in the statute. The connection in which the word "survivor" is there used, we think, makes it quite plain that it was intended to describe one who has succeeded to rights or obligations which were and would have remained those of the deceased person mentioned but for the latter's death. The plaintiff is not the "survivor" of the insured in such a sense. The right she asserts by the suit is not one which the insured ever possessed. The death of the insured was necessary to bring it into existence. It is a right which the contract alleged conferred on the plaintiff herself, not one which was vested in the deceased and which the plaintiff acquired by successorship from him. The statute did not have the effect of making the witness incompetent to give the testimony objected to. According to that testimony, the renewal receipt was refused by the deceased, with the result that the continuance of the insurance which it was to evidence never became effective.

[3, 4] At the request of the defendant the court gave to the jury the following charge:

"The delivery of the renewal premium receipt or certificate in this case was merely an offer by the insurance company to the insured to enter into a new contract continuing for another year, from September 21, 1914, the insurance that was about to expire, and this offer raised in the insurance company no liability to indemnify the insured against accidents until it was accepted, and, if it was refused when tendered by the agent of the company, such refusal would be presumed to continue, and, unless the insured changed his mind and decided to take it before the expiration of the policy, there would be no existing policy."

What was stated in this charge is not open to criticism, except possibly the part of it which required a decision of the insured to continue the insurance to be made before the expiration of the policy. The plaintiff could not have been prejudiced by that part of the instruction, as there was no evidence tending to prove that Brawner changed his mind and decided to accept the renewal receipt or certificate after the expiration of the insurance which was in force at the time the instrument came into his possession.

Other questions presented for review are not such as to call for discussion. The conclusion is that the record does not show the commission of any reversible error.

The judgment is affirmed.

EMERSON v. FISHER et al.

(Circuit Court of Appeals, First Circuit. November 15, 1917. On Petition for Rehearing, February 5, 1918.)

No. 1270.

1. BANKRUPTCY ⟸303(3)—PROCEEDING BY TRUSTEE—MISMANAGEMENT OF SUBSIDIARY CORPORATION—EVIDENCE.
   Where the trustee in bankruptcy of an alleged subsidiary corporation sought to recover damages for alleged mismanagement of the subsidiary corporation by the principal company, of which respondents were receivers, evidence *held* insufficient to show mismanagement, though goods of the alleged subsidiary company were sold at prices below the list prices to raise spot cash.

2. APPEAL AND ERROR ⟸1022(3)—REVIEW—MASTER'S FINDING APPROVED BY COURT—CONFLICTING EVIDENCE.
   A finding of the master, upheld by the trial court, based on conflicting evidence, will not be disturbed on appeal.

3. CORPORATIONS ⟸401—OFFICERS—AUTHORITY.
   After the resignation of the treasurer of a debtor corporation, who had been applying its funds to payment of obligations due another corporation, the authority of such officer ceased, and with it any authority delegated to an officer of the creditor corporation to make such application by him of funds.

4. CORPORATIONS ⟸426(12)—OFFICERS—ACQUIESCENCE—KNOWLEDGE.
   Where the president of a corporation did not know that the treasurer before resignation had authorized an officer of another company to apply its funds, such application cannot be upheld, on the ground that acquiescence amounted to an adoption of the practice.

5. CORPORATIONS ⟸466—NEGOTIABLE INSTRUMENTS—UNAUTHORIZED INDORSEMENT BY OFFICER—EFFECT.
   The unauthorized indorsement by an officer of a creditor company of commercial paper belonging to the debtor company did not change title to the paper or to the proceeds.

6. BANKRUPTCY ⟸140(½)—CREDITORS—POSSESSION OF PROPERTY.
   Where a creditor company, without authority obtained possession of funds belonging to a debtor corporation, such unauthorized possession of

funds did not, on bankruptcy of the debtor company, entitle the creditor company to apply them to payment of its own claim to the prejudice of other creditors.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Bill by Rensselaer L. Curtis against the Walpole Tire & Rubber Company, upon which Robert C. Fisher and another were appointed receivers. Robert S. Emerson, trustee in bankruptcy of the Consumers' Rubber Company, presented a claim. From the decree dismissing the claim for damages for mismanagement, and for an equitable lien on a sum of money, claimant appeals. Decree affirmed as to a dismissal of claim for damages for mismanagement, and reversed in so far as it dismissed the claim for an equitable lien, being affirmed in other respects.

George H. Huddy, Jr., of Providence, R. I. (Mumford, Huddy & Emerson, of Providence, R. I., on the brief), for appellant.

Lee M. Friedman, of Boston, Mass. (Swift, Friedman & Atherton, of Boston, Mass., on the brief), for appellees.

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

BROWN, District Judge. This is an appeal by Robert S. Emerson, trustee in bankruptcy of the Consumers' Rubber Company, a Rhode Island corporation, from a decree of the District Court confirming a master's report and disallowing two claims against the Walpole Tire & Rubber Company.

The first claim was for damages for mismanagement, and involved two disputed questions of fact:

A. Whether the Walpole Company had assumed control and full management of the affairs of the Consumers' Rubber Company as its subsidiary.

B. Whether the Walpole Company had mismanaged the affairs of the Consumers' Rubber Company to its great financial loss.

Upon both these contentions of fact the master and the District Court found against the appellant.

The second claim is for an equitable lien upon a balance of funds alleged to have been wrongfully taken from the Consumers' Rubber Company and to be now in the hands of the receiver of the Walpole Company. This claim was disallowed by both master and District Court upon grounds that involve questions of both fact and law.

[1] The case is not free from doubt, and is complicated by the fact that the same individuals were in active management of both the Consumers' Company and the Walpole Company, and were not managing either company solely in its own interest, nor solely for their joint interests, but were acting also in the interest of the Atlantic National Bank in a plan for the organization and financing of the present Consumers' Rubber Company, which succeeded a former and deeply insolvent Consumers' Rubber Company, of which the Atlantic National Bank was a large creditor.

The claim for damages through mismanagement is to the amount

of $54,721.66, resulting from so-called sacrifice sales of the great bulk of manufactured goods—rubber shoes, etc.—of the Consumers' Company, and from large discounts on goods already sold, all of which were made to secure spot cash. It is also urged that these sales in bulk were not only an unreasonable sacrifice for the purpose of securing cash, but were made in pursuance of a plan to close out the shoe manufacturing business of the Consumers' Company, and to develop in its place a wire department, to be operated in connection with the Walpole Company's production of wire tape.

We think that the evidence shows a business situation which justified a considerable lowering of prices because of an overstock of goods and a weak market. There was a pressing demand for funds to meet the obligations of the Consumers' Company, and it does not appear that moneys were available from any other source to meet its obligations and carry on its business. To what extent it was necessary or advisable to reduce prices in order to move the goods and procure immediate funds was a matter of business judgment. The District Court was not satisfied upon the evidence that better prices could have been obtained at any time before the bankruptcy of the Consumers' Company, and approved the master's finding to that effect.

We find in the record no evidence that the Walpole Company had bound itself to advance moneys to the Consumers' Company in order to carry it. Even if we should find, contrary to the decision of the District Court, that the Walpole Company had assumed control and management of the Consumers' Company, it would not follow that it was under obligation to advance it moneys or do more than procure for it such credit as the Consumers' Company was entitled to upon its own assets; nor would it follow that the Walpole Company was debarred from applying those assets to reimburse itself for advances and for merchandise sold to the Consumers' Company.

The failure of the Consumers' Company to meet its obligations would probably have led to forced sales at prices much below list prices. The appellant computes its claim of damages by subtracting from list prices the actual prices obtained. It cannot be assumed, however, that list prices of an overstock of goods on hand fairly represented the true value of the goods to the Consumers' Company at the time of sale.

The master, in passing upon the question of mismanagement, properly took into account the fact that the Consumers' Company was greatly in need of funds, and that, in case of an involuntary and forced sale of goods to meet liabilities to creditors, it was to be expected that there would be a large reduction from list prices. A voluntary sale of goods for about two-thirds of the list prices, in order to obviate a forced and involuntary sale, is not so clearly an act of mismanagement as to justify a reversal of the findings of the master and of the District Court upon this question, or to lead us to the conclusion that the sale was made in bad faith, or in total disregard of the rights of the Consumers' Company.

It was found by the District Court that the proceeds of the sales were used to pay off the obligations of the Consumers' Company, and that no part of them went to the Walpole Company, except in payment

of what was due it from the Consumers' Company, and that only a small part of it was used in discharging obligations of the latter class.

That the Walpole Company received from these sales any payments to which it was not legally entitled is not made to appear.

It is suggested in appellant's supplemental brief that as a result of these sales the Walpole Company was paid while other creditors went unsatisfied; but no question of preferences through the application of the proceeds of these sales seems now open on this record.

It is doubtless the fact that the sales were made with regard to the interests of the Walpole Company and of the Atlantic Bank, as well as of the Consumers' Company, and we appreciate the force of the argument that the interests of the Consumers' Company were not as carefully protected as if it had been independently represented. On the other hand, the plan of reorganization of the Consumers' Company contemplated a close relation between the two companies, and reliance upon the facilities and resources of the Walpole Company in order to pull out of hopeless insolvency the affairs of an old and unsuccessful business.

The Walpole Company, whether with or without lawful authority, was being used as the backer and chief reliance of the Consumers' Company, and the financial embarrassment of the backer meant also the further embarrassment of the Consumers' Company. Whether the relation between the two companies was that of principal and subsidiary, or of backer and borrower, it was necessary in the common interest for those in management of both to take care of the Walpole Company as well as of the Consumers' Company. If the Walpole Company had cramped itself by its large advances or credits to the Consumers' Company—advances which it had not legally bound itself to make—it cannot be said that it was clearly unreasonable to require payments of sums due on open account, even at the expense of a considerable sacrifice of expected profits on manufactured goods or of actual values of a large stock of manufactured goods which could not be moved in ordinary course of business.

Upon the whole we find no sufficient reason for disagreeing with the decision of the District Court disallowing the claim for damages for mismanagement.

This renders it unnecessary to consider the many assignments of error relating to the contention that the Walpole Company had become a majority stock owner in the Consumers' Company, and as such had assumed full control and management of its affairs as a subsidiary.

A considerable part of the opinion of the District Court relates to this subject.

It was found that the action of the Rhode Island court in respect to the reorganization proceedings was induced by representations not in accordance with the facts; that the responsibility for inducing that court to so act must rest upon the present plaintiff, Emerson, and Gardner; and that their attempt to justify their representations concerning the Walpole Company's connection with the plan of reorganization submitted by them to court was without success.

In reaching the conclusion that the Walpole Company never became a party to the reorganization scheme approved by the Rhode Island court, and never became the owner of a majority of the common stock of the Consumers' Company, or responsible for the action of Baldwin and Gleason, the District Court apparently was of the opinion that upon the part of Emerson, Gardner, Baldwin, and perhaps others, there was a lack of good faith and of full disclosure to the directors of the Walpole Company of the reorganization scheme.

In regard to an issue of 200 shares of stock of the Consumers' Company in certificates of 50 shares each to Baldwin, Gleason, Dunbar, and Gardner, the District Court expressed the opinion that this amounted to a fraud upon the Consumers' Company, since it had not authorized it.

Although there was no formal action of the board of directors of the Walpole Company assenting to the reorganization plan, there is a strong argument for the contention that there was informal assent to the plan. The publicity of the proceedings in the Rhode Island court, and the subsequent long-continued transaction of the business of the Consumers' Company and the keeping of its books by the Walpole Company's employés at the office of the Walpole Company, the inclusion of the Consumers' Company, in a report of the condition of subsidiaries made to a directors' meeting of the Walpole Company, and a large number of acts done apparently in pursuance of the reorganization plan, seem to be inconsistent with a finding that there was a dishonest intention to conceal or misrepresent the relation between the companies as understood by the promoters of the reorganization plan.

It must be noticed that though in the plan the Walpole Company was expected to arrange to finance the new Consumers' Rubber Company, and to give it the benefit of the Walpole's buying and selling facilities, it was not required to bind itself to advance new capital to the company, or to do more than give it the services of its office force, and possibly to pay a sum sufficient to pay a dividend of 17 per cent. to non-assenting creditors of the old company, who chose to accept this dividend rather than join with the majority of creditors in taking preferred stock in the reorganized company.

We cannot agree that the contention by the plaintiff, Emerson, that the Walpole Company had fully assented to the reorganization plan, and acted with full understanding in accordance therewith, is made otherwise than in good faith. The proofs that the Consumers' Company was treated as a subsidiary of the Walpole Company are numerous and strong enough, at least to negative any lack of good faith in the plaintiff's contention that the Walpole Company had in fact assumed such full management of the Consumers' Company as to become responsible for its mismanagement, in case mismanagement were proved. Upon this view of the case the question of good faith in the transfer of the 200 shares of stock was a question between the Walpole Company and the transferees, rather than between them and the Consumers' Company; and upon the record we do not find sufficient reason for imputing to those who made the transfer an intention to defraud the Consumers' Company of shares of its common

stock. Whether there was an unauthorized appropriation of stock to which under the reorganization plan, the Walpole Company would have been entitled, is a question that was not in issue, and there appears to be no sufficient reason for a finding of bad faith in respect to that transaction.

[2] But as we have found insufficient evidence of mismanagement, which disposes of the claim for damages, and as the evidence bearing upon the question whether the Walpole Company accepted the position of majority stockholder of the Consumers' Company, and assumed its management, was doubtful and conflicting, rather than clear and convincing, and the master and District Court both found that the Walpole Company did not accept such position and assume such management, we do not feel justified in reversing the finding.

[3] As we accept the decision of the District Court that during the period when Baldwin was treasurer and manager of both companies, and when, as appellee's brief states, the financial affairs of both corporations were controlled by Baldwin, the Consumers' Company was independently managed, so that its relation to the Walpole Company was merely that of debtor, and so that Baldwin, as treasurer of the Consumers' Company, had authority to apply its funds in payment of its obligations to the Walpole Company, this decision must be given due effect upon consideration of the second claim for an equitable lien.

The plaintiff claims a lien upon funds now in the hands of the receiver of the Walpole Company, amounting to $18,560, as wrongfully taken from the Consumers' Company by the Walpole Company. Whether the receiver of the Walpole Company has funds in his hands which belong to the trustee in bankruptcy of the Consumers' Company, representing its general creditors, is not merely a question of a settlement of accounts between the two companies. It is rather a question of the right of the Walpole Company to take for itself assets of the Consumers' Company and apply them towards the extinguishment of its claim, and of the right of the referee in bankruptcy to receive this fund for the general benefit of creditors, including the Walpole Company.

The plaintiff contends that the right of the Walpole Company to this fund is no greater than that of other creditors, and that it is entitled only to its pro rata share on an equality with other creditors.

Upon the failure of the Atlantic National Bank, April 14, 1913, Baldwin took all the checks and funds of the Consumers' Company and indorsed them to the Walpole Company. A large part of this was expended for the benefit of the Consumers' Company. Between the failure of the Atlantic Bank on April 14, 1913, and the bankruptcy of the Consumers' Company on July 31, 1913, the funds of the Consumers' Company so taken amounted to $116,572.15. So long as Baldwin continued to be the treasurer of the Consumers' Company and to apply its funds to meet its obligations to the Walpole Company, it is possible to regard this application of funds as the voluntary act of the Consumers' Company, and not as a wrongful appropriation by the Walpole Company.

A fact of great importance upon this question of equitable lien, however, is that upon July 10, 1913, Baldwin resigned as treasurer of the

Consumers' Company, and thereafter was wholly without authority to direct the application of funds coming in to the Consumers' Company to the reduction of the open account with the Walpole Company, or to the payment of any of its creditors.

It appears that after Baldwin's resignation, Bunker, an assistant treasurer and director of the Walpole Company, continued to indorse the paper belonging to the Consumers' Company, and thereby took Consumers' funds to the amount of $13,919.16. The District Court disposed of this question by holding that Bunker did so under Baldwin's instructions, and that his acts are to be regarded as if done by Baldwin or Gleason, and as permitted by acquiescence of the Consumers' other officers, whoever they may have been at that time.

With this we are unable to agree. Baldwin's authority, and with it any delegated authority, ceased upon his resignation.

A notice for a stockholder's meeting of the Consumers' Company upon July 15, 1913, was issued under date of July 3, 1913. At the meeting on July 15, 1913, which, though five days later than Baldwin's resignation, was for consideration of matters of which notice was given seven days before his resignation, a heated discussion occurred over Baldwin's taking over the accounts of the Consumers' Company after the failure of the Atlantic Bank, as well as over his conduct in selling out the stock of goods at a large sacrifice.

[4] That Gleason, the president of the Consumers' Company, and a vice president and director of the Walpole Company, and who had oversight of the Consumers' Company's manufacturing, was authorized to succeed Baldwin in authority as financial manager, or that he did in fact assume to authorize Bunker to succeed Baldwin and to continue to direct the application of the Consumers' Company's funds, does not appear. On the contrary, Gleason testified that he had nothing to do with the financial end of the business of either the Walpole Company or the Consumers' Company, and also said: "I don't worry about the financial part. I was concerned in the manufacturing. Baldwin was to take care of the financial end." Also that he did not know of the details of the Walpole Company taking the Consumers' funds after the failure of the Atlantic Bank; that he knew Baldwin had some little financing to do, but just how it was done he did not know; that he did not know whether the Walpole was taking Consumers' funds, or vice versa. From a reading of his entire testimony, it appears that he had so little knowledge of Baldwin's methods that his failure to intervene after Baldwin's resignation cannot be regarded as amounting to an adoption or authorization of a continuation of Baldwin's methods by Bunker.

It was found by the District Court that it was no doubt true that the disposition made of the Consumers' funds after April 14, 1913, was unjustified by the by-laws of the company. Gleason's evidence is inconsistent with the finding that it was directed or authorized by him. Acquiescence implies knowledge (Pence v. Langdon, 99 U. S. 578, 581, 25 L. Ed. 420), and Gleason testified that he did not have knowledge.

Bunker testified that he had never been an officer nor assistant treasurer of the Consumers' Company, nor on its pay roll; that indorsements were placed on Consumers' checks by Baldwin's direction. That

he was otherwise authorized or directed, or that any officers of the Consumers' Company had such knowledge of his acts that noninterference after Baldwin's resignation amounted to acquiescence, is not shown.

[5, 6] While we think that the plaintiff's characterization of these indorsements of the Consumers' Company's paper as "Bunker's forged indorsements" is not justified, it is proper to say that they were unauthorized and did not change the title to the paper so indorsed, nor to its proceeds. We are of the opinion that the plaintiff has proved that the proceeds of the paper thus indorsed, without authority, by Bunker to the Walpole Company were deposited in the name of the Walpole Company in the Industrial Trust Company of Providence, and that they came into the hands of the receiver of the Walpole Company. As the title to this paper was not changed by the unauthorized indorsements, so the title to the proceeds was not changed. The Walpole Company, after Baldwin's resignation, was without authority, express or implied, to apply these funds, and merely as a creditor had no right in these funds which was greater than the right of other creditors now represented by the plaintiff as trustee in bankruptcy. The mere unauthorized possession of the funds gave the Walpole Company no right to apply them to the payment of its own claims to the prejudice of other creditors.

The decree of the District Court, in so far as it dismisses the plaintiff's claim for damages for mismanagement and holds that the Walpole Company did not accept the position of majority stockholder of the Consumers' Company and assume its management, is affirmed; but in so far as it dismisses the plaintiff's claim for an equitable lien upon the sum of $13,919.16, the proceeds of paper indorsed in the name of Consumers' Rubber Company by Fay L. Bunker, after July 10, 1913, is reversed. In other respects the decree is affirmed, and the case will be remanded to that court for further proceedings consistent with this opinion. The appellant recovers costs of appeal.

On Petition for Rehearing.

PER CURIAM. The petition for a rehearing sets forth nothing that we had not fully considered. The opinion points out that the question whether the receiver of the Walpole Company has funds belonging to the trustee in bankruptcy of the Consumers' Company is a question not of settlement of accounts between the two companies, but of the right to specific assets; the proceeds of paper indorsed by Bunker, who never in any sense was the employé of the Consumers' Company, either before or after Baldwin's resignation. That Baldwin, before his resignation, used Bunker as his personal assistant, and directed him to perform certain of Baldwin's duties as treasurer of the Consumers' Company, did not make Bunker the agent of the Consumers' Company or vest him with any authority which held over after Bunker's resignation.

As a large part of the testimony relating to the claim for damages related also to the question of the general relations between the companies, and thus to the question of an equitable lien, it seems proper in the present case to follow the usual rule and award costs to the prevailing party, even though he does not wholly prevail.

Petition for rehearing denied.

NORFOLK COUNTY WATER CO. v. CITY OF NORFOLK et al.

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

No. 1540.

1. CONSTITUTIONAL LAW ⟸211—EQUAL PROTECTION OF LAWS—LEGISLATION AFFECTING WATER COMPANY.

A water company, given by its charter no exclusive right in the territory where it operates, takes its charter and develops its business subject to the risk that competitors may be permitted to enter the same field; and a state law which authorizes a city to do so, although it prohibits the city from extending its system in another direction into territory in which other companies are operating, is not for that reason unconstitutional, as denying the company the equal protection of the laws.

2. CONSTITUTIONAL LAW ⟸211—EQUAL PROTECTION OF LAWS—NATURE OF DISCRIMINATION PROHIBITED.

The mere fact that it results in inequality is not enough to invalidate a state law; but the inequality forbidden is that which results from arbitrary imposition of burdens upon one which are not imposed upon others in substantially the same situation.

3. CONSTITUTIONAL LAW ⟸48—EQUAL PROTECTION OF LAWS—PRESUMPTION IN FAVOR OF STATUTE.

The presumption in favor of the constitutionality of a statute embraces presumption that the Legislature intended to be just and to promote the public welfare, and that it investigated and found some reasonable basis of distinction and classification, warranting an apparently unequal burden imposed or unequal exemption allowed by the statute, and in the absence of facts clearly showing the distinction to be arbitrary the statute will be sustained by the courts.

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

Suit in equity by the Norfolk County Water Company against the City of Norfolk and T. S. Purdie, William M. Hannan, and S. S. Nottingham, members of the Board of Control of said City. Decree for defendants, and complainant appeals. Affirmed.

Luther B. Way, of Norfolk, Va. (Pender, Way & Foreman, of Norfolk, Va., on the brief), for appellant.

George Pilcher, of Norfolk, Va., for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. The foundation of the bill filed by the Norfolk County Water Company on June 15, 1917, is the allegation that a statute of Virginia of 1916 so affected the interests of the complainant so as to deprive it of the equal protection of the laws of the state. The District Court refused to grant the temporary injunction asked by the complainant, and on motion of the defendant dismissed the bill, on the ground that it stated no cause of action.

The case presented may be thus summarized: The complainant, Norfolk County Water Company, was organized as a corporation in 1900, and began to supply water to the inhabitants of Norfolk county

near the city of Norfolk. In 1902 a portion of the territory served by the complainant was annexed to the city as the Seventh ward, and in 1911 other portions were annexed as the Ninth and Tenth wards. As a consequence the city became a competitor of the complainant in furnishing water to the inhabitants of the annexed territory. In 1907 the complainant enlarged its plant, and acquired from individuals and from the county valuable property and franchises. Prior to the year 1912 the statutes of Virginia prohibited altogether the city of Norfolk from selling water outside of its corporate limits. In that year an act was passed (Laws 1912, c. 102) empowering the city to contract for furnishing water, gas, and electricity, "either within or without the city limits." The statute contained the proviso:

"That in no event shall such contracts be made *with individuals or corporations (except water companies) for the delivery of water at points without the city where the mains laid or to be laid are paralleled by the mains of any water company; nor shall such contracts be made* for the delivery of water within the city of Portsmouth, or, on the west side of the Elizabeth river, within three miles of the corporate limits thereof, except by virtue of power derived by law from the acquisition of the property of any water company doing business in said city."

This law, including the proviso, was re-enacted by the act of 1914 (Laws 1914, c. 88) amending the charter of the city. In 1916 (Laws 1916, c. 229) the act was amended by striking out the words italicized above, making the proviso read:

"That in no event shall such contracts be made for the delivery of water within the city of Portsmouth, or, on the west side of Elizabeth river, within three miles of the corporate limits thereof, except by virtue of powers derived by law from the acquisition of the property of any water company doing business in said city."

The change resulted, it is alleged, in serious disadvantage to the complainant in this way: The statutes in force prior to the act of 1916 prohibited the city of Norfolk from competing with any water company, including the complainant, outside its own limits, thus placing the several water companies in the vicinity on an equality. By the act of 1916 the city of Norfolk was empowered to run its mains and sell water in any of the territory on the east side of Elizabeth river. Great injury will result to the complainant operating in that territory from the city's competition, without compensation by condemnation and purchase, or otherwise; whereas, the water companies occupying and serving the territory on the west side of the river, including the city of Portsmouth, are protected from the competition of the city of Norfolk, since it can operate in that territory only on condition of acquiring the property of those companies. The question is whether this discrimination deprives the complainant of the equal protection of the laws.

[1] The charter of the complainant conferred no exclusive right to the business of laying mains and selling water in the territory where it operates; therefore it must be held to have taken its charter and developed its business in the face of the risk that the General Assembly might at any time authorize, by charter or otherwise, either a municipal corporation or another private public service corporation to enter that

territory in competition with it. The Legislature in effect did this when it enlarged the corporate limits of the city of Norfolk, thus authorizing the city to extend its water system, so as to compete with the complainants. The fact that another water company was operating in territory not annexed, and therefore was not brought into competition with the city, would furnish no basis for a claim that the complainant had been denied the equal protection of the laws, within the meaning of the Fourteenth Amendment. The extension of the corporate limits, with the resultant disadvantage to the complainant, did not impose any burden upon the complainant from which another in like situation was exempted. It was merely the exercise by the legislative power of its right to extend the corporate limits of a city, to which the advantages and disadvantages falling to corporations and individuals are necessary incidents.

[2] But it is argued that the history of the legislation and the terms of the act of 1916 show that it was not only the effect, but the purpose, of the act of 1916 to discriminate against the complainant, by allowing the city to compete with it, while protecting from the city's competition water companies in precisely the same situation doing business on the west side of Elizabeth river. The mere fact that it results in inequality is not enough to invalidate a state law. The inequality forbidden is that which results from arbitrary imposition of burdens upon one which are not imposed upon others in substantially the same situation. St. Louis, etc., Co. v. Kansas City, 241 U. S. 419, 430, 36 Sup. Ct. 647, 60 L. Ed. 1072.

"Equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other." Cotting v. Kansas City Stock Yards, 183 U. S. 79, 112, 22 Sup. Ct. 30, 46 L. Ed. 92.

[3] The presumption in favor of the constitutionality of a statute embraces presumption that the Legislature intended to be just and to promote the public welfare, and that it investigated and found some reasonable basis of distinction and classification warranting the apparently unequal burden imposed or unequal exemption allowed by the statute. The strength of these presumptions is growing in judicial conception. The difficulty is in the application of these general rules for determining the limit of the protection of the Fourteenth Amendment. Two late cases are illustrative of discriminations that fall without and within the protection of the Constitution. The state may create tax districts and apportion the burdens of taxation, though unequal, without violation of the Fourteenth Amendment, unless the apportionment is palpably arbitrary and a plain abuse. Houck v. Little River Drainage District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266. But a scheme of taxation which subjects without reason owners of property having greater depth than that adjoining to greater and disproportionate taxation is unconstitutional. Gast Realty, etc., Co. v. Schneider, etc., Co., 240 U. S. 55, 36 Sup. Ct. 254, 255, 60 L. Ed. 523.

It cannot be said that the statutory distinction was arbitrary, in allowing the city of Norfolk to extend its water system on the Norfolk

side of the Elizabeth river, with the incidental unrestricted competition with the complainant, while burdening such extension to the Portsmouth side within three miles of the city of Norfolk with the condition that it should acquire the property of the water companies operating in that territory. Evidently the prohibition against the city of Norfolk operating on the Portsmouth side might have been absolute, and the complainant would have had no standing to object. In general, the power to grant or prohibit absolutely implies the validity of any condition in the grant or prohibition.

The terms of the contract of the city of Portsmouth with the water companies by which it is served do not appear. That contract may be so advantageous to the city of Portsmouth that to allow the city of Norfolk to compete with the water companies serving the city of Portsmouth would impair their efficiency, and thus their ability to serve the city of Portsmouth and its inhabitants. Many other conditions may be thought of making it entirely reasonable that the Legislature, in the public interests, should allow the city of Norfolk to furnish water to the territory which the Legislature regarded contiguous to it, in connection with its service to its new docks, without condition, and to forbid it altogether to extend its mains into the territory on the Portsmouth side of Elizabeth river, or to put such burdens upon it as would tend to prevent its entrance upon the territory contiguous to Portsmouth.

Affirmed.

MOODY-HORMANN-BOELHAUWE v. CLINTON WIRE CLOTH CO. et al.

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

No. 3154.

1. BANKRUPTCY ⊂=81(1)—ADJUDICATION—PETITION.

Under Bankruptcy Act July 1, 1898, c. 541, § 3, subd. a (4), 30 Stat. 546, as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (Comp. St. 1916, § 9587), declaring that a general assignment for benefit of creditors shall be an act of bankruptcy, a petition for the adjudication of one as a bankrupt on the ground of a general assignment for creditors need not allege the assignor's insolvency.

2. BANKRUPTCY ⊂=60—ACTS OF BANKRUPTCY—GENERAL ASSIGNMENT FOR CREDITORS.

Under Rev. St. Tex. 1911, art. 1205, declaring that a corporation is dissolved where four-fifths in interest of all of the stock outstanding shall vote in favor of a dissolution; article 1206, declaring that upon dissolution of any corporation, unless a receiver is appointed by some court, the president and directors and manager of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees for the creditors and stockholders, with full power to settle the corporate affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them, and to this end they may, in the name of such corporation, sell, convey, and transfer all real and personal property belonging to the corporation, collect all debts, compromise controversies, etc.; and article 1207, declaring that such trustees shall

be severally responsible to the creditors and stockholders of the company—a Texas corporation was dissolved by vote of the stockholders, the directors being named as trustees to liquidate the affairs of such corporation. *Held* that, though the dissolution and transfer of corporate property to the directors was effected through the agency of the stockholders, yet it was a transfer by the corporation of all of its property, in the nature of an assignment for the benefit of creditors, and amounted to an act of bankruptcy within Bankruptcy Act, § 3, subd. a (4), as amended by Act Feb. 5, 1903, c. 487, § 2.

3. BANKRUPTCY ⟸467—APPEAL—PERSONS ENTITLED TO ALLEGE ERROR.

A Texas corporation having been dissolved by a vote of stockholders, and its property pursuant to statute transferred to the directors as trustees, its creditors filed against it a petition in involuntary bankruptcy. The directors demurred to the petition, and, demurrer being overruled, the corporation was adjudicated a bankrupt, despite its answer applying for jury trial. The directors alone appealed, and they assigned as error that, having duly demanded a jury trial, and an order having been duly entered allowing a trial by jury, and the directors having filed an answer denying the allegations of the petition, the court erred in rendering a decree on demurrer adjudicating the corporation bankrupt. *Held*, that as the record did not show that the directors filed any pleading to the petition, other than the demurrer, though showing that the corporation filed an answer to the petition, denying its allegations, and demanding a jury trial, the directors cannot, the corporation not objecting, complain of the manner in which the court disposed of the issue of fact raised.

4. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY—"GENERAL ASSIGNMENT" FOR CREDITORS.

A "general assignment," within the meaning of Bankruptcy Act, § 3, subd. a (4), as amended by Act Feb. 5, 1903, c. 487, § 2, providing that the making of a general assignment for the benefit of creditors shall constitute an act of bankruptcy, embraces any act by the alleged bankrupt having the effect of a conveyance of all its property and an appropriation of it to raise funds to pay its debts, share and share alike.

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

Appeal from the District Court of the United States for the Western District of Texas; Duval West, Judge.

In the matter of the bankruptcy of Moody-Hormann-Boelhauwe, a corporation. On petition of the Clinton Wire Cloth Company and others, after the demurrer of W. C. Moody, Karl E. Hormann, and Charles T. Boelhauwe was overruled, Moody-Hormann-Boelhauwe, a corporation, after jury trial, was adjudicated a bankrupt, and the individual defendants appeal. Affirmed.

The petition of creditors of Moody-Hormann-Boelhauwe, a corporation organized under the laws of the state of Texas, to have that corporation adjudged bankrupt, alleged that "the said alleged bankrupt made a general assignment for the benefit of its creditors, said assignment having been made, as petitioners are informed, during the latter part of June or early part of July, 1916, the nature of said assignment being that prior to the 1st day of June, 1916, said alleged bankrupt had become insolvent, and had ceased to be a going concern, and steps were taken looking to a dissolution of said corporation and the liquidation of its affairs, and that thereafter a meeting of the stockholders of said corporation was duly held in accordance with law, and by unanimous vote of the stockholders of said alleged bankrupt it was decided that said corporation should be dissolved, and that all of its affairs

should be liquidated, and that the directors of the company, to wit, W. C. Moody, Karl E. Hormann, and Charles T. Boelhauwe, were named as trustees to liquidate the affairs of said alleged bankrupt, and that they are still acting, or attempting to act, in such capacity, and that immediately thereafter said trustees aforementioned did file in the office of the secretary of state of the state of Texas such documents required by law for the dissolution of the alleged bankrupt, and that thereupon said W. C. Moody, Karl E. Hormann, and Charles T. Boelhauwe became the trustees of the creditors and stockholders of said alleged bankrupt; and petitioners allege that the effect of said proceedings and the transfer of the assets of said alleged bankrupt to said above-mentioned parties as trustees, with power vested in them to settle the affairs of the said alleged bankrupt, collect its outstanding debts, divide the moneys thereof, etc., was virtually a general assignment for the benefit of the creditors of the alleged bankrupt." W. C. Moody, Karl E. Hormann, and Charles T. Boelhauwe demurred to the petition, on the ground that "the same shows on its face that the alleged act of bankruptcy is not an act of bankruptcy under the law." This demurrer was overruled, and the corporation was adjudged bankrupt. The record does not show that the demurrants pleaded to the petition after their demurrer was overruled. The individuals who interposed the demurrer appealed from the above-mentioned decree.

Don A. Bliss, of San Antonio, Tex., for appellants.

H. M. Aubrey, of San Antonio, Tex. (Schlesinger & Schlesinger, of San Antonio, Tex., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge (after stating the facts as above). [1] The Texas statute provides that "a corporation is dissolved * * * where four-fifths in interest of all the stock outstanding shall vote in favor of a dissolution at a stockholders' meeting called for that purpose" in a manner prescribed by the statute, and a prescribed certificate showing such action is filed with the Secretary of State. Revised Statutes of Texas (1911), art. 1205. The two articles of the Revised Statutes immediately succeeding the one just cited are the following:

"Art. 1206. Upon the dissolution of any corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and to this end, and for this purpose, they may, in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and to exercise the full power and authority of said company over such assets and properties; and the existence of every corporation may be continued for three years after its dissolution from whatever cause for the purpose of enabling those charged with the duty to settle up its affairs; and, in case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle up the affairs of such corporation.

"Art. 1207. The trustees mentioned in the preceding article shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands."

If the allegations of the petition showed the making by the corporation of a general assignment for the benefit of its creditors, an allegation of the corporation's insolvency was superfluous. Bankruptcy Act, § 3, subd. a (4), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797; West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; In re Louis Neuburger, Inc., 240 Fed. 947, 153 C. C. A. 633.

[2, 4] A general assignment, within the meaning of the cited provision of the Bankruptcy Act, embraces any act by the alleged bankrupt having the effect of a conveyance of all its property and an appropriation of it to raise funds to pay its debts, share and share alike. The name and form which the transaction assumes are not material. In re Thomlinson Co., 154 Fed. 834, 83 C. C. A. 550; In re Utley (D. C.) 235 Fed. 905; 5 Corpus Juris, 1118. The Texas statute (article 1206, supra) gives to the action alleged the effect of divesting the corporation of the title to all its property and vesting it in designated persons as—

"trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and to this end and for this purpose they may, in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and to exercise the full power and authority of said company over such assets and properties."

We do not think that there is any merit in the suggestion that the transaction alleged was one by the corporation's stockholders, and was not one by the corporation, because not effected by the officers or agents of the corporation having authority to bind it. An effect of the statute is to make the corporation's stockholders the agency by which a conveyance or transfer of its property and an appropriation of it to raise funds to pay its debts, share and share alike, are accomplished. The transfer was as effectually that of the corporation as it would have been if made in the name of the corporation, by its officers or agents ordinarily vested with authority to take such action in its behalf. The conclusion is that the transaction alleged had the essential features of a general assignment for the benefit of creditors, within the meaning of the above-cited provision of the Bankruptcy Act. This being so, the Bankruptcy Act gave the corporation's creditors the right to have it adjudged bankrupt and to have its assets administered by the bankruptcy court, instead of by the trustees in effect nominated by its stockholders.

[3] As above stated, the appeal is by W. C. Moody, Karl E. Hormann, and Charles T. Boelhauwe, directors. They assign as error that:

"These complainants having duly demanded a jury trial, and an order having been duly entered allowing a trial of this cause by jury, and these complainants having filed an answer in this cause denying the allegations of plaintiffs' petition herein, the court erred in rendering a decree on demurrer adjudicating Moody-Hormann-Boelhauwe a bankrupt."

The record does not show that appellants filed any pleading to the petition, except a demurrer. It does show that the alleged bankrupt filed an answer to the petition, denying its allegations and demanding a trial by jury of the issues involved in the cause. The bankrupt is not in this court making complaint of the manner in which the issue of fact it tendered was tried. We are not of opinion that the appellants, who tendered only an issue of law, can here sustain a complaint as to the method of disposing of an issue of fact which they did not raise.

The decree appealed from is affirmed.

MOYER et al. v. BUTTE MINERS' UNION.

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

No. 2875.

1. SPECIFIC PERFORMANCE ⟸121(1)—SUFFICIENCY OF EVIDENCE—PROOF OF CONTRACT.

In a suit on behalf of the Western Federation of Miners, a voluntary unincorporated association, against the Butte Miners' Union, a corporation, for the specific enforcement of a provision of the charter issued by the federation and to the union that, in case of withdrawal of the union or forfeiture of its charter, its property should become the property of the federation, the evidence held to sustain a finding by the District Court that the contract was not established, in that the original charter, which had been destroyed, and in lieu of which the later one was issued, did not contain such forfeiture clause, and that the new charter had not been accepted by the union.

2. SPECIFIC PERFORMANCE ⟸121(4, 9)—PROOF OF CONTRACT.

One who seeks to enforce the specific performance of a contract must establish very clearly and to the entire satisfaction of the court, the existence of the contract, and its terms.

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

Suit in equity by Charles H. Moyer, as trustee for the Western Federation of Miners, a voluntary unincorporated association, and Charles H. Moyer, C. E. Mahoney, and Ernest Mills, as members of such association, against the Butte Miners' Union. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 232 Fed. 788.

Canning & Geagan, of Butte, Mont., O. N. Hilton, of Denver, Colo., E. P. Kelly, of Butte, Mont., and Cæsar A. Roberts and Leslie M. Roberts, both of Denver, Colo., for appellants.

A. C. McDaniel and Peter Breen, both of Butte, Mont., for appellee.

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

HUNT, Circuit Judge. The principal parties to this suit are organizations of miners and workingmen. Moyer, as trustee for the Western Federation of Miners, a voluntary unincorporated association of per-

sons with headquarters at Denver, Colo., and others, as members of such association, brought the suit against the Butte Miners' Union, a Montana corporation, for a decree adjudging that the Miners' Union has no interest in certain lands and property, and requiring the Miners' Union to perform all the terms of a certain charter from the above-mentioned Western Federation to the Miners' Union by conveying to the federation certain property described, and for injunction restraining the Miners' Union from asserting claim to the property described.

Plaintiffs allege that the Western Federation of Miners is divided into local unions of miners and workers in the different states of the United States, with headquarters in Denver, Colo.; that it has many thousand members; that about September 22, 1914, the Butte Miners' Union applied to the Western Federation for "a reissuance of a charter for a local union to take the place of its first charter," lost or destroyed; that thereafter the Western Federation issued to the corporation a charter, in which it was provided that the defendant should be known as "Butte Miners' Union, No. 1, Western Federation of Miners"; that the union, being installed, could elect members and transact business in accordance with the constitution and rules of the Western Federation of Miners. The charter recited that the union agreed, in accepting the charter, that it would conform to the constitution and regulations, and in default the charter might be revoked and the union suspended from "all rights and benefits accorded to the laws of the Western Federation of Miners," and, further, that if the union should "withdraw, or be dissolved, suspended, or forfeit the charter, then all property, moneys, books, and papers should become the property of the Western Federation of Miners." The charter binds the Western Federation "to sustain said union in the exercise of all its rights, privileges, and benefits as a local union under its protection." The charter was signed by Charles H. Moyer, President, and Ernest Mills, Secretary-Treasurer, of the Western Federation of Miners. The complaint alleges that the corporation, defendant, accepted this charter and worked thereunder until about June 15, 1915, when it passed a resolution withdrawing from the Western Federation and refusing longer to affiliate with it; that thereafter, about July 13, 1915, the Western Federation demanded that the union transfer to the federation all the property and money that it owned on the date of the passage of the withdrawal resolution just referred to; but the union refused to comply with the demand and claimed to own the property. Plaintiff pleads performance of the obligations incumbent upon it.

The Miners' Union by answer alleges its incorporation in 1881 under the laws of Montana, and admits that about September 22, 1914, it applied for a reissuance of a charter to take the place of the first charter, lost or destroyed, and says that the Western Federation sent a charter as heretofore described, but denies that such charter was a reissue of the charter lost or destroyed, which was dated May 15, 1893, or that it ever accepted the charter or worked under it, but, on the contrary, says that it rejected such charter upon its arrival, because it was not a reissue or duplicate of the former charter. It pleads that for a long time after the receipt of the pretended charter it refused to affili-

ate with the Western Federation of Miners, and that it never agreed upon the terms of the charter referred to by the plaintiffs, and that the plaintiff never lived up to the terms of the charter of 1893. Defendant denies that the property possessed by it ever rightfully became the property of the Western Federation, and avers that under the laws of Montana it was unable to make any such contract to bind itself or its property, or in any way to dispose of the property or its control. It then alleges that it was regularly incorporated under the laws of the territory of Montana in 1881, and has never sought dissolution; that by collections from its members it has built a hall, cared for sick and distressed members, and lived up to the objects of its corporate existence; that about May 15, 1893, it had about $60,000 on hand; that in May, 1893, it, with other miners' unions in several states, called a convention of delegates from the unions with a view to create harmonious interchange of relationships between certain labor unions, and that they created the Western Federation of Miners; that membership in the Western Federation is voluntary, and that the federation depends upon the voluntary revenue derived as per capita tax from the different unions; that, upon organizing, the federation as a central body adopted a constitution and by-laws governing the conditions under which new local unions could be admitted to membership; that there is no provision for forfeiture whereby the property of any of the local unions can become forfeited to or confiscated by the federation upon withdrawal of the local from membership in the Western Federation. It asks that plaintiff be enjoined from asserting any claim to the property belonging to the defendant. The District Court decreed that plaintiffs take nothing by the action, that they be enjoined from claiming the property involved, and that defendant is the sole owner of such property. Plaintiffs appeal.

[1] Upon the trial the case largely turned upon the question whether or not the original charter granted by the Western Federation of Miners to the Butte Miners' Union contained the following clause:

"It is agreed that, should the aforesaid union withdraw or be dissolved, suspended, or forfeit this charter, then all property, moneys, books, and papers shall become the property of the Western Federation of Miners."

The position of the federation is that the charter of May, 1893, contained this clause, and that the charter issued in October, 1914, was but a reissuance of the charter of 1893; that such charter became binding as between the parties; and that by the action of the Miners' Union, had on June 15, 1915, it put itself in a position where it became obligated to convey to the federation all property owned by it on June 15, 1915. The Miners' Union, on the other hand, insist that the clause heretofore referred to never was in the original charter, and, furthermore, that such a clause would have been and is illegal and void, as against public policy and the laws of Montana.

There was considerable testimony taken, and not a little conflict of statement, as to the contents of the charters of 1893 and 1914. The judge of the District Court, however, resolved the conflict by finding that the evidence was insufficient to establish plaintiff's contentions,

that the May, 1893, charter, which was granted by the Federation of Miners to the Miners' Union, and which was destroyed or lost in June, 1914, contained the clause appearing in the 1914 charter, whereby, in the event of withdrawal or forfeiture of charter, the property of the Miners' Union should become the property of the federation. In support of his conclusion the judge refers to the evidence as showing that, after a form of charter to be granted by the federation was adopted, the clause referred to was objected to, and a form without such a clause was printed by order of the Miners' Union and thereafter issued to it by the federation. Examination of the record shows that this view is supported by the evidence of several witnesses who were intimately associated with the affairs of the Miners' Union from the time of its early history, and who testified that the forfeiture clause, as they called the clause in question, was not in the old charter, and that the new charter of October, 1914, with such clause, was not a duplicate, and never was worked under or accepted by the union. The record gives substantially this history:

The original corporate objects of the Miners' Union, as stated in their articles of incorporation filed in 1881, were to protect the interests of the membership of the association and to hold such property as might be necessary for the protection of its good, and to enable it to establish subordinate organizations and to become a body politic. Incorporation was had under the statutes of Montana (Revised Statutes of 1879, p. 463), which authorized religious, benevolent, and other like corporations in Montana. Various amendments of the statutes cited have been made from time to time, but it is not material to cite them in detail. The corporation continued to raise funds among its individual members and to perform its corporate purposes until 1893, when, for reasons then evidently satisfactory to itself, it joined in creating the Western Federation of Miners, an organization of miners' unions in the several states, having objects declared in a constitution to be the union of the various miners' unions of the West into one central body, and to use means to maintain friendly relations between themselves and employers, and to endeavor by arbitration and conciliation to settle such differences as may arise between them, and thus make strikes unnecessary. Friendly relations continued to exist for years, and until about June, 1914, when grave difficulties arose between the Miners' Union and the federation, and the Miners' Union hall at Butte was destroyed, and the charter paper issued by the federation in 1893 was lost or destroyed, and never has been found. In September, 1914, however, the Miners' Union applied in writing to the federation for a reissue of a charter to take the place of its first charter, lost or destroyed. In applying, the Butte Miners' Union agreed that in acceptance of the charter applied for it would conform to all its provisions, and that the same were fully understood, and agreed to the constitution, by-laws, rules, and regulations of the Western Federation of Miners. Thereafter a charter dated October 3, 1914, was forwarded by the Western Federation to the Miners' Union, and in this charter was included the forfeiture clause heretofore quoted.

The testimony further discloses that when this charter was received a serious question at once arose within the Miners' Union as to whether this was a duplicate of the original charter, and whether or not it should be accepted by the union. The discussion revolved about the forfeiture clause, and the effect which might follow if the new charter was accepted with the clause providing that the property of the union would be forfeited if the Miners' Union might see fit to withdraw from the federation. Charles Baxter, a witness for the plaintiff, who had been a member of the Miners' Union since 1890, and who frequently attended meetings of the organization, testified that he had frequently seen the first charter hanging on the wall of the hall, and had read it many times from beginning to end, but never saw any clause therein which authorized the forfeiture of any property by the Miners' Union; that he had observed a forfeiture clause in the new charter sent in 1914; that the question of the new charter was brought up at a meeting of the union; that the charter was read by some of the members and thrown aside without any action being taken on it; that there was an effort made to return the last charter to the federation, and that it was tendered back by a member named Lee; but that the person to whom it was tendered declined to accept it. Jack Oliver, another member of the Miners' Union, says that at a meeting of the Miners' Union in October, 1914, when the last charter was received, it was agreed that it should not be accepted; that it was remarked that under its provisions the property of the Miners' Union could be taken if it did not comply with the rules and regulations of the Western Federation of Miners; that at that time the Miners' Union had property; and that the Western Federation had never contributed to the acquisition of such property. On cross-examination this witness said that, as far as he knew, as an organization the Butte Miners' Union never took action upon the charter sent in October, but there was much discussion of it, and it was the general understanding that the charter was refused.

Frank O'Connor, who had been a member of the Butte Miners' Union since 1891, and had been president of the organization four or five times, said that the old charter did not contain a forfeiture clause, and that he recalled the time of the arrival of the new charter in 1914, but that the new charter was not a duplicate of the one that had been destroyed, and which had hung on the wall of the hall for years. "It differed," said the witness, "in that they controlled the whole property; they would take all our property; that is, they would take the Butte Miners' Union property under the clause they had in here; by accepting the charter they would take all our property, and we objected to it." Pat Leahy, another member of the union, said that the charter which had been received in 1893 disappeared when the Miners' Union hall was blown up in 1914; that when the new charter came he advised the members against accepting it, because "there was a clause in it that did not suit, and changed the intent of the former charter"; that at a meeting of the Miners' Union the matter was brought up under the head of "good and welfare of the meeting," and that the men

said, in referring to the new charter, "Throw it in the waste basket." He said that the new charter differed in another respect from the 1893 charter, in that it required the Miners' Union to conform to the terms, rules, and regulations of the federation, and in default thereof the charter issued might be revoked. Pat Lee, who was secretary of the Miners' Union in 1914, after the receipt of the new charter, testified that he wrote a letter as secretary (the letter is in the record), addressed to Ernest Mills, secretary of the federation, dated November 24, 1914, in which he advised Mr. Mills that the charter had been received, but that there was "some dispute about putting it up, as some of the members wanted a copy of the old charter from Helena." Witness said that he recognized that the new charter did not conform to the old one, but that the Miners' Union continued to act with the federation officials, although "they wanted a copy of the old charter under which they continued working."

There was additional evidence to sustain the defendant's contention that the 1914 charter was, in respect to the forfeiture clause, essentially different from the charter of 1893. On the other hand, it is fair to say there was testimony introduced by plaintiff from some old-time members of the Union, who said very positively that they were familiar with the original charter issued by the federation to the Miners' Union, and that the forfeiture clause in the 1914 charter was identical with that in the earlier one of 1893. To such effect was the evidence of J. J. Maher, who was at one time secretary and treasurer of the federation, and of J. C. Lowney, a member of the federation and in 1893 a member of the Miners' Union. There was also evidence that the union kept the 1914 charter until it was produced in court in June, 1915, and that some official business was done with the federation after October, 1914; but Lee, the witness who carried on the correspondence, says the union was acting under the old charter. But from June, 1914, relations between the two bodies seem to have been more or less disturbed, and finally, in June, 1915, the Miners' Union formally adopted resolutions wherein, after reciting the date of their incorporation, the fact of the creation of the federation, the destruction of the old charter, the history of their application for a new charter, and detailing the financial accounts between the two bodies, they referred to the suspension of the union by the federation, and, after reciting that the federation "is no longer a bona fide labor organization," concluded by rescinding and repudiating any contract that theretofore existed or might then exist between the corporation and the Western Federation by reason of the charter or in any other way, and declaring that the union withdraw from the Western Federation and return to the headquarters of the federation the charter received from it.

[2] It requires no extended citation of authority to sustain the rule that one who seeks to enforce the specific performance of a contract must establish very clearly and to the entire satisfaction of the court the existence of the contract and the terms thereof. Story, in his Eq-

uity Jurisprudence, §§ 769, 770, in writing upon specific performance of written contracts, says:

"If they are not certain in themselves, so as to enable the court to arrive at the clear result of what all the terms are, they will not be specifically enforced. In the first place, it would be inequitable to carry a contract into effect where the court is left to ascertain the intentions of the parties by mere conjecture or guess; for it might be guilty of error of decreeing precisely what the parties never did intend or contemplate."

See Deeds v. Stephens, 10 Idaho, 332, 79 Pac. 77; Pomeroy's Equitable Remedies, §§ 764, 765.

The present case is not one which calls for departure from the general rule that where there is a serious conflict in the evidence, and the District Court has had the advantage of seeing and hearing the witnesses, and has decided that the weight of the testimony as to the existence of a fact is with the one side as against the other, the appellate court will not disturb the conclusion of the lower court, but will confine its review to the questions of law presented for its consideration. Under this view the charter of 1914 was not the charter requested by the Miners' Union, and the union was therefore not bound by the terms of such charter, unless the action which they took after the receipt of the 1914 charter made a complete contract with respect to the new charter. But this contention cannot be sustained, for again the court has decided against the plaintiff upon the issue. Moreover, we are clearly of the opinion that under the evidence the action taken by the Miners' Union and its officers after the receipt of the 1914 charter is inconsistent with the view that the union intended to accept it in the form it was sent, or intended to act under it and to be bound by its terms. The corporation never treated it as a reissue. No record of corporate adoption appears. The witness Lee, who wrote the letter of November 24th, heretofore referred to, to the secretary of the federation, said that after mailing that letter the Miners' Union never was able "to receive any communication, or any recognition, or any reports that the constitution provided should be sent to the various locals from the federation," and that the reason why the union did not formally withdraw at once was that a suit had been filed in December, 1914, by the federation against the officers of the union, and under legal advice withdrawal while the suit was pending was thought inadvisable.

Our conclusion is that, the District Court having had very substantial evidence upon which it decided as a direct issue that the plaintiff had failed to establish the essential foundation upon which it could seek specific performance, this court should not reverse the action of the lower court. Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253. As this point is decisive of the case, it is unnecessary to consider whether it would have been beyond the power of the union to make a contract such as was forwarded by the federation to the union in 1914.

Affirmed.

BOSTON TERMINAL CO. v. GILL (three cases).

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

Nos. 1277–1279.

INTERNAL REVENUE ⊂=9—EXCISE TAX ON CORPORATIONS—CORPORATIONS "ORGANIZED FOR PROFIT"—"ENGAGED IN BUSINESS."

The Boston Terminal Company was organized under a special statute (St. Mass. 1896, c. 516) closely defining its organization and powers for the purpose of building and maintaining a union station. As in effect required by the act, its capital stock, or $500,000, was subscribed for by the five railroad companies named therein, in equal shares. Such companies were also required to use the station, and to pay therefor, in proportion to the use made of the same, such amounts as should be necessary to pay the expenses of the corporate administration and of maintaining the station, the interest on the company's bonds, which amounted to $14,500,000, and dividends on its stock not exceeding 4 per cent. Such companies were also required in case of foreclosure to pay any deficiency of the bonded debt in the same proportions. The company received a substantial income aside from payments from the railroad companies from facilities furnished to the traveling public and from leases and concessions. It had never paid any dividends on its stock. It was required to pay a state franchise tax on its capital stock, but the station property was assessed to the railroad companies. *Held*, that the company was a corporation "organized for profit" and "engaged in business," within the meaning of section 38 of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 112, and subject to the special excise tax thereby imposed; that its gross income under the act included all sums received from the railroad companies, and that it was entitled to a deduction therefrom on account of interest paid, under clause 2, to the extent only of the interest on so much of its debt as equaled its capital stock of $500,000.

In Error to the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Actions at law by the Boston Terminal Company against James D. Gill, Collector of Internal Revenue (three cases). Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the opinion of Dodge, Circuit Judge, in the court below:

In these three actions at law the plaintiff seeks to recover back payments made by it to the defendant collector which had been assessed upon and collected from the plaintiff as taxes due from it under the federal Excise Tax Statute of August 5, 1909, § 38 (36 Stats. 112–117). The first suit relates to the taxes so collected for the year 1909; the second and third to the taxes for the years 1910 and 1911, respectively.

The parties waive trial by jury and have submitted the cases to the court upon a statement of agreed facts, filed November 22, 1915, covering all three cases. I therefore find the facts to be as set forth in said statement, which is to be referred to in connection with this opinion. The agreement provides that the court may draw inferences of fact.

1. The first question to be determined is whether the plaintiff corporation, which had "a capital stock represented by shares," was a corporation "organized for profit" within the meaning of the act, and therefore subject to pay annually the special excise tax provided for by section 38, with respect to the carrying on or doing business by it during the years here in question.

The plaintiff corporation was established by, organized under, and its operations conducted in accordance with, a statute of Massachusetts passed

June 9, 1896, and entitled "An act to provide for a union station for passengers on railroads entering the southerly part of the city of Boston." It forms chapter 516 of the Massachusetts acts of 1896. It is set forth in full as part of the agreed statement.

The five railroads named in section 2 of this statute subscribed for and paid in $100,000 each of the $500,000 capital stock therein provided for. The Boston & Albany Railroad Company was leased to the New York Central & Hudson River Railroad Company in 1900, and thereafter operated by the lessee; the New England Railroad Company was leased to the New York, New Haven & Hartford Railroad Company in 1898, and was thereafter operated by said lessee and subsequently merged with it in 1908; the Boston & Providence Railroad Company had been leased to the Old Colony Railroad Company in 1888, was operated by said lessee when the statute was passed, and thereafter until 1893, when the New York, New Haven & Hartford Railroad Company became lessee of both the last-mentioned railroads and thereafter continued to operate them. During the years here in question, therefore, the actual control of the five railroad companies mentioned in the statute was vested in the New York Central & Hudson River Railroad Company and the New York, New Haven & Hartford Railroad Company, which two companies thereafter complied, on behalf of their respective lessors, and the last-mentioned company on its own behalf, with the provisions and requirements of the above statute.

The plaintiff company proceeded under such statute to acquire the necessary land and to build thereon the contemplated union station, which was thereafter used by all the five railroads named or their respective lessees. The land was acquired and the station built with the money paid in by them as capital stock, and with money raised by the issue of its mortgage bonds, under section 4 of said statute, to the amount of $14,500,000.

To each of said five railroad companies there was issued for the $100,000 paid in by it 1,000 shares of the plaintiff company's stock, each share of the par value of $100, making in all the total capital stock authorized by the Massachusetts statute. Each railroad company has since retained all the stock issued to it as above and now owns it. While they thus became and now are the only holders of all the shares into which the plaintiff company's stock is divided, the nature of said stock in respect of the rights belonging to and the liabilities incurred by its owners is made to differ widely from that belonging to ordinary stock in a business corporation, by the following provisions of said Massachusetts statute, which are believed to be the only provisions especially signficant upon the question whether or not the company is to be regarded as "organized for profit," within the meaning of the federal act.

(a) As to the issue of the stock, while the statute provided only that the above-named railroads might take and pay for it as above, without requiring them to do so, or prohibiting its issue to others, or in amounts different from the above, it authorized the company to acquire the land necessary to its operations only when each said railroad should have taken and paid for the amount of stock allotted to it by the statute and the company's entire capital should have been so paid in by them.

(b) Ownership of the stock was not, of itself, to carry with it any voting power in the choice of the company's officers. Management of the company, instead of being in the hands of directors chosen by its stockholders, was placed by the statute in the hands of five trustees, one to be appointed by each of said railroads, each trustee to be a director of the railroad appointing him, and to hold his office as trustee at its pleasure. Any vacancy was to be filled in like manner.

(c) The liability of each railroad for the company's debts and liabilities was, by the statute, not to be confined to the ordinary liability of a stockholder in a business corporation. The issue of bonds, to such amount as might be necessary and approved by the railroad commissioners, was authorized, and an issue largely exceeding the capital stock in amount was clearly contemplated; such bonds to be secured by mortgage of the land to be acquired and the station to be thereon erected by the company. The five railroads who

were to take the stock as above were required, in the event of foreclosure of such mortgage and a sale of the property mortgaged for less than the principal and interest of the mortgage debt, to make good to the bondholders the amount of such deficiency, each to contribute thereto, not in the proportions wherein they had taken and paid for the stock (one-fifth each), but each in proportion to the use which it or its lessees might then have of the property.

(d) The company was not given unrestricted power in the operations which the statute authorized it to undertake. Plans prepared by the company for the construction of the station it was to build on such land as it might take for the purpose were to be approved or changed as ordered by the municipal authorities of Boston with the concurrence of the Massachusetts railroad commissioners. Rules made by the company for the use of the completed station were to be subject to modification by said railroad commissioners upon application of the Boston municipal authorities or of the railroads themselves.

(e) The railroads who were to take the company's stock as above were required to use the completed station it was to build, instead of their respective terminal facilities then in use. For such use the statute further required them to make payment to the company, such payments to be part of their operating expenses. The respective proportions in which the statute required each to pay were to depend upon the proportionate use made by it of the new facilities, not upon the proportion of stock held; and were to be fixed by agreement, or, in case of failure to agree, by said railroad commissioners; with provisions for revision, either by agreement or said commissioners, at intervals of not less than three years. What the payments required as above from the railroads were to cover is expressly provided by the statute; which provisions, though not very directly bearing upon the rights and liabilities attending the ownership of stock in the company, are next stated.

(f) The payments required to be made by said railroads for their use of said station were to be made monthly to said company for its use. Said railroads were to pay (section 10)—

Such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act, as the same shall become payable, and a dividend, not to exceed 4 per cent. per annum, upon its capital stock.

It is to be noticed in connection with these provisions that in its last section (25) the statute required the company to pay a franchise tax upon the true market value of its capital stock without any deduction whatever. But the plaintiff company's real estate used by said railroad companies is by the same section directed to be assessed to them, not to said company, and the taxes thereon are to be paid, not by the company, but by said railroad companies in the proportions wherein each should at the time be making use thereof.

Although neither railroad company has sold any of the stock taken by it as above, the statute nowhere prohibits such sale; and no obstacle to such sale at any time appears to exist, other than the practical difficulty of obtaining a purchaser for stock without voting power, entitled to dividends only in case trustees representing the railroads who would have to furnish the money to pay them if declared should so determine, and limited to 4 per cent. even in that event. It cannot be said that upon no terms within the power of its present owners to offer could the difficulty ever be got over, nor can it be said that the statute contemplates no sale of the stock in any event. That its owners, whether said railroad companies or other persons, might at some time and in some manner become entitled to dividends upon it, is a possibility for which express provision is made. The organization is therefore for profit, at least upon contingencies which, however remote, are not wholly impossible of occurrence.

The plaintiff says that the railroads, its only stockholders as above, would themselves have to pay into it the amount of any dividend declared, only to receive back again as dividends the amounts so paid in. This would be true if each of the five used the station in the same proportion as that which its holding of stock bears to the entire capital. But it appears that, during the three years here in question at least, the only use made by the New York, New Haven & Hartford Company of the station has been as lessee or owner of three of the five railroads named in the statute, while the only other railroad making use of it has been the Boston & Albany, leased to the New York Central; so that the payments to be made according to actual use have been in the proportions one-fourth by the latter railroad and three-fourths by the New Haven on behalf of its three lessors and itself. The latter railroad, on behalf of itself and its lessors, would thus have to pay in only 75 per cent. of any amount used for dividends, while it would be entitled to 80 per cent. (four-fifths) thereof in dividends upon its and their stock. It can hardly be said, therefore, that the prescribed organization permits no profit in any event to any original stockholder.

But apart from any question as to dividends, the agreed facts show that the total cost of corporate administration, maintenance, and operation, etc., is not in fact wholly borne by the five stockholding railroad corporations. The provisions of section 10 of the statute requiring payment by them of such amounts as might be needed to pay the expenses of administration, etc., have been cited above. From paragraph 5 of the agreed facts it appears that the plaintiff company has leased space in the station and has granted concessions and licenses therein to persons other than said stockholding railroads, for the transaction on their own account of various kinds of business whose transaction there might accommodate passengers there arriving or thence departing, but was not otherwise connected with its business; the amounts received by it in payment for the privileges in the station so granted being applied in reduction of the expenses of administration, etc., to be met as above by the stockholding railroads. And, as also agreed in paragraph 5, the plaintiff has also itself operated facilities and supplied power, heat, light, gas, etc., manufactured by it for use in said station to such other persons as well as to said railroads, deriving revenue directly therefrom, which has been applied in like manner as above.

By means of revenue thus obtained by the company, not from said stockholding railroads but from others, the cost to them of the administration, maintenance, and operation for which the statute required them to provide has been very materially reduced, as paragraph 6 of the agreed facts more fully shows. There is no suggestion that the above dealings by the plaintiff company with others than said railroads are beyond its statutory powers. They were obviously for the better accommodation of the traveling public who were to use the station, and may be regarded as incidental to the maintenance and operation thereof by it which the statute expressly directed, and therefore as contemplated by the statutory provisions, establishing the company's organization. Since the railroads have been thereby relieved from having to meet out of their earnings a material part of the charges expressly ranked by the statute among their operating expenses, and their net earnings applicable by them to their own dividends have been to that extent augmented, that the company's organization is in no respect for profit can hardly be reasonably said.

There appears to be no little ground for the conclusion that every organization which does not belong to any one of these classes expressly mentioned in the proviso which section 38 of the excise tax act contains should be regarded as "organized for profit" within the meaning of that section. In Sargent, etc., Co. v. Von Baumbach, 207 Fed. 423, 428, the District Court in Minnesota, expressed itself in favor of such a construction. In its enumeration of the classes of organizations to be exempted from the general liability to taxation under the act, the proviso adds: "No part of the net income of which inures to the benefit of any private stockholder or individual."

These words forbid the application of the proviso wherein they occur to any organization mentioned therein whereto they do not apply, even though

in all other respects the proviso would entitle it to exemption. But I cannot regard them as indicating that no organization is to be treated as one "for profit" in the sense of the statute unless it provides for or permits a net income inuring directly to the benefit of some private stockholder or individual.

I therefore consider the scheme of the plaintiff's organization adapted to permit the acquisition of what may fairly be called "profit," and hold that it was a corporation organized for profit within the meaning of the federal statute. I reach this conclusion without regard to the fact that it pays, as required by the state statute under which it is organized, a franchise tax upon the market value of its capital stock to the state of Massachusetts; and notwithstanding the fact that it has neither paid any dividends on said capital stock nor accumulated any surplus from its operations.

2. The next question is whether the plaintiff corporation was "engaged in business" within the meaning of the act during the years to which this case relates. There being no dispute that during those years it carried on the operations it was organized to carry on, in all respects as directed in or contemplated by the state statute permitting its organization and regulating its operations, its contention upon this point is only that said operations were not "for profit," and that by "engaged in business" the act cannot mean business from which no profit is to result. This contention is in effect disposed of in the defendant's favor by what has been above said.

3. It remains to consider the plaintiff's claim that it has been taxed upon an amount greater than the true amount as its "net income" for the years in question. The facts regarding its income for 1909 are as below, and determination of the correct method of ascertaining its taxable net income for that year will determine the correct method applicable to the figures dealt with in each of the two later years, which figures differ little in either year, for purposes here material, from those of the year 1909.

In 1909 the plaintiff's gross receipts were:	
From N. Y., N. H. & H. R. R. Co. (1)	$ 517,848.17
From the N. Y. C. & H. R. R. R. Co. (2)	172,616.07
From other sources as above (3)	312,673.11
Total	$1,003,137.35
Its expenditures were:	
Interest on its bonds (4)	$ 490,000.00
Operating expenses (5)	345,551.26
Repairs (6)	143,512.77
General expenses (7)	15,384.57
Massachusetts franchise tax (8)	8,688.75
Total	$1,003,137.35

The plaintiff's annual return under the act for 1909 shows as "gross income" only the above item 3 of its gross receipts, viz. $312,673.11, which was stated to consist of "amounts actually received for rent of offices and concessions, receipts for parcel room, baggage storage, and lavatories, and proceeds of power, heat, light, Pintsch gas, and ice."

It claimed the same amount as a deduction authorized by the statute for "all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation," thus disclosing no taxable net income whatever.

Neither the amounts paid in by the railroads nor the equivalent amount of expenditures balanced thereby were included in the return as made, either as gross income or as deductions therefrom.

But the tax commissioner, acting under the fourth clause of section 38 of the act, amended this return by making it include in "gross income" not only the item of receipts above identified as 3, but items 1 and 2 also; in other words, the entire gross receipts. The "deductions" to be made therefrom, as approv-

ed by him, included the items of expenditure 5–8, inclusive, but of the item (4), interest paid on bonds, only $17,500 was allowed to stand as a deduction. Interest on bonded or other indebtedness paid within the year is to be deducted from gross income, according to the second clause of section 38; but only the interest paid upon such indebtedness to an amount not exceeding the corporation's paid-up capital stock—in this case $500,000—as already stated. The interest paid on this amount was the $17,500 allowed; all the remaining interest paid was disallowed as a deduction. Agreed facts, par. 4.

These amendments made by the commissioner had the result of leaving $472,500 of the plaintiff's gross receipts, in fact used by it in paying interest on its bonds, to stand as net income ascertained according to the second clause of section 38, and of estimating the tax payable by the plaintiff at 1 per cent. upon that amount, less the specific exemption of $5,000, allowed by the first clause of said section, i. e., upon $467,500, although its actual total receipts had been in fact wholly exhausted and balanced by its actual total expenditures, as shown above.

The plaintiff contends that receipts devoted to the payment of interest on its bonds were not income at all within the meaning of the act. But to take this position is to say that no part of what the railroads paid in to it was gross income within the act. The railroads were not required by the state statute to make, nor did they in fact make, so far as appears, separate or specific payments identified as payments to meet the interest semiannually becoming due from the plaintiff to holders of its outstanding bonds. A statement sent each railroad on the first day of each month gave the plaintiff's total expenditure for the preceding month, including as one item thereof one-twelfth of the total annual interest on said bonds. Each such statement gave also the plaintiff's total revenue for the same month from sources other than said railroads. Each railroad's proportion of the expenditure not covered by the revenue shown as above was charged to and paid by it, month by month, the New York Central paying, during the years here in question, 25 per cent. of said balance, and the New York, New Haven & Hartford 75 per cent. thereof. Agreed facts, par. 7.

If allowed to offset its gross income by the entire amount of its expenditure or disbursements, no net income affording a basis for taxation under the act would remain and (assuming the correctness of the conclusions herein above adopted) the plaintiff would have nothing to complain of. It is only the fact that the express provisions of the second clause of section 38 forbid the inclusion of any interest paid on bonds in the deduction allowed for "ordinary and necessary expenses * * * paid * * * out of income in * * * maintenance and operation," and, while allowing a deduction for interest payments, forbid such deduction, when indebtedness exceeds paid-up capital stock, of any interest paid upon such excess, which gives rise to the plaintiff's complaint that a tax has been exacted from it, contrary to the intent of the act. But if the plaintiff was a corporation taxable under the act, the question presented with regard to the deduction for interest paid on its bonds is the same as that considered by the Supreme Court in Anderson v. Forty-Two Broadway Co., 239 U. S. 69, 36 Sup. Ct. 17, 60 L. Ed. 152. In that case the interest on $600 only, being the amount of paid-up capital stock, was allowed to be deducted, and the net income whereon the tax was computed included receipts which had been in fact devoted to payment of the remaining interest on a bonded indebtedness of $4,750,000. In the opinion of the court, Congress deemed that:

The carrying of the indebtedness should be considered as a principal object of the corporate activities, that the operations of such a corporation are conducted more for the benefit of the creditors than of the stockholders and that the contribution of the corporation to the expenses of the government should be admeasured with this fact in view.

In the case above cited it had been held in the District Court and on appeal that, as the plaintiff here contends, the entire interest paid on bonded indebtedness should be treated as part of the cost of maintenance and operation and therefore be allowed as a deduction from gross income. 209 Fed. 991; 213

Fed. 777, 130 C. C. A. 338. The contrary construction of the act adopted by the Supreme Court as above determines this question in the defendant's favor.

The plaintiff has further contended that the facts set forth in paragraph 6 of the agreed statement, relating to the returns of annual net income made by the railroads themselves and the estimate of their own net incomes accepted by the tax commissioner as the basis of the franchise taxes to be paid by them, show that they will be subjected to double taxation in respect of some of the same items if the plaintiff's net income subject to taxation is estimated as above. I am unable to sustain this contention. If the railroads included in their expenditures to be deducted the expenditures of the terminal company, they also included in their gross income so much of the terminal company's gross income as they had not themselves contributed, so that the amount of tax to which they were liable independently of the terminal company was not, in the result, increased.

It follows from the conclusions above stated that the taxes here in issue were rightly assessed by the tax commissioner, and that the plaintiff corporation has paid the defendant no more than the Federal statute required it to pay.

I therefore find for the defendant.

Stuart C. Rand, of Boston, Mass. (John L. Hall and E. S. Kochersperger, both of Boston, Mass., on the brief), for plaintiff in error.

Thomas J. Boynton, U. S. Atty., of Boston, Mass., for defendant in error.

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

PER CURIAM. These three cases involve the same questions. The first relates to the method of ascertaining the amount of income subject to a tax under the act of 1909. The method adopted excluded the amount paid by the terminal company for interest on its bonds exceeding its capital stock. This would seem to be quite in accordance with Anderson v. Broadway Co., 239 U. S. 69, 36 Sup. Ct. 17, 60 L. Ed. 152. That case goes upon the ground that such interest deductions are declared against by the Corporation Tax Law of 1909, known as the Excise Law.

The other questions relate to the declaratory phrases, "organized for profit" and "engaged in business," and, in respect to these, the contention of the terminal company is that the two should be read together in determining the question of the applicability of the statutory phrase, "organized for profit."

Upon the question whether the terminal company was engaged in business, we are satisfied with the reasoning and findings of Judge Dodge, and, indeed, the terminal company makes no contention against such view if the case were to turn upon the single question as to whether it was engaged in business. But it is urged that the kind of business they were engaged in shows that it was not a corporation organized for profit within the meaning of the statute. We are satisfied with the contrary reasoning below in respect to the character of the corporation and the finding that it was organized for profit within the meaning of the statute; and, moreover, the result in this respect has strong support in the decision in Von Baumbach v. Sargent Land

Company, 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460, decided by the Supreme Court since the decision below.

We think it can fairly be said that profit was one of the substantial objects of the organization of the terminal company, and that, apparently, is enough to bring it within the statute.

Judgment of the District Court affirmed, with costs.

FARMER v. FIRST TRUST CO.

In re MILWAUKEE MOTOR CO.

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

No. 2472.

1. MASTER AND SERVANT ⊜30(3)—CONTRACTS OF EMPLOYMENT—GROUNDS FOR DISCHARGE.

   While it is a general rule that one employed in a supervisory capacity is not so strictly accountable to the employer for his time as is a clerk or workman, the applicability of the rule depends upon the circumstances of the particular case, and the voluntary and unnecessary absence from duty of a superintendent, at a time when his presence is vitally necessary to the success of the employer's business, is ground for his discharge.

2. MASTER AND SERVANT ⊜32—DISCHARGE OF EMPLOYÉ—STATEMENT OF CAUSE.

   Even if the cause assigned for dismissal of an employé was not in itself sufficient, the dismissal is justified if it appears that sufficient cause therefor did in fact exist.

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

In the matter of the Milwaukee Motor Company, bankrupt; First Trust Company, trustee. Appeal by A. J. Farmer from an order disallowing his claim. Affirmed.

Appellant Farmer, a mechanical engineer, was employed as superintendent of the bankrupt's gas engine shops at Milwaukee. After serving about two months in such capacity, a contract for a year's service, beginning August 1, 1912, was entered into, under which Farmer was to superintend and manage the shops, devoting his entire time thereto, and to receive for such service a salary of $6,500 and a bonus of $3 per engine if, with the equipment of the factory, and such further equipment as had theretofore been specified by Farmer, 3,000 engines were produced within the year at prescribed factory costs, to fill contracts therefor which were extant. Provision was made for renewal of the contract for another year if Farmer "has made good his guaranty to make the said 3,000 engines now sold within this contract year, and within the above schedule cost of manufacture."

Under date of July 26th, the bankrupt had entered into a contract with the Imperial Automobile Company of Jackson, Mich., to supply it 2,200 motors, with option for 1,000 more, during the entire year; the contracted deliveries for 1912 being August 100, September 130, October 260, November 260, and December 300.

The work of installing the new equipment was being carried on, and the manufacture of the engines proceeded, but in the months indicated only 190 engines were completed for delivery, and some, if not all of these, proved unsatisfactory. Demands for overdue deliveries were being made, as well as complaints respecting engines delivered. In response to the complaints the

bankrupt's vice president on December 18th went to Jackson, taking Farmer with him. The next day Farmer started back home by way of Chicago. The vice president urged him to be back to the shops as soon as possible, and Farmer said he would reach Milwaukee the same day, as he intended stopping at Chicago but a short time to buy his wife a Christmas present. Upon reaching Chicago he did not return to Milwaukee, but remained at Chicago until the 22d, indulging himself in diversion strictly personal. Coming to Milwaukee on the 22d, he did not go to the shop because of a severe cold he had contracted. On the 24th he was dismissed from his employment. Within six months thereafter the company became bankrupt. Farmer filed his claim for $13,062.45 for damage accruing to him by reason of his alleged unlawful dismissal.

The referee found that the absence from duty was in no manner on account of his own necessities or of the employer's business, but because of Farmer's own self-indulgence during that time. He found further that this absence and the failure to return to his employment was not such a breach of his contract of employment as to justify his dismissal, and that his conduct during such time was not such as was inconsistent with the nature of his employment, or rendered him unfit to continue it. He allowed the claim to the extent of $3,862.50 for the balance of the full year's salary, and disallowed it for the rest of the claim, which was based upon the bonus. Both parties petitioned for review, and the District Court reversed the referee's order of allowance, and directed that the entire claim be disallowed. Farmer appeals.

Lyman G. Wheeler, of Milwaukee, Wis., for appellant.
Arthur W. Fairchild, of Milwaukee, Wis., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] It is maintained for appellant that one serving in a supervisory capacity is not so strictly accountable to the employer for his time as is a clerk or a workman, and that Farmer's absence of two or three days without permission was not such a breach of the contract as warranted its termination. The legal proposition, as generally stated, is sustained by the authorities cited from Wisconsin, the state where this contract was made, as well as elsewhere. Moody v. Streissguth Clothing Co., 96 Wis. 202, 71 N. W. 99; Schumaker v. Heinemann et al., 99 Wis. 251, 74 N. W. 785; Loos v. Walter Brewing Co., 145 Wis. 1, 129 N. W. 645, 140 Am. St. Rep. 1052; Green v. Somers, 163 Wis. 96, 157 N. W. 529; Beach on Modern Law of Contracts, § 584.

But the applicability of such rule must depend on the facts of particular cases. Conditions may be readily imagined where in a well-organized, smoothly running, and successful business a day's or even a month's absence of a general superintendent, who has the business well in hand, might be wholly consistent with its continued uneventful and successful operation. Upon the other hand, the business may be in condition so critical that a single hour's willful absence of such an officer at such a time might well be regarded as rank disloyalty and gross insubordination. Nearly five months of the new contract period had passed. Instead of deliveries of 1,050 engines required during that time under a single contract, to say nothing of other outstanding contracts, but 190 all told had in fact been delivered, and these more or less defective. Purchasers were clamoring for deliveries and complaining of defects in those delivered; materials were delayed; there

was more or less trouble in the shop; and things generally seemed to be going awry. Added to this, the new equipment was in process of installation; old machines were being moved and changed; and the shop was undergoing radical rearrangement and reconstruction. The responsible head was Farmer. He had various foremen under him, but he was the only mechanical engineer connected with the plant, and while in authority it was upon his designing, planning, and direction that success or failure depended. This high-priced man faced obstacles, to surmount which would manifestly require his fullest capacity and undivided attention. Surely this was not a situation wherein the man at the helm might needlessly and with impunity abandon his post that he may tread "the primrose path of dalliance."

It is urged that the evidence shows no harm to the business resulting from these days of absence of its mechanical head. The sentry sleeping at his post is not less derelict in duty if, haply, disaster does not follow; nor is the responsible employé's disloyalty or insubordination measured by the extent of the resultant harm to the employer, nor minimized if none happens to follow.

It is insisted that even if, while at Chicago, appellant did transgress the canons of propriety and right living, this of itself would not warrant his dismissal. The authorities support the proposition that if the transgression does not injure the employer, nor unfit the transgressor for the employment, termination of a contract of employment for such cause alone would not be justified. Wood, Master & Servant, § 110; Child v. Boyd, etc., Co., 175 Mass. 493, 56 N. E. 608; Brownell v. Ehrich, 43 App. Div. 369, 60 N. Y. Supp. 112. But the dismissal here is not justified on the ground of the employé's personal transgression at Chicago. The fact of the transgression affords evidence that the absence from duty was not necessitated by any of such causes as might excuse it, and emphasizes the conclusion that it was willful and deliberate, and under conditions which gave to the conduct strong color of disloyalty and insubordination.

[2] Nor is it material that at the time of the dismissal the employer did not know of his conduct at Chicago, and did not assign it as a cause of dismissal. Even if the cause assigned for dismissal was not in itself sufficient, if it appears that sufficient cause therefor did in fact exist, the dismissal was justified. Wood, Master & Servant, § 121; Labatt's Master & Servant, § 189; Carpenter Steel Co. v. Norcross, 204 Fed. 537, 123 C. C. A. 63, Ann. Cas. 1916A, 1035; Thomas v. Beaver Dam Mfg. Co., 157 Wis. 427, 147 N. W. 364, Ann. Cas. 1916A, 1020; Loos v. Walter Brewing Co., 145 Wis. 1, 129 N. W. 645, 140 Am. St. Rep. 1052; Von Heyne v. Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524. But the employer did then know the desperate condition of things at home; did know that appellant's place was there, and his presence there much needed; did know appellant had been asked at Jackson to return at once to the shop, and had stated he would do so after a short stay at Chicago for buying a present; and did know that for several days he did not put in appearance at his place of duty. Without any excuse appearing for the absence, such as illness or other

unavoidable cause might afford, the employer was warranted in attributing it to a willful disregard of the master's interests, and to insubordination, which, in our judgment, upon this record justified his dismissal.

The order of the District Court is therefore affirmed.

JOHN B. CARTER CO. v. HENGST.

(Circuit Court of Appeals, Third Circuit. November 7, 1917.)

No. 2286.

CONTRACTS ⊜170(1)—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES. The parties entered into an agreement for doing of railroad construction work; defendant to contribute the plant, which it owned, and complainant his services as manager. There was no provision for termination of the contract, which contemplated the securing of successive contracts for work, nor was there any provision for valuation of the plant; but there was a provision for determining the profits on each contract performed, and that, "in ascertaining the profits made on said contract on completion of the work, the parties hereto shall agree upon the reasonable value of the plant." In making such several settlements, the plant was valued by taking its cost and charging certain percentages for use and deterioration. *Held* that, in view of such practical construction of the contract by the parties, the same method of valuation was properly adopted by the court in a suit for final settlement and accounting between them, after completion of the last contract.

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Suit in equity by Robert Graham Hengst against the John B. Carter Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 235 Fed. 982.

Collins & Corbin, of Jersey City, N. J., and Charles A. Denneen, of New York City, for appellant.

Lindabury, Depue & Faulks, of Newark, N. J. (J. E. Ashmead, of Newark, N. J., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Robert G. Hengst, a citizen of Pennsylvania, filed a bill against the John B. Carter Company, a corporate citizen of New Jersey, for an accounting. An interlocutory decree for such accounting having been entered, the cause was referred to a master, who took testimony, examined the accounts submitted by both parties, and thereafter filed a report finding a balance in favor of Hengst. The Carter Company having filed exceptions to such report, the court below heard the same, and in an opinion published in 235 Fed. 982, made some minor clerical corrections, but in substance adopted the views of the master and entered a

decree in Hengst's favor for some $19,000. Thereupon the Carter Company took this appeal.

Without here restating in detail the history of the cause, all of which is fully set forth in the opinion referred to, it suffices to say the parties, by written contracts, engaged in railroad construction work, and this bill was for an accounting for alleged profits. Each party submitted an account to the master, and, apart from minor differences, there was no substantial difference between them, save as to the value placed in the accounting on the construction plant which the Carter Company owned and which had been used in the several different railroad contracts the parties had completed. In that regard the contention of the Carter Company was that the aggregate of the market value of the different appliances, tools, etc., which made up the plant, was the value to be adopted as a basis of settlement. On the other hand, Hengst claimed the plant should be valued as a going concern, and its value determined by its cost price, less proper deductions for use and deterioration.

The relations and rights of the parties, as we have said, were created by contract, and are to be determined by such contract, and while the situation that arose was, as is generally the case, and is generally the cause of disputes, one not foreseen or provided for by the contract, still the contract, its terms, purposes, and objects, constitute the spirit in which the rights of the parties should be adjusted. Turning, therefore, to such contract, we find it was entered into with a view to the parties, not only doing the particular contracting work then undertaken, but also other work to be thereafter secured. In this joint initial enterprise, and in those to succeed and actually succeeding it, the Carter Company was to contribute the use of the plant it owned, and Hengst was to contribute his services. Provision was made for determining the profits of each separate work thus undertaken, and for carrying the plant into succeeding operations, by the following stipulation:

"In ascertaining the profits made on said contract, on completion of the work the parties hereto shall agree upon the reasonable value of the plant."

In fulfillment of this provision, the parties, as new contracts were obtained, fixed the value of the plant in settling the profits of one contract and establishing a profit basis for a new construction in operation, by taking the cost of the plant and charging certain percentages for use and deterioration. Such method of fixing the plant value, the plaintiff contended for before the Master. The latter followed that view, the court below concurred, and we are now asked by the plaintiff to adopt it as our view. On the other hand, the defendant contends for a market price for the individual articles of the plant. This, in brief, makes a difference of some $19,000 in valuation, and is the substantial dispute here involved.

The situation, as we have said, is one not contemplated by the contract and necessitates a valuation of plant, for which the contract did not provide any particular method. The contract contemplated and provided for a successive series of future contracts, and made no explicit provision for a stoppage of the relation between the parties. But, while no stoppage was provided for, we think the court below, sitting

in this cause as a chancellor, has grasped and enforced a settlement based on the spirit of the contract as interpreted by the parties to it. While, as we have said, the contract made no provision for the ending of the relations between Hengst and the Carter Company, yet manifestly the contract could not have been made without the possibility of its some day ending. And in the absence of any provisions for a valuation at its termination, what standard of valuation commends itself more highly, or is more likely to be right, than the one which the parties had themselves set the seal of their approval upon by adopting it in their performance of the contract? That contract provided that "in ascertaining the profits made on said contract, on completion of the work the parties hereto shall agree upon the reasonable value of the plant," and in construing and applying that language they had taken cost with a deduction for use and deterioration as a standard of the reasonable value of the plant.

Why should not that standard also apply to the ending of the relation? The plant was owned by the Carter Company. It was meant for continuous service. Hengst had neither ownership nor property interest in it; he could not compel its sale or future use. Nor was the Carter Company obliged to disintegrate and sell the plant in the market, in order to fix a value on which to settle with Hengst. Under such circumstances, we are clear that the value of the plant when the parties separated was that reasonable value which the parties had acted upon, namely, its plant value as a plant, based on cost, less due allowance for use and deterioration. In Attorney General v. Drummond, 1 Dr. & War. 368, Sugden, Chancellor, said:

"Tell me what you have done under such a deed, and I will tell you what that deed means."

We are of opinion the court below, in following the path the parties had made, was more likely to be right than if it had departed therefrom.

Finding in this particular and in other respects no error, the decree below is affirmed.

ATLANTA & W. P. R. CO. v. GREEN.

(Circuit Court of Appeals, Fifth Circuit. December 21, 1917.)

No. 3042.

1. NEGLIGENCE ⟸25—WHAT CONSTITUTES—ATTRACTIVE NUISANCE.
It is actionable negligence for one to leave unguarded, on a part of his premises which he knows is frequented by children for purposes of play, a dangerous thing, which may be fatal to any one who touches it, without taking any precaution against the mischief likely to result.

2. NEGLIGENCE ⟸32(2)—LANDOWNERS—LIABILITY.
A landowner, who leaves on his premises, which are frequented by children, an unguarded dangerous agency, is liable to a third person who, without negligence on his part, is injured in an attempt to rescue the child or children in peril.

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

3. ELECTRICITY ⊂⊃19(2)—PLEADING—DEMURRER—SCOPE.
Plaintiff's petition alleged that between a thickly settled street and the tracks of the defendant company there was a strip of land covered with grass, uninclosed, which was customarily used by children in the neighborhood as a playground, and that defendant made no objections to such use. The petition further alleged that cables of wires transmitting electricity in volume sufficient to instantly kill a human being, from an electric plant on one side of defendant's tracks to a customer on the other side, fell in a heavy storm and were severed by a passing train; that a short while thereafter defendant's section hand removed the cables, throwing them on the grass-covered plot used by children as a playground, although knowing at that time that they were heavily charged with electricity; that one of the wires came in contact with the grass and ignited it, and some of the children, seeing the fire, went to that place and began to jump over it, whereupon plaintiff's husband, realizing the danger of the children, approached the fire to save them, but in going to the place where the children were playing stepped on the live wire and was instantly killed. *Held* that, though the complaint might be subject to criticism on the ground that the word "children," as used with reference to those playing and jumping across the fire, was defective in not showing that they were immature persons of insufficient capacity to be capable of guarding against the peril to which they were exposed, that defect could not, under Georgia practice, be raised by general demurrer, and as against general demurrer the petition must be deemed sufficient; the word "children" being used in its common acceptance.

4. TRIAL ⊂⊃143—PROVINCE OF JURY—CONFLICTING EVIDENCE.
An issue is for the jury when the evidence is conflicting.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by Mrs. Etta Green against the Atlanta & West Point Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

P. H. Brewster and Arthur Heyman, both of Atlanta, Ga. (Brewster, Howell & Heyman, of Atlanta, Ga., and A. H. Thompson, of La Grange, Ga., on the brief), for plaintiff in error.

Lester C. Slade and H. H. Swift, both of Columbus, Ga., George Westmoreland, of Atlanta, Ga., and Sidney Holderness, of Carrollton, Ga. (Meadors & Wyatt, of La Grange, Ga., on the brief), for defendant in error.

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

WALKER, Circuit Judge. This was an action by the defendant in error, Mrs. Etta Green (hereinafter called the plaintiff), to recover damages for the death of her husband. Her petition averred the following state of facts:

The plaintiff, her husband, and their three children resided in the city of La Grange on a street running parallel with the track of the plaintiff in error railway company (which will be called the defendant). That street was thickly settled, and there were a great many children in the neighborhood, which facts were known to the defendant. Between that street and the defendant's track there was a strip of land belonging to the defendant. That strip was covered with grass, was

uninclosed, ordinarily was a safe playground for children, and, with the knowledge of the defendant and without objection from it, was used by the children of the neighborhood as a playground. Cables or wires which transmitted electricity, in volume sufficient to kill instantly a human being, from an electric plant on one side of the defendant's railroad to a customer of the operator of the plant on the other side of the railroad, were strung on poles, one of which, during a heavy wind and rain, fell, resulting in the wires strung to it being thrown onto and across the rails of defendant's track. Soon after this occurred a train operated by the defendant passed the point at which the wires or cables were upon the track and severed them. In a short while thereafter a section master of the defendant, assisted by the section hands under him, removed the fallen wires or cables from the track and threw them on the above-mentioned strip of land, knowing at the time that the wires were heavily charged with electricity and were likely to be hidden by the grass which covered the ground where the severed wires were left. An end of one of the wires came in contact with the grass and ignited it. Some children saw the fire, went to the place where it was, and played at jumping over the wire. Some time after the wires were blown down, and after they had been removed from the track to the above-mentioned strip of land, the plaintiff's husband, when he reached his gate in going to his residence, saw the children jumping over the wire where the grass was burning, and, realizing the danger of their doing so, approached to warn and save them; and, as he was doing so, being intent on the danger the children were in and looking at them and the fire, he stepped on a wire which was hidden in the grass, came in contact with the electric current, and was instantly killed. The defendant negligently left the severed wires, known to be heavily charged with electricity, at the place to which they were removed from the track, without guarding the same, or giving any warning to children or any one else of the danger incident to their presence there.

[1-3] It is actionable negligence for one to leave unguarded on a part of his own premises, which he knows is frequented by children for purposes of play, a dangerous thing, which may be fatal to any one who touches it, without taking any precaution against the mischief likely to result. Union Pacific Railway Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. And such person is liable to a third person, who, without negligence on the latter's part, is injured in an attempt to rescue the child or children discovered in peril due to such negligence of the proprietor of the premises on which they are playing. Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825, and note. It is urged in behalf of the defendant that the plaintiff's petition does not show that the defendant was negligent with reference to the persons whose rescue was being attempted by her husband when he came to his death. The basis of this contention is that the petition describes those persons as "children," and does not specifically aver that they were so young and immature as to be incapable of appreciating and guarding against the peril to which they were exposed. The sufficiency of the petition as a

whole was questioned in the trial court only by a general demurrer, and the particular ground of objection above stated was not there pointed out. The word "children" is appropriate to describe very young persons, such as are not old enough to dispense with protective aid and care. It is such a one that was pictured when it was said:

"When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things."

The averments of the petition as to what the "children" mentioned were doing when their rescue was attempted graphically show that they had not put away childish things. It is quite questionable whether anything more was needed to be said to show that they were lacking in maturity and capacity to guard against the danger, due to conduct chargeable against the defendant, to which they were exposing themselves. But let it be assumed that the petition was subject to objection on the ground that its description of the persons in behalf of whose safety the deceased was acting when he was killed did not with the certainty and definiteness which may be required show that those persons were so immature as to need to be guarded from a danger which others might be expected to avoid, with the result of making alleged conduct negligent as to them, though it was such as not to be a breach of any duty owing to others of more maturity and capacity. If the petition was defective in not more clearly disclosing that the word "children" was used to describe immature persons, this defect was one of form, and not of substance, which, under the Georgia practice, is not taken advantage of by a general demurrer. East Georgia & Florida R. Co. v. King, 91 Ga. 519, 17 S. E. 939; Western Union Telegraph Co. v. Jenkins, 92 Ga. 398, 17 S. E. 620; Little Rock Cooperage Co. v. Hodge, 105 Ga. 828, 32 S. E. 603. When questioned only by a general demurrer, a petition is to be regarded as averring negligence when the language used, as it is commonly understood, when used as it is used in the pleading, is appropriate to express that meaning.

[4] The evidence adduced was quite conflicting, but a phase of it supported the material averments of the petition. The court was not in error in refusing the defendant's request for an instruction that the jury render a verdict in its favor.

We are not of opinion that there was reversible error in any ruling of the court which is presented for review.

The judgment is affirmed.

UNITED STATES v. MUELLER.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4577.

ALIENS ⇐68—NATURALIZATION—TIME FOR FILING PETITION.

The provision of Naturalization Act June 29, 1906, c. 3592, § 4 (2), 34 Stat. 596 (Comp. St. 1916, § 4352 [2]), which requires an alien to file his application for admission to citizenship "not less than two years nor

more than seven years" after making his declaration of intention, is to be strictly observed by the courts, and the seven-year limitation is not enlarged by the fact that within that time the alien filed two petitions for admission in a court which was without jurisdiction because of his nonresidence within the district, and which were for that reason dismissed.

Smith, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the United States against Rudolf Mueller. From a decree dismissing the complaint, the United States appeals. Reversed.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

A. L. Agatin, of Duluth, Minn. (Chester A. Congdon, of Duluth, Minn., on the brief), for appellee.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

HOOK, Circuit Judge. This is a suit by the United States to cancel a certificate of citizenship issued to Mueller, upon the ground that it was illegally procured. The trial court dismissed the complaint as insufficient, and the government appealed. The suit was brought under section 15 of the Act of June 29, 1906 (34 Stat. 596 [Comp. St. 1916, § 4374]). The particular ground of illegality asserted by the government is that Mueller's petition for naturalization was filed more than seven years after his declaration of intention to become a citizen. The parts of the act of June 29, 1906, bearing on the case, are as follows:

Section 3 (Comp. St. 1916, § 4351) confers exclusive jurisdiction to naturalize aliens upon various courts, among which are courts of record in the states. It also provides:

"That the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts."

Section 4 provides that "an alien may be admitted to become a citizen of the United States in the following manner and not otherwise," and the first of the succeeding paragraphs requires that he shall make a declaration of intention on oath before the clerk of the court or his authorized deputy "two years at least prior to his admission." The second paragraph provides that "not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing" for naturalization.

Section 27 (Comp. St. 1916, § 4382) prescribes the form of declaration of intention including this heading: "Invalid for All Purposes Seven Years after the Date hereof." Each alien receives a copy of his declaration.

The government's complaint which the trial court held insufficient discloses the following: On January 28, 1907, Mueller filed his declaration of intention in the office of the clerk of the district court of Ramsey county, Minn. In February, 1910, he filed in that court a

petition for admission to citizenship stating that he was then a resident of St. Paul, in Ramsey county. It was averred in the government's complaint that he did not then reside in that city or county. The petition was called for hearing in the Ramsey district court in June, 1910, and as he did not appear it was continued to a fixed day in the succeeding month. He again failed to appear, and the court denied his petition for that reason. In February, 1911, he filed in the same state court a second petition, with a like averment as to his residence in Ramsey county. It was heard in June, 1911, and denied, upon the ground that he was not in the court's jurisdiction. August 13, 1914, more than seven years after his declaration of intention he filed a third petition in the District Court of the United States for the District of Minnesota, averring that he was then a resident of St. Louis county, Minn. Upon this petition an order was rendered granting the certificate of citizenship now in question, over the objection of a representative of the naturalization service of the United States.

The case stated in the complaint is within the rule of United States v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853 (April 9, 1917), as to the trial court's jurisdiction of plenary suits to cancel certificates upon grounds like those above narrated. In that case the Supreme Court also expressed the necessity of strict observance by alien applicants of the statutory requirements for naturalization. The provisions of the act of 1906 are clear and positive. "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." Though Mueller's first two petitions were within the prescribed seven-year period after his declaration of intention, the Ramsey county court in which they were filed was without jurisdiction. He was not a resident within its judicial district. Its favorable action upon the petitions would have been void. The filing under such circumstances did not enlarge the limitation of the act of Congress. Nor can those petitions be taken as fresh declarations of intention because for a like reason the court had no power to receive and entertain them for that purpose. Mueller's third petition was filed in a court in whose judicial district he resided, but it was more than seven years after his declaration of intention. We need not consider the reasons for this limitation. It is positive and unqualified, and courts are without power to dispense with it or enlarge it by construction.

Counsel invoke section 3 of the act of June 25, 1910 (36 Stat. 829, c. 401 [Comp. St. 1916, § 4352]), which authorizes relief from the results of misinformation under certain conditions. We do not consider whether Mueller could have brought himself within the provisions of that section. The right conferred by them is limited and exceptional, and the burden of an affirmative showing rested upon the alien applicant. It is enough to say that the complaint of the government was sufficient on its face to exclude them.

The order is reversed, and the cause remanded for further proceedings.

SMITH, Circuit Judge, dissents.

THE ROCKAWAY.

THE RICHARD F. YOUNG.

(Circuit Court of Appeals, Fourth Circuit. October 9, 1917.)

No. 1534.

COLLISION ⊂=153—SUIT FOR COLLISION—REVIEW ON APPEAL—FINDINGS OF FACT.

Where the question of responsibility for a collision is a doubtful question of fact, and the finding of the trial court is supported by substantial evidence, it will not be disturbed on appeal.

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

Suit in admiralty by Bannie Barnes against the ferryboat Rockaway, the Ferries Company, claimant, and the tug Richard F. Young, Henry Crew, claimant. Decree for libelant against both vessels, and claimants appeal. Affirmed.

For opinion below, see 240 Fed. 844.

Braden Vandeventer, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., and Foley & Martin, of New York City, on briefs), for appellant Henry Crew, owner and claimant of tug Richard F. Young.

R. Randolph Hicks, of Norfolk, Va., for appellant Ferries Co., owner and claimant of ferryboat Rockaway.

D. Lawrence Groner, of Norfolk, Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The appellee, Bannie Barnes, a passenger on the ferryboat Rockaway, plying between Norfolk and Portsmouth, was injured in a collision between the ferryboat and the steam tug Richard F. Young, which occurred just after the former started from her Norfolk slip. Prior to the accident the tug had been lying, bow upstream, at Campbell's Wharf, which nearly adjoins the ferry slip, with another tug and a carfloat between her and the wharf. To permit the carfloat to be taken elsewhere, the Young moved out into and up the stream a short distance, and then turned about to go back to the wharf when the carfloat was out of the way. This maneuver took place almost in front of the ferry slip and for a couple of minutes or so prevented the Rockaway from leaving. But when the tug began to move downstream and her stern was passing the end of the lower line of piling, the Rockaway gave the usual signal and started out on her trip. She had gone only some 200 feet, her stern clearing the mouth of the slip by about 50 feet, when she hit, or was hit by, the fantail of the tug, causing the injury in question. The court below found both vessels at fault and decreed that each of them should pay half the damages awarded. Both appealed. Each concedes that appellee is entitled

to recover, because the accident was not unavoidable, but each seeks to escape liability by making out that the other was wholly to blame.

As here presented the case turns mainly on the position and movements of the tug immediately before and at the moment of the collision. The Rockaway contends that she did not start until the tug was clear of her course, that she moved "straight out" from the slip, as was right and proper for her to do, and that she had gone but little more than her own length, not having gained sufficient speed for steerageway, when the tug without the slightest warning suddenly began backing at full speed, and kept backing until they collided, although she twice blew danger signals and did everything else in her power to avert the accident. Indeed, the alleged backing of the tug into the pathway of the ferryboat, when the latter could not reasonably foresee or guard against such a movement, is the principal ground upon which the Rockaway claims exemption.

Against this is the testimony of witnesses for the Young, equally positive and, so far as we can see, equally believable, to the effect that the tug did not back at all after she started downstream; that she reversed her engines just enough to check her speed and bring her practically to a standstill; that she did this to avoid running down a couple of launches which were crossing her bow, one going to and the other from a landing at Campbell's Wharf; that the pilot of the ferryboat could and should have perceived the difficult situation of the tug and taken it into account before leaving the slip; that the stern of the tug was some 25 feet below the lower line of piling when the accident happened; that the Rockaway either went to starboard or was carried down by the tide and struck the tug when the latter was compelled to stop; and that consequently the Rockaway was wholly at fault.

This outline of opposing contentions is quite sufficient, as we think, to show that the question of responsibility for the collision, as between the ferryboat and the tug, was a doubtful question of fact, and that the finding of the learned district judge is supported by substantial and not improbable proof. This being so, the finding will not be disturbed, as we have repeatedly held, and the decree is, accordingly, affirmed.

SIMONTON v. SHAW.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1917.)

No. 3118.

1. EVIDENCE ⇐402—ORAL AGREEMENT INCONSISTENT WITH NOTE.
   In the absence of fraud, accident, or mistake, the maker of a note cannot defeat action thereon by proving a prior or contemporaneous agreement inconsistent within it.
2. SET-OFF AND COUNTERCLAIM ⇐22(2)—ACTION ON CONTRACT—TORT AS SET-OFF.
   Under the law of Georgia, a tort cannot be set off in an action at law on contract.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by Leslie M. Shaw against J. M. Simonton. Judgment for plaintiff, and defendant brings error. Affirmed.

Ben J. Conyers and George Gordon, both of Atlanta, Ga., for plaintiff in error.

Owens Johnson, of Atlanta, Ga. (Dorsey, Shelton & Dorsey, of Atlanta, Ga., on the brief), for defendant in error.

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

WALKER, Circuit Judge. This was an action by the defendant in error on a promissory note made by the plaintiff in error to one Porter and by the latter indorsed to the defendant in error. The court sustained a demurrer to and a motion to strike so much of the defendant's answer as undertook to set up a defense to the action. This ruling is assigned as error.

It is not clear, from the averments of the answer, whether what is relied on as a defense is a parol contemporaneous agreement to which the maker and payee of the note were parties, and which was inconsistent with the obligation evidenced by the note, or is tortious conduct of the holder of the note, the plaintiff in the suit, sought to be availed of as a set-off. Whether the defense relied on is regarded as the one kind or the other, the court is not chargeable with error in the disposition made of it. In the absence of fraud, accident, or mistake, the defendant could not defeat the action by proving a prior or contemporaneous oral agreement inconsistent with the written instrument sued on. And under the law of Georgia it is not competent in a court of law to set off a tort in an action on a contract. Green v. Combs, 81 Ga. 210, 6 S. E. 582; Hecht v. Snook & Austin Furniture Co., 114 Ga. 921, 41 S. E. 74.

The judgment is affirmed.

TATUM BROS. REAL ESTATE & INVESTMENT CO. v. SHENK.

(Circuit Court of Appeals, Fifth Circuit. December 13, 1917.)

No. 3062.

APPEAL AND ERROR ⊂=931(10)—REVIEW—PRESUMPTIONS.

There is a presumption in favor of the correctness of the findings upon which the decree appealed from was based.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by W. E. Shenk against the Tatum Brothers Real Estate & In-

vestment Company, a corporation. From a decree for plaintiff, defendant appeals. Affirmed.

W. P. Smith and Frank B. Shutts, both of Miami, Fla., and Edwin T. Merrick, of New Orleans, La., for appellant.

F. M. Hudson, of Miami, Fla. (Hudson, Wolfe & Cason, of Miami, Fla., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

PER CURIAM. The sufficiency of the plaintiff's (appellee's) averments of diversity of citizenship to give the court jurisdiction of the case is not questioned, and is not open to question. The sufficiency of the evidence adduced to support the averment of the plaintiff's citizenship is questioned in this court for the first time. We are of opinion that that evidence well supports the conclusion that prior to the bringing of the suit the plaintiff was a resident citizen of a state other than Florida, the state in which the suit was brought, and that at the time the suit was brought he had not lost such citizenship.

A phase of the evidence adduced well supported the findings made by the master and which were approved by the trial court. That evidence consisted principally of testimony of witnesses given in the presence of the trial judge before the reference to the master was made. The evidence relied on as being opposed to the findings mentioned is not such as to make it clearly appear that those findings were improper.

The conclusion is that the presumption in favor of the correctness of the findings upon which the decree appealed from was based has not been overcome, and that it does not appear from the record that that decree was erroneous. It is affirmed.

ROTAN GROCERY CO. v. WEST.

In re STAR GROCERY CO.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1917.)

No. 3125.

BANKRUPTCY ⊜169—PREFERENCE—SET-OFF.

A creditor receiving an illegal preference is not entitled to have the amount due from the bankrupt set off against such preference.

Appeal from District Court of the United States for the Western District of Texas; Duval West, Judge.

In the matter of the bankruptcy of the Star Grocery Company. Petition by Frank T. West, trustee, for reconsideration of the order allowing the claim of the Rotan Grocery Company. The referee sustained the contest and expunged its claim from the record, and the Rotan Grocery Company, claimant, petitioned for review. From a de-

cree of the court, sustaining the order of the referee, the claimant appeals. Affirmed.

J. D. Williamson, of Waco, Tex., for appellant.

John W. Davis, of Waco, Tex. (Davis & Cocke, of Waco, Tex., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We are of opinion that the evidence adduced well supported the conclusions that the transfer made by the bankrupt to the appellant a few days before the petition in bankruptcy was filed was a payment on an account which then no longer was an open one, and was made under such circumstances as to constitute it an illegal preference, with the result that the appellant was not entitled to have what was owing to it from the bankrupt set off against the payment so made. Mechanics' Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121. The complaint against the decree appealed from is not sustainable.

That decree is affirmed.

SCHLANK v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4829.

APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS OF FACT.

A finding of fact by a trial court, made on conflicting testimony of witnesses, some of whom testified orally, will be regarded on appeal as presumptively correct.

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

Suit in equity by George Warren Smith against Jake Schlank. Decree for complainant, and defendant appeals. Affirmed.

William Baird, of Omaha, Neb. (Wm. Baird & Sons, of Omaha, Neb., on the brief), for appellant.

Francis A. Brogan, of Omaha, Neb. (Brogan & Raymond, of Omaha, Neb., on the brief), for appellee.

Before HOOK, SMITH, and STONE, Circuit Judges.

HOOK, Circuit Judge. The issue in this suit in equity is as to the existence of an enforceable contract in writing for a 99-year lease of some ground on Farnam street, Omaha, Neb. The issue turns upon the narrow question of fact whether the proposition of Schlank, to which Smith, the owner, addressed a letter of acceptance, included the particular ground in question. Part of the evidence at the trial was by depositions, and part, equally important, was from witnesses who testified orally. The case so made is so nicely balanced that it is diffi-

cult to say from the record before us with which party the truth abides. The trial court held with Smith. It had an advantage in hearing the oral testimony and observing the witnesses, which we do not possess. This condition requires the application of the familiar rule that the finding of a chancellor upon conflicting evidence will be regarded on appeal as presumptively correct.

The decree is affirmed.

THRAILKILL v. CROSBYTON-SOUTHPLAINS R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1917. Rehearing Denied January 16, 1918.)

No. 4649.

1. BROKERS ⟸40—COMPENSATION.
   Defendant, which owned a large tract of land, placed it in the hands of a corporation as its agent for sale, on terms therein agreed upon. Afterward plaintiff sold certain of the lands under a contract with a third party, which was interested, to pay a commission on such sales. *Held*, that there was no implied contract by defendant to pay such commissions, but that, at least in the absence of evidence to the contrary, it had the right to suppose that plaintiff was acting for and paid by its agent.

2. CORPORATIONS ⟸452—CONTRACTS—FORMAL REQUISITES.
   Where an agent of a railroad company had authority to execute a contract in its behalf, the fact that he signed it as "Land Commissioner," instead of "Special Emigration Agent," which was his official designation, was immaterial, and does not relieve the company from liability thereon.

3. CORPORATIONS ⟸385—CORPORATE POWERS—DOCTRINE OF ULTRA VIRES.
   The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law.

4. CORPORATIONS ⟸456—IMPLIED POWERS—RAILROAD COMPANIES.
   It is within the implied powers of railroad company, whose line runs through a territory largely unsettled, as an aid to its own business to encourage settlement of lands tributary to its road, and to that end it may make a valid contract to pay a reasonable commission on sales of such lands to settlers, although it is not the owner of the same.

Hook, 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 Della Thrailkill against the Crosbyton-Southplains Railroad Company and the C. B. Live Stock Company. Judgment for defendants, and plaintiff brings error. Affirmed as to the Live Stock Company, and reversed as to the Railroad Company.

Earl R. Ferguson, of Shenandoah, Iowa (C. R. Barnes, of Shenandoah, Iowa, on the brief), for plaintiff in error.

J. W. Burton, of Crosbyton, Tex. (D. W. Higbee, of Creston, Iowa, on the brief), for defendants in error.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

SMITH, Circuit Judge. In July, 1900, there was organized under the laws of Illinois the defendant the C. B. Live Stock Company, with its principal place of business at Chicago, Ill. It originally had a capital stock of $100,000, divided into shares of $100 each, held as follows:

Julian M. Bassett	200 shares	$20,000.00
L. A. Coonley, ward	150 shares	15,000.00
Howard Coonley	75 shares	7,500.00
Avery Coonley	200 shares	20,000.00
Edward P. Bailey	100 shares	10,000.00
John Stuart Coonley	200 shares	20,000.00
Sarah Coonley	75 shares	7,500.00

This company had acquired by 1912 about 87,000 acres of land in Crosby county, Tex. In the meantime railroads had been built through the region, but none striking the lands of the defendant the C. B. Live Stock Company. It was about 40 miles to the nearest point on the railroad. Then the owners of the C. B. Live Stock Company decided to build a railroad. An Illinois corporation, and least of all one organized to engage in the live stock business, could not build a railroad in Texas, and it was decided to organize a new corporation for that purpose. It was necessary for a majority of the directors of the railroad company to reside in Texas, and for the reasons stated and to get more capital five or six new stockholders were taken into the new company, not in the old. On March 28, 1910, the articles of incorporation of the Crosbyton-Southplains Railroad Company were acknowledged, and on April 2, 1910, the majority of the board of directors made affidavit that the capital stock had been subscribed to an amount in excess of $1,000 per mile of the proposed railroad and 5 per cent. thereof had been paid in cash. On April 6, 1910, the Attorney General certified that the articles were in accordance with the provisions of chapter 1, title 94, of the Revised Statutes of Texas, and not in conflict with the laws of the United States or the state of Texas. On the same day the articles were filed for record with the secretary of state and recorded. On May 10, 1911, the first train was operated over the road which extended from Spur, in Dickens county, across Crosby county, to Lubbock, in Lubbock county, and it has been continuously operated ever since. On May 9, 1912, the C. B. Live Stock Company entered into a contract with the Realty Realization Company of Chicago, Ill., by which the former put all its lands in the hands of the latter company for sale, agreeing to pay $5 per acre for the expense of sale, and 30 per cent. of the purchase money above a stipulated net price as a commission for making the sale. The Crosbyton-Southplains Townsite Company and the Realty Realization Company entered into a contract, adopting the contract between the C. B. Live Stock Company and the Realty Company, save a change as to the amount of the commission on the sale of town lots. On the same day, but whether before or after the two contracts just referred to, does not appear, and perhaps that is immaterial, at a special meeting of the board of directors of the Crosbyton-Southplains Railroad Company:

"The chairman stated to the board that, on account of the vast unsettled country through which the road is operating and will operate if extended, it

had become necessary to establish an emigration department in order to get into communication with settlers, emigration companies, agents, and landowners, and to assist in advertising and settling farmers and others in Crosby and adjoining counties. He stated that, as the company had for its object the transportation of freight and passengers, it was incumbent upon the board to do all in its power to help create this business in every legitimate manner, and that he believed that an emigration department would greatly increase traffic of all kinds of the railroad, by aiding in settling the country and creating a publicity department, such as is usual with the present-day railroad. Whereupon, on motion duly made and seconded, the board did unanimously create and establish, for this company and for the purposes mentioned by the chairman, an emigration department, and appointed Clinton S. Woolfolk general emigration agent, and did authorize the vice president-general manager to pay said general emigration agent whatever salary deemed necessary by said vice president-general manager; said general emigration agent to work under the authority of the vice president-general manager, with power to appoint special emigration agents, under the advice and with the consent of the vice president-general manager."

The salary of Clinton S. Woolfolk as "general emigration agent" was subsequently fixed at $1 a month and an annual pass on the railroad. Numerous persons were appointed special emigration agents, as provided for in the action of the board of directors. Among these was George W. Butler, W. J. Brunson, F. W. Wilsey, and probably Fred H. Johns. Their salary was also fixed at $1 a month and a pass over the road. On August 24, 1912, a contract was entered into, signed by the "Land and Colonization Department, Crosbyton-Southplains Railroad Company, by George W. Butler, Land Commissioner," and the plaintiff, Della Thrailkill. This contract recited that the railroad controlled the sale of certain lands in Crosby and Dickens counties, Tex., and desired to secure the services of Mrs. Thrailkill in the sale and disposition of the same, and appointed and designated her as agent at Clarinda, Iowa, for the sale of said lands.

"The party of the first part [the Railroad Company] agrees to pay to the party of the second part [Mrs. Thrailkill] as compensation for services in the premises a commission equaling $3 per acre up to $40 per acre and 7½ per cent. on land above $40 of the purchase price at which any lands are sold by or through the efforts of such second party at prices and terms acceptable to said first party."

There is no evidence that this contract was ever terminated, but on August 24, 1913, a new and similar contract was executed in the name of the Orchards Heights Development Company, the Crosbyton-Southplains Railroad Company, by Fred H. Johns, manager, and by Mrs. Thrailkill. The plaintiff went ahead and sold considerable quantities of the lands of the C. B. Live Stock Company under these contracts, and brought suit against it and the Railroad Company to recover for the stipulated commissions. The case was tried to a jury, and at the conclusion of all the evidence the court said:

"In the cause on trial * * * there has been submitted to the court in the course of the evening a motion to direct this jury to return a verdict for the defendants, and that has been fully argued by counsel on both sides, and on the submission of the motion I have deemed it my duty to instruct you to return a verdict for both defendants in this case for two reasons, along with other reasons: First, that the Railroad Company—that as to any contract or obligation of the Railroad Company—made to take care of commission of

agents working for the Realization Company, that the Railroad Company has no power to make such a contract, being a public service corporation, the rates being fixed by the law, by the Interstate Commerce Commission. It has no money except what people pay for transporting goods over the railroad. It has only power to use money for legitimate railroad purposes, and not for speculation of this kind, and any contract made would be absolutely void, if a contract was made. As to the Cattle Company, I should say that the evidence here is that the Realization Company did sell this land for them, and that she, the plaintiff, was working for the Realization Company, and of course the Live Stock Company would not be held to pay the agents—the men employed to sell the land under a contract by which that agent, the Realization Company, agreed it would pay all the expense itself, any more than if [you] hired a man to sell your farm for you, and agreed to pay him $200, and he went out and hired another man, and agreed to give him $50; you would not be bound to pay the $50 and also the $200. So for those two reasons the motion is sustained. You are directed to return a verdict for the defendants, and you may sign this."

To this instruction the plaintiff excepted, and, after judgment rendered upon a verdict returned in accordance with the instruction, the plaintiff sued out this writ of error.

[1] Let us first see if the ruling of the District Court is correct as to the C. B. Live Stock Company. There is no claim there is any express contract between plaintiff and it. Reliance is had as against that corporation upon the right to recover under a quantum meruit. When, as in this case, the C. B. Live Stock Company had a contract with the Realty Realization Company to sell its lands, and there is nothing to indicate that it knew that the plaintiff was selling the lands in their own behalf, or not as a subagent of the Realty Realization Company, there is nothing upon which an implied contract of the C. B. Live Stock Company to pay her can rest. The court was right in directing a verdict for the C. B. Live Stock Company. Very different is the situation with reference to the Crosbyton-Southplains Railroad Company.

With that corporation the plaintiff had what appeared to be an express written contract to pay her $3 per acre commission upon all lands controlled by them sold by her. Two questions naturally arise: First, did the agent who signed her contract have authority to do so? Second, was said contract ultra vires?

[2] The first contract in the name of the Railroad Company was signed "The Land and Colonization Department, Crosbyton-Southplains Railroad Company, by George W. Butler, Land Commissioner." This was manifestly signed by the Railroad Company, by Butler, and, if he had authority to make the contract, the mere fact that he signed it "Land Commissioner," in place of "Special Emigration Agent," would not defeat a recovery. It is evident that the contract was signed by the company by Butler, and if Butler had authority to sign the contract for the corporation it could make no difference if he signed it "Land Commissioner," in place of "Special Emigration Agent."

We therefore turn to the question whether he had the power as special emigration agent to sign the contract. The chairman of the board of directors told the board that on account of the vast unsettled country through which the railroad was operating it became necessary to establish an emigration department in order to get into communi-

cation with settlers, emigration companies, agents, and landowners, and to assist in advertising and settling farmers and others in Crosby and adjoining counties. It was accordingly unanimously resolved to establish for the purposes mentioned by the chairman an emigration department and Clinton S. Woolfolk was appointed general emigration agent, with power to appoint special emigration agents upon the advice and with the approval of the vice president-general manager. Under the resolution Butler was appointed special emigration agent, and as such, under the title of "Land Commissioner," he signed the contract. The words "Land Commissioner" are descriptio personæ, and the contract, if signed in the name of the Crosbyton-Southplains Railroad Company, by George W. Butler, without more, would be sufficient, if it appeared that George W. Butler was an agent of the Crosbyton-Southplains Railroad Company authorized to make the contract. The creation of the emigration department, to get into communication with settlers and to assist in settling farmers and others in Crosby and adjoining counties, and the appointment of Mr. Butler as special emigration agent, apparently vested in him the authority to make the contract in question.

[3] We come now to the question as to whether said contract was ultra vires. There is no express prohibition of such a contract by a railroad company in the laws of Texas. It is customary for railroad companies for the purpose of developing freight and passenger business to maintain immigration departments. No authority has been called to our attention which prohibits such departments or the paying of reasonable compensation for securing settlers. The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law. San Antonio v. Mehaffy, 96 U. S. 312, 315, 24 L. Ed. 816; Railway Co. v. McCarthy, 96 U. S. 258, 267, 24 L. Ed. 693; St. Avit v. Kettle River Co., 133 C. C. A. 76, 216 Fed. 872.

[4] Could the Railroad Company lawfully contract to pay commissions upon the sale of lands which it did not own, but along its route, by individuals to other individuals; the Railroad Company being neither vendor nor vendee?

It seems to us that this is a question as to whether the Railroad Company has a right to advertise the lands along its route to bring settlers, and, if it can, why can it not pay a reasonable sum to some one to secure purchasers rather than to expend a large sum in advertising in the hope of securing purchasers? The question must ordinarily be resolved into one of whether the contract is fair and reasonable. In Heinz v. National Bank of Commerce, 150 C. C. A. 592, 237 Fed. 942, this court said:

"It is elementary that the corporate powers of a national bank, as well as of other corporations, are of two classes: (1) Those expressly granted; and (2) those impliedly granted, as reasonably incident and necessary to the carrying out of the powers expressly granted. The former have to do largely with the main business objects and purpose of the corporation; the latter largely with the means and methods of attaining those objects and carrying out those purposes. The former are determined once and for all by the language of the charter or the fundamental law; the latter may change according to time, place, and surrounding circumstances. The test of the former is whether they are found in the words of the charter or law; the test of the

latter is whether they are fairly incident to the former, and reasonably necessary to carrying them out. In determining whether a given act is within the former, the judgment, and actions of the directors and stockholders have no legal weight or bearing. In determining whether a given act is within the latter, the judgment of the directors and stockholders, while not conclusive, is entitled to consideration. Morse on Banks and Banking, § 54; Machen, Modern Law of Corporations, vol. 1, §§ 68, 87–90; Thompson on Corporations (2d Ed.) §§ 2100–2129. In Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357, this court said, speaking of the implied powers of a private corporation; 'While the powers of a corporation are limited to those expressly granted and those fairly incidental thereto, they include the latter as completely as the former, and they always include the indispensable and the suitable means to exercise the granted powers.' In Colorado Springs Co. v. American Publishing Co., 97 Fed. 843, 38 C. C. A. 433, this court said, in speaking of the same subject: 'To sustain an act done by a private corporation as a valid exercise of corporate power, it is only necessary, where the act is not challenged by the state, to show that the act in question was not prohibited by the company's charter, and that it had a natural and reasonable tendency to aid in the accomplishment of one or more of the objects for which the corporation was created.' That the word 'necessary,' when used in reference to implied powers, does not mean indispensable, and is not to be given a narrow, restricted meaning, it is only necessary to refer to McCulloch v. Maryland, 4 Wheat. 316, 413, 414, 4 L. Ed. 579."

In Jacksonville, etc., Railway Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515, the court quotes with approval the language of Lord Chancellor Selborne in Attorney General v. Great Eastern Railway, 5 App. Cas. 473, 478:

"This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be ultra vires."

In Union Pacific Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 581, 16 Sup. Ct. 1173, 1180 (41 L. Ed. 265), the court said:

"But where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing 'whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not, unless expressly prohibited to be held by judicial construction to be ultra vires.'"

A railroad company may enter into contracts not expressly nominated in its charter, if they are reasonably incidental to its objects or subsidiary to its chief purposes. Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care, and management of its property may be undertaken by the corporation and be within the scope of its corporate powers. Teele v. Rockport Granite Co., 224 Mass. 20, 112 N. E. 497.

The Railroad Company ran for many miles through the lands of the C. B. Live Stock Company. It could obtain no business, freight or passenger, through that territory, except as it derived it directly or indirectly from the Live Stock Company. It was deeply interested from every financial point in having these lands divided up. The commissions agreed to be paid were, as shown by the evidence, very low for that region. We are of the opinion that, to secure the di-

viding up of these lands, one of the incidental powers of the Railroad Company was to agree to pay reasonable commissions for the sale of these lands, and the contract made in the name of the company by Butler was not ultra vires.

It is true the District Court treated this as a contract to take care of commissions of agents working for the Realty Realization Company. This contract did not so provide. There is no evidence that the plaintiff was in these matters the agent of the Realty Realization Company.

Our conclusion is that the judgment must be affirmed as to the C. B. Live Stock Company and reversed as to the Crosbyton-Southplains Railroad Company, with directions to set aside the verdict as to that corporation and grant a new trial.

HOOK, Circuit Judge, dissents.

JOHN LUCAS & CO. v. BRADLEY.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1917.)

No. 1524.

1. BILLS AND NOTES ⟸493(1)—ACTIONS—DEFENSE.
   While the giving of a note raises a presumption that the amount named is then owing by the maker to the payee, the presumption is rebuttable.
2. EVIDENCE ⟸441(11)—PAROL EVIDENCE RULE.
   In an action on a note, given by defendant after having made part payment on a larger debt, evidence in support of his counterclaim, that at the time of the execution of the note plaintiff was indebted to him on account of claims not then liquidated, and that it was agreed such claims would be credited on the note, relating to a collateral agreement, is admissible, not varying or contradicting the terms of the note.
3. ESTOPPEL ⟸104—EQUITABLE ESTOPPEL.
   Where a debtor, who pledged collateral, signed a written statement, in which he admitted he was not entitled to any credit by virtue of a note deposited as collateral, except as to the amounts paid thereon, the creditor, though he extended the note, is not, the maker being a bankrupt at the time of the trial, liable for the amount of the note; the debtor, by reason of his statement, being estopped from asserting the creditor's liability on account of the extension.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action by John Lucas & Co. against S. O. Bradley, who counterclaimed. There was a judgment for defendant on his counterclaims, and plaintiff brings error. Reversed.

Louis M. Bourne, of Asheville, N. C. (J. Howard Reber, of Philadelphia, Pa., and Bourne, Parker & Morrison and Theo. F. Davidson, all of Asheville, N. C., on the briefs), for plaintiff in error.

Joseph F. Ford, of Asheville, N. C. (Lee & Ford, of Asheville, N. C., on the brief), for defendant in error.

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

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

KNAPP, Circuit Judge. In this action on a promissory note the matters in dispute are certain counterclaims set up by defendant. The record shows the following facts: Plaintiff in error, plaintiff below, is a Pennsylvania corporation engaged in the manufacture of paints and similar articles at the city of Philadelphia. In 1911 defendant was president of the Asheville Paint & Glass Company, of Asheville, N. C., which dealt in the same articles. In August of that year he gave plaintiff a note for $6,500, payable on demand and secured by 150 shares of the stock of his company and a deed of trust on his residence in Asheville. On November 7, 1914, having sold the house, he paid plaintiff $3,500 on this note and gave a new note for the balance of $3,424.72, which is the note in suit.

[1, 2] All the transactions on which the counterclaims are based occurred before the latter note was executed, and plaintiff contends that this operates to bar their allowance. Undoubtedly the giving of a promissory note raises the presumption that the amount named in it is then owing by the maker to the payee. But this presumption is rebuttable, and there are many cases in which the maker may prove a collateral agreement or other facts which relieve him from liability. Such proof does not vary or contradict the written note, but shows independently that it is not a binding obligation. In this case the defendant testified:

"Along about the time this note of $3,400 was made, they forced me to sell my home, which I did, and applied it on this note for $6,500. They told me to give a new note for the balance, which I agreed to do, provided I would get the credits for commissions on sales, some stock I had turned over to Mr. Estreicher, and some notes * * * I had indorsed over to them to be credited on this $6,500 original note."

From this and other testimony of like import, detailing what was thus summarized, the jury were warranted in finding that plaintiff was indebted to defendant in various sums when the note sued on was given, and that such indebtedness was not then liquidated or discharged. It is enough to say that this testimony was clearly admissible under the pleadings, and that plaintiff cannot defeat the counterclaims of defendant on the ground that they antedate the execution of the note.

[3] Aside from this general contention, which cannot be sustained, the only question raised by the assignments of error is the allowance by the jury of a note for $1,000 given by one Poole to defendant and by him indorsed and turned over to plaintiff, before the note in suit was executed, as further security for the original debt. When this note became due, the plaintiff, without the consent or knowledge of defendant, as the latter alleges, accepted from Poole new notes made by him, either two or four, on which suit was afterwards brought and judgment recovered. The record does not disclose the date when such extension of credit was granted, and we find no proof that Poole was then insolvent, though he was shown to be in bankruptcy when this case was tried. If nothing more appeared, it might be assumed, under the general rule of law, that plaintiff was chargeable with the amount of the original note because he renewed it at maturity instead of taking steps to enforce its payment. 31 Cyc. 838; Mauney v. Coit, 80 N. C. 300, 30 Am. Rep. 80. But this rule is without application here

for the reason that defendant, in June, 1915, signed a written statement in which he admits and agrees:

"That there is no credit due on the $3,400 note by virtue of the Poole and Sluder notes, except as the amounts of principal and interest are paid on them, respectively."

Whatever might otherwise be his legal rights, we are of opinion that defendant is estopped by this admission from claiming credit on account of the Poole note for any greater sum than plaintiff has actually collected thereon. The testimony is not all before us, but it appears from a statement in the judge's charge that only $17 had been paid on this note. If that be the fact, and it was not challenged in argument, there was no evidence to support a verdict for any larger amount on this item of the counterclaim, and the allowance of the face value of the note was therefore an error which entitles plaintiff to a new trial. Inasmuch, however, as the proofs warranted the other items allowed by the jury, such new trial should be confined to the question of how much has been paid on the Poole note, to the end that a correct and proper judgment may be entered in accordance with the views expressed in this opinion.

Reversed.

MACBETH-EVANS GLASS CO. v. GENERAL ELECTRIC CO.

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

No. 2900.

1. PATENTS ⟸83—RIGHT TO PATENT—USE OF INVENTION AS TRADE SECRET.
The right to preserve a monopoly in an invention by its use as a trade secret for profit, and the right to secure its protection under the patent laws, are inconsistent.

2. PATENTS ⟸83—RIGHT TO PATENT—USE OF PROCESS AS TRADE SECRET.
An inventor of a process who used it in secret for nearly 10 years, placing the product on public sale, cannot thereafter, when difficulty is encountered in protecting the secret, obtain a patent, and thus extend his monopoly for the patent term, but will be held to have elected to abandon his right to a patent.

3. PATENTS ⟸83—RIGHT TO PATENT—"ABANDONMENT."
The policy of the patent law is to secure to the public the full benefit of inventions after expiration of the fixed term deemed sufficient to reasonably stimulate invention, and any action of an inventor which would defeat such policy by withholding his invention from the public for an indefinite time for his own profit will operate as an abandonment of his right to a patent, which in every sense material to the patent laws is tantamount to an "abandonment" to the public of the invention itself.

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

4. PATENTS ⟸328—VALIDITY—PROCESS FOR MAKING GLASS.
The Macbeth reissue patent, No. 13,766 (original No. 1,097,600), for a formula and process for making glass, *held* void for abandonment.

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

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suit by the Macbeth-Evans Glass Company against the General Electric Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 231 Fed. 183.

Paul Synnestvedt, of Philadelphia, Pa., Joseph Wilby, of Cincinnati, Ohio, and James I. Kay and James C. Bradley, both of Pittsburgh, Pa., for appellant.

Squire, Sanders & Dempsey, of Cleveland, Ohio (F. P. Fish and W. K. Richardson, both of Boston, Mass., and William L. Day, of Cleveland, Ohio, of counsel), for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was a suit for infringement of letters patent reissue 13,766, bearing date July 7, 1914, to George A. Macbeth, assignor to Macbeth-Evans Glass Company, a corporation of Pennsylvania. The invention relates to a "method and batch or mixture for making glass for illuminating purposes such as in electric and other shades and globes." The pleadings present the usual issues of a patent suit, except that a distinct defense was introduced and made the basis of the decision. This was brought about in pursuance of Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), and on motion of defendant below, the General Electric Company, separately to hear and dispose of the defense set up in paragraph 14 of its answer; the facts, for purposes of the motion and hearing, being stated in a written admission of plaintiff below, Macbeth-Evans Glass Company, which was filed with the motion. According to the facts so shown, George A. Macbeth discovered and perfected the formula and process in issue prior to the fall of 1903. About the fall of that year, the appellant company (with which Macbeth was connected as president and stockholder) commenced to use the formula and process "as secret inventions for making illuminating glass," and thereafter continued such use until the application of Macbeth for the original letters patent (No. 1,097,600) was filed, May 9, 1913. Throughout this period the products of the formula and process were "put upon the market and sold in this country in large quantities as regular articles of trade and commerce."

In May, 1910, one of the plaintiff company's employés, who had been intrusted with the secrets of the invention set out in the reissued letters patent, left the company's employ and without its knowledge and in fraud of its rights disclosed these secrets to officials of the Jefferson Glass Company; and prior to the 17th of the following December that company began a secret use of the invention and continued such use until after application was made for the patent as stated, May 9, 1913, and placed the products upon the market and sold them in this country

as "regular articles of trade and commerce continuously from and after a date prior to December 17, 1910."

On the last-mentioned date, appellant commenced an action in the common pleas court of Allegheny county, state of Pennsylvania, against its former employé and the Jefferson Glass Company, including also a salesman of appellant who had left its employ and entered that of the Jefferson Glass Company, praying injunction against disclosures of the secrets to others and further manufacture and sale of glass under the secret formula and process. January 30, 1912, decree was entered in that court enjoining defendants from making any glass "by substantially said secret process and formula and from disclosing the same to others." This decree was affirmed by the Supreme Court of Pennsylvania January 6, 1913. Macbeth-Evans Glass Co. v. Schnelbach, 239 Pa. 76, 86 Atl. 688.

The instant case was heard below upon the facts thus in substance stated. District Judge, now Mr. Justice, Clarke, entered a decree adjudging the patent in suit to be void "because the discovery was used in the manner stated in the stipulation for almost ten years before the patent in suit was applied for, and was therefore abandoned, and also because the invention described in the patent was in public use more than two years prior to the application of (for) the patent" (231 Fed. 183, 190); accordingly, the bill was dismissed. The Macbeth-Evans Glass Company appeals.

[1, 2] The question is whether one who has discovered and perfected an invention can employ it secretly more than nine years for purposes only of profit, and then, upon encountering difficulty in preserving his secret, rightfully secure a patent, and thus in effect extend his previous monopoly for the further period fixed by the patent laws. Are both of these courses consistent with a reasonable interpretation of the constitutional provision and the statutes of the United States in relation to patents?

It is earnestly contended for appellant that its rights under the patent in issue are to be tested (1) by the use that was made of the invention, rather than of the product of the invention, prior to the application for a patent, and (2) by the acts if any of appellant and its assignor Macbeth, which would evince an intent to abandon the invention as distinguished from the right to patent the invention. The argument is that, when the acts of Macbeth and appellant are tested by the language of the patent laws, the secret use made of the invention could not have been a public use, and the constant effort made to preserve the secret was inconsistent with intent to abandon the invention; and consequently that the public use and the abandonment contemplated by the patent laws are inapplicable to the present case. The statutory provisions relied on are sections 4886 and 4920, Rev. Stat. (16 Stat. § 24, p. 201, section 61, p. 208 [Comp. St. 1916, §§ 9430, 9466]). Section 4886 provides:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, * * * not known or used by others in this country, and not patented, or described in any printed pub-

lication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may * * * obtain a patent therefor."

Section 4920 enumerates "special matters" which in an action for infringement may upon notice be proved under the general issue, and among them:

"Fifth. That it [the invention or discovery] had been in public use or on sale in this country, for more than two years before his application for a patent, or had been abandoned to the public."

The existence of all the conditions thus prescribed is essential alike to the right to issue or to obtain a patent; the absence of any one of the conditions is fatal. It is to be added that section 4884 (Comp. St. 1916, § 9428) limits the grant of every patent to a "term of seventeen years." The requirements and the limitation so imposed existed at the date of the patent in issue, and they were enacted in virtue of the power vested by the Constitution in Congress "to promote the progress of science and useful arts, by securing for limited times to * * * inventors the exclusive right to their respective * * * discoveries." Article 1, § 8. These provisions at once define a public purpose and the restrictions under which it is intended to be accomplished. The subject is a broad one; but the compass of the present case is restricted. No decision has come to our attention upon facts precisely like those here involved; in a word, the case is sui generis. It is not necessary, we may observe, to consider the portion of the decision below which deals with the question of public use. Our consideration will be limited to questions pertinent to abandonment.

In considering the subject of abandonment we assume that the patent is for a process which is not unitary with the product. If, indeed, this patent is for a process, and if the process and the product are distinct inventions separately patentable (as has been held in more or less analogous situations—the Leeds-Catlin Case, 213 U. S. 301, 318, 29 Sup. Ct. 495, 53 L. Ed. 805; the Acetylene Case, 192 Fed. 321, 325, 326, 112 C. C. A. 573 [C. C. A. 6], and see Judge Lurton's comment in the Sanitas Case, 139 Fed. 551, 552, 553, 71 C. C. A. 535 [C. C. A. 6]), there are some difficulties in the way of concluding that secret use of the process resulting in public use and sale of the product constitutes the statutory public use of the invention. It is these difficulties which we pass by when we make, for the purpose of the opinion, the assumption just stated.

It is in substance urged for appellee that there is distinct inconsistency between the right to a trade secret and the right to a patent; and that Macbeth, having elected to use his invention as a trade secret for some ten years instead of applying for a patent, could not under settled principles of the doctrine of election turn around and assert the inconsistent right to a patent. It is not entirely clear whether appellee's counsel mean that the right to practice an invention in secret and for profit is inconsistent with the right to obtain a patent for the

invention or with the right acquired under a granted patent; but we understand them to treat the trade secret as the invention. Macbeth, like any inventor of a new and useful object, possessed the right to practice his invention in secret and for profit, though the secret was the sole source of protection for the invention. He had no right to exclude others from legitimate discovery and use of the invention (John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 29, 82 C. C. A. 158, 12 L. R. A. [N. S.] 135 [C. C. A. 6]; Chadwick v. Covell, 151 Mass. 190, 191, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442); but he had an inchoate right to the exclusive use of the invention, which right, apart from the issues of the instant case, he might have perfected and made absolute by proceeding in the manner required by the patent laws (Gayler v. Wilder, 51 U. S. [10 How.] 477, 492, 13 L. Ed. 504); and while this was the only step open to him to secure the absolute right to exclude others (Paper Bag Case, 210 U. S. 405, 424, 425, 28 Sup. Ct. 748, 52 L. Ed. 1122; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 584, 112 C. C. A. 185 [C. C. A. 6]; Swindell v. Youngstown Sheet & Tube Co., 230 Fed. 438, 442, 144 C. C. A. 580, and citations [C. C. A. 6]), yet he failed to take the step. Hence the controversy as to inconsistency of rights must relate to the unpatented invention and so present the question, whether there is inconsistency between the right to practice an invention in secret without limit of time and for profit and the right to obtain a patent on the invention. Counsel for appellant say that these rights are different but not inconsistent. Such rights are important here only in their relation to a patentable invention. In this relation they seem to us to be inconsistent; inherently considered, their use can lead only to opposed ends—the one to reject and the other to seek a patent. The test of this will be aided by contrasting what was admittedly done in the exercise of the first of these rights with the claimed retention of the other.

When Macbeth perfected his invention in 1903 he and his company evidently concluded to control and use it for purposes of profit, and to work out these ends by practicing the invention in secret and placing the product on public sale. The plain object of such a course was to exclude others from using the invention and to secure its benefits for themselves. The adoption of this course signified by necessary implication a belief that the nature of the invention would enable them in this way to protect it for a substantial period of time, if not for a longer time than could be secured under the patent laws. The result shows that their belief was justified for a period of nearly ten years. True, it is admitted and rightly that the inventor and his company adopted and pursued this plan with knowledge that the invention, as already pointed out, furnished them no protection against use by others who might honestly discover it. This, however, inevitably concedes an intent either to abandon the right to secure protection under the patent laws, or to retain such right and if necessity should arise then to obtain through a patent a practical extension of any previous exclusive use (secured through secrecy) into a total period be-

yond the express limitation fixed by those laws. If the first of these hypotheses be the true one, it is not easy to see how the right to secure patent protection survived. The second hypothesis presents the two rights claimed and which it is said could not both be retained because of their inconsistency.

The conduct of the parties in carrying out the scheme of secret use and profit is appropriate evidence of its object and effect. It would be a contradiction to say that an inventor could both give up and hold the right to secure a patent. Here we have a continuous and uniform course of conduct for upwards of nine years; this would certainly be sufficient in any other sort of controversy to establish a definite intent; and, as if to accentuate their intent, the present inventor and his assignee engaged in serious litigation to maintain their scheme of secret use. It is impossible to see how such a course of conduct is reconcilable with a subsisting purpose to adhere to the right to secure a patent; it has every token of practical repudiation of such a purpose. Admittedly, we may repeat, these things were all done in the exercise of the right to adopt and pursue the scheme of secret use and profit; and it will not escape attention that the logic of this admission would lead to the same result as respects a purpose to retain the right to a patent if the plan had been pursued for a much longer time.

[3] All this is strengthened by distinct provisions of the patent laws. We refer to the provision, already pointed out, which limits the grant of every patent to a "term of seventeen years"; and also to section 4888 (Comp. St. 1916, § 9432), which requires that the application shall contain such a description of the invention as will "enable any person skilled in the art or science to which it appertains * * * to make, construct, compound, and use the same." The relation of this exaction to the term fixed for a grant is manifest. The two provisions define a policy which was enacted in the interest of the public. When a patent expires, the right to practice the invention thus becomes available to everybody. The object of such a limitation and disclosure was to secure to the public the full benefits of patented objects as speedily as was consistent with reasonable stimulation of invention. If then we assume that the course adopted by the present inventor and his assignee did not contemplate an intent to abandon the right to secure a patent, it certainly did contemplate an indefinite delay in disclosure of the invention and a practical and substantial enlargement of any period of monopoly recognized by statute. Can it be doubted that this was opposed to a declared and subsisting public policy?

Enough, however, has been shown of the practical construction and effect of the right to practice an invention in secret and for profit and the right to obtain a patent on the invention fairly to test the soundness of the claim that the rights are not inconsistent. They of course are now to be considered with reference to a scheme which includes an effort to secure a patent. And so regarded we may safely add to what we have already said of these rights that the first is in its nature and

essence susceptible of exercise only in a way to evade, or at least unduly to delay, a disclosure of the invention in the interest of science and the useful arts, and with an intent to expand the statutory period of monopoly and thereby reap additional profits. The second is a means simply to acquire a monopoly subject to all the conditions and limitations of the patent laws. Such rights in our opinion are inconsistent in themselves—notably in the matter of profits available through use as distinguished from sale of the invention—and in their respective relations to the patent laws. It is not conceivable that an inventor can consistently hold both rights throughout the same period of time, where the design is to use them for purposes and with results like or similar to those here shown. We understand the rule of election to be broad enough to reach such rights as these; in Birmingham v. Kirwan, Lord Chancellor Redesdale said: "The rule of election seems to me to apply to every species of right." 2 Schoales & Lefr. 442, 450. And we think that in this case Macbeth was put to a choice, an election. In Wm. W. Bierce, L'D. v. Hutchins, 205 U. S. 340, 346, 27 Sup. Ct. 524, 525 (51 L. Ed. 828), Mr. Justice Holmes in delivering the opinion of the court said:

"Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone."

So many applications have been made of the rule, thus so clearly stated, that it is not necessary to refer to more of them than appear in the opinion in that case. It is settled that when a choice of inconsistent rights is once made by a person having the right of election and also knowledge or means of knowledge of the essential facts, he is concluded by his action. Here the choice made was deliberate and is unmistakable; it was the secret use for profit and was persisted in for years. If the right to secure protection of the patent laws can be effectively repudiated, it certainly has been here.

This conclusion is reinforced by other considerations of a kindred character which lead to a like result. When the application for a patent was made we think the invention had in legal effect been abandoned. This is plainly related to the question whether there was an election, equivalent to an abandonment, and is of course a question individual to each case. True, as we have seen, it is contended that the efforts made here to preserve the secret were not reconcilable with an intent to abandon the invention. This is based on the theory that in the absence of intervening rights of other inventors a perfected invention may in point of time be indefinitely used in secret and for profit and also in entire consistency with the right to secure a patent on the invention; in a word, that persistence in such secret use, no matter for what length of time, will not justify an inference of abandonment of the invention. The abandonment contemplated by the patent laws naturally has reference to the advantages and protection alike which are obtainable under those laws. Abandonment in this sense must have been intended to signify a relinquishment of patent

privileges. Kendall v. Winsor, 62 U. S. (21 How.) 322, 329, 16 L. Ed. 165. As Macomber says:

"Abandonment must reside in the acts of the inventor by which he has deprived himself of the right to establish or enjoy the monopoly which he might have secured." Macomber, Fixed Law of Pat. (2d Ed.) 2; Walker on Patents (5th Ed.) § 91, at page 110.

Otherwise stated, abandonment of patent privileges is in every sense material to the patent laws tantamount to abandonment of the invention itself; and, of course, proof of such relinquishment or abandonment may be shown by conduct inconsistent with any other purpose. Rifle & Cartridge Co. v. Whitney Arms Co., 118 U. S. 22, 24, 25, 6 Sup. Ct. 950, 30 L. Ed. 53; Planing Machine Co. v. Keith, 101 U. S. 479, 484, 25 L. Ed. 939.

What has already been shown in respect of appellant's and its assignor's conduct in connection with the question of election is clearly pertinent to the question of abandonment and so need not be repeated. Appellant also contends, it is true, that it is necessary to prove abandonment of the invention to the public. There could be no abandonment that would not inure to the benefit of the public, since the public could be the only possible beneficiary of such a relinquishment; this would be equally true if the invention were cast away or destroyed and the circumstances of the act or conduct of the inventor were consistent only with an intent to abandon the invention. This we think fairly accounts for the use of the words "had been abandoned to the public." Paragraph 5, § 4920. When the intent then of sections 4886 and 4920, paragraph 5, is kept in mind, they may be as literally interpreted as counsel claim they must be, and yet forbid issue of the patent in suit. The views thus expressed are fortified by the rule that abandonment may take place at any time. Elizabeth v. Pavement Co., 97 U. S 126, 134, 24 L. Ed. 1000. That rule differs and ought to differ from the statutory rule enacted with reference to the public use of an invention or the act of placing it on sale, since abandonment in itself signifies surrender of the right to a patent. This would seem to indicate a strong reason, if not the very reason, for the omission to prescribe a distinct period within which a patent must be applied for after an invention is perfected. Further, the fact that the public may in some such instances lose the advantages of inventions cannot impair the force and effect of the inventor's conduct, for in all instances abandonment in terms prevents the issue of a patent.

There is still another view to be taken of the course pursued by the present inventor and his assignee. Their conduct was inconsistent with the duty of diligence resting upon an inventor desiring to patent his invention. This duty was in effect defined by the Supreme Court as early as 1829, when, speaking through Mr. Justice Story, it was in substance declared that withholding disclosure of an invention for a long period of time and for purposes only of profit was opposed to the intent and policy of the constitutional provision and the statutes in relation to patents. At that time the patent laws contained no provision

respecting abandonment of an invention; this, however, cannot be important since an abandoned invention could never have been intended to be made the subject of a patent. Moreover, this rule of diligence was also declared by Mr. Justice Daniel, speaking for the Supreme Court, in 1858 in respect of a patent which had been issued after the introduction into the patent statutes of a provision in effect the same as the present one concerning abandonment. In Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327, an infringement suit, the invention involved was perfected in 1811 and the patent obtained in 1818; the patent was for an improvement in the art of making water hose. In this interval the inventors had permitted one Jenkins, under an agreement as to price, to use the invention and to sell the product so derived. During much of the time Jenkins was in the service of the inventors and had been instructed by them in the art of making the hose. Verdict and judgment were recovered by defendant in the court below. The statute then applicable authorized a patent to be granted upon application of any citizen who should allege that he had invented a new and useful art, machine, etc., "not known or used before the application." The true meaning of these words was the ultimate question for decision. It was held that, since it would have defeated the object of the law to apply to the inventor the words "known or used," the clause meant that the thing invented was "not known or used by the public, before the application." After determining the question of use as stated, and presumably in view of the lapse of some seven years between the time the invention was perfected and the patent issued, Mr. Justice Story, in announcing the opinion of the court affirming the judgment of the court below, said:

"And thus construed, there is much reason for the limitation thus imposed by the act. While one great object was, by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius; the main object was 'to promote the progress of science and useful arts'; and this could be done best, by giving the public at large a right to make, construct, use and vend the thing invented, at as early a period as possible, having a due regard to the rights of the inventor. If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it, during his fourteen years; it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries."

The rule of diligence thus declared in respect of an inventor who has perfected his invention was affirmed in Kendall v. Winsor, 62 U. S. (21 How.) 322, 328 (16 L. Ed. 165); Mr. Justice Daniel saying:

"* * * The inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts

of Congress. He does not promote, and, if aided in his design, would impede, the progress of science and the useful arts. And with a very bad grace could he appeal for favor or protection to that society which, if he had not injured, he certainly had neither benefited not intended to benefit."

And again (329):

"* * * He may forfeit his rights as an inventor by a willful or negligent postponement of his claims. * * *"

We do not overlook the contentions of counsel in relation to these two decisions. It is said of Pennock v. Dialogue that the statutory change subsequently made declaring specifically the effect of "public use," in place simply of "use," was designed to prevent a "secret use" from invalidating a patent, and so was intended to change the rule of law laid down in that case; it is said moreover that this effect of the change was recognized in Kendall v. Winsor. We do not so understand the subsequent legislation nor the decision in Kendall v. Winsor. The statutory change from "use" to "public use" was simply to state distinctly in the new statute what Mr. Justice Story held the old one to imply. The contention then that the change was in effect to prevent a secret use from invalidating a patent and to overrule Pennock v. Dialogue is opposed not only to the reason there expressed for construing use to mean public use, but also to the ruling made in that case, and again in Kendall v. Winsor long after the statutory change took place, against any method of withholding an invention from the public for purposes of profit and of seeking later, through application for a patent, to extend the period of monopoly. And as respects Kendall v. Winsor, we think counsel are mistaken in supposing that it is not in harmony with Pennock v. Dialogue. This may be readily seen by comparison of the instructions asked by defendants and denied below in the Kendall-Winsor Case with the instructions there given by the learned trial judge (62 U. S. 325–327, 16 L. Ed. 165), in connection with the proofs offered. Opposed testimony had been offered at the trial below concerning Winsor's use of the invention prior to his application for a patent and as to the acts of one of his employés who had left his position and, in violation of a pledge of secrecy concerning knowledge he had obtained of the invention, constructed some machines for defendants below in accordance with the invention. The plaintiff below had also offered testimony tending to show that what he had done with respect to making and selling harness was to remedy defects found in his invention and to simplify and otherwise improve it, and further that he had "constantly intended to take letters patent when he should have perfected the machine." All this testimony was submitted to the jury with the instructions given, as stated, and the verdict and judgment were in favor of the plaintiff below, the patentee. The conclusive effect then of the verdict, as well as the judgment, in that case was that the use made of the invention prior to the application was experimental and made under a constant purpose to apply for a patent when the invention had been perfected; and the opinion of Mr. Justice Daniel discloses entire approval of the reasoning and opinion of Mr. Justice Story in Pennock

v. Dialogue. Following the decision in Pennock v. Dialogue it was held by the Circuit Court for the District of Columbia in Spear v. Belson, Fed. Cas. No. 13,223, 22 Fed. Cas. 903, that:

"Belson had no right to use his invention privately for his own gain for five years, and then expect and claim a monopoly from the public for fourteen years more."

Spear v. Belson, as also Pennock v. Dialogue and Kendall v. Winsor, were followed in Lovering v. Dutcher, Fed. Cas. No. 8,553, 15 Fed. Cas. 1001, 1002. Mr. Walker, in his work on Patents (5th Ed., p. 110), treats failure to observe the rule of diligence, where the delay is for purposes of private gain, as actual abandonment. Mr. Frost, however, while recognizing doubt where the inventor resorts to a secret use for purposes of profit, thinks that in England a patent may be granted in spite of the secret use (1 Frost, Pat. Law & Pr. [4th Ed.] 123, 128–131); but it is to be observed that in Morgan v. Seaward, 1 Web. Pat. Cas. 187, 194, Baron Parke said:

"If the inventor could sell his invention keeping the secret to himself, and when it was likely to be discovered by another take out a patent, he might have a monopoly for a much longer period than fourteen years."

Further, in Germ Milling Co., Limited, v. Robinson, 3 Rep. Pat. Cas. 399, 408, Lord Justice Bowen said:

"* * * It has been thought and may be thought by a certain class of persons to be hard law that the patentee must not make a beneficial use to himself of the invention before he takes out his patent, on the other hand it is to be remembered that if a patentee should be allowed to sell his mysterious and secret product first for a substantial period of time, and then to take out a patent for his invention, he would be able to give himself a longer monopoly than the law gives him; he would be able first of all to give himself a monopoly during the time he was selling his product made secretly, and then he would be able to get the years of monopoly which the statutes give him; so that there is no particular reason to think that the law has been unintentionally left in the state in which it is." [1]

We therefore cannot think that the rule laid down in Pennock v. Dialogue and Kendall v. Winsor was intended to be qualified by the remarks of Mr. Justice Clifford in Bates v. Coe, 98 U. S. 31, 46, 25 L. Ed. 68, or Parks v. Booth, 102 U. S. 96, 105, 26 L. Ed. 54. We are confirmed in this by the reference made in Bates v. Coe, 98 U. S. 46, 25 L. Ed. 68, to the decision in Pennock v. Dialogue and to the effect of the legislation enacted since, and particularly by the view expressed by the same justice while sitting on the circuit in Jones v. Sewall, 3 Cliff. 563,

[1] It should be noted, moreover, that the views pointed out in the foregoing decisions are in accord with expressions of Mr. Justice Bradley in Elizabeth v. Pavement Co., supra, at page 137 of 97 U. S., 24 L. Ed. 1000, of Mr. Justice Strong in Planing Machine Co. v. Keith, 101 U. S. 479, 485, 25 L. Ed. 939, of Mr. Justice Matthews in Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 249, 256, 8 Sup. Ct. 122, 31 L. Ed. 141, and of Mr. Justice Blatchford in his approval of these two decisions in Root v. Third Ave. Railroad, 146 U. S. 210, 224, 225, 13 Sup. Ct. 100, 36 L. Ed. 946.

592, 593, Fed. Cas. No. 7,495, where, in distinguishing between the intent to be inferred from experimental practice of an invention and practice for gain, he said:

"Such an inference (of intention to surrender the invention to the public) is never favored, nor will it in general be sufficient to prove such a defense, unless it appears that the use, exercise, or practice of the invention was somewhat extensive, and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his invention without applying for the protection of letters patent. Curtis on P. (3d Ed.) § 389."

We may add that the rule of diligence laid down in Pennock v. Dialogue and Kendall v. Winsor finds support through analogy deducible from provisions of the patent laws other than the language considered in those decisions. Diligence in applying for the reissue of defective patents, for instance, is recognized as one of the conditions inhering in the power bestowed in that behalf, although the statute is silent as to time. Mahn v. Harwood, 112 U. S. 354, 357, 359, 360, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665; Miller v. Brass Co., 104 U. S. 350, 352, 26 L. Ed. 783; Wollensak v. Reiher, 115 U. S. 87, 101, 5 Sup. Ct. 1132, 29 L. Ed. 355; Topliff v. Topliff, 145 U. S. 156, 171, 12 Sup Ct. 825, 36 L. Ed. 658; Wollensak v. Sargent, 151 U. S. 221, 228, 14 Sup. Ct. 291, 38 L. Ed. 137. Again, diligence in reducing an invention to practice is of the essence of the right to treat the date of the invention as relating back to its conception. Twentieth Century Machinery Co. v. Loew Mfg. Co., 243 Fed. 373, 384, 385, and citations (C. C. A. 6). Why should not the same considerations that exact diligence in such instances as these be controlling also in respect of applications for patents?

As already stated, however, counsel insist that this course of reasoning is opposed to the language of the patent laws; and special reliance is placed on the rule declared in Henry v. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. That case has been overruled since the submission of the instant case (Motion Picture Co. v. Universal Film Co., 243 U. S. 502, 518, 37 Sup. Ct. 416, 61 L. Ed. 871); and it is to be observed that, in overruling Henry v. Dick Co., stress was laid on the fact that the statutes relating to patents do not authorize patentees to impose conditions upon the use of patented machines when once sold. By analogy it is not too much to say (in addition to what we have already said on the subject) that the absence of express statutory limitation as to the time within which an application for a patent may be filed cannot be regarded as entitling an inventor himself to fix such time in respect of a perfected invention, subject only to the rights of another inventor who may meanwhile have acquired a patent upon a like invention.

It is said that exaction of diligence in a case like this is opposed to the rule of the Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, allowing a patentee to hold his patented invention in nonuse. So far as that case is claimed to concern the present controversy, it deals with the right of the holder of a validly issued patent to refrain

both from using and permitting others to use the invention. We are dealing with a patent whose validity is in contest, and with the right secretly to use a perfected invention indefinitely and for profit and then secure a patent. Under the patent laws the right of a patentee and the right of an inventor are of course not the same. A patent, as we have seen, vests in its holder the right to exclude others from using the invention; but a mere invention gives no such right. United States v. Bell Telephone Co., 167 U. S. 224, 238, 17 Sup. Ct. 809, 42 L. Ed. 144; Dable Grain Shovel Co. v. Flint, 137 U. S. 41, 43, 11 Sup. Ct. 8, 34 L. Ed. 618. However, as before pointed out, under the patent laws an inventor has an inchoate right to obtain a patent. A patentee then who holds his invention in nonuse is at least in the exercise of an absolute right to exclude others, while an inventor who simply for his secret use and advantage withholds a perfected invention is neglecting, indeed declining, to exercise his inchoate right to secure a patent; the patentee moreover unites his original right in the discovery with the exclusive right he receives under the patent, but the inventor rejects this course and resorts to one of his own until it fails him. The ultimate difference between the two courses is that the patentee at most receives the benefit of his monopoly only for the prescribed statutory period, but the inventor would upon approval of his course inevitably transgress the limits of that period and this too without the slightest sanction, but in abuse, of the patent laws. The Paper Bag decision therefore is plainly inapplicable.

[4] We are thus led to conclude that whatever view may be taken of the conditions existing at the time the patent in suit was applied for, the invention had been abandoned.

Accordingly, upon this ground the decree will be affirmed.

W. W. SLY MFG. CO. v. CENTRAL IRON WORKS.

(Circuit Court of Appeals, Seventh Circuit. July 27, 1917. Rehearing Denied August 24, 1917.)

No. 2444.

PATENTS ⊂328—VALIDITY—PRIOR PUBLIC USE.

Evidence *held* insufficient to invalidate the Sly patent, No. 703,313, for a barrel closure for tumbling mill doors, on the ground of prior public use for more than two years, under the rule that such proof must be clear and satisfactory, and must convince the court beyond a reasonable doubt.

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

Suit in equity by the W. W. Sly Manufacturing Company against the Central Iron Works. Decree for defendant, and complainant appeals. Reversed.

Appeal from decree dismissing appellant's bill for want of equity. Appellant's suit was to sustain two patents, No. 514,097, issued February 6, 1894, and No. 703,313, issued July 24, 1902; the application for this last patent having been filed March 5, 1902. Both patents, if valid, were infringed by appellee. No serious controversy over facts in reference to patent No. 514,097 exists, its validity being conceded, and the sole defense to patent No. 703,313 was invalidity through public use more than two years preceding March 5, 1902. The District Court found patent No. 703,313 invalid because of prior public use. The other patent expired pending the litigation, and although it was in force when the suit was begun, the court refused an accounting, and dismissed the bill as to both patents. The decision of the Circuit Court of Appeals for the Sixth Circuit in a prior suit between the same parties, sustaining patent No. 514,097 (W. W. Sly Mfg. Co. v. Russell & Co., 189 Fed. 61, 110 C. C. A. 625), was conclusive upon both parties, so far as that patent was concerned. W. W. Sly, the original patentee in both patents, died before this suit was begun.

Appellant contends: (a) The court erred in holding patent No. 703,313 invalid because of prior public use. (b) Even if patent No. 703,313 was invalid, the court erred in not retaining jurisdiction of the suit and directing an accounting as to infringement of patent No. 514,097.

Robert H. Parkinson, of Chicago, Ill., and John B. Hull, of Cleveland, Ohio, for appellant.

Howard G. Cook, of St. Louis, for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Did the evidence establish prior public use of the apparatus covered by patent No. 703,313, so as to render it invalid? The conclusion reached by this court on this question makes it unnecessary for us to consider the other assignment of error.

All the testimony received on this trial was taken by deposition, and we must draw our own conclusions therefrom. The quantum of proof required to upset a patent on the ground of prior public use has many times been stated. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. It has been repeatedly decided that evidence of prior use sufficient to defeat a patent must be clear and satisfactory and convince the court beyond a reasonable doubt.

The patented article in question is referred to generally as a "barrel closure," and was used on mills made and sold by appellant and defendant. Its chief virtue lay in the fact that it was operated by one man. It had similar visual resemblance to a fastening device previously used by Sly, but it was a decided improvement in that one man was eliminated in its operation. Appellee's proof consisted of statements of numerous witnesses, who testified with a considerable degree of certainty that the barrel closure covered by the patent now under consideration was on a mill sold by Sly to the Gem City Stove Manufacturing Company on or about July 11, 1898, or nearly four years prior to Sly's application for a patent. Another witness testified to another public use. He stated that a mill installed by Sly in the Bridge & Beach Manufacturing Company, in April, 1898, contained the door-

fastening device covered by this patent. These two mills were admittedly installed in 1898.

The testimony of these witnesses, given from memory some 15 or 16 years after the mills were installed, is necessarily questionable. Conceding the fullest integrity to each witness, his recollection of details under such circumstances could not be certain and reliable. The substance of the testimony of each witness was that the door-fastening device had remained unchanged since the mill was installed. The additional statement was made that the door-fastening device in use at the time the witness testified was the same as when the mill was installed. These witnesses frankly admitted that they could not tell within a couple of years when the mill itself was installed, and appellee's chief witness admitted that he was not in the employ of the Gem City Stove Manufacturing Company for 8 of the 15 years that elapsed since the mill was installed, nor was it his duty to operate the mill at any time.

The uncertainty of human memory, the possibility of mistake, due to the similarity in appearance of the new and the old device, must cause grave doubt as to the accuracy of this testimony. Without questioning the integrity of any of the witnesses, it is doubtful whether the court would be justified in finding, upon this testimony, that there had been such prior use of the device covered by the patent in question as to call for the forfeiture of the patent.

There is, on the contrary, strong and persuasive evidence disputing this testimony. The tumbling mills sold by W. W. Sly, were built for him by Hess, Snyder & Co. during the years 1898 and part of 1899. In the latter part of 1899 his son, W. C. Sly, operating under the name of the Cleveland Repair & Manufacturing Company, began building them. This son was well acquainted with the business of his father, often looked after the correspondence, and his shop constituted the father's headquarters in 1900. The mills installed at the Gem City Stove Manufacturing Company and Bridge & Beach Company, were made by Hess, Snyder & Co., for this company made all of Sly's mills in 1898. In 1899 all of the castings used by the Hess, Snyder & Co. factory were sent to W. C. Sly, and all of these castings were for the old style of fastener. There were no castings sent by Hess, Snyder & Co. to W. C. Sly that would make the new style of fastener.

Still more significant is the fact that Hess, Snyder & Co. installed one of these mills in its own shop. After this suit was commenced, the Hess, Snyder & Co. plant was examined, and it was found that the Sly mill thus installed in that plant was provided with a door-fastening device of the old style. It is hardly conceivable that, if this company made mills that were provided with a door-fastening device which required the use of but one man, it would have equipped its own shop with the old device that called for two men to operate it. There is likewise much testimony tending to show that these fastening devices, in the very heavy and rough use to which they were constantly subjected, would not last 15 years, but would have worn out two or three times during that period.

Another fact, not in dispute, helps to explain how defendant's witnesses became confused. It appeared that Mr. Sly, after he perfected his second device, the one covered by the patent in suit, wrote his old customers and offered to furnish, without charge, this new door-fastening device. It is fair to assume from all of the evidence that the Gem City Stove Manufacturing Company mill was supplied with the later style of fastening device some years after the mill was installed, and that this change was made without the knowledge of the witnesses who testified for the defense. In addition to this, three witnesses testified positively that the new style of door-fastening device made its appearance in 1900. W. C. Sly testified concerning his father's experiments and efforts to perfect the door fastener, and that none were manufactured until after his firm, the Cleveland Repair & Manufacturing Company, began making the mills. This statement was corroborated by two of the employés of W. C. Sly.

Considering all of the evidence, we are convinced that it fails to establish prior public use with such certainty as the law requires to justify invalidating the patent in issue.

The jurisdiction of the court of equity having been properly invoked to dispose of the suit involving appellee's invasion of appellant's rights growing out of patent No. 703,313, it becomes unnecessary for us to consider appellant's further asserted right to demand a separate accounting for the infringement of patent No. 514,097, irrespective of its connection with the other patent. Certainly, with patent No. 703,313 sustained, there can be no longer any question but plaintiff is also entitled in this suit to have an accounting for the infringements of patent No. 514,097, for both are conjointly employed in a unitary structure.

The decree is reversed, with direction to grant an injunction against future infringement of patent No. 703,313 and for an accounting for past infringements of this patent, and for an accounting for infringement of patent No. 514,097, occurring prior to its expiration.

HEBE CO. et al. v. CALVERT et al.

(District Court, S. D. Ohio, E. D. Nov. 21, 1917.)

No. 72.

1. COURTS ⊜101—NUMBER OF JUDGES SITTING—INJUNCTION.
Under Judicial Code, § 266 (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]), the presence of three judges is necessary to the hearing of a bill for injunctive relief against the enforcement by state officers of a state statute alleged to be unconstitutional.

2. COURTS ⊜308—FEDERAL COURTS—INJUNCTION.
Where the amount involved is above the jurisdictional amount, the federal courts can take jurisdiction invoked on account of diversity of citizenship to enjoin the enforcement of an unconstitutional state statute.

3. FOOD ⊜1—ACTS—PURPOSE.
One of the purposes of the several Ohio acts relating to food and drugs and to dairy products is to prevent deception in their sale to consumers and conserve the public health.

4. COURTS ⊜366(1)—PRECEDENTS—BINDING PRECEDENTS.
The construction given to state acts relating to food and drugs and dairy products by the highest state tribunal is binding on the federal courts.

5. FOOD ⊜2—STATUTES—LEGISLATIVE QUESTION—"SKIMMED MILK"—"FOOD"—"ADULTERATE"—"MISBRAND."
Gen. Code Ohio, § 5774, provides that no person shall manufacture, offer for sale, sell, or deliver, or have in his possession with intent to sell, or deliver, any article of food, which is adulterated or misbranded. Section 5775 declares that a compound article is a "food" if used by man as such, while section 5778 declares that a food is "adulterated" if a valuable or necessary constituent or ingredient has been wholly or in part abstracted; section 5785 declaring that it is "misbranded" if it is labeled so as to deceive or mislead the purchaser, or if the label bears a statement regarding such food which is false or misleading, but that the section shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink if the label state the percentage of each ingredient. Section 12716 declares milk to be standard or unadulterated if it contains not more than 88 per cent. of water fluid, while subsequent sections denounce the offense of selling adulterated milk, although section 12720 permits the sale of skimmed milk as such, while section 12725 provides that whoever manufactures, sells, exchanges, exposes, or offers for sale or exchange condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk from which the cream has not been removed, shall be punished, *Held*, that the statutes in their applicability to a compound article made by condensing "skimmed milk," which is milk from which the cream has been taken in whole or in part, and the addition of cocoanut oil, cannot be held invalid, the question being for the Legislature, where it was debatable whether such article was as nutritious as condensed milk made from unskimmed milk, this being particularly true where the compound lent itself and was often sold for regular condensed milk made of unskimmed milk.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adulterate; Food; Misbrand; Skimmed Milk.]

6. CONSTITUTIONAL LAW ⊜70(3)—PROVINCE OF COURT—WISDOM OF STATUTE.
In such case, the courts have no concern with the wisdom of such statutes, and the Legislature cannot be held to have transcended its

powers; the statutes having a substantial relation to a proper purpose, the protection of public health, and the prevention of deception in the sale of dairy products.

7. FOOD ⊂=2—STATUTES—CONSTRUCTION—VALIDITY.

Gen. Code Ohio, § 12725, prohibiting the manufacture and sale of condensed milk unless made from unskimmed milk, cannot be held invalid because the product made by condensing skimmed milk and adding cocoanut oil was not known at the time of its enactment, on the theory that the Legislature might have unwittingly prohibited the sale of an article of which it had no knowledge.

8. FOOD ⊂=2—STATUTES—VALIDITY.

Such statute, being intended to protect public health and prevent deception in the sale of condensed milk and being regulatory and not prohibitive, is not invalid under the state or federal Constitutions.

9. COMMERCE ⊂=12—INTERSTATE COMMERCE—BURDEN UPON.

As National Pure Food and Drugs Act June 30, 1906, c. 3915, §§ 7, 8, 34 Stat. 769, 771 (Comp. St. 1916, §§ 8723, 8724), does not purport to declare that an article of food whose transportation in interstate commerce is allowed may be sold in a state to which it is shipped if it is susceptible of use and is used as a means of deceiving customers, and as the constitutional provision giving Congress the right to regulate interstate commerce does not deprive the states of their power to pass under their police power legislation to protect their citizens, hence, though the labels on the tins containing defendant's product made by condensing skimmed milk and adding cocoanut oil, shipped to Ohio in interstate commerce, stated the nature of the article, the percentages of vegetable oils and solids, and were sufficient under the national act, yet as it was advertised even on the labels for the same purposes as condensed milk and sold as such, purchasers being deceived, Gen. Code Ohio, § 12725, forbidding manufacture and sale of condensed milk made from anything but wholesome milk from which the cream has not been removed, is valid and enforceable.

10. CONSTITUTIONAL LAW ⊂=296(1)—DUE PROCESS OF LAW—STATUTES.

Gen. Code Ohio, § 12725, forbidding the manufacture and sale of condensed milk unless it be made from unadulterated milk from which the butter fat has not been removed, is not, because it recognizes the principle of equality among those engaged in condensing milk, in violation of Const. U. S. Amend. 14, as depriving one manufacturing a product from skimmed milk and cocoanut oil of his property without due process of law; the statute not being unreasonable or arbitrary.

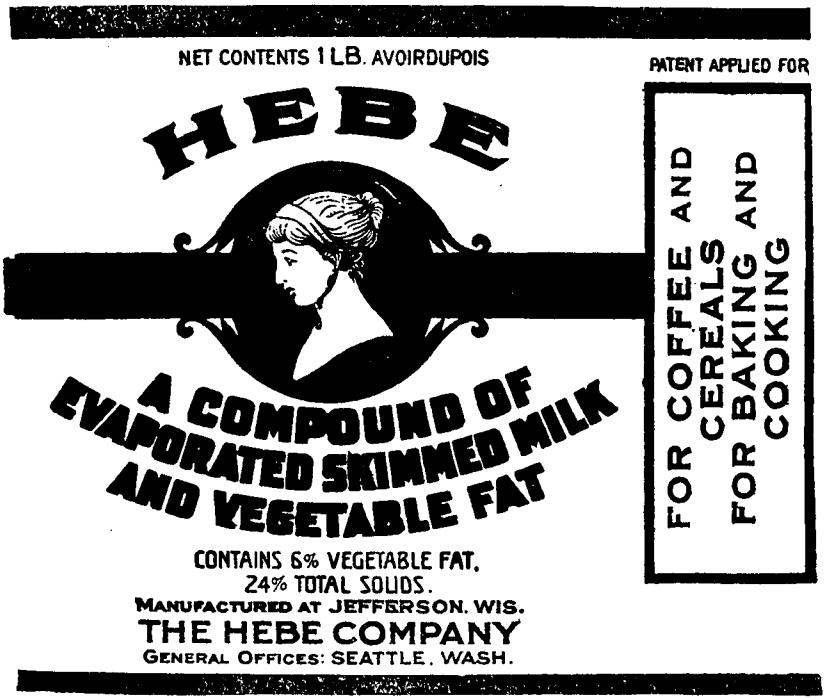
In Equity. Bill by the Hebe Company and the Carnation Milk Products Company, corporations, against Thomas L. Calvert, Chief of Division of Dairy and Food of the Board of Agriculture of Ohio, and others. On final hearing. Bill dismissed.

A. T. Seymour, of Columbus, Ohio, and B. B. Davis and Lannen & Hickey, all of Chicago, Ill., for plaintiffs.

L. D. Johnson, Special Counsel of Attorney General, of Urbana, Ohio, and Chas. J. Pretzman, of Columbus, Ohio, for defendants.

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

SATER, District Judge. Jurisdiction of this case is vested in the court through the presence of federal questions and the diverse citizenship of the parties litigant. Rail & River Coal Co. v. Yaple (D. C.) 214 Fed. 273, 277; Ohio River & W. Ry. Co. v. Dittey (D. C.) 203 Fed. 537, 539, and authorities there cited. Both of the plaintiffs are foreign corporations. The defendants are Calvert, Chief of Division of Dairy and Food of the Board of Agriculture of Ohio, and other officers and agents of such board. The plaintiffs were authorized by Calvert's predecessor in office to sell in Ohio their food product known as "Hebe," if appropriately labeled. One-half of the label adopted and thereafter used is as follows, the remaining half being the same as the portion here shown:



[1, 2] After Calvert entered upon the discharge of his duties, at his instance an opinion was rendered by the state's Attorney General, in which it was held that in view of the provisions of sections 12716, 12717, and 12725, considered in connection with sections 5774 and 5778, Ohio General Code, and the reasoning of Reiter v. State, 109 Md. 235, 71 Atl. 975, "Hebe," whether it be a compound or otherwise, cannot be sold in Ohio because the major part of it is adulterated condensed milk to which a minor constituent (cocoanut oil) has been added and because it is regarded by a large percentage of the public as genuine condensed milk, whereby the public is misled and deceived into its pur-

chase and use for the condensed article made of whole or standard milk. The plaintiffs and their customers were thereupon notified by the defendants that, unless further sales of their product in Ohio be discontinued, prosecutions would follow and the penalties provided by statute would be inflicted on all who should fail to desist. The bill charges that such prosecutions against the plaintiffs and those selling their product, whether they be their wholesalers or their more than 300 retailers, would result in a great multiplicity of suits and would greatly and irreparably injure their business in the state, even if the prosecutions should terminate favorably to the accused. Injunctive relief is sought against the enforcement by the state's officers of the pertinent sections of the state statute, on the ground of their unconstitutionality. The presence of three judges is therefore necessary to a hearing of the case. Section 266, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]). If the threatened acts of the defendants are in excess of the authority vested in them by law, an action to enjoin them is within the jurisdiction of a federal court, both diverse citizenship and the necessary jurisdictional amount being present. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. The issues having been made up, the case was heard on its merits. It is now for decision with reference to the Ohio statutes.

The terms "evaporated" and "condensed," as applied to milk, are, as generally understood, synonymous, and they will for the purposes of this opinion be so regarded. "Hebe" is recognized by the Bureau of Chemistry of the National Department of Agriculture as a compound. Ninety-four per cent. of it is evaporated skimmed milk; the remaining 6 per cent. is cocoanut oil, highly refined and of good quality, which in its properties, as disclosed by the record, more nearly resembles butter fat than any other known substance. The two ingredients are by an undisclosed process so brought together as to remain properly combined until the food product is ready for consumption. There is no claim that the product, or either of its ingredients, is impure or unwholesome. The article is produced in and shipped from Wisconsin by the plaintiffs to jobbers in various states, including Ohio, on orders accepted in the state of Washington, and reaches consumers through retailers who purchase of such jobbers. It is transported in cans which are packed in inclosing, sealed, fiber shipping cases, completely concealing the cans and their labels; each case containing either 48 cans of one pound each or 96 cans of six ounces each. When shipped in carload lots, the shipping cases bear only the name of the consignee and other data appropriate for identification and delivery. When such cases are received by the retailer, he removes the cans and exposes them for sale to his customers. The plaintiffs' position is that their food product, being plainly and fairly labeled in a conspicuous manner, is not within the condemnation of the Ohio statute and may be lawfully sold and offered for sale in such state. It is further claimed that if the Ohio statute, correctly construed, prohibits the sale of

Hebe, a compound composed of two well-known articles of food, each of which is pure, wholesome, and nutritious, it is in that event violative of the Fourteenth Amendment of the federal Constitution, in that: (a) It deprives the plaintiffs of liberty and property without due process of law, and also denies them the equal protection of the law; (b) it does not regulate the sale of Hebe, but arbitrarily, unjustly, unduly, and in a confiscatory manner, discriminates against it and prohibits its distribution and sale, although such article is so conspicuously and correctly labeled as to show its true character, and although the statute permits the sale of uncondensed skimmed milk, if it be labeled skimmed milk; (c) by its denial of the right to sell Hebe in individual tin cans, which cans are labeled as required by the National Food and Drugs Act and are "original packages" in so far as that act is concerned, it conflicts with such act and the regulations made in accordance with it, and unlawfully interferes with the interstate commerce laws of the United States.

[3-7] Chapter 1 of "Part 2, Title 2, Police Regulations," of the Ohio Code, deals with "Adulterations." It provides, inter alia, as follows: No person within the state shall manufacture, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, any article of food which is adulterated or misbranded within the meaning of such chapter. Section 5774. A compound article is a food, if used by man as such. Section 5775. A food is adulterated, if a valuable or necessary constituent or ingredient has been wholly or in part abstracted from it. Section 5778. It is misbranded, if it is labeled so as to deceive or mislead the purchaser, or if the label on the package containing the food bears a statement regarding such food which is false or misleading in any particular (section 5785), provided, however:

"That this section shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink, if each package sold or offered for sale is distinctly labeled in words of the English language as mixtures or compounds, with the name and percentage, in terms of one hundred per cent. of each ingredient therein. The word 'compound' or 'mixture' shall be printed in letters and figures not smaller in height or width than one-half of the largest letter upon any label on the package, and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest upon any label on the package, and such compound or mixture must not contain an ingredient that is poisonous or injurious to health."

Certain of the provisions of chapter 6, found in "Part 4, Title 1, Felonies and Misdemeanors," and dealing with "Offenses Against Public Health," are also pertinent to the subject-matter under consideration. It declares milk to be standard or unadulterated, if it contains not more than 88 per cent. of watery fluid; and not less than 12 per cent. of solids or 3 per cent. of fats. Section 12716. Whoever sells, exchanges, or delivers, or has in his custody or possession with intent to sell or exchange, or exposes or offers for sale or exchange, adulterated milk, is subject to a fine for his first offense, to a fine or imprisonment for his second offense (section 12717), and to both a fine and imprison-

ment for any subsequent offense (section 12718). In view of section 5778, milk from which the cream or butter fat has been removed, i. e. skimmed milk, is not pure, but is adulterated. Section 12720, however, permits the sale of such milk if conspicuously labeled "Skimmed Milk," notwithstanding the provisions of sections 5774, 5778, 12717, and 12718, and therefore serves as an exempting clause to those sections. By "skimmed milk" is meant milk from which its natural cream has been taken in whole or in part. Commonwealth v. Hufnal, 185 Pa. 376, 380, 39 Atl. 1052. Section 12725 is as follows:

"Whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat, and unless the package, can or vessel containing it is distinctly labeled, stamped or marked with its true name, brand, and by whom and under what name made, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

Compound foods were first legally recognized by section 2 (now, in so far as pertinent, section 5775) of the Act of March 20, 1884, 81 Ohio Laws, p. 67. Section 12725, in substance, but with some variation in phraseology, originally appeared as section 13 of the supplementary act of May 17, 1886, 83 Ohio Laws, p. 178, entitled, "An act to prevent adulteration of and deception in the sale of dairy products," i. e., cheese, butter, and milk. A perusal of the act shows that its provisions conform to the purpose declared in the enacting clause. When the Legislature came to the enactment of section 13 for the purpose of regulating the manufacture and sale of condensed milk, it knew that within legal limitations compound foods were permissible, and recognized, as appears by necessary implication from the section itself, that an article might, as the law then stood, be made and marketed as condensed milk (if such had not already been done), which was not made from whole or natural milk. It declared, to the exclusion of skimmed or any other form of adulterated milk and of any and all mixtures and compounds in which such milk is an ingredient, that there should be but one kind of condensed milk, and that it should be made of pure, clean, fresh, healthy, unadulterated, wholesome standard milk. Its purpose is to secure to the population, adult and infant, wholesome condensed milk of a certain standard of strength and purity. It is the conception of the law that condensed milk made from milk below the prescribed standard is not wholesome.

One of the purposes of the several acts relating to foods and drugs and to dairy products is to prevent deception in their sale to consumers and to preserve the public health. State v. Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; State v. Hutchinson, 56 Ohio St. 82, 46 N. E. 71; Arbuckle v. Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864 (C. C. A. 6). The construction thus giv-

en to such statutes by the state's highest judicial tribunal must be accepted. Price v. Illinois, 238 U. S. 446, 451, 35 Sup. Ct. 892, 59 L. Ed. 1400. There is a conflict in the evidence as to whether Hebe is as nutritious and as effective as a growth producer, and therefore as a health promoter and maintainer, as the legally recognized condensed milk. So long as that question is debatable, the Legislature is entitled to its own judgment, and that judgment may not be superseded by the views of the court. Price v. Illinois, 238 U. S. at page 452, 35 Sup. Ct. 892, 59 L. Ed. 1400; Rast v. Dan Deman & Lewis, 240 U. S. 342, 357, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Atlantic Coast Line v. Georgia, 234 U. S. 280, 288, 34 Sup. Ct. 829, 58 L. Ed. 1312; Staas v. State, 23 Ohio Cir. Dec. 159, affirmed without report 81 Ohio St. 497, 91 N. E. 1139; Klopfer v. Board of Health, 9 Ohio N. P. (N. S.) 33. With the wisdom of the exercise of that judgment the court has no concern; and, unless it clearly appears that the enactments have no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. Purity Extract Co. v. Lynch, 226 U. S. 192, 201, 202, 33 Sup. Ct. 44, 57 L. Ed. 184. Nor is it material that Hebe was not known when the Ohio statutes under consideration were enacted, and that the Legislature may have unwittingly prohibited the sale of an article of which it had no knowledge. Reiter v. State, 109 Md. at p. 240, 71 Atl. 975.

As to the practice of deception on consumers in the sale of the plaintiffs' product, there is substantial and uncontradicted evidence that it is represented to be and is sold as "Hebe milk" and as condensed milk. The monetary value of the cocoanut oil substituted for the butter fat removed from the milk by skimming is much less than that of such fat; the cost of the oil prior to the commencement of the present European War being about 13 cents and at the time of the hearing about 19 cents per pound. The difference between the price at which condensed milk and Hebe, respectively, may be manufactured and sold, is such that the temptation to impose upon the public has been too great to be resisted. It seems that when the form of label was under consideration by Calvert's predecessor in office, and when the Attorney General's opinion was rendered, there were but three wholesalers in the state that were distributing the plaintiffs' product. One of them in filling a contract of some magnitude with the United States Military Department twice supplied Hebe to fill an order for evaporated milk. The substitution was not detected until after the second delivery of goods was made. They were then returned to the seller.

It is in evidence that the plaintiffs have instructed their representatives to sell their product for what it really is; but, the purpose of the statute being to protect the people from deception by selling them one thing when they desire another, it is not important whether the plaintiffs intend or do not intend to deceive. They are the producers of an article which, it sufficiently appears, is freely sold by some retail dealers, at least, as a brand of condensed milk, of which there are several on the market, and is susceptible of being thus sold and used, and has

in good faith been bought by ordinary purchasers as such. The label, it is true, states that Hebe is a compound and names the elements of which it is composed; but it also informs the public that it may be used "for coffee and cereals, for baking and cooking." It may be applied to and is designed for the same uses as condensed milk. Its appearance is that of condensed milk, and, if there be a difference in the taste of the two, it is not such as the layman would be likely to detect. Blame cannot therefore be rightfully imputed to the unwary consumer who does not closely scrutinize the label upon the package in which Hebe is contained, and who concludes that that article, applied, as it may be, to the same purposes as condensed milk, is and must be condensed milk itself, although parading under a fanciful name, and especially when it is sold to him by the retailer in response to an inquiry for such milk. Whether Hebe is as wholesome and nutritious as condensed milk is unimportant, so long as it is used as an instrument of fraud. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. Producers of an article of food which may be and is used to deceive the public are not favored in courts of equity.

[8] The lawmakers have asserted, and the state Supreme Court has broadly declared, the constitutional right to enact the statutes here under consideration pertaining to food, drugs, and dairy products. State v. Hutchinson; State v. Capital City Dairy Co., affirmed in Capital City Dairy Co. v. State, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171. The sections which specifically deal with condensed and skimmed milk were not involved, it is true, in the cases just cited; but the regulatory rules which pervade those sections are so similar in character to those which govern the manufacture and sale of butter and oleomargarine and other foods and drugs as to bring such sections well within the provisions of the Ohio Constitution and render the last cited decisions applicable. They are furthermore regulatory and not prohibitive. State v. Capital City Dairy Co., 62 Ohio St. at pages 363, 364, 365, 57 N. E. 62, 57 L. R. A. 181; State v. Rippeth, 71 Ohio St. 85, 87, 72 N. E. 298; Capital City Dairy Co. v. Ohio, 183 U. S., at page 246, 22 Sup. Ct. 120, 46 L. Ed. 171; Butler v. Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 638, and extended note. They forbid the practicing of fraud upon the general public. They seek to suppress false pretenses, to promote fair dealing and the public health in the sale of an article of food. They do not prohibit the manufacture and sale of all condensed milk, but guarantee to consumers a pure dairy product and prevent the sale of an adulterated or deceptive article. The Constitution of the United States does not secure to any one the privilege of manufacturing and selling an article offered in such manner as to induce purchasers to believe they are buying something which is in fact different from that which is offered for sale. That the state may rightfully enact a law such as that now under consideration, and that such law does not contravene any provision of the federal Constitution, appears from many well-considered cases. In Price v. Illinois, 238 U. S. at page 451, 35 Sup. Ct. at p. 894, 59 L. Ed. 1400,

in which a statute prohibiting the use of boric acid in food preservatives was upheld, it was said that:

"The state has undoubted power to protect the health of its people and to impose restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the state and the safeguards required. In the avowed exercise of this power, the Legislature of Illinois has enacted a prohibition—as the statute is construed—against the sale of food preservatives containing boric acid, and, unless this prohibition is palpably unreasonable and arbitrary, we are not at liberty to say that it passes beyond the limits of the state's protective authority."

In Dent v. West Virginia, 129 U. S. 114, 122, 9 Sup. Ct. 231, 32 L. Ed. 623, it was announced that the power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity, as well as deception and fraud. Mr. Justice Harlan, in Plumley v. Massachusetts, 155 U. S. 461, 472, 15 Sup. Ct. 154, 158 (39 L. Ed. 223) after citing the Dent Case to the above point, added:

"If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally, affect trade in such products transported from one state to another state. But that circumstance does not show that [the] laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states."

[9] There are many other cases to the point that the legislation of a state, such as is here under consideration, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is valid and of obligatory force upon citizens within its territorial jurisdiction, whether engaged in commerce, foreign or interstate, or in any other pursuit, among which are Sherlock v. Alling, 93 U. S. 99, 103, 23 L. Ed. 819; Rahrer's Case, 140 U. S. 546, 11 Sup. Ct. 865, 35 L. Ed. 572; Standard Stock Food Co. v. Wright, 225 U. S. 540, 547, 32 Sup. Ct. 784, 56 L. Ed. 1197; and Minnesota Rate Cases, 230 U. S. 352, 408, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

Reliance is placed by the plaintiffs on McDermott v. Wisconsin, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, in which it was held that the word "package," or its equivalent expression, as used by Congress in sections 7 and 8 of the Pure Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. 1916, §§ 8723, 8724]), in defining what shall constitute "adulteration" and what shall constitute "misbranding" within the meaning of that act, refers to the immediate container of the article which is intended for consumption, and that, when an article in inter-

state commerce is by the terms of that act properly labeled, a state cannot require such label, when properly affixed, to be removed and other labels authorized by its own statute to be affixed to the package containing the article, so long as it remains unsold by the importer, whether it be in the original case or not. It is claimed that the teachings of that case are that the protection accorded to articles of interstate commerce by the federal Constitution extends to the sale in Ohio by wholesale and retail dealers in plaintiffs' goods in the original packages, i. e., the labeled tin containers, notwithstanding the Ohio statute under consideration. The Wisconsin act was in direct conflict with the federal act, which covers the field, as regards the labeling of articles of food which are transported in interstate commerce, and leaves nothing on which a state law touching labels can operate. The object of the federal act is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food; and, in order that its protection may be afforded to those who are intended to receive its benefits, the brands or labels, the regulation of which is within the power of Congress, it was properly held, must be upon the package intended to reach the purchaser.

But it was also expressly stated that it by no means follows that the state is not permitted to make regulations with a view to the protection of its people against fraud or imposition by impure food or drugs. The plaintiffs' contention must fail, for the reason that, where the mode of putting up and labeling a package is adapted to meet the requirements of local trade or intrastate commerce and its sale is conducive to the deception of the consumer, the dealer will not be protected on the ground that he is selling an original package. The police power of a state extends to all regulations of its internal commerce designed to prevent imposition and fraud, as well as to those designed to promote public health, public morals, or public safety although the regulations prescribed may incidentally affect interstate commerce, provided Congress has not acted in the particular matter. Congress has not declared that an article of food whose transportation in interstate commerce is permissible under the terms and provisions of the Pure Food and Drugs Act may be sold in a state to which it has been shipped, if such article is susceptible of use and is used as a means of deceiving consumers. The self-protecting power of the state may be rightfully exerted against its introduction, and such exercise of power cannot be considered a regulation of commerce prohibited by the Constitution. Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835; Mutual Film Co. v. Industrial Commission of Ohio (D. C.) 215 Fed. 138; Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217, 61 L. Ed. 480, Ann. Cas. 1917C, 643; Arbuckle v. Blackburn.

[10] Nor does the Ohio statute contravene the Fourteenth Amendment to the federal Constitution. It has drawn a distinction, as it may do (Rast v. Van Deman & Lewis, 240 U. S. 342, 357, 36 Sup. Ct. 370,

60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455), between condensed milk made in accordance with its terms and that which is otherwise produced, and between the manufacturers and sellers of such respective kinds of milk. The statute, like that under consideration in Powell v. Pennsylvania, 127 U. S. 678, 687, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, places under the same restrictions, and subjects to like penalties and burdens, all who manufacture or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions—thus recognizing and preserving the principle of equality among those engaged in the same business. We cannot say that the Ohio statute is unreasonable and arbitrary and deprives the plaintiffs of property without due process of law. Price v. Illinois; St. John v. New York, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909.

Whether either standard or skimmed milk may be used as a constituent element of a compound or mixed food, and whether Hebe is nothing more than adulterated condensed milk with a minor ingredient added, and other questions discussed by counsel, need not be decided, although they have received the thoughtful consideration of the court.

A decree may be entered dismissing the bill.

WARRINGTON, Circuit Judge, and HOLLISTER, District Judge, concur in the foregoing opinion.

AMERICAN NAT. BANK OF MACON v. COMMERCIAL NAT. BANK OF MACON et al.

(District Court, S. D. Georgia, W. D. November 8, 1917.)

No. 25.

BANKS AND BANKING ⊂=64—VOLUNTARY LIQUIDATION—TRANSFER OF BUSINESS AND ASSETS—CONSTRUCTION OF CONTRACT.

A resolution of the directors of the Commercial National Bank provided for its liquidation by and consolidation with the American National Bank of the same city, and the transfer of its business and all of its assets to the American to secure the latter for all advances made in the payment of the liabilities of the Commercial, which it was to assume. It was also to liquidate the assets of the Commercial, without charge for its services, and account to the stockholders for any surplus. By a complementary resolution of its directors, the American agreed to accept the proposal if, "in the estimation of the officers" of the American, the assets of the Commercial were sufficient in value to protect and secure it for payment of the debts of the Commercial. The transfer was made and accepted by the American, and afterward a memorandum contract was entered into between the two banks, reciting that it was to carry out the purposes of the resolutions of their respective directors. By this contract the American agreed to pay the indebtedness of the Commercial, which was definitely stated, and hold its assets as security, and to liquidate the same in accordance with

the prior resolutions. The Commercial agreed to secure a ratification of the liquidation by its shareholders, which was done and approved by the Comptroller. *Held*, that the contract must be construed as a whole, and in the light of the resolutions which it was intended to carry out, and which measured the rights and obligations of the parties; that, so construed, it created no relation of debtor and creditor between the two banks, but was in effect a purchase by the American of the business and assets of the Commercial, in consideration of the payment of its debts and the accounting for the excess of assets, if any.

In Equity. Suit by the American National Bank of Macon against the Commercial National Bank of Macon and its shareholders. On motion to dismiss bill. Motion sustained.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for plaintiff.

Hall & Grice, Feagin & Hancock, and W. D. McNeil, all of Macon, Ga., W. A. Dodson, of Americus, Ga., R. L. Berner, C. L. Bartlett, Minter Wimberly, E. P. Mallary, and Jordan & Lane, all of Macon, Ga., Green F. Johnson, of Monticello, Ga., and C. M. Huguley, for defendants.

EVANS, District Judge. The American National Bank exhibits its bill against the stockholders of the Commercial National Bank, in behalf of itself and other creditors, if any, of the Commercial Bank. The Commercial Bank is not sued, and the action against its stockholders is founded on Act Cong. June 30, 1876, c. 156, § 2 (Rev. Stat. § 5151 [U. S. Comp. Stat. 1916, §§ 9689, 9807]), giving federal courts original jurisdiction in equity of a creditors' bill against stockholders of a national bank. The primary and controlling question is the relation between the two banks, resulting from their contract for the liquidation of the Commercial by the American. The action is not maintainable, unless that contract and what was done under it make the American National Bank the creditor of the Commercial National Bank.

The contract recites that it was entered into by the banks to carry out the purposes of the resolutions of the directors of the respective banks, and the subject-matter and terms of those resolutions necessarily must control the interpretation of the contract executed in pursuance of them. The resolution of the directors of the Commercial National Bank authorized (1) the officers of that bank to commence proceedings for its liquidation and for consolidation with the American National Bank; (2) in pursuance of such purpose to transfer to the American National Bank all of the assets of the Commercial; (3) which assets were transferred by the resolution to fully protect and secure the American for all moneys advanced or to be advanced in the payment of the liability of the Commercial; (4) the resolutions contemplated in consideration of the foregoing that the American (a) should take over the business of the Commercial; (b) liquidate its assets; (c) account to the shareholders of the Commercial for any excess of proceeds of assets over liabilities, without charge for its services.

The resolution of the directors of the American is the complement of that of the Commercial. The American National Bank, by resolution of its directors, assumed the liabilities of the Commercial National on condition (1) that the assets of the Commercial transferred be sufficient in amount and in value, "in the estimation of the officers of the American National Bank," to fully protect and secure the American for all payments made of the debts of the Commercial which it assumed.

It appears to me, from these resolutions, that the directors of the Commercial Bank realized that it was the course of prudence to liquidate its business through the medium of the American Bank by a transfer of all its assets, which were deemed by them to be of greater value than the amount of its liabilities. The directors of the American were willing for that bank to become the liquidating agent, and to assume the payment of the debt of the Commercial on condition that the directors of the American estimated such assets to be sufficient to pay all the debts of the Commercial. If the directors of the American deemed the assets of the Commercial sufficient for that purpose, the American was to take over the business of the Commercial, all of its assets by transfer, and to assume all of its debts, and advance the necessary money to pay these debts, and reimburse itself out of the funds realized from the assets of the Commercial, and pay over the excess, if any, to the stockholders of the Commercial, without charge for its services. This seems to me to have been the plain intent of the parties in making this contract.

The structure of the resolutions reflect the attitude of the respective boards of directors. The directors of the Commercial felt that, though the exigency was such that the Commercial could not continue as an active banking agency, it was solvent, and that the American would be willing to take over its business, pay its debts in advance of realizing on the assets, and account for the excess of assets over the liabilities to the stockholders, without compensation for its services, in return for the patronage of the customers of the Commercial. The American was willing to accept the offer of the Commercial on condition—not that the assets of the Commercial actually would be sufficient to reimburse itself for advances to pay the Commercial's liabilities, but on condition that such assets be "sufficient in amount and in value in the estimation of the officers of the American National Bank to fully protect and secure said association (American) for any and all amounts, payment of which was assured under said resolution." With this purpose in mind the two banks entered into the contract which we are called on to construe.

I do not suspect that the directors of either bank thought there would be a deficiency in the Commercial's assets. Both banks were located in the same city, and the directors of the American were fully competent to estimate the worth and value of the Commercial's paper. The American evinced a desire to enter into the transaction, if its directors estimated the assets of the Commercial to be sufficient to pay all of its liabilities. The resolutions did not contemplate that the relation of

creditor and debtor should exist between the banks. Indeed, both sets of resolutions contemplate that the American should take over all the assets of the Commercial and all of its business. Nothing was left from which the Commercial could pay anything. Bereft of business and of assets, it presented a sorry plight for a debtor who was expected thereafter to pay a substantial sum.

These facts appear from the resolutions. They cannot be disregarded when we come to the interpretation of the contract. As was said by Mr. Justice Clifford in Nash v. Towne, 5 Wall. 689, 699, 18 L. Ed. 527:

"Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

The first paragraph contains words appropriate to a formal transfer of all of the assets of the Commercial to the American, with warranty of title. The second and third paragraphs contain promises that the Commercial Bank will call a meeting of its stockholders, to provide for the liquidation of its affairs, agreeably to sections 5220, 5221, and 5223 of the Revised Statutes (Comp. St. 1916, §§ 9806, 9808, 9810), and "consolidating same with the American National Bank of Macon by purchase of the assets of said Commercial National Bank by the American National Bank, but without providing for stock in the American National Bank to be issued to the shareholders of the Commercial National Bank." The bill alleges that such a meeting of the stockholders of the Commercial was called, and at that meeting a resolution was adopted by a vote of more than two-thirds of the stockholders, placing the Commercial bank in voluntary liquidation, which resolution was duly approved by the Comptroller of Currency. The fourth paragraph contains a covenant that the Commercial will maintain its corporate existence until final liquidation and settlement with its shareholders. This provision is superfluous, as there is no necessity of a contract to preserve the corporate existence under such circumstances. Central Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. The fifth paragraph contains the promise of the American to pay the liabilities of the Commercial. The sixth and last paragraph contains the American's express acceptance of the appointment of liquidating agent and its promise to proceed with due diligence to collect and reduce to cash all of the Commercial assets:

"All of the assets of said association to be held as security by said American National Bank for all advances made by it in paying the depositors and other liabilities of said Commercial National Bank, and the actual expenses incurred by said American National Bank in realizing on said assets, and that, after deducting from the proceeds of said assets the actual expenses incurred by said American National Bank in liquidating said association and acting as liquidating agent and in collecting said assets and realizing upon the same,

it will apply the proceeds: First, in repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven (7%) per cent. per annum; next, in discharging the liabilities of said Commercial National Bank which shall not have been paid by advances made by said American National Bank; and that when all of said liabilities have been fully discharged, it will fully account to the shareholders of said Commercial National Bank and from time to time pay over to said shareholders pro rata the surplus remaining in its hands from the proceeds of said assets, said American National Bank to act as liquidating agent without compensation for its own services."

This paragraph also provided that, in the event the liquidation should be interrupted for any reason beyond the control of the American National Bank, the American National Bank "shall and does hold all of the assets of said Commercial National Bank as security for the advances which may have been made by it, up to the time such liquidation may be so discontinued," and further provided that neither the resolutions of the boards of directors nor the contract shall relieve the shareholders of their legal liability to respond, in the event it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of the Commercial in the payment of its liabilities.

Paragraphs 1 to 5, inclusive, are in harmony with the plain intent of the resolutions that the American is to take over the Commercial's assets and business as a purchaser and liquidating agent, and not as a creditor. It must be confessed that some of the language in the sixth paragraph, taken by itself, may be somewhat incongruous with the purpose as expressed in the resolutions of the boards of directors; but all parts of a contract must be construed together in its interpretation. The sixth paragraph begins with an express acceptance by the American of the appointment as liquidating agent of the Commercial. The assets of the Commercial were already in possession of the American when the contract was signed. These assets come into the American's possession by force of the resolution of its directors, which authorized the transfer to them and the assumption by the American of the Commercial's liabilities, upon condition that the American's directors estimated them "sufficient in amount and value" to pay the Commercial's liabilities. The American's directors had acted, and had fulfilled the condition; the trade was closed; the assets were turned over, and the Commercial had ceased to do business; and the contract was intended to be a memorial of the transaction as authorized by the resolutions of the directors of the two banks. The American was desirous of absorbing the business of the Commercial, with its consequent advantages. It was willing to liquidate the Commercial's affairs by advancing its own money to pay the Commercial's debts, and to account and pay over to the shareholders of the Commercial whatever excess of assets over liabilities there might be. But, before any excess could arise, the American was to repay or reimburse itself for the interest on the money advanced by it before it realized on the Commercial's assets. The amount of the debts of the Commercial which the American assumed was definitely stated; these debts were to be paid at once by the American. This amount, plus the addition of interest accruing intermediate

the time of payment and the time of realizing on the assets of the Commercial was the money consideration of the transfer of the Commercial's business and assets to it. Any excess from the realized assets would go to the Commercial's shareholders, and the American agrees to account for same. There are no words in the contract that the money advanced by the American is to be a loan to the Commercial; there are no words of defeasance in the contract appropriate to a construction that the assets were taken over as a pledge; and when we consider that the parties expressed in their contract that the American was to take over the business of the Commercial, which included its good will and right to do business, we cannot conclude that this most valuable and important benefit to the American was to be acquired and enjoyed by it as security for a loan of money. The contract strips the Commercial of every attribute of a going concern. When the contract was made, the Commercial's business, its assets, and all of its available financial resources became the property of the American Bank. The Commercial remained but a legal myth, without tangible qualities evidencing its existence. I do not think that an implication can be drawn that this phantom of the law was expected to respond to the payment of a debt utterly beyond its power to meet. Verbal inaccuracies in a contract must yield to the manifest intent of the parties as gathered from the four corners of the instrument.

It is argued that the provision for holding the assets of the corporation as security for money advanced in the event of a discontinuance of the liquidation for any reason beyond the control of the American is inconsistent with the conclusion we have reached. It will be borne in mind that at the time the contract was made the Commercial's assets were in the hands of the American Bank, though the shareholders of the Commercial had not assented to the bank's liquidation. Only shareholders may authorize the liquidation of a national bank. The contract was made by the directors in advance of and in contemplation of the shareholders' action, and this clause very probably was inserted as a precaution against a contingency that might nullify the transfer as a purchase because of lack of power in the directors to liquidate the bank. Be that as it may, the bill alleges that the shareholders of the Commercial did ratify the contract, and no lack of power on the part of the directors to make the contract is presented.

The disclaimer of release of the shareholders from their statutory liability is without particular significance. The directors had no power to release them, and at most this clause is but a disclaimer that their contract is not intended to have such effect.

Several cases have been cited in the argument bearing on the question: Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; George v. Wallace, 135 Fed. 286, 68 C. C. A. 40; Schofield v. State Nat. Bk., 97 Fed. 282, 38 C. C. A. 179. I have carefully examined these cases, and have derived much benefit from them in construing this contract. All of them have distinguishing features. Every contract possesses its own individuality, and similar contracts which have

been construed by courts are only to be looked to as to shedding light upon the particular contract under review. After careful consideration, I have reached the conclusion that, under the resolutions of the directors of the two banks and the contract, the American purchased the business and assets of the Commercial, and assumed all of the latter's debts, and further agreed to refund (if any) the excess to be realized from the Commercial's assets after reimbursing itself for the sum paid in extinguishment of the Commercial's debts, with interest; that under the contract no relation of debtor and creditor was created or intended to be created; that the shareholders of the Commercial are not individually liable under the statute to the American Bank for the deficiency between the amount it expended in payment of the debts of the Commercial assumed by it and that realized from a conversion into cash of the Commercial's assets.

Let an appropriate order be prepared, sustaining the motion to dismiss the bill.

In re VICTOR.

LANHAM v. VICTOR et al.

(District Court, N. D. Georgia, N. W. D. November 1, 1917.)

No. 884.

1. BANKRUPTCY ⟸303(3)—PROPERTY PASSING TO TRUSTEE—PROPERTY CLAIMED BY WIFE.
   Evidence *held* to sustain the finding of a referee that a stock of goods in a store which for many years had been conducted in bankrupt's name, which was on the sign, and in which all goods were bought, was his property, and not that of his wife as claimed, although she had during all of the time participated in the conduct of the business, both in buying and selling.

2. APPEAL AND ERROR ⟸1017—DECISIONS OF REFEREE—REVIEW.
   The decision of a referee on questions of fact will not be interfered with, unless clearly and manifestly erroneous.

In Bankruptcy. In the matter of A. Victor, bankrupt. On petition to review order of referee requiring bankrupt and his wife to deliver to H. L. Lanham, trustee, certain personal property. Order confirmed.

M. B. Eubanks and Max Meyerhardt, both of Rome, Ga., for Mrs. A. Victor.

L. H. Covington, of Rome, Ga., for trustee.

Denny & Wright, of Rome, Ga., for petitioning creditors.

NEWMAN, District Judge. The referee has filed an opinion in this matter, which comes before the court with a petition to review his findings. The opinion of the referee in the case is as follows:

The bankrupt and his wife conjointly participated in the carrying on of the business in question, at a place of business on Broad street, Rome, Ga.; both of them co-operating in the matter of purchasing goods, wares, merchandise, and fixtures, consisting of fruits, foods dispensed as lunches to customers, drinks which were iced for sale, a refrigerator, cash register, and fixtures necessary for the conduct of the business. Both participated in the actual sales and work about the place. In every instance goods, wares, and fixtures were bought in the name of the bankrupt, A. Victor. The fixtures in some instances were bought under formal written contracts signed "A. Victor," such contracts as for a $65 McCrary refrigerator and a $313 National cash register, being certified herewith as part of the evidence. Purchases of goods were invariably receipted for in the name of A. Victor; sometimes the wife signing the name, and sometimes the bankrupt doing so, and in instances the children so receipting. The bankrupt attended to small purchases by using his name without express authority in each specific instance, with his wife's knowledge and consent; but in important matters he sought and obtained his wife's consent.

Nothing appeared at any time at the place of business to indicate claim of the ownership or interest in the business on the part of the wife. The window contained a large sign "A. Victor," painted there by the Coca-Cola Company, at the direction of A. Victor, and without objection on the part of the wife, who does not disclaim knowledge of its existence or profess objection thereto; the evidence and the manner of both on the stand indicating very strongly that it was the express desire of both for the sign to so remain. A. Victor received $75 per month for six months of the year, and only his clothes the other six months. A large amount of goods were acquired from numerous trade creditors in this course of dealing, all of which were paid independent of the bankruptcy administration. The bankrupt swears that these accounts he paid with his wife's money.

The goods involved in this proceeding, as well as all other goods and fixtures, were bought in the name of A. Victor, and on the strength of his credit entirely—his explanation being that every one knows A. Victor, and no one knows C. Victor, or words to that effect; that people knew him a hundred times better than his wife, the name of the wife never having appeared in connection with the business, in any way or at any time. The goods now in the possession of the bankrupt under these facts consist of: "A certain stock of goods and merchandise, located in the storehouse at No. 410 Broad street, in the city of Rome, Georgia, said stock of goods and merchandise consisting of fruits, candies, canned goods, and confections in general, and also fixtures located in said store, consisting of showcases, cash register, refrigerator, and other fixtures used by said bankrupt in connection with his business, conducted in said storehouse." No disputes were made as to the nature of the goods, nor its alleged value of $600; but ownership was denied by him, and asserted by bankrupt and his wife to be in his wife.

The city license issued by the municipality of Rome, Ga., for the years of 1914, 1915, and 1916, were issued to C. Victor, the wife. This was after the creation of a debt of $750 by subscription to stock of the Broadstreet Hotel Company. This company is the only creditor listed by the bankrupt in his schedules. The licenses for prior years are not in evidence; the bankrupt testifying that he kept all licenses in his safe, but did not now know where the old licenses were, his counsel stating in open court that some others were in his possession. The claim of the Broadstreet Hotel Company, based upon the second and last installment of the stock subscription, was proved and allowed by Hon. W. S. Rowell. The first installment, in like sum, had been sued to judgment in the state courts, carried to the Court of Appeals of Georgia, and the judgment of the lower court confirmed.

On application the order of the former referee was reopened, the claim considered, and the objections overruled and the claim finally allowed. This judgment of the referee was not appealed from, and is not now on review. The following facts are found as to this debt as bearing upon the main question here for review:

The subscription to the stock was taken by J. H. Lanham and E. P. Harvey, acting jointly. At the time the bankrupt, A. Victor, and wife, C. Victor, were present. The bankrupt was told in the presence of his wife that the building of the hotel would enhance property values. The bankrupt discussed the matter at some length with his wife, and the subscription was signed by A. Victor. The wife, after discussion and evident joint consideration with her husband, expressed a desire for the husband to subscribe.

The bankrupt and his wife testified at the hearing. They testify laconically that the wife always owned the business since 1912, at which time Victor had financial troubles and lost his money in New York. That the word "manager" or "agent" was never added to the invariably used business title of "A. Victor," but that in fact A. Victor always acted as agent for the wife, C. Victor. That the father of C. Victor gave her the business. That the building in which the business was run belongs to the wife, and was deeded to her by A. Victor some years prior to the bankruptcy, and was bought by A. Victor in his own name, with C. Victor's money, and transferred to her.

The bankrupt testifies, in rather categorical manner also, that the business has been run in his name, but only as agent for his wife, for some 18 years. The wife testifies in similar manner to such state of facts existing for many years, but that she only married the bankrupt some 13 years since. He explains that through mistake he listed the claim of Broadstreet Hotel Company in his schedules as Rome Hotel Company.

The stenographer's transcript of the examination of the bankrupt at the first meeting of creditors was offered in evidence and objected to because of the fact that Hon. W. S. Rowell, the referee presiding, was disqualified, and has since formally disqualified, and the matter referred to the acting referee.

This examination, while admissible to contradict the bankrupt on this hearing, and possibly in other proper cases, was held to be inadmissible, and was not considered in making any findings of fact herein reported. The transcript is transmitted, however, along with the record herein.

Findings of Law as Applicable to Facts.

Possession of the res by the bankrupt, or any one for him not having a bona fide adverse claim at the time of the commencement of the proceedings which result in an adjudication, gives the bankruptcy court summary powers to compel its production. The question so stated is fully discussed in Collier on Bankruptcy (9th Ed.) pp. 490 to 498, and specially in numerous holdings of the federal courts; the exceptions being largely based upon comity and discretion, and usually in cases of conflict of jurisdiction between courts. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; Murphy v. John Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, 21 Am. Bankr. Rep. 487; In re Eppstein, 19 Am. Bankr. Rep. 89, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; Mound Mines Co. v. Hawthorne, 23 Am. Bankr. Rep. 242, 173 Fed. 882, 97 C. C. A. 394.

Under the Georgia law, possession by the husband and wife is presumptively that of the husband, though the presumption may be rebutted by proof. Perryman v. Morgan, 103 Ga. 555, 29 S. E. 708.

The possession in the case at bar, construing the facts most favorably to the wife, is that of a joint possession in both the husband and wife. And a summary proceeding should lie in such a case to compel relinquishment of the property, at least where the wife is unable to show anything more than a claim which on its face is patently a specious one.

Indeed, the facts smack very strongly of fraud. The remarkable business relationship, outlined by the bankrupt and his wife, of a long-continued use of the husband's name alone to buy goods on his credit, admittedly without the slightest influence from the wife's credit, the persistent concealment of the wife's alleged interest, and equally persistent publications of the husband's name in the business title, forces the conviction that the husband is, and has always been, the real owner of the property, and the wife's suddenly asserted claim, after expectancy of litigation and evidently of bankruptcy, rather

clumsy and unappealing to a court of equity, to say the least of it. Under the facts shown, the belief that the wife's claim is merely colorable is unavoidable.

Objections were interposed by Mrs. C. Victor to the jurisdiction of the court to hear and determine her rights to the property, but after submission of the case her counsel waived her personal rights in this respect in the briefs filed, and herewith returned for the use of the court, leaving only the primary question, imposed upon every court, as to jurisdiction of the subject-matter. This could hardly be doubtful, and therefore the case was considered upon its merits, and in only three respects, to wit:

"(1) Is the actual ownership of the property in the wife, or is her claim merely a fraudulent scheme, arranged between her and her husband to defraud the creditor, who credited on the strength of it and its ownership by the husband?

"(2) If the wife has any title or ownership at all, is she not a dormant or secret partner?

"(3) Under all the facts shown, should the wife be estopped from asserting title to any of the property as against the creditor, who extended credit to her husband with her knowledge and active consent?"

This is a transaction between husband and wife, and must be scrutinized closely by the trial court. The law of Georgia is mandatory in this respect, and the burden is on the husband and wife under a very strict rule of evidence. Section 3011, Code of Ga. (Park's), provides:

"When a transaction between husband and wife is attacked for fraud by the creditors of either, the onus is on the husband and wife to show that the transaction was fair."

The law and the rule for weighing the evidence is further emphasized in sections 4625 and 4626 of the same Code, to wit:

"4625. Fraud may be consummated by signs, or tricks, or through agents employed to deceive, or by any other unfair way used to cheat another, and

"4626. Fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence."

Out of a large number of cases handed down by the Georgia courts of last resort, reference to one of the older cases, but which is still unreversed, is helpful in determining the law of the case at bar; a land case, it is true, but applicable to a case involving personal property as well, in the light of the code provisions cited. In this case of Skellie v. James, 81 Ga. 419, 425, 8 S. E. 607, 608, the court uses the following language: "After charging that the husband and wife had a right to make contracts, one with the other, and the contracts would be good between them, he [the lower court] added: 'The only difference is that the law requires it should perhaps be looked into a little more closely.' We think, on the contrary, that in a contest between creditors of the husband on the one hand, and the wife on the other, where a fraud is charged, and where the wife sets up a secret contract between herself and her husband, as was done in this case, the jury should be instructed to scan the transaction closely, and that the bona fides thereof must be clearly established, and not that perhaps they might look into it 'a little more closely.'"

A still older unreversed case—Booher v. Worrill, 57 Ga. 235—affords a much more amplified and complete discussion of the same principles. To quote the many more recent decisions to the same effect would afford no additional weight to those cited and still the law of this state. The case of Strickland v. Jones, 131 Ga. 409, 62 S. E. 322, but reiterates the same holding, citing another older decision specially, Comer v. Allen, 72 Ga. 1.

With every effort to steel one's self against any possible "presumption" of fraud which might arise, the circumstances proven, and largely admitted by the bankrupt and his wife, are such that the conviction that the claim of the ownership in the wife is but a fraudulent artifice and scheme is in fact overpowering. It is almost impossible of belief that such a course of dealing as existed in this case through a long period of time and under such astonishing circumstances could have been simply casually arranged, and persisted in, without sinister motive.

As to Dormant or Secret Partnership.

Under the circumstances shown in this case, the interest of the wife, if any, in the husband's business, is very closely analogous to that of a dormant partner. In fact, to so construe her relationship to the business would be the most favorable one possible in her behalf. The secret status arranged between the two is such as would place creditors in a most helpless situation, and one which a court of conscience could not tolerate. The arrangement for the wife to own the business secretly and the husband to receive $75 per month for six months, and clothing for the remainder of the year, is nothing less than a division of the profits between them. The husband's name made him liable for the losses. The simple dogmatic denial of ownership could not change the real status of the parties under the facts of this case.

Section 3157 of the Code of Georgia (Park's) provides:

"An ostensible partner is one whose name appears to the world as such, and he is bound, though he have no interest in the firm. A dormant or secret partner is one whose connection with the firm is really or professedly concealed from the world."

As to Estoppel.

The doctrine of estoppel has been invoked by counsel for the trustee, and convincing array of authorities cited in support of his contentions. Under any view of the case—whether the wife is a dormant partner or actually owns the property by secret stipulation with her husband—she should be estopped from now asserting any claim to the property as against the creditor, represented by the trustee, who undoubtedly credited the husband on the strength of belief in his ownership. The wife stood by and connived at the fraud while the actual stock subscription was being taken, and to allow her now to assert her claim would be unconscionable. All standard authorities and the courts of last resort of all the states and of the United States have so uniformly upheld the application of this doctrine to such cases that it seems unnecessary to cite them in detail. The essence of them all is tersely stated in the following quotation from 12 Ruling Case Law, Husband and Wife, § 191: "Unquestionably, a married woman may, by her own voluntary conduct, forfeit protection to her separate estate. Being sui juris in respect to such property, she is responsible for her own fraudulent acts, as well as subject to the law of estoppel. And where a husband sells, as his own, property belonging to his wife, and she, with knowledge of the sale and an opportunity of notifying the purchaser of her rights, and before the price is paid, fail to do so, it has been held that she is estopped from asserting title. So a married woman, by permitting her husband to use and manage her separate property, thereby conferring on him the indicia of ownership, whereby third persons are induced to give credit to him on the faith of his ownership, may be estopped to claim the property as her separate estate as against the claims of such creditors."

To the same effect is 21 Cyc. 1399, with the added emphasis on the necessity of inducement by the wife that "the credit, however, must have been extended in reliance upon the husband's ownership caused by some act of the wife."

The Supreme Court of Georgia, in the case of Dill v. Hamilton, 118 Ga. 208, 44 S. E. 989, announces the same rule in this state, and, after holding that in some cases a creditor could not assert a lien against a wife's secret equity, added: "For, under such circumstances, the creditor is not in a position to assert a lien on the land as the property of the husband, unless the conduct of the wife was such as to estop her from setting up a claim to the same."

Trustee's counsel have cited voluminous authorities, a few of which are Bigelow on Estoppel, p. 624; Austin v. Southern Home B. & L. Ass'n, 122 Ga. 439, 50 S. E. 382; Dotterer v. Pike, 60 Ga. 29; Laughlin v. Mitchell, 121 U. S. 411, 7 Sup. Ct. 923, 30 L. Ed. 987; Keating v. Keefer, Fed. Cas. No. 7,635; St. Louis & S. F. R. Co. v. Folz (C. C.) 52 Fed. 627.

After rendering this opinion the referee entered an order requiring the bankrupt to immediately turn over to Lanham, trustee, a certain

stock of goods and merchandise located in storehouse at 410 Broad street in the city of Rome, Floyd county, Ga., consisting of fruits, candies, confections, etc., and also certain showcases, cash register, refrigerator, and other furniture in the storehouse.

A question was raised in this case as to the right of the referee to decide the question of the ownership of this stock of goods in a summary proceeding; but in the brief of counsel for Mrs. A. Victor, the claimant of the stock of goods, in a proceeding against A. Victor, bankrupt, and his wife, by the trustee in bankruptcy, this is stated:

"On the hearing, representing the wife, we raised the question of the court's jurisdiction to hear and determine this matter on the summary proceeding, and insisted that it could only be done on a plenary suit filed in the proper court to recover the property. We withdraw this objection to the court's jurisdiction, and insist upon a decision upon the merits of the controversy, believing that the court can, under this evidence, adjudicate the question of title, so as to end the matter."

[1] The only remaining question, therefore, is the correctness of the referee's decision, holding that the stock of goods in question belongs to A. Victor, the bankrupt. I think his finding that A. Victor was the owner of the property in question is clearly right. Certainly there is abundant evidence to support his finding. The reasons given in the excellent opinion filed by the referee render it unnecessary for me to say more than that his conclusion is abundantly supported by the evidence and should not be interfered with.

[2] It is almost unnecessary to say here, what I have so often said, that the opinion of a referee in bankruptcy, on questions of fact, will not be interfered with, unless clearly and manifestly erroneous; and such is not the case here.

The action of the referee is approved and confirmed, and an order will be entered accordingly.

MURPHY v. MITCHELL.

(District Court, N. D. New York. December 31, 1917.)

CONSPIRACY ⇐⇒18—TO INDUCE EXECUTION OF WILL—COMPLAINT—SUFFICIENCY.

A complaint seeking to recover damages for fraud and deceit alleged that decedent made a valid last will and testament, making large gifts to plaintiff, that defendants, aided by others and a priest of the church of which decedent was a member, conspiring and acting together to the injury of plaintiff, and at a time when decedent was incompetent to make a will, by deception, misrepresentations, and threats, conspired to have him make another will, which greatly reduced the gifts to plaintiff, and that, concealing the fact of the execution of the first will, defendants induced plaintiff to accept the legacy under the second will. *Held* that, as mere general allegations of fraud and conspiracy are of no value as stating a course of action, the complaint was insufficient not indicating what facts defendants have to meet.

At Law. Action by Mary A. Murphy against John Clark Mitchell. Application on rule to show cause for an order striking from the new complaint allegations, which were claimed to be mere conclusions or in the alternative requiring plaintiff to make the complaint more definite and certain. Motion sustained, in event of failure of plaintiff to serve an amended complaint.

See, also, 245 Fed. 219.

This is an application, on rule to show cause, for an order striking from the new complaint in this action certain allegations which are claimed to be mere conclusions, or, in the alternative, requiring the plaintiff to make the complaint more definite and certain by stating what acts of improper and undue influence were practiced on one Dennis Sullivan to induce him to make a new will when incompetent to execute a will, and what deception was practiced upon him, and what misrepresentations, threats, and promises were made to said Dennis Sullivan to induce, and which did induce, him to make what purported to be another last will and testament revoking a former will.

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 gist of the complaint, which is to recover damages for fraud and deceit, is that one Dennis Sullivan, now deceased, was a man of large means and who left an estate of several hundred thousand dollars; that he made a valid last will and testament under the provisions of which the plaintiff would have received $800,000 or more; that thereafter the defendant, aided by others, all conspiring and acting together to injure and to the injury of the plaintiff, and at a time when said Dennis Sullivan had become incompetent to make and execute a will by reason of old age and mental and physical infirmities, and was unable to withstand deception, misrepresentations, threats, and promises, conspired to have said Sullivan make another will, purporting to revoke his prior will, which should substantially cut off the said Mary A. Murphy and greatly reduce her legacy or share in his estate, to defendant's advantage. The complaint, in paragraph 6, alleges:

"That in carrying out said conspiracy he [defendant] improperly and unduly influenced the said Dennis Sullivan and both himself, personally, and acting through such others ('such others' being previously named so far as plaintiff was able to do so), among such others being said Malone, a priest of the Roman Catholic Church, in the faith of which church the said Dennis Sullivan had been raised, and said Lewis and said Grant, wrongfully and by improper and undue influence and by threats and promises, induced said Dennis Sullivan to make and execute another paper, in form, and purporting to be his last will and testament."

The complaint then alleges that, concealing the fact of the execution, etc., of the first will mentioned, the defendant, aided by such others, or some of them, and in execution of the scheme and conspiracy, represented that such second paper was the last will of said Sullivan, and procured her to assent to the proof and probate of such last-mentioned paper, and also procured plaintiff to accept a legacy of $8,000 given her thereby, and sign off all interest in the estate. Nowhere in the

complaint is it stated how and by what means said conspirators, or defendant, "improperly and unduly influenced the said Dennis Sullivan," except it states that they "wrongfully and by improper and undue influence, and by deception and misrepresentations, and by threats and promises, induced said Dennis Sullivan to make," etc. The alleged misrepresentations and threats and promises are not set out or alleged in words or in substance.

What was the "improper and undue influence"? The complaint neither states nor gives the nature or character thereof. What was the "deception" practiced, and what were the "misrepresentations" made? The complaint gives no information. What "threats and promises" were made? The complaint gives no information. What acts were done, and did the acts done constitute "deception"? Were the statements made, claimed to be "misrepresentations," false or true? How can defendant meet such charges, unless informed by the complaint in substance what acts and statements are relied on? How can it be determined on demurrer whether or not words were spoken, constituting threats and promises, or either, unless they or the substance are stated in the complaint; and how can defendant on the trial be prepared to meet such a charge, unless informed in substance of the words used or spoken? What acts were done constituting improper and undue influence?

It is fundamental that a complaint is not to set up the evidence. But it is also fundamental that where "deception" is relied on the complaint must state the substance of the deception practiced, and where "misrepresentations" are relied on the complaint must state the substance of the "misrepresentations" made; and this is true of "threats" and of "promises" alleged to have been made. On the trial it will be competent, of course, for the plaintiff to prove all material deception practiced, all material misrepresentations made or alleged to have been made, and also all material threats and promises made to induce or secure the execution of the alleged fraudulent instrument purporting to be the last will and testament of the said Dennis Sullivan. But the acts and statements must be pleaded. The defendant is entitled to be advised what he is to meet, and how can he test the sufficiency of the complaint, unless it states what the deceptive acts, misrepresentations, threats, and promises were, and in substance how and by what means Sullivan was improperly and unduly influenced? The exact words need not be given, but the substance and nature thereof should be. Ritchie v. McMullen, 159 U. S. 235, 241, 16 Sup. Ct. 171, 40 L. Ed. 133; Ambler v. Choteau, 107 U. S. 586, 589, 591, 1 Sup. Ct. 556, 27 L. Ed. 322; Alexander v. Bryan, 110 U. S. 414, 420, 4 Sup. Ct. 107, 28 L. Ed. 195; Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 202, 24 L. Ed. 656; St. Louis, etc., Railway Co. v. Johnston, 133 U. S. 566, 577, 10 Sup. Ct. 390, 33 L. Ed. 683; Williamson v. Beardsley, 137 Fed. 467, 469, 69 C. C. A. 615; United States v. Rose (C. C.) 166 Fed. 999; Schell v. Alston Mfg. Co. (C. C.) 149 Fed. 439; Beswick v. Dorris (C. C.) 174 Fed. 502; Southern R. R. Co. v. King, 217 U. S. 524, 536, 30 Sup. Ct. 594, 54 L. Ed. 868.

It is unnecessary to cite the numerous decisions of the courts of the state of New York to the same effect, but see Butler v. Viele, 44 Barb. 166; Hilsen v. Libby, 44 N. Y. Super. Ct. 12; Lawrence v. Foxwell, 49 N. Y. Super. Ct. 273, 4 Civ. Proc. R. 340; Wood v. Amory, 105 N. Y. 278, 11 N. E. 636; Reed v. Clark Cove Co., 47 Hun, 410; Zimmele v. Am. Plaster Co., 21 N. Y. Supp. 846. In Wood v. Amory, supra, it is held:

"Mere general allegations of fraud or conspiracy are of no value as stating a course of action."

In Knapp v. City of Brooklyn, 97 N. Y. 520, it was held:

"Where the complaint in such an action simply alleged that the expense of the improvement and the assessment had been increased to an amount stated 'by reason of the illegal actions, frauds, and irregularities of the officers,' without specifying the illegal actions, the frauds, or the irregularities complained of, held, that it was defective, as averring simply legal conclusions, not facts, and that a demurrer thereto was properly sustained."

The plaintiff may serve an amended complaint within 10 days after being served with a copy of the order to be entered pursuant hereto, setting forth so far as possible the acts, or words, or both, claimed to have constituted improper and undue influence, the acts and words constituting the deception practiced, and the misrepresentations, threats, and promises made. Where this cannot be done specifically, the substance should be stated. If this is done, the motion to strike out will be denied; otherwise, granted.

So ordered.

In re CORDARO.

(District Court, N. D. Iowa, C. D. December 31, 1917.)

ALIENS ⇐61—NATURALIZATION—PETITION BY MINOR.

While a declaration of intention may be filed by an alien after he has reached the age of 18 years, and no specific date is fixed for filing a petition for naturalization, yet the grave act of petitioning for citizenship, which carries with it a renunciation of allegiance to a foreign sovereignty, should not be permitted by a minor, and a petition filed by an alien during his minority is void.

At Law. In the matter of the petition of Joseph Cordaro for admission to citizenship. Petition denied.

M. R. Bevington, of St. Louis, Mo., Chief Naturalization Examiner, for the United States.

WADE, District Judge. It appears that the applicant was under the age of 21 years when he filed his petition for naturalization. It is now objected by the representative of the Bureau of Naturalization that

naturalization cannot be granted, for the reason that the law does not permit a petition to be filed until applicant has reached the age of 21 years. It appears that the petition was filed June 27, 1917; his declaration of intention having been filed April 3, 1915. At the time the petition was filed the applicant was aged 20 years 6 months and 10 days. The petition was set for hearing on November 28, 1917, upon which date applicant was still a minor. The court continued the hearing to December 18, 1917.

While the statutes do not in express language provide that the petition for naturalization cannot be filed by a minor, a review of the legislation by Congress upon this subject convinces me that it was not contemplated that the grave act of petitioning for citizenship should be permitted during minority. There is much force in the following language by Judge Landis in Re Spitzer (C. C.) 160 Fed. 137:

"Congress seems to have declared its will that no step, looking to the acquisition of citizenship in the United States, shall be taken by a person of alien birth prior to the attainment of his majority, on the theory that the abdication by an individual of allegiance to one sovereign and the undertaking of allegiance to another are acts of such grave solemnity that they should be performed only by persons of mature judgment."

While this statement was not made with reference to present existing statutes, it well expresses sound considerations which cannot be overlooked in construing the present law. A declaration of intention may be filed by an alien after he has reached the age of 18 years; but no specific age is fixed for filing a petition. But in view of all legislation, and in view of the construction of the law by the Bureau of Naturalization (which in case of doubt is entitled to some consideration), and in view of the wise suggestions of Judge Landis, above quoted, I hold that a petition for naturalization, filed by a person under age of 21 years, is void.

GRAFTON v. MEIKLEHAM.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1917. Rehearing Denied December 15, 1917.)

No. 3048.

1. TIME ⊜10(9)—APPEAL—TIME OF PERFECTION.
Under Bankr. Act July 1, 1898, c. 541, § 31, 30 Stat. 554 (Comp. St. 1916, § 9615), providing that, whenever time is enumerated by days, the number of days shall be computed by excluding the first and including the last, unless the last day shall fall on Sunday or a holiday, in which event the day last included shall be the next day therefrom, which is not a Sunday or legal holiday, an appeal from an order granting a discharge on September 21st, allowed October 2d, is within time, where the day preceding October 2d was a Sunday, even though the appeal was not taken within 10 days.

2. APPEAL AND ERROR ⊜719(1)—ASSIGNMENTS OF ERROR—NECESSITY.
It is competent for the Circuit Court of Appeals to notice a plain error, in the absence of any assignment.

3. APPEAL AND ERROR ⊜628(2)—APPEAL—DISMISSAL.
Though the original citation for an appeal was returnable November 2d, and the appeal was not docketed, nor was the record filed until several months thereafter, it will not be dismissed under rule 16 (150 Fed. lxxix, 79 C. C. A. lxxix), though the time was not properly enlarged as prescribed by the rule, where the statement of the evidence was not completed and signed by the District Judge until the day before it was filed, and appellee, long after the time when the original citation was returnable, participated in the proceedings.

4. BANKRUPTCY ⊜407(3)—DISCHARGE—DENIAL.
Under Bankr. Act, § 14, subd. b (4) (Comp. St. 1916, § 9598), declaring that a bankrupt shall not be discharged, if at any time subsequent to the first day of the four months immediately preceding the filing of the petition he transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors, a bankrupt must be denied a discharge where he transferred on the eve of bankruptcy moneys due him to one creditor, but his real and declared purpose was to hinder and delay his principal creditor and prevent her sharing therein.

5. BANKRUPTCY ⊜407(3)—DISCHARGE—DENIAL.
Under such section, a bankrupt must be denied a discharge, where on the eve of bankruptcy he made a transfer to one creditor, which reserved to him a secret benefit, and was made with intent to hinder, delay, or defraud other creditors.

6. BANKRUPTCY ⊜407(3)—DISCHARGE—DENIAL.
A fictitious transfer by a bankrupt with intent to prevent a creditor from participating in the property transferred, which is an offense under Bankr. Act, § 29 (Comp. St. 1916, § 9613), is ground for denying the discharge under section 14, subd. b (1).

7. BANKRUPTCY ⊜407(3)—DISCHARGE—SCHEDULE OF ASSETS.
A bankrupt, who received a large monthly salary, filed a petition about the middle of the month, but did not include in his schedule salary earned up to that time. His attorney had advised him that it was unnecessary to include such salary in the schedule, and that he would take the amount for fees. The bankrupt understood that it was to be a fee in the bankruptcy proceeding, but the attorney intended to apply a part on a claim arising out of previous litigation. While an assignment under the state laws was not valid unless in writing, the attorney did not have the same reduced to writing, and the bankrupt expressed himself

as indifferent to the fate of such assigned salary, unless a particular creditor participated therein. *Held* that, as the bankrupt collected the salary himself and made no payment thereof to his attorney or into the bankruptcy court until the question of his discharge arose, the transfer must be deemed one tending to hinder or defraud creditors, or to be a fictitious transfer, precluding discharge.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

In the matter of the bankruptcy of H. P. Meikleham. From an order of the District Court, granting the bankrupt a discharge (236 Fed. 401), Mrs. Virginia A. Grafton, the objecting creditor, appeals. Order reversed, and cause remanded, with directions.

R. A. Denny and J. E. Dean, both of Rome, Ga., for appellant.

Barry Wright, of Rome, Ga., for appellee.

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

GRUBB, District Judge. This is an appeal by an objecting creditor from an order of the District Court, granting the appellee a discharge under the Bankruptcy Act of 1898. A motion to dismiss the appeal was submitted, at the time of the submission on the merits. The motion to dismiss was based on three grounds: (1) That the appeal was taken 11 days after the order of discharge was entered; (2) that the assignments of error, because of their vagueness, would not support the appeal; and (3) that the appeal was not docketed and the record filed within the 30 days at the expiration of which the appeal was returnable.

[1] 1. The appeal was allowed October 2, 1916, from a judgment entered September 21, 1916. It was therefore allowed on the eleventh day, and would have been too late but for the fact that the day preceding October 2, 1916, was Sunday. Section 31 of the act of 1898 is as follows:

"Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event, the day last included shall be the next day thereafter which is not a Sunday or legal holiday." Comp. St. 1916, § 9615.

The appeal was taken in time.

[2] 2. We think the first assignment of error is explicit enough to present the question as to whether the discharge was properly granted under the evidence in the record. It is competent for the court to notice a plain error in the absence of any assignment.

[3] 3. The appeal was not docketed, nor was the record filed until February 22, 1917. The original citation was returnable November 2, 1916. The settlement of the evidence in narrative form was entered upon soon after the allowance of the appeal, but was not completed and signed by the District Judge until February 1, 1917. The appellant seems to have been guilty of no fault in this respect. The appellee participated in the hearings in the District Court before the District Judge for the settlement of the case, long after the return day of the

original citation. Both parties and the District Judge appear to have acted under a misapprehension as to the return day of the citation, and as the appellant was prompt in docketing the case and filing the record after the settlement of the case was signed by the District Judge and filed on February 1, 1917, we do not think the appeal should be dismissed under rule 16 (150 Fed. lxxix, 79 C. C. A. lxxix) for that reason, though the time was not properly enlarged, as prescribed by that rule. The motion to dismiss is overruled.

[4] Coming to the merits, we find it necessary to consider only the ground for opposing the discharge, based on the failure to schedule the salary owing the bankrupt from his employer, and withheld from his trustee, until after objections to his discharge were filed.

The bankrupt was employed at and before the time of the filing of the petition as the agent for the Massachusetts Mills, at Lindale, Ga., at a salary of $10,000, payable monthly. At the time of the filing of the petition there was owing him on account of salary about $390. While the schedules of the bankrupt were being prepared for filing with his voluntary petition, the subject of this salary item and the duty of the bankrupt to schedule it as an asset was discussed with his attorney. It was in the mind of the bankrupt when he swore to his schedules. The bankrupt failed to schedule it as an asset. His reason for omitting it, as testified to by him, was that he understood that it was to be applied to the payment of the attorney fee for his attorney in the bankruptcy proceedings. His attorney, Mr. Barry Wright, testified that $100 of the amount only was agreed upon as the amount of his fee in the bankruptcy case, and the balance of $290 of it was transferred to him verbally in payment of fees owing to him and his associate in previous litigation for the bankrupt. The evidence of the bankrupt with reference to the omission of the salary from the schedule is as follows:

"I remember that the schedule in bankruptcy was prepared in Barry Wright's office one night, and that at that time I informed him that the mill owed me between $350 and $400 in salary on that month's account. Mr. Wright stated that there was no use in letting that go into the general smash-up; that he might as well have that money as attorney's fee in the bankruptcy case. I don't remember Mr. Wright's giving me any legal advice on the subject. He said something about he thought he would make it stick, or he didn't know whether he could make it stick, that he would try it, and asked me to transfer the money to him. I think he told me that, if there was any penalty attached, it would only be that I would have to pay the money back into the estate, or words to that effect. After my petition in bankruptcy was filed, Mr. Wright never asked me for this money, nor asked me to send it to him. I considered that as a debt to him. After telling Mr. Wright about my assets and liabilities, I did not examine the schedule. I don't think I even saw it. I left it all to Mr. Wright, and relied absolutely upon his legal advice. I told Mr. Wright about this asset that the mill owed me, this $400 or $390 prior to that time I signed the schedule—in fact, while it was being made out. I did not know whether it was listed in the schedule or not. I want to change that: I thought it was shown in the schedule. As soon as Mr. Wright called on me for the $290 I paid it to him."

The evidence of Barry Wright, his attorney, in reference to the same matter is as follows:

"I want to state that, when Capt. Meikleham employed me to file his petition for involuntary bankruptcy, he disclosed to me the fact that he had a part of

a month's salary earned; that it was at my suggestion and request that he agreed to prefer me and Mr. Eubanks to the extent of the salary earned, except $100, which it was agreed that he pay to me as a retainer in this proceeding; that he sat in my office while I wrote out the schedules from the information that he gave, and that he signed the schedule under my advice; that I advised Capt. Meikleham that the payment to me, or the agreement to pay me, was probably a preference, but that the only penalty attached to it was that I would be liable to return that money to the trustee if I had paid it out—if I had received it, I mean, and, if I had not received it, then the trustee could recover it instead of me. I did not inform Capt. Meikleham whether the transaction would be disclosed by the bankruptcy papers or not, and I stated to Capt. Meikleham that I didn't know whether any objection would be made to it or not, and mentioned the fact that Mr. Denny, who was opposing it, was my partner in other matters, and Mr. Ed Dean, another attorney, was a very close personal friend of mine, and that I thought for these reasons that possibly I could get away with that $250 or $300."

The evidence of the trustee, Graham Wright, with reference to the same matter, is as follows:

"I was present the night Mr. Meikleham's schedules were being made up. The salary question came up. I was sitting in the office, and I think there was some discussion of it. I don't remember what was said, other than Barry Wright suggested that he (Meikleham) might as well give him (Wright) the salary, let him have it; and he said that was all right with him, or words to that effect. I am not testifying as to the exact language, but that just as long as Mrs. Grafton didn't get any more than she had to get that it was all right with him; that is the sum total of it. There was no statement that that money wasn't to go to Barry Wright bona fide for a fee. I remember Barry Wright's saying something about his and Mr. Eubanks' fee; that Meikleham owed Mark Eubanks a fee for defending a case. I was a clerk in the law offices of Denny & Wright at that time, and Barry Wright was a member of that firm."

The evidence further showed that the amount of salary was payable December 1, 1914, and was collected by the bankrupt and spent by him, and that no part of the sum owing him for salary, when the petition was filed, was ever paid by him to his attorney, in satisfaction of either his fees in the bankruptcy case or for previous litigation, but was collected and disposed of by the bankrupt, just as if there had been no assignment of it and no bankruptcy proceedings pending. It was not until after objections had been filed to his discharge in the bankruptcy case that he paid the $100 fee in the bankruptcy case to his attorney and paid $290 to his trustee—not to his attorney—and then payment was made, not out of moneys due him when his petition was filed, but out of moneys subsequently earned by him, and which were not assets of the bankruptcy estate.

On the side of the bankrupt it is contended that there was no concealment of the salary earned as an asset of the bankrupt, and no fraudulent transfer of it, but at most it was partly a preferential payment to his attorney for services outside the bankruptcy case and partly the payment of a reasonable fee in the bankruptcy case, and so constituted no ground for denying the bankrupt his discharge. If the transaction bears this interpretation, the discharge was properly granted.

The objecting creditor contends: (1) That there was no bona fide transfer of the salary to the attorney, either to satisfy the fee in bank-

ruptcy or fees for previous services, but that it was a fictitious arrangement, not intended to be carried out, to excuse the bankrupt from listing the salary as an asset, and hence a concealment of his assets from his trustee in bankruptcy; or (2) that, if there was a verbal transfer of the debt owing him for salary to his attorney, it was not made for the purpose of preferring his attorney, but for the expressed purpose of hindering, delaying, and defrauding his principal creditor, and was also infected with a secret trust in his own favor, by which he was to be permitted to collect and spend the money when it was due as he saw fit.

We think that the declarations of the parties, the circumstances of the transaction, and the subsequent conduct of the bankrupt and his attorney with reference to the disposition of the salary bear out the contention of the objecting creditor. The bankrupt testifies that, when he informed his lawyer of the fact that salary was then due him, the lawyer replied "that there was no use letting that go into the general smash-up; that he might as well have that money as attorney's fee in the bankruptcy case"; that "he thought he would make it stick; that he would try it, and asked me to transfer the money to him." The witness Graham Wright, who afterwards became trustee, testified that Barry Wright suggested that the bankrupt might as well let him have the salary, and, in reply, the bankrupt said that "just so long as Mrs. Grafton didn't get any more than she had to get that it was all right with him." These declarations are to be considered with what was subsequently done by the bankrupt and his attorney with reference to the salary. Instead of the money being paid by the Massachusetts Mills to the attorney, or by the bankrupt after he had received it, the bankrupt collected the salary himself and spent the whole of it for his own account, no part being applied to his attorney's claims against him. The attorney acquiesced in this conduct of the bankrupt, and the record clearly shows collected his fees without reference to the assignment, and as if none had been made. When the bankrupt's application for a discharge was opposed, the bankrupt, with the consent of his attorney, if not by his advice, then first paid $290, in lieu of the money, covered by the alleged assignment and owing at the time his petition was filed, and which he had appropriated when he received it, not to his attorney, but to the trustee, recognizing that it was assets of the bankrupt estate. Though the law of Georgia required the assignment, to be valid, to be in writing, as the attorney must have known, no written transfer of the salary was executed. So little did this feature of the transaction interest the bankrupt and his attorney that their minds never met as to what the transaction was. The bankrupt testified that all the earned salary was to be applied to the fee of the attorney in the bankruptcy case, while the attorney testified that but $100 of it was to be so applied and the balance was to be applied to the payment of fees due the attorney and another for services rendered in other cases than the bankruptcy proceedings.

The bankrupt's principal creditor, who was his mother-in-law, was the Mrs. Grafton mentioned by him in his evidence, quoted above. She had obtained a judgment against him shortly before the petition was filed in a large sum, arising from a transaction in which the bank-

rupt had converted her securities, loaned to him, to his own use. It seems a fair inference that the voluntary petition was filed to defeat the collection of this judgment. The bankrupt had separated from his wife, and there was hostile feeling between himself and his mother-in-law. His purpose to keep any part of his assets from reaching her was outspoken, and it was to effectuate this purpose, evidently, that he failed to schedule his earned salary. Plainly, no purpose of compensating his attorney actuated him, on his own statements.

Though he transferred his earned salary to his lawyer to secure a debt he owed him, yet, if his real purpose in so doing was his declared purpose, viz. to hinder and delay his principal creditor in her right to have a part of the sum applied to her judgment, this would constitute a transfer of his property with intent to hinder, delay, or defraud his creditors, within the meaning of subdivision b (4) of section 14 of the Bankruptcy Act, and would prevent his discharge.

[5, 6] If the transfer was made with the secret understanding between the bankrupt and his attorney, either express or implied, that the bankrupt was to be permitted, in spite of the assignment, to collect and use the money covered by it as if it were his own, and the assignment was to be operative only to protect the bankrupt, in case this disposition of the earned salary or the failure to schedule it was brought in question by his creditors, then the reservation of this secret benefit to the bankrupt would render the transfer of the money one made "with intent to hinder, delay, or defraud his creditors," within the meaning of the same section of the Bankruptcy Act, and prevent his discharge.

If there was no real transfer, but the transaction was fictitious, with no better basis than to afford a pretext for not scheduling the earned salary as an asset, so that the bankrupt's mother-in-law might be kept from receiving any part of it, then this would be a concealment by the bankrupt of property belonging to the estate in bankruptcy from his trustee, which is an offense punishable by imprisonment under section 29 of the act, and a ground for denying him a discharge under subdivision b (1) of section 14 of the Bankruptcy Act. Only in the event the transaction was an actual one, and its only infirmity that it preferred the attorney over the bankrupt's other creditors, would it afford no ground for denying the bankrupt his discharge.

[7] In view of the declarations of the bankrupt and of his attorney in his presence, in view of the character of the assignment, and the fact that there was no meeting of the minds of the bankrupt and his attorney as to its terms—its admitted invalidity—and in view of the complete ignoring of it in the subsequent conduct of the bankrupt and his attorney, we have concluded that the transaction was more than a preferential one, and that it constituted either a transfer with intent to hinder, delay, or defraud creditors or a concealment of assets, and was a bar to the discharge of the bankrupt.

The other grounds of opposition are insufficient to deny the bankrupt his discharge, though they clearly show that the bankrupt was not actuated by that desire to surrender all his assets to his trustee, and to see them distributed among his creditors to the best advantage in reduction of their debts, which the act contemplates.

The order of the District Court, granting the bankrupt his discharge, is reversed, and the cause remanded to the District Court, with directions that an order be there entered, denying the bankrupt his discharge, and the appellee is taxed with the costs of appeal.

In re TERRELL.

ANDERSON v. OKLAHOMA MOLINE PLOW CO.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1917.)

No. 164, Original.

1. BANKRUPTCY ⟸140(1)—PROPERTY PASSING TO TRUSTEE—PROPERTY ACQUIRED BY CONDITIONAL SALE.

Under Rev. Laws Okl. 1910, § 2894, providing that, "in the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract," and the decisions of the Supreme Court of the state, a contract of conditional sale of personal property retaining title in the seller until the price is paid in full, although not filed for record as required by section 6745, to be valid against "creditors," in the absence of fraud, is valid as between the parties and as against creditors of the purchaser existing at the time the contract was made, or who became such subsequent thereto, who had not acquired specific liens on the property prior to the purchaser's bankruptcy.

2. BANKRUPTCY ⟸151—LIENS VESTED IN TRUSTEE.

The provision of Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), that "trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon," vests the trustee with such lien only from the date of the filing of the petition, and such lien only as a creditor might acquire on that date and necessarily subject to prior rights in the property.

3. BANKRUPTCY ⟸163—PREFERENCES—PROPERTY ACQUIRED BY CONDITIONAL SALE.

Where a bankrupt obtained possession of personal property under a contract of conditional sale, reserving title in the seller until full payment of the price, and which under the law of the state, although unrecorded, was valid between the parties and as against all creditors of the bankrupt not having acquired liens on the property, the fact that the contract was filed for record within four months prior to the bankruptcy did not make the transaction a transfer of property by the bankrupt, which could be attacked by the trustee as preferential under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1916, § 9644).

Petition to Revise Order of the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

In the matter of J. E. Terrell, bankrupt. Petition of E. R. Anderson, trustee, to revise, in matter of law, an order directing the surrender of property to the Oklahoma Moline Plow Company, claimant. Petition denied.

J. C. Willingham, of Oklahoma City, Okl. (Morse, Standeven & Willingham, of Oklahoma City, Okl., on the brief), for petitioner.

David I. Johnston, of Oklahoma City, Okl. (James R. Keaton, Frank Wells, and George G. Barnes, all of Oklahoma City, Okl., on the brief), for respondent.

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

REED, District Judge. The bankrupt, J. E. Terrell, was engaged in the general mercantile business in Texola, Beckham county, Okl., from some time prior to July 9, 1912, up to and including February 3, 1914, when an involuntary petition in bankruptcy was filed against him upon which he was duly adjudicated a bankrupt on February 24th following, and the petitioner, Anderson, was in due time appointed trustee in bankruptcy of his estate.

On July 9 and again on August 3, 1912, the bankrupt entered into separate written contracts with the Oklahoma Moline Plow Company, a corporation, for the conditional sale by the plow company and purchase by the bankrupt of certain farm property described in said contracts which provide that the title and right to the possession of the property shall remain in the plow company until the agreed price therefor shall be paid in full. The property so conditionally sold was delivered to the bankrupt about the date of the respective contracts, but they were not recorded until December 30, 1913, when they were duly filed for record in the proper county in which the property was situated. The petitioner as trustee, upon his appointment and qualification, took possession of the property of the bankrupt estate, also a part of the property so conditionally sold and delivered by the plow company to the bankrupt. Between the date of the contracts, and the filing thereof for record, other persons became creditors of the bankrupt for goods sold to him on credit, but who have no lien upon the property described in the contracts, or any part of the bankrupt estate other than such lien, if any, as the petitioner may have as trustee for their benefit under section 47a (2) of the Bankruptcy Act as amended June 25, 1910. The plow company not having been paid for the property, in due time filed its petition with the referee for an order requiring the trustee to return to it the property in his custody described in the conditional sale contracts. Upon a hearing of such petition the referee sustained the same and ordered the trustee to return such property to the plow company. Upon petition for review by the trustee, the order of the referee was approved by the judge, and the petitioner brings this proceeding to revise in matter of law the order so approving the order of the referee upon the ground; that under the Oklahoma statute the conditional sale contracts not having been filed for record were void as against creditors of the bankrupt who became such prior to the recording of the contracts on December 30, 1913, though they have not by attachment or otherwise secured or fastened a lien upon the property, prior to the bankruptcy.

The questions for determination are:

(1) Are the contracts of conditional sale void under the Oklahoma statute as to general creditors of the bankrupt who became such between the date of such contracts and the filing of the same for record,

but who have acquired no lien upon the property by attachment or otherwise, prior to the bankruptcy?

(2) Does the trustee in bankruptcy under section 47a (2) of the Bankruptcy Act as amended in 1910, acquire any greater rights in or to the property acquired by the bankrupt under conditional sale contracts made and to be performed in Oklahoma than the bankrupt has?

[1] The applicable provisions of the Oklahoma statute as appear in the Revised Laws of Oklahoma (1910) are:

"Sec. 2894. In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract."

"Sec. 4031. A mortgage of personal property, is void as against creditors of the mortgagor, subsequent purchasers, and incumbrancers of the property, for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated. * * *"

"Sec. 6745. Any instrument in writing, or promissory note, evidencing the conditional sale of personal property, which retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept; and when so deposited, it shall be subject to the law applicable to the filing of chattel mortgages; and any conditional, verbal sale of personal property, reserving to the vendor any title in the property sold, shall be void as to creditors and innocent purchasers for value."

Counsel for each of the parties have filed extensive briefs citing many authorities in support of their respective contentions, to review all of which would unduly extend this opinion, and we deem it necessary to refer in the main only to those which declare the law of Oklahoma and construe the statutes of that state bearing upon the question involved.

There is no claim of any actual fraud between the plow company and the bankrupt in the making of these contracts, or in withholding them from record, and they are valid as between the parties though not filed for record; also as against creditors of the bankrupt existing at the time they were made, or who became such subsequent thereto, who have not acquired specific liens upon the property covered by the contracts prior to the bankruptcy (Revised Laws of Oklahoma [1910] § 2894, above; McCormick v. Koch, 8 Okl. 374, 58 Pac. 626, decided in 1899); and no title passed to the bankrupt until the purchase price of the property was paid as specified in the contracts; (McIver v. Williamson Co., 19 Okl. 454, 92 Pac. 170, 13 L. R. A. [N. S.] 696, decided in 1907, and cases cited); nor had the bankrupt any attachable interest in the property covered by the contracts before the purchase price was paid (Lockwood v. Frisco Lumber Co., 22 Okl. 31, 97 Pac. 562, decided in 1908); nor have creditors without a lien upon the property any standing in court to challenge the title of the plow company to the property (Chandler v. Colcord, 1 Okl. 269, 32 Pac. 330, 335, decided in 1893).

That the contracts in question are valid as between the parties, though not recorded, cannot be successfully controverted, is also settled by repeated decisions of the Supreme Court of the United States

(Fosdick v. Schall, 99 U. S. 235, 250, 25 L. Ed. 339), even in states where under the local law they are to be treated in effect as chattel mortgages (Id., 99 U. S. 251, 25 L. Ed. 339; Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; Bryant v. Swofford Brothers, 214 U. S. 279, 290, 291, 29 Sup. Ct. 614, 53 L. Ed. 997).

McIver v. Williamson Co., 19 Okl. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 696, above, was replevin by the defendant Williamson Company wholesale grocers to recover certain groceries that it had sold and delivered to one Pickford, a retail dealer in groceries, under an agreement to be paid for upon delivery, but were not paid for. After several demands upon him for payment, which he failed to make, the goods were levied upon under execution by others of his creditors and were replevined by the Williamson Company. After a full consideration of the authorities the Supreme Court of Oklahoma said:

"We take it that * * * attachment and execution creditors here are in no better position, and have no greater rights, than had the vendee (the execution debtor), because our own Supreme Court, in the case of Central Loan & Trust Co. v. Campbell Commission Co., reported in 5 Okl. 411, 49 Pac. 52 (decided in 1897), lay down this rule: 'Where personal property is sold and delivered, upon condition that the title shall not vest in the vendee, unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until the performance of the condition'—[citing many authorities]. * * * Under the law as laid down in this decision, and all of the decisions upon the subject that we are able to find, we think that the conclusion of the jury and the finding of the court below that the plaintiff was entitled to recover the goods was correct. * * *"

In Chandler v. Colcord, 1 Okl. 260, 32 Pac. 330, decided in 1893, the court said:

"The law is well settled that a creditor, who has no lien on the property covered by a chattel mortgage, cannot be permitted to assail the validity of the mortgage, on the ground that it was made with intent to hinder, delay and defraud the creditors of the mortgagors. In order to do so, he must not only obtain a judgment, but must have a valid execution against the property of the mortgagor. [citing People's Saving Bank v. Bates, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754]."

In Lockwood v. Frisco Lumber Co., 22 Okl. 31, 97 Pac. 562, above, decided in 1908, the syllabus reads:

"Where a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser of the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition."

In the course of the opinion it is stated:

"The universal and fundamental principle of our law of personal property is that no man can be divested of his property without his own consent, and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor."

And it is now settled by the great weight of authority that, unless otherwise declared by statute, such bona fide purchaser acquires no better title than his vendor had. Lawton Pressed Brick Co. v. Ross-Kellar Co., 33 Okl. 59, 124 Pac. 43, 49 L. R. A. (N. S.) 395, decided in 1912, and Frick Co. v. Oats, 20 Okl. 473, 94 Pac. 682, decided in 1908, are to the same effect. See, also, Gentry v. Singleton, 128 Fed.

679, 63 C. C. A. 231, Court of Appeals, this Circuit, in error to the United States Court of Appeals, Indian Territory, and Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756.

In Garrison v. Street & Harper Furniture Co., 21 Okl. 643, 97 Pac. 978, 129 Am. St. Rep. 799, decided in 1908, Garrison on November 20, 1904, sold to a Mrs. Wade certain hotel furniture in a hotel in Oklahoma City, delivering possession thereof to her on the same day, taking her note for the purchase price, some $4,000, secured by a chattel mortgage on the property sold her, which also covered any property that she might afterwards acquire and place in the hotel. This mortgage was not filed for record until December 31, 1904, when it was filed in the proper office. December 15, 1904, the Street & Harper Furniture Company sold to Mrs. Wade certain bedding and furniture, which she placed in the hotel, taking from her on the same day a chattel mortgage thereon to secure the purchase price, some $1,275. This mortgage was not filed for record until the afternoon of January 3, 1905, when it was filed for record in the proper office. The mortgage of Mrs. Wade to Garrison not having been paid, Mrs. Wade, about 9 o'clock in the forenoon of January 3, and four hours before the Street & Harper Company's mortgage was filed for record, voluntarily delivered to Garrison all the property covered by the mortgage to him, and authorized him to foreclose the same by a sale of the property as provided in the mortgage, which he proceeded to do. January 15, 1905, in default of payment by Mrs. Wade of the first of her notes to the Street & Harper Company, that company commenced this suit against Garrison and Mrs. Wade to recover the property mortgaged by Mrs. Wade to them. Upon the trial the court rendered judgment in favor of the Street & Harper Company, and Garrison brought error. In reversing this judgment Judge Dunn speaking for the Supreme Court of Oklahoma said:

"Upon what theory the" Street & Harper Company "was given judgment in the court below we are not advised, except as is stated in counsel's brief that the decision of the lower court was right, under the construction given to our statute in the case of Greenville National Bank v. Evans-Snyder-Buel Co., found in 9 Okl. 353, 60 Pac. 249," which doubtless was the controlling authority in the mind of the court below; but in Frick Co. v. Oats, 20 Okl. 473, 94 Pac. 682, "the portion of that opinion bearing upon the question involved in this case was specifically overruled."

Cornelius v. Boling, 18 Okl. 469, 90 Pac. 874, decided in 1907, cited in support of the opinion in Greenville National Bank v. Evans, is also disapproved in Frick Company v. Oats, as mere dictum and not binding upon the court. In the course of the opinion (in Garrison v. Street & Harper Company) it is further said in effect that at common law the mortgagee of personal property held the right of possession as well as the legal title to the property, but that rule has been changed by nearly all of the Western states, so that the legal title to the property remains in the mortgagor, and where the mortgage or statute so provides, the mortgagor may remain in possession, and if he does his mortgage as a general rule must be filed for record, or it will not be protected against creditors of the mortgagor who have acquired valid liens thereon by contract or judicial process; but if the mortgagee takes

possession of the property or files his mortgage for record before any other right to or lien upon the property attaches, the title under the mortgage is good against everybody, though not recorded, if it was previously valid between the parties. The ultimate conclusion of the court is that a chattel mortgage in Oklahoma, though not recorded or possession of the property not taken by the mortgagee when made, yet if possession is taken by him, or the mortgage is filed for record prior to the attaching of liens of other parties, the filing of the mortgage for record has the effect of taking possession, and the rights of the mortgagee will be protected from the date of the filing of the same for record. This, it will be observed, is the rule as to chattel mortgages in Oklahoma; but, as we have before seen, contracts for the conditional sale of personal property in that state and generally, in which the legal title and right of possession are reserved in the vendor until the purchase price is paid though not recorded, stand upon a different footing and are valid as between the parties and as against creditors of the vendee who have acquired no lien thereon. In Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, the authorities bearing upon the question of conditional sales of personal property and the effect of local laws of different states bearing upon their validity are reviewed; the court in conclusion saying:

"It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho (where the contract was made) to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale (of personal property) is good and valid, as well against third persons, as against the parties to the transaction, and the further rule that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed."

Is this rule changed by section 6745, Revised Statutes of Oklahoma 1910, or by the Bankruptcy Act as amended June 25, 1910? Section 6745 of the Revised Laws of Oklahoma provides:

"Any instrument in writing, or promissory note, evidencing the conditional sale of personal property, which retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept; and, when so deposited, it shall be subject to the laws applicable to the filing of chattel mortgages."

This section was enacted in 1897, but we discover nothing therein inconsistent with section 2894 of the Revised Laws, enacted in 1890. The contracts in question were deposited for record in the proper office December 30, 1913, and not until that time, under a literal reading of the section, were they subject to the law of Oklahoma as to the filing of chattel mortgages. But if the true interpretation of the statute be that conditional sale contracts in that state are to be treated as chattel mortgages, and void as to creditors of and innocent purchasers from the vendee unless filed for record, etc., still the legal title and right of possession to the property in controversy remained in the vendor from their date as security for a then present consideration

for the property delivered by the plow company to the vendee, and are within the protection of section 67d of the Bankruptcy Act as amended in 1910; and the failure to record the contracts does not, under the Bankruptcy Act, change the essential character of the transaction, as these contracts were not converted into a preferential transfer by the bankrupt of his property by the mere failure to file them for record. In re Jackson Brick & Tile Co. (D. C.) 189 Fed. 636, 645; Deupree v. Watson, 216 Fed. 483, 490, 132 C. C. A. 543 (Court of Appeals, 6th Circuit). As there are no subsequent purchasers of the property in controversy from the bankrupt, the controversy relates only to the rights of general creditors represented by the trustee.

[2] Section 47a (2) of the Bankruptcy Act, as amended in 1910, provides:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

This section by its terms only vests in the trustee "the rights, remedies and powers of a creditor holding a lien," etc., upon property coming into the custody of the court of bankruptcy from the date of the filing of the petition in bankruptcy, if adjudication in bankruptcy follows; but this is far short of declaring that such rights, remedies, and powers are paramount or superior to all prior liens upon or rights in such property; nor does it vest in the trustee a lien upon or right in or to property not in fact belonging to the bankrupt, or in which he has no interest; and it is settled by the decisions of the Supreme Court of Oklahoma that lien creditors by attachment, judgment, or otherwise in that state, reach only the interest of the debtor in such property, subject to prior liens or incumbrances thereon. The rights so vested in the trustee, therefore, under section 47a (2), are only such as any other lienholder might acquire in or to the property of the bankrupt on the date of the filing of the petition in bankruptcy, and if he has no interest in the property, the trustee acquires none. The bankrupt, Terrell, under the contracts had the right to pay the balance of the purchase price to the plow company at any time prior to its taking possession of the property, and prior to the bankruptcy proceedings and thus acquire the full title thereto; and this right vested in the petitioner as trustee upon his appointment and qualification, who undoubtedly might enforce this right of the bankrupt; but this he does not seek to do.

In Baily v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, the Supreme Court recognizes and gives effect to the distinction between contracts for the conditional sale of personal property where the title to and right of possession are reserved in the vendor until the purchase price is paid, and sales where the absolute title is in the vendee and a mortgage is made to secure the purchase price of the property, and upholds the title of the conditional vendor as against the trustee in bankruptcy, though the conditional sale contract, was not recorded when made, but is filed for record prior to the filing of the petition in bankruptcy. It was also held that the conditional

sale contract did not amount to a preferential transfer of the ice machine to the bankrupt within the meaning of the Bankruptcy Act as amended, because there was no transfer by the bankrupts of any property belonging to them, which is essential to create a preferential transfer.

Counsel for the petitioner rely especially upon In re Johnson (D. C.) 212 Fed. 311, in which Judge Campbell of the Eastern District of Oklahoma reaches a conclusion different from that reached by him In re Wall (D. C.) 207 Fed. 994, wherein it is held that a creditor, within the meaning of the Oklahoma statute, means "a creditor who has perfected a lien by legal process upon specific property." It is said in the brief of counsel for the respondent that Judge Cotteral, of the Western District of Oklahoma, has twice held (In re McGuire and In re Bell, two unreported cases) to the same effect; and such seems to be the general rule. In re Wall and the decisions of Judge Cotteral so referred to were cases arising prior to the amendment of the Bankruptcy Act in 1910; but In re Johnson and the present case by Judge Cotteral were decided in actions arising since that amendment. It thus apparently appears that the United States District Courts for the two districts of Oklahoma have taken different views of this question.

In Re Johnson, the amendment of 1910, and Cornelius v. Boling, 18 Okl. 469, 90 Pac. 874, and some other cases are cited as the reason for departing from the ruling In re Wall; but no reference is made to Garrison v. Street & Harper Co., 21 Okl. 643, 97 Pac. 978, 129 Am. St. Rep. 799, or to Frick Co. v. Oats, 20 Okl. 473, 94 Pac. 682, wherein Cornelius v. Boling is disapproved by the Supreme Court of Oklahoma, and Greenville National Bank v. Evans et al., 9 Okl. 353, 60 Pac. 249, is directly overruled. Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533, is also cited in support of the ruling In re Johnson; but, as that is a construction of the North Dakota recording act, we need not consider it, for we examine the decisions of the Supreme Court of Oklahoma not to determine whether or not they are correctly decided, but only to ascertain what they decide is the meaning of the local statutes of that state bearing upon the questions involved, and when we have ascertained this such decisions will be given effect by us.

[3] In re Martin (Petition of George Bothe) 173 Fed. 597, 97 C. C. A. 547, and First National Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, are also cited as supporting the conclusion In re Johnson; but they were decided under the recording law of Missouri. It may be said, however, that since the present case was argued and submitted the Supreme Court of the United States in Carey v. Donahue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, has considered the case of Bank v. Connett and cases like it, and has apparently disapproved the construction placed by them upon the words of section 60b of the Bankruptcy Act as amended in 1903 and 1910, "if by law such recording or registering is required." As we read the opinion in Carey v. Donahue, it holds that the four months period prescribed in sections 60a and 60b of the act as amended in 1903 and 1910 for filing or recording a preferential transfer, shall not expire until four months after

the date of the recording or registering of the transfer, "if by law such recording or registering is required," is in the interest of persons who by the applicable local law are to be protected by such registration, and do not refer to transfers which are valid between the parties and as against creditors whether recorded or not; and unless persons so interested in the registering of the transfer are those who under the local law would be protected by the record of the transfer if one was made, the filing of the instrument for record is "not required," and becomes immaterial.

By the express terms of section 2894 of the Revised Laws of Oklahoma, and by the settled decisions of the Supreme Court of that state, creditors who under sections 4031 and 6745 may successfully challenge the validity of the conditional sale contracts because not recorded, are those only who have acquired or fastened a lien upon the property by judgment or otherwise. There are none of this class of creditors in this case; and if it be only a matter of procedure to obtain such a lien that is hardly a valid reason for disregarding the statute in the one case, and the decisions of the Supreme Court of Oklahoma construing the other two sections.

Further than this, section 60b of the Bankruptcy Act, as amended in 1910, authorizes the trustee to avoid a preferential transfer only when the person receiving the transfer or to be benefited thereby, or his agent acting therein, "shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee," etc. As before stated, there is no question of fraud involved in this controversy; nor is there any showing of a preferential transfer by the bankrupt of any of his property involved herein to the plow company or any one else. The matter was submitted to the referee and the judge upon a stipulation of facts, the pertinent parts of which after setting out the making of the conditional sale contracts, the date thereof, the time of filing the same for record, the filing of the petition in bankruptcy, the adjudication thereon, and the appointment of the petitioner as trustee, read in this way:

"That between the date of the making of the contracts and the filing thereof for record on December 30, 1913, third parties who are now creditors of the bankrupt sold certain goods to him on credit (which goods are described); that on December 20, 1913 (nearly a year and a half after the credits were extended), the bankrupt was insolvent, and the claimant plow company then had reasonable grounds to know of his insolvency."

This wholly fails to show that the plow company, though it may have known of the bankrupt's insolvency ten days before it filed the conditional sale contracts for record, had reason to believe when the contracts were filed that a preference would be effected by the filing thereof for record. For this reason alone the trustee would not be entitled to retain possession of the property involved in this controversy. Besides the lien of the trustee under section 47a (2) of the act as amended dates only from the filing of the petition in bankruptcy. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275.

In the case of Bunch v. Maloney, 233 Fed. 967, 147 C. C. A. 641, upon appeal from the District Court, Eastern District of Arkansas, wherein a mortgage given for a present consideration ten months before but was not recorded because of some defect in the filing until within the four months preceding the filing of the petition in bankruptcy, was submitted to us at the same term the case now under consideration was submitted, in which we held that Carey v. Donahue properly understood was not inconsistent with Bank v. Connett and other like cases, and we followed the rule announced in that case, though the Arkansas recording statute as construed by the Supreme Court of that state is that creditors not having a lien upon the property covered by the unrecorded mortgage are not within the protection of the statute. In that case creditors represented by the trustee in bankruptcy had not prosecuted their claims to judgment, but had procured the appointment of a receiver in the state court of the property because of the insolvency of the bankrupt; but a receiver in insolvency is not within the protection of the recording statute of Arkansas. In re Bunch Com. Co. (D. C.) 225 Fed. 243, 246. The Supreme Court of the United States has granted a writ of certiorari in that case (242 U. S. 626, 37 Sup. Ct. 13, 61 L. Ed. 535), which has not yet been determined, so far as we are advised, and its determination by that court must be awaited before it can be said definitely what its decision will be. It is safe to say, however, that Carey v. Donahue, as decided does not disapprove the decision in Bailey v. Baker Ice Machine Company, wherein it is held that a conditional sale contract of personal property, though unrecorded, is not a preferential transfer by the bankrupt vendees in violation of any provision of the Bankruptcy Act, where the transaction is entirely free from fraud.

Post v. Berry, 175 Fed. 564, 99 C. C. A. 186, is also cited, and is said to be a late decision of this court that should be followed. The case arose under the Iowa recording act, and In re Martin (George Bothe, Petitioner) 173 Fed. 597, 97 C. C. A. 547, and the Connett Case, were followed as controlling decisions. But it does not control the decision of this case, for the Iowa statute under which it arose is as follows:

> Code of Iowa 1897, § 2905: "No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless * * * recorded."
>
> Section 2906: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless" recorded.

The last section would be inapplicable in any event, for the plow company here, which was the vendor, did not retain possession of the property, and it was delivered to the vendee. The Supreme Court of Iowa has repeatedly held that section 2905 of the Code does not mean general creditors, even though their indebtedness is incurred subsequent to the execution of the unrecorded mortgage and before it is recorded; and before such a creditor can successfully assert a right as

against the unrecorded instrument he must obtain a lien upon or interest in some way in the mortgaged property by judgment or otherwise. Blackman v. Baxter & Co., 125 Iowa, 118, 100 N. W. 75, 70 L. R. A. 250, 2 Ann. Cas. 707; Meyer v. Car Co., 102 U. S. 1, 10, 26 L. Ed. 59; Nauman Co. v. Bradshaw, 193 Fed. 350, 353, 113 C. C. A. 274. And see Emerson-Brantingham Co. v. Lawson (D. C.) 237 Fed. 877, and cases cited. But we need only say that the decision (Post v. Berry) is not controlling of this case.

A number of other cases are cited by the petitioner, but we need not consider them, for, under the facts stipulated, the cases to which we have referred, and the recording statute of the state of Oklahoma as construed by the decisions of the Supreme Court of that state we are satisfied that the district court correctly held that the plow company was entitled to the property in controversy.

The petition to revise is therefore denied at the cost of the petitioner; and it is accordingly so ordered.

Since the foregoing opinion was filed, the decision of the United States Supreme Court in Martin v. Commercial National Bank has been published in 245 U. S. —, 38 Sup. Ct. 176, 62 L. Ed. —.

STERRETT v. SECOND NAT. BANK OF CINCINNATI, OHIO.

SECOND NAT. BANK OF CINCINNATI, OHIO, v. STERRETT.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1917.)

Nos. 2998, 3001.

1. RECEIVERS ⊕=210—ACTIONS BY RECEIVER—CAPACITY TO SUE—"CHANCERY RECEIVER."

A mere "chancery receiver" is but an officer of the court appointing him, and, in the absence of some conveyance or statute vesting in him title to the debtor's property, he cannot sue in the courts of a foreign jurisdiction for its recovery upon the mere order of the appointing court or by virtue alone of his appointment as receiver; and, in the absence of actual conveyance, the question whether the receiver has title is governed by the statutes of the state by whose court the appointment was made.

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

2. RECEIVERS ⊕=210—STATUTORY POWERS—CAPACITY TO SUE.

Under Code Ala. 1907, §§ 3509, 3511, 3512, and 3560, as construed by the Supreme Court of the state, a receiver appointed in involuntary proceedings against an insolvent corporation is not vested with title to the property of the corporation, but is "the mere agent of the court for the collection and distribution of the assets," and such a receiver cannot be authorized by the court to maintain an action to recover assets in a foreign jurisdiction.

3. APPEAL AND ERROR ⊕=174—REVIEW—TITLE TO CAUSE OF ACTION.

The defense that plaintiff has no title to the asserted right of action is always open, and may be raised in the appellate court, although not asserted in the court below.

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

Suit in equity by W. C. Sterrett, as receiver of the Alabama Trust & Savings Company against the Second National Bank of Cincinnati, Ohio. From the decree, both parties appeal. Reversed.

Lawrence Maxwell, Ferdinand Jelke, Jr., and Landon L. Forcheimer, all of Cincinnati, Ohio (Charles M. Leslie, Joseph Sagmeister, and J. B. Foraker, all of Cincinnati, Ohio, of counsel), for Second Nat. Bank of Cincinnati, Ohio.

Philip & S. C. Roettinger, of Cincinnati, Ohio, and Edmund H. Dryer, of Birmingham, Ala., for W. C. Sterrett.

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

KNAPPEN, Circuit Judge. The plaintiff, as receiver of the Alabama Trust & Savings Company, filed his bill in the court below to recover sums for which he alleged the National Bank was liable on account of dealings between that bank and the Savings Company and its officers. Upon final hearing on pleadings and proofs, the District Court found defendant liable for the application of a balance of the Savings Company's deposit in the National Bank, upon paper held by the latter bank on which the Savings Company appeared as principal maker, but which was found to have been given for the benefit of certain of the Savings Company's officers. Plaintiff's remaining claims were rejected. Both parties have appealed.

At the outset we are met with defendant's contention that plaintiff is without authority to maintain this suit. The Savings Company is a banking corporation organized under the laws of Alabama. In the year 1911, upon a bill filed against it in a state chancery court of Alabama, by certain of its creditors, alleging its insolvency, plaintiff was appointed receiver, and later was given, by the Alabama court, discretionary authority to prosecute the instant suit, which was accordingly brought in a federal District Court in Ohio; there having been no receivership proceedings, ancillary or otherwise, in that state.

[1] It is the settled rule that a mere chancery receiver is but an officer of the court appointing him, and that in the absence of some conveyance or statute vesting in him title to the debtor's property he cannot sue in the courts of a foreign jurisdiction for its recovery upon the mere order of the appointing court, or without other authority than that arising from his appointment as receiver; and that in the absence of actual conveyance (there was none in this case) the question whether the receiver has title is governed by the statutes of the state by whose court the appointment was made. Booth v. Clark, 17 How. 321, 15 L. Ed. 164; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; Great Western Mining Co. v. Harris, 198 U. S. 561, 573, 25 Sup. Ct. 770, 49 L. Ed. 1163; Keatley v. Furey, 226 U. S. 399, 403, 33 Sup. Ct. 121, 57 L. Ed. 273. On the other hand, it is equally well settled that, where the statute under which the appointment was made confers such title on the receiver, he may sue as of right in the courts of the foreign jurisdiction; and such courts will, in respect to such question of title, accept the construction put upon the

statute by the highest court of the state. Bernheimer v. Converse, 206 U. S. 516, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 256, and following, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. The question is: Under which classification does plaintiff receiver come?

[2] Section 3509 of the Code of Alabama (1907) provides that:

"The assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshaled and administered in courts of equity in this state."

Section 3511, which relates to proceedings for voluntary dissolution of corporations by action of stockholders, provides for the appointment by the chancery court of a receiver of "all the books, property, and assets of the corporation," and that such receiver shall *"under the direction of the court"* collect all debts due to, and sell all the property of, the corporation, paying its debts in full or ratably and dividing the residue among stockholders.[1]

Section 3512, which relates to the dissolution of insolvent corporations generally, provides for the appointment of a receiver of all the corporate property and assets, requiring that officer to exercise and perform, *"under the direction of the court,"* the powers and duties required of receivers under section 3511, and to "otherwise manage the affairs of the corporation pending final settlement thereof *as the court shall direct.*"

Section 3560, which is confined to proceedings against insolvent banks, requires the Attorney General (upon direction of the Governor, based on the State Treasurer's finding of insolvency) to institute, "in a court having jurisdiction in the county where the bank or parent bank is located," proceedings "to put the bank in the hands of some competent person"; such appointee being required to give bond in an amount to be fixed by the judge, and to "immediately take charge of the business of said bank, collecting its assets and paying off its liabilities, *under the law and rules of such court.*" It was under these statutes (although upon bill by private creditors) that plaintiff's appointment was made, and by which the question of his title is to be tested.

The decree, after reciting the corporate organization of the Savings Company under the general laws of Alabama, its insolvency, its suspension of business, and inability to resume the same with safety to the public, that its assets constitute a trust fund for the payment of its creditors and "should be marshaled and administered in this court," that upon final settlement it should be dissolved, and that a receiver "should now be appointed to administer its estate," directs that plaintiff "be and he is hereby appointed receiver of defendant, and empowered and directed to demand and take into his possession all the defendant's assets and property to which it is entitled and to recover the same, to be reduced to money and administered *under the further order of the court,*" with express authority to employ counsel and to bring actions at law or in equity "as he may be advised," and to incur expense necessarily incident thereto.

[1] All italics in this opinion ours.

It will be seen that these statutes do not expressly confer title upon the receiver; that they, at least at first view, suggest generally a court direction and control—an ordinary chancery receivership—and that the order of appointment specifically provides for the administration of the bank's estate, including recoveries by suit, under the court's order.

In Oates v. Smith, 176 Ala. 39, 57 South. 438, which involved the right of a debtor to set off a debt of the bank acquired after its insolvency against a debt due the bank, the court, recognizing the rule that in ordinary cases of receivership the receiver gets no title to the debtor's assets, passed by the question whether the receiver was vested with the legal title, basing its decision upon the trust-fund nature of the assets of the insolvent bank, which of itself forbade such set-off.

In Montgomery Bank & Trust Co. v. Walker, 181 Ala. 368, 61 South. 951, which involved the power of the superintendent of banks, under section 10 of Act No. 84 of the General Acts of Alabama of 1911 (in effect when the instant receivership was created) to maintain suit to avoid a fraudulent transaction made by the bank's officials, the court cited National Bank v. Kennedy, 17 Wall. 19, 21 L. Ed. 554, as asserting the power of a receiver under the National Bank Act, "as statutory assignee," to collect the assets of the bank; but the opinion contains no suggestion that the superintendent of banks was in fact such assignee. On the contrary, in asserting the constitutionality of the act, as against an alleged lack of due process, the court expressly said (page 378 of 181 Ala., page 954 of 61 South.) that it did not "understand the act as making this proceeding operate as a change in the ownership or legal title to the property, but the superintendent is in reality a receiver, who takes charge of the bank for the benefit of the stockholders, depositors, and other creditors."

In the later case of Cobbs, Receiver, v. Vizard Investment Co., 182 Ala. 372, 62 South. 730, Ann. Cas. 1915D, 801, brought under section 3509, supra, for the administration of an insolvent bank, in denying the right of the receiver (for lack of interest in the distribution) to appeal from a decree allowing the claim of a creditor, the court (page 374 of 182 Ala., page 730 of 62 South., Ann. Cas. 1915D, 801) characterized the receiver as "the mere agent of the court for the collection and distribution of the assets of the insolvent corporation under orders of the court which fully protect him," etc., saying (page 375 of 182 Ala., page 731 of 62 South., Ann. Cas. 1915D, 801): "The receiver is the mere creature of the court. He must give heed to his master's voice."

In the still later case of Coffey v. Gay, 191 Ala. 137, 67 South. 681, L. R. A. 1915D, 802, which involved the right of a receiver of an insolvent bank, appointed under section 3560, supra, to appeal from an order in the principal suit denying the liability of stockholders for unpaid subscriptions, the proposition involved in Cobbs v. Vizard Investment Co. was reasserted, and upon the same grounds there announced; the court quoting from the opinion in that case the language above set out, and further saying that "this suit the receiver was without authority to bring until he first obtained permission of the court of his appointment."

True, in the still later case of Hundley v. Hewitt, 195 Ala. 647, 71 South. 419, which involved the right of a receiver of an insolvent insurance company, appointed under section 4552 of the Code, to recover unpaid stock subscriptions (under section 3509, supra, and section 3744), the court, in support of the existence of such power, quoted the definition of the title of the "trustee in bankruptcy" as contained in Cartwright v. West, 173 Ala. 202, 55 South. 917, and expressed (page 654 of 195 Ala., page 422 of 71 South.) the opinion that:

"The receiver appointed in this case, acting under orders of the court appointing him—a court of competent jurisdiction, with full power to settle the affairs of the dissolved corporation—has rights and duties of a kindred character to those of a trustee in bankruptcy, *so far as the question here concerned is involved.*"

But we find nothing in the opinion asserting that the receiver holds title to the property of the insolvent bank; the implications are all to the contrary.

The instant case is readily distinguishable from cases relied upon by plaintiff. In Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337, the "temporary agent and receiver" of the insurance company (page 223 of 103 U. S., 26 L. Ed. 337) was held (page 225 of 103 U. S., 26 L. Ed. 337) to be "the statutory successor of the corporation for the purpose of winding up its affairs." In Bernheimer v. Converse, supra, and in Converse v. Hamilton, supra, it was held that under the Minnesota statute, as interpreted by the Supeme Court of that state, as well as by the Supreme Court of the United States, "the receiver is not the ordinary chancery receiver or arm of the court appointing him, but a quasi assignee, and a representative of the creditors." And see Courtney v. Croxton (C. C. A. 6) 239 Fed. 247, 249, 152 C. C. A. 235.

In Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, the bank's receiver, which the Washington court (whose statute was involved) called a "quasi assignee for creditors," was declared by the Massachusetts court (page 579 of 175 Mass., page 888 of 56 N. E., 49 L. R. A. 301) to be "the owner of the legal title to this fund as a trustee for the creditors." In Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725, the Washington statute was similarly construed.

There is a marked, and not unnatural, tendency in the courts in favor of the construction, where possible, of statutory proceedings for the dissolution of corporations (as distinguished from ordinary creditors' suits) as vesting in the receiver the title to corporate assets (in Mining Co. v. Harris, supra, the receiver was appointed in a creditors' suit); and were it not for the decisions in Bank v. Walker, supra, Cobbs v. Investment Co., supra, and Coffey v. Gay, supra, such construction of the Alabama statute would present less difficulty. But this construction seems impossible without disregarding these three decisions, and in the face of the fact that neither of the other Alabama decisions cited contains anything necessarily inconsistent with the holdings in the three cases mentioned. In so saying, we have not overlooked the fact that in Cobbs v. Investment Co. and Coffey v. Gay the orders sought to be appealed from were made in the court of principal administration.

We are thus constrained to hold that the Alabama statute confers upon the receiver in the instant case no title to the bank's assets, and thus no right to maintain the instant suit; for (as said in Gt. Western Mining Co. v. Harris, supra, in which the appointing court had authorized the action by the receiver), in the absence of statutory authority therefor, the receiver's right "to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered." Page 576 of 198 U. S., page 774 of 25 Sup. Ct., 49 L. Ed. 1163.

[3] It follows that in the present state of the record the defendant is entitled to a dismissal of the suit, notwithstanding its apparent failure to call to the attention of the court below the proposition on which our decision is based; for, if plaintiff had no title and no right of action in the court below, that court was without power to render decree in his favor. See Gt. Western Mining Co. v. Harris, supra, at pages 577, 578 of 198 U. S., at page 770 of 25 Sup. Ct., 49 L. Ed. 1163. A defense that plaintiff has no title to the asserted right of action is always open.

A disposition by this court of the appeal without determination of the merits is unfortunate, and it is with reluctance that we have reached the conclusion that there is no escape from it. But lack of title in plaintiff is not a mere "technicality," in the ordinary meaning of that term, for there is always, theoretically at least, a possibility that defendant may be subjected to further suit by the owner of the title and right of action. The present difficulty could readily have been avoided by ancillary receivership, and the dismissal of the case will not necessarily preclude further proceedings. Whether an ancillary receivership, and an ancillary bill thereunder, would save the present suit from dismissal, we need not decide. See Coal & Iron Co. v. Reherd (C. C. A. 4) 204 Fed. 859, 882, 123 C. C. A. 155. Such a question, if presented, would properly be addressed to the court below; and counsel have not been heard upon it here.

The decree of the District Court is reversed, and the record remanded to that court, with directions to take further proceedings not inconsistent with this opinion.

MULLER v. GLOBE & RUTGERS FIRE INS. CO. OF CITY OF NEW YORK.

MULLER v. INSURANCE CO. OF STATE OF PENNSYLVANIA.

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

Nos. 16, 17.

1. INSURANCE ⟸272, 668(6)—MARINE INSURANCE—DISCLOSURE.
An applicant for marine insurance is under legal obligation to disclose all facts material to the supposed risk; but the materiality of any fact not disclosed is as much a question of fact as that of nondisclosure or disclosure.

2. INSURANCE ⟸665(2)—MARINE INSURANCE—DISCLOSURE—EVIDENCE.
In an action on maritime policies protecting the insured against war risk only, based on a binder issued by an agent of the insured, which binder specified no warranties, evidence *held* to show that the underwriter knew that the applicant for insurance did not want insurance with warranties as to neutrality, because he could not give them, and hence that such applicant was not bound to disclose that his nationality was that of one of the belligerents.

3. INSURANCE ⟸668(10)—JURY QUESTION—PROXIMATE CAUSE.
Proximate cause of an injury or loss is a question for the jury, unless there is but one inference possible in the settled facts.

4. INSURANCE ⟸402—MARINE INSURANCE—POLICIES—WAR RISK.
A mere increase of sea peril by removal for belligerent purposes of aids to navigation does not afford ground for recovery under a policy of maritime insurance protecting against war risk only.

5. INSURANCE ⟸413—MARINE INSURANCE—"PROXIMATE CAUSE."
That cause is proximate which sets other causes in motion, and an intervening act is not a "proximate cause," unless it is efficient to break the causal connection.

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

c6. INSURANCE ⟸413—MARINE INSURANCE—WAR RISK—POLICY—PROXIMATE CAUSE.
A shipper of cotton destined to a Swedish port, there to be transshipped to Austria, which country, with Germany, was engaged in war with Great Britain and its allies, secured a maritime policy protecting against war risk only; the insurance covering the risk of capture, seizure, or destruction or damage by men of war, by letters of marque, takings at sea, arrest, restraints, detainments, and acts of kings, princes, and people, authorized by and in prosecution of hostilities between belligerent nations. The master of the vessel, intending to proceed to a Scottish port and there to submit to examination by British authorities, was boarded by a British cruiser, which sent an armed party on board and directed the steamer to take a particular route to the Scottish port and by night. During the night, aids to navigation having been removed or extinguished, the vessel was wrecked. The master of the vessel relied on the alleged superior local knowledge of the naval officer in charge of the boarding party. *Held* that, as the vessel would not have been boarded, or directed to proceed during the night, but for the war, the loss was the proximate result of acts authorized in prosecution of hostilities, and hence covered by the policy.

7. INSURANCE ⟸132—"BINDER."
A "binder" is used in marine insurance as an application for insurance made on behalf of the proposed insured and approved by the insurer or his agent.

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

Libels by Max F. Muller against the Globe & Rutgers Fire Insurance Company of the City of New York and against the Insurance Company of the State of Pennsylvania. From decrees for the libelant, respondents appeal. Affirmed.

Appeals in admiralty from final decrees entered in the District Court for the Southern District of New York. The cases were tried together below, and argued here on one record. Libelant is a subject of the Austro-Hungarian Empire resident in the United States. He sued on policies of marine insurance issued by the respective respondents, protecting against "war risk" only. The form of words used by both companies was as follows: "This insurance covers only the risk of capture, seizure, or destruction or damage by men of war, by letters of marque, by takings at sea, arrests, restraints, detainments, and acts of kings, princes, and people, authorized by and in prosecution of hostilities between belligerent nations; but excluding claims for delay, deterioration and/or loss of market and warranted not to abandon in case of capture, seizure, or detention until after condemnation of the property insured, nor until sixty days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade and free from any claim for loss or expense in consequence thereof or of any attempt to evade blockade; but in event of blockade to be at liberty to proceed to an open port and there end the voyage. Foregoing clause does not cover any war risk on shore."

Neither respondent obtained from Muller (the insured) any warranty against seizure or loss by reason of belligerent ownership. Such warranty is at times inserted in "war risk" insurance, and one form thereof is as follows: "Warranted by the assured that the merchandise covered by this insurance is not owned, consigned or shipped to a German or Austrian subject, and is not intended for consignment to Austria and/or Germany either directly or indirectly."

[7] Both policies in suit resulted from a "binder," issued by one man, who for the purposes of these suits was the agent of both companies. A "binder" is (inter alia) an application for insurance, made on behalf of the proposed insured, and approved by the insurer or his agent. The binder in this instance specifically stated "No warranties"—a phrase admittedly meaning that Muller did not want policies containing such a limitation as above quoted. Accordingly policies issued, in which the above-quoted "war risk" clause covered the whole adventure, and attached to a large quantity of cotton shipped at Galveston on the Danish steamer Canadia, bound to Swedish ports, and cargo consigned to Swedish subjects.

The evidence is clear that the insured cotton was intended for reshipment from Sweden to Austria, and that Muller knew it; his business both before and after the opening of the present war being the purchase of cotton in the United States for the use of certain named Austrian manufacturers. When insurance effected, however, and when the Canadia sailed, no British orders in council had as yet directed seizure of goods such as cotton in neutral bottoms bound to neutral ports, even though shown to be intended for transshipment to a country at war with Great Britain. The steamer's intended course was to the northward of both the Orkneys and Shetlands, and thence to Kirkwall, Scotland, there to submit to examination by British authorities; at least such is the uncontradicted evidence of her master. The usual peace route would have been through the Pentland Firth, a course then deemed dangerous on account of mines, etc.

When within 120 miles of the British coast, the Canadia was boarded by the British cruiser Hilary, which sent an armed party (one officer and six men) aboard, and told the steamer to go to Kirkwall, by the passage between the Orkneys and Shetlands, and by night. The aids to navigation, and particularly the light on the Fair Isle (between the Shetlands and Orkneys), were removed or extinguished, and the Canadia's master objected to the night passage for that reason. He was compelled to attempt it, and a course was

adopted that should have carried clear of Fair Isle by about 12 miles. In doing this the British naval officer and the master of the Canadia consulted, and the latter deposes that he relied on the alleged superior local knowledge of the former. Proceeding by dead reckoning, and taking soundings, both officers seem to have thought the ship clear of Fair Isle, and changed course, but too soon, as the vessel ran ashore on that islet at the foot of a cliff 300 feet high, and became a total loss.

The insurers refused payment, and defended these resulting suits on two grounds: (1) That Muller failed to disclose to them the material fact that he was a subject of Austria-Hungary, a country at war with Great Britain. (2) That the loss incurred was not due to "war risks," but to peril of the sea. Both defenses having been overruled, and decrees entered for libelant, these appeals were taken. Other points were raised in argument, not necessary to mention further.

Frederick R. Coudert and Howard T. Kingsbury, both of New York City, for appellants.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] It is to be noted that respondents do not complain of concealment in the sense of suggestio falsi, nor allege that there was suppressio veri, in the sense of maintaining silence as to any subject of investigation. The assertion is that Muller failed in the active duty, incumbent upon him as an applicant for insurance, of disclosing every fact material to the proposed contract, which as a matter of business and fair dealing ought to have been disclosed. Such is the legal obligation of the assured, though the materiality of any fact not disclosed is as much a question of fact, as is that of disclosure or nondisclosure. Blackburn v. Vigors, 12 A. C. (1887) 531; Maryland Ins. Co. v. Ruden, 6 Cranch, 338, 3 L. Ed. 242; McLanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98; Royal Ins. Co. v. Martin, 192 U. S. 149, at 163, 24 Sup. Ct. 247, 48 L. Ed. 385.

We will assume (but not decide) that under the circumstances existing Muller's nationality was a material fact. We nevertheless incline to the opinion that disclosure was actually made. Such seems the necessary implication from the brief memorandum filed by the trial judge, and such is the evidence of two witnesses. The sum of their story is that Muller was shipping a great deal of cotton, taking out much "war risk," and other insurance and that the agent who accepted the "binder" application herein had been told repeatedly that Muller was an Austrian. This the agent denies, but we find the balance of evidence against him, largely from consideration of the binder itself. That document as prepared by libelant's broker for presentation to the underwriter, stated in substance that Muller would not warrant his nationality as neutral. That any sensible man, looking at such an application from a Max Muller, could have believed him an American, when insurance with warranty was cheaper, is something of a tax on credulity. We cannot accept appellee's contention that the insertion

in the binder of the phrase "No warranties" relieved Muller as a matter of law from the duty of disclosure: but we do hold, as triers of the facts, that the language quoted is potent evidence to sustain libelant's claim that when the binder was accepted, the underwriter knew that Muller did not want insurance with warranties, because he could not honestly give them.

[3-6] The second contention herein raises ultimately the question of proximate cause, of which, after centuries of litigation, the Squib Case still remains the best and classic example. That the Canadia and her cargo was seized, arrested, and detained within the meaning of the policy we think too plain to require more than mention; the sole query is whether her loss proximately resulted therefrom.

Counsel have, we think, collated all the reported cases whose facts are suggestive;[1] but it should be remembered that, however desirable is the exercise of ordered thought and arrival at a logical result, proximate cause is a question for the jury, unless there is but one inference possible from the settled facts. Therefore decisions of judges are rarely precedents in the same way as are legal rulings. Donegan v. Baltimore, etc., R. R., 165 Fed. 869, 91 C. C. A. 555; Erie R. R. v. Russell, 183 Fed. 722, 106 C. C. A. 160. Of the cases noted below, the Ionides decision best serves as text or starting point. From that ruling it is argued that, if (as was there held) going ashore at a notoriously dangerous point (Hatteras), whose lighthouse had been extinguished as a war measure, was not a "consequence of hostilities," but a sea peril, neither was a stranding on the unlighted Fair Isle proximately caused by any action of "kings, princes, and people," and more especially the British cruiser Hilary.

The contention is not unattractive, and we fully recognize it as a rule of law, supported by reason and the authorities quoted, that a mere increase of sea peril, by removal for belligerent purposes of all or any aids to navigation, does not per se afford ground for recovery under such "war risk" as this, in respect of a loss due to the absence of accustomed assistance. Such act, indeed, no more than restores the dangers of the seas to their normal.[2]

But the problem still remains whether the Canadia's loss was proximately due to sea peril, and solution primarily depends on the meaning of "proximate," as construed by judicial commentators. That cause is proximate which sets the other causes in motion; only when causes are independent is the nearest in time looked to. Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, a case whose facts are instructive and interesting. If there is an unbroken connection between act and injury, the act causes the injury; an intervening act is not the proxi-

[1] Anderson v. Masten, A. C. (1908) 334; Livie v. Janson, 12 East, 648; Green v. Emslie, 1 Peake (N. P.) 278; Hagedorn v. Whitmore, 1 Starkie, 157; Ionides v. Universal, etc., Ass'n, 14 C. B. (N. S.) 259; Magoun v. New England, etc., Co., 1 Story, 157, Fed. Cas. No. 8961; Schieffelin v. New York, etc., Co., 9 Johns. (N. Y.) 21; Patrick v. Commercial Ins. Co., 11 Johns. (N. Y.) 14; Coolidge v. New York, etc., Co., 14 Johns. (N. Y.) 308.

[2] Sed quære, if a belligerent not only removed the civilized aids of peace, but set up false beacons or the like?

mate cause of injury, unless it is efficient to break the causal connection (Milwaukee, etc., R. R. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256).[3]

These rules are guides to ascertaining whether, as matter of fact, the Hilary's seizure of the Canadia caused the loss of the latter, and here both the facts and reasoning of British, etc., Co. v. The King, 33 Times L. R. 520, are illuminating. There a merchant vessel, chartered by the crown as a transport and insured substantially against war risks, was compelled to navigate without lights in the Mediterranean, and while so doing was rammed and sunk by a French man of war. Rowlett, J., held in substance that the obligation, imposed by military necessity, of doing so dangerous a thing as to run at night without lights, made such obligation the proximate cause of collision.

We entertain a similar view in this cause. The Hilary did not say to the Canadia, "Go to Kirkwall, as you intended; the lights are out, and you must pick your own way," but compelled her to pursue an imposed and dangerous route, and especially to go by night in charge of a naval officer whose local knowledge was perhaps deficient, and certainly not useful. Not only did a belligerent's necessity create the peril of unlighted seas, but by "acts of kings, authorized in prosecution of hostilities," the Canadia was forced to run risks that even in time of war she could and would have escaped under the uncontradicted evidence. Furthermore, the very purpose of compelling such navigation was to prevent aid and comfort reaching enemies of Great Britain; therefore the insured cotton was lost in the continuing process of detaining the ship that carried it, for purposes of search, and seizure, too, if the facts found had warranted it.

Thus we find no intervening cause, breaking the causal connection between the control assumed by the Hilary's boarding party, and the loss of the ship. There was no time when the shipmaster was left to navigate his own ship in his own way; she was lost while he was doing what he had to do. A workman compelled to handle familiar tools with one eye blindfolded, and injured by his own blundering use of them, is in truth injured by the person who put compulsion upon him.

For these reasons, the decrees appealed from are affirmed, with costs.

[3] To the same effect are our own decisions in Boston, etc., R. R. v. Miller, 203 Fed. 968, 122 C. C. A. 270; The Anchoria, 83 Fed. 847, 27 C. C. A. 650; Long Island R. R. v. Killen, 67 Fed. 365, 14 C. C. A. 418; The Portia, 64 Fed. 811, 12 C. C. A. 427.

ELLIS v. DODGE BROS.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1917.)

No. 3033.

1. CONTRACTS ⇐10(4)—TO SELL AUTOMOBILES—MUTUALITY.
Agreement whereby automobile manufacturer grants right to dealer to sell them, which provides it will ship cars to him with sight draft attached, that he will appoint associate dealers in his territory, that he will make claim for shortages within 10 days after receipt of shipments, and that he authorizes it to make shipment in accordance with the schedule therein contained, obliges it to sell to him; the contract not being canceled as therein authorized.

2. CONTRACTS ⇐162—CONSTRUCTION.
Agreement between automobile manufacturer and dealer, in the clause providing for sale by manufacturer to dealer of cars according to a given schedule, stipulated that the dealer would not cancel any cars in the schedule, without giving 15 days' notice, in which event the manufacturer might cancel an equal number, and in another clause provided that the agreement should expire by limitation in a year, or might be canceled by either party on 15 days' notice, and that cancellation or termination of it would act as a cancellation of all orders from the dealer for cars not delivered prior to the cancellation. *Held* that, in case of conflict between the clauses, the specific provision with reference to cancellation in the clause containing the schedule governed the schedule, so that, the agreement having expired by limitations, without any modification of the schedule, the dealer had a right of action for nondelivery of cars provided in the schedule.

Grubb, District Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by Frampton E. Ellis, administrator of Samuel A. Pegram, deceased, against Dodge Bros. Demurrer to the petition was sustained (237 Fed. 860), and plaintiff brings error. Reversed and remanded.

Shepard Bryan and Madison Richardson, both of Atlanta, Ga., for plaintiff in error.

Alex C. King and Daniel MacDougald, both of Atlanta, Ga. (King & Spaulding, of Atlanta, Ga., and McGregor & Bloomer, of Detroit, Mich., on the brief), for defendant in error.

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

BATTS, Circuit Judge. Suit was instituted by Samuel A. Pegram against Dodge Bros. on an instrument which describes itself as a dealer's agreement. Upon the death of Pegram his administrator became a party. The material parts of the agreement may be thus summarized:

(1) The manufacturer grants unto the dealer the right to sell Dodge Bros. motorcars and repair parts during the life of the agreement in the territory described.

(2) The price at which cars are to be billed is indicated, running from 6 to 12 motorcars, inclusive, at 15 per cent. off manufacturer's list price, to 1,000 cars or more, at 25 per cent. off.

(3) The prices of repair parts are indicated.

(4) A deposit of $1,000 is required to protect the manufacturer against nonpayment of repair parts accounts; the deposit to be returned upon the expiration of the agreement, with interest at 6 per cent.

(5) The dealer agrees to appoint associate dealers.

(6) "The manufacturer will ship cars to the dealer, with sight draft against bill of lading attached, and the dealer shall pay such draft with exchange, upon presentation. Upon failure to do so, the dealer will pay interest thereon at the rate of 6 per cent. per annum from the date of presentation."

(7) "This agreement shall expire by limitation June 30, 1915, or may be canceled by the manufacturer or dealer upon 15 days' written notice. The termination or cancellation of this agreement will immediately act as a cancellation of all orders received from the dealer for motorcars or parts, which have not been delivered prior to date of cancellation."

(8) The dealer is to make claims for shortage within 10 days after receipt of a shipment.

(9) The manufacturer reserves the right to change list prices at any time.

(10) "The dealer authorizes the manufacturer to make shipments of Dodge Bros. motorcars in the quantities and according to the schedule printed below. The dealer agrees to accept and pay for such motorcars as shipped, and will not cancel any motorcars in this schedule without giving the manufacturer 15 days' written notice, in which event the manufacturer will have the right to cancel a number of motorcars equal to those canceled by the dealer." The list is then given, as follows: October, 8 touring cars; November, 2 roadsters and 7 touring cars; December, 2 roadsters and 16 touring cars; January, 2 roadsters and 19 touring cars; February, 3 roadsters and 21 touring cars; March, 2 roadsters and 25 touring cars; April, 3 roadsters and 24 touring cars; May, 3 roadsters and 30 touring cars; June, 3 roadsters and 30 touring cars.

(11) The dealer agrees to purchase repair parts that will inventory not less than $3,000. Upon the termination of the agreement, the manufacturer agrees to purchase from the dealer any new repair parts that he may have in stock, the dealer to prepay transportation to Detroit.

(12) "It is the intention of the manufacturer to at all times establish list prices which represent a fair value to the car owners, and a legitimate profit to the dealer, discounts considered. Therefore the dealer should sell only at these list prices to enable him to successfully conduct a permanent business."

(13) A provision as to the manufacturer's warranty.

The agreement was dated July 29, 1914. During the period covered by the agreement, 64 cars were delivered to the plaintiff. Plaintiff, contending that 136 cars were still due under the contract, sought to recover damages for the failure to deliver these cars. The plaintiff alleged that in order to carry out the contract he had rented property

at the rate of $210.60 per month, that he had devoted his time to the business contemplated by the agreement, that he had maintained a selling force during the period of the contract, and that he had incurred other expenses which were set up in the petition. The petition is in a number of counts; the first, third, fourth, and fifth being based upon the theory that the agreement, having never been canceled, was continuing until expiration under its terms, and that, plaintiff having completely performed, and Dodge Bros. having accepted the benefits accruing to it by his performance, the defendant became bound to perform its part of the agreement. Counts 2 and 6 are upon the theory that, at all events, the dealer's agreement constituted an offer to sell the cars therein set out, and this offer was accepted by Pegram's placing orders for the 200 automobiles specified in the agreement.

The defendant filed a number of special exceptions to the petition, and by general demurrers raised the following issues:

(1) That the contract was in law a nullity.

(2) That it was not a binding offer to sell, by reason of the arbitrary right of cancellation, and that the acceptance of the offer would not make a binding contract, as one party would be bound and the other not; the effect being to make the contract unilateral and void.

(3) That if the cars were ordered, and not delivered, no right of action would arise, unless the orders were first accepted.

(4) That no suit could be maintained, based upon failure to deliver cars after termination of the contract, by reason of the fact that all orders undelivered at the expiration had been canceled by agreement of the parties.

[1] In disposing of this case we will proceed upon the assumption that when business men negotiate with each other, and reduce the result of their negotiations to writing, and speak of that which they execute as an agreement between themselves, that the purpose was to accomplish something. The instrument, if it is capable of such construction, will be so construed as to make all of its parts consistent and effective. So considered, it is very apparent that it was the intention of Dodge Bros. to sell motor cars to the Pegram Motorcar Company, and that it was the purpose of the latter to buy and pay for such cars, and to resell them. It is apparent that the latter had a right to buy, and this must carry with it the obligation of the former to sell. Any other conclusion would be in conflict with the language used:

"The manufacturer grants unto the dealer the right to sell Dodge Bros. motorcars and repair parts during the life of the agreement." "The dealer agrees to appoint associate dealers at all points in his territory." "The manufacturer will ship cars to the dealer with sight drafts against bill of lading attached." "To facilitate and expedite the adjustment of claims for shortages, the dealer agrees to make claims within ten days after the receipt of shipment." "The dealer authorizes the manufacturer to make shipments" in accordance with the schedule. "The dealer agrees to accept and pay for such motorcars as shipped, and will not cancel any motorcars in this schedule without giving the manufacturer 15 days' written notice, in which event the manufacturer will have the right to cancel a number of motorcars equal to those canceled by the dealer."

The language used, and other language in the agreement, is inconsistent with any theory other than that defendant undertook to sell,

and plaintiff undertook to buy and pay for, motorcars; and the schedule referred to indicates the number to be bought and the time when they are to be bought and paid for, unless modified by the timely action of the purchaser or the exercise of a reciprocal right on the part of the manufacturer. One of the provisions of the contract is to this effect:

"This agreement * * * may be canceled by the manufacturer or dealer upon 15 days' written notice."

The circumstance that the contract provides a method and time of cancellation carries with it the idea that there is something to cancel. Defendant insists that, inasmuch as this cancellation clause could have been exercised at any time within the life of the contract, the contract was thereby rendered nugatory. Even assuming that the cancellation clause could have been arbitrarily exercised without giving any consideration to expenditures made by either party, it is, nevertheless, a contract which would always be effective for at least the 15 days required for written notice. But defendant insists that, the contract having been made on July 29, 1914, and not providing for the delivery of any cars until October of that year, there was a period of more than 2 months when either party could have rendered the contract entirely nugatory by giving the 15 days' written notice.

It is a sufficient answer to this contention that no such action was taken between July 29 and October 1, 1914, and that, if the contract had no force prior to the latter date, the instrument being in existence at that time, and no action having been taken looking to its cancellation, it was effective from that time until the date of its expiration. But it is a mistake to assume that nothing could have been done under the terms of the contract during the period mentioned. The plaintiff was under obligations to purchase repair parts that would inventory at all times during the life of the agreement not less than $3,000. He not only had the obligation to purchase these repair parts, but he had the right to purchase them at a designated discount. The contract provided also for a deposit by him, and he was entitled to interest at 6 per cent. during the time of the deposit. According to the allegations of the petition, immediately upon the signing of the agreement the complainant began to make expenditures and to personally labor in carrying out its terms. The clause of cancellation quoted, while making his investment somewhat precarious, was at least warrant for such action until receipt of the notice provided for.

Even if it be assumed that the contract is one which, on account of its unilateral character, or for any other reason mentioned by defendant, could not primarily have been enforced, it determined the respective rights of the parties during the time both parties treated it as subsisting and effective; and the defendant, having permitted, without any effort to exercise its right of cancellation, the plaintiff to carry out his contract fully, must be held to have incurred a reciprocal obligation.

[2] The paragraph in which appears the date of expiration and the provision with reference to cancellation has also the following:

"The termination or cancellation of this agreement will immediately act as a cancellation of all orders received from the dealer for motorcars or parts which have not been delivered prior to date of cancellation."

It is insisted that, by virtue of the terms of this provision, when on June 30, 1915, the contract expired by limitation, this expiration resulted in a cancellation of the right of plaintiff to receive the cars named in the schedule. To give the clause quoted the effect contended for by defendant would be to give to a violation of the contract the effect of abrogating the results of a violation. This clause should be given such a construction as will make it consistent with the balance of the agreement. The schedule gives a definite right to the dealer to have shipped to him the 200 cars at times therein detailed. He had a right, on 15 days' written notice, to cancel any part of this schedule. If he exercised the right, a corresponding right arose upon the part of the manufacturer; but it was not exercised by either party. The specific provisions with reference to canceling, in the clause which contains the schedule, will be held to govern the schedule, even if such provision be in conflict with the general paragraph as to cancellation and expiration of the contract. If necessary to give effect to all parts of the agreement, it should be held that there was an obligation to deliver these 200 cars, entirely without reference to any order for cars, and to hold that on that account the quoted provision did not apply. A simpler disposition of the entire matter, however, would be to assume that the parties, having provided the time of the expiration of the contract, and having provided for its cancellation upon 15 days' written notice, intended to use the words "termination" and "cancellation," in the clause "the termination or cancellation of this agreement," as synonymous.

Again, it does not follow that because, under the terms of the contract, the order shall be regarded as having been canceled, that the legal consequences of a failure to furnish shall not result. The cancellation of the order could properly follow a failure to furnish within the time provided, and yet damages for failure to furnish survive.

The general demurrers to the petition should not have been sustained. The judgment is reversed, and the cause remanded for action in accordance herewith.

Reversed.

GRUBB, District Judge, dissents.

ROYAL EXCH. ASSUR. OF LONDON v. THROWER.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1917.)

No. 3113.

1. INSURANCE ⟸319(1)—FIRE INSURANCE—BREACH—OCCUPANCY.
   Breach of a provision in a fire policy with reference to occupancy avoids the policy, notwithstanding the absence of a causal connection between the increased hazard and the origin of the fire.
2. INSURANCE ⟸146(2)—FIRE POLICIES—CONSTRUCTION.
   The language of a fire policy being that of the insurance company should, where involved, prolix, and conflicting, receive that construction which will as nearly as may be give effect to all parts of the instrument and bring results as nearly approximating equity as possible.

3. INSURANCE ⊂=322—FIRE INSURANCE—INCREASING HAZARD.
Where one clause of a fire policy provided for forfeiture if the hazard should be increased by any means within the control or knowledge of the insured, while a subsequent clause of the same paragraph provided for forfeiture "if any change other than by death of the insured take place in the interest, title or possession of the subject-matter of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise." Other clauses of the policy provided that any increase of hazard should be made known to the company at the time of the renewal or the policy should be void. *Held*, that the several provisions should be construed together, and the policy will not be avoided by an increase of hazard resulting from a change in occupancy on insured's demise of the premises, unless it is within the control or knowledge of the insured.

4. INSURANCE ⊂=319(1), 668(4)—FIRE INSURANCE—INCREASE OF HAZARD.
Whether the hazard was increased by reason of conducting on the insured premises a certain business is a question of fact for determination as ordinary questions of fact, and cannot be decided by reason of the fact that the insurer charged higher rates for that character of occupancy than others.

5. INSURANCE ⊂=322—FIRE POLICIES—OCCUPANCY—CHANGE.
Where a building described as occupied for warehouse and storage purposes was unoccupied when a fire policy was written and the policy required occupancy, the subsequent occupancy of the building by the insured's lessee was not a change that increased the contemplated hazard; the policy authorizing change of occupants without increase of hazard.

6. INSURANCE ⊂=147(2)—FIRE POLICIES—WHAT LAW GOVERNS.
A fire policy issued on Georgia property is subject to the Georgia statutes with reference to the liability of fire insurers.

7. INSURANCE ⊂=319(1)—FIRE POLICIES—STATUTE.
Civ. Code Ga. 1910, § 2482, providing that any change in the property or the use to which it is applied without the consent of the insurer whereby the risk is increased voids the policy, leaves within the discretion of the insurer the matter of the effect of increase of hazard.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Suit by the Royal Exchange Assurance of London against Marvin L. Thrower. From a decree (240 Fed. 811, 1024) in favor of defendant and allowing his claim for a set-off, complainant appeals. Affirmed.

Alex C. King and Daniel MacDougald, both of Atlanta, Ga., for appellant.

George Westmoreland and Wm. D. Ellis, Jr., both of Atlanta, Ga., for appellee.

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

BATTS, Circuit Judge. An insurance policy was issued by appellant company upon property thus described:

"The following described property, while located and contained as described as contained herein and not elsewhere, to wit, M. L. Thrower, $5,000.00 on the one-story, frame, composition-roof building and additions thereto attached, occupied for warehouse and storage purposes, and situated on Irwin street, Sampson street and the Southern Railroad, in Atlanta, Georgia."

The policy was subject, in favor of Mrs. Caroline Hertzfeld, to the standard mortgage clause, which provided that:

"The interest of the mortgagee could not be invalidated by any act or neglect of the mortgagor * * * nor any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy."

The insured property having been totally destroyed by fire, the insurance company paid the amount of the policy to Mrs. Hertzfeld, took an assignment from her of the note secured by the mortgage, and instituted suit against the appellee thereon. The defendant asking for recovery on the policy, plaintiff replied that the policy had been avoided by a change of occupancy increasing the hazard. Judgment was for defendant.

At the time of the issuance of the policy, the premises were not occupied. Thereafter the property was leased to and occupied by the A. A. Smith Cotton Products Company, which concern carried on a business which involved the storage of cotton and certain cotton manufacturing processes. It is claimed that this occupancy was more hazardous than that indicated by the description of the property insured as being "occupied for warehouse and storage purposes." Pertinent provisions of the policy are as follows:

"This entire policy * * * shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured; * * * or if any change, other than by the death of the insured, take place in the interest, title or possession of the subject matter of insurance (except change of occupants without increase of hazard) whether by legal process or judgment, or by voluntary act of the insured or otherwise."

The property insured was burned as the result of a fire which started in another building, the character of the occupancy having no relation thereto.

[1] It seems to be the law that a breach of the provision with reference to occupancy avoids the policy, notwithstanding the absence of a causal relation between the increased hazard and the origin of the fire. Imperial Fire Insurance Co. of L. E. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; German Fire Insurance Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868.

A different conclusion would seem to be more consonant with the established principles of equity. But, assuming this to be the law, and recognizing that the result could follow only from a very strict, technical, and literal construction of the policy, and applying also the principle that forfeitures are not favored in equity, this policy will not be held to have been forfeited, unless it clearly appears that its terms have been violated.

[2, 3] It is quite possible to consider the provisions of the policy which have been cited as correlative, instead of antagonistic. The policy recognizes that the risk may be increased without the knowledge of the insured, and as the result of something beyond his control; and the stipulation is that a forfeiture shall take place only in case the increase is within his control and within his knowledge. The contract contemplates that there might be changes in the occupancy.

While forbidding any change in possession, other than this change of occupants, it evidently regards such a change an ordinary incident of the use of realty, not requiring cancellation. This change, however, of the occupants must be one without increase of hazard. There is nothing to indicate that while all other increases of hazard must, in order to bring about a forfeiture of the contract of insurance, be within the knowledge of the insured, increase of hazard resulting from a change of occupants will avoid the policy, whether the insured has a knowledge of the increase of hazard or not. The evident general policy of the insurance contract is to create a forfeiture only when the insurer is to blame, and it will not be assumed that this general policy is departed from with reference to a matter to which it ought peculiarly to apply unless that purpose is made manifest.

The language of an insurance policy is the language of the company. It is prolix, involved, conflicting. Important provisions, printed in small type, are rarely read by policy holders. If read, the policy holder would know little more about the contract entered into. If the companies desire clearness, there would appear to be no good reason why it should not be attained; and, in its absence, the courts will give that construction which will, as nearly as may be, give effect to all parts of the instrument and bring results as nearly approximating equity as possible.

The insurance companies have shown no lack of capacity in so framing language as to protect themselves, and, if they had intended the result herein contended for, the first of the clauses would doubtless have read something as follows:

"This policy shall be void if the hazard be increased by any means within the control or knowledge of the insured, and if increased by a change in occupants, whether or not within his knowledge or control."

The construction given the quoted provisions of the policy is supported by other clauses. The following clause would seem to require knowledge of the increase of hazard upon a renewal, and evidently contemplates that it may to that time continue effective notwithstanding increase:

"The policy may by renewal be continued * * * provided that any increase of hazard must be made known to this company at the time of the renewal or this policy shall be void."

Another clause provides for return of premium if the "policy shall be canceled * * * or become void or cease."

Notwithstanding the separation within the paragraph of the clauses of the policy first cited, the conclusion is reached that they must be construed together, and it is held that an increase of hazard resulting from a change in occupants must be within the control or knowledge of the insured.

This conclusion is not without something of support in the authorities. Merrill v. Ins. Co. of N. A. (C. C.) 23 Fed. 245; 3 Joyce on Insurance, § 2222; N. B. Merc. Co. v. Union S. Y., 120 Ky. 465, 87 S W. 285; East Texas F. Ins. Co. v. Kempner, 12 Tex. Civ. App. 533,

34 S. W. 396; Northern Assur. Co. v. Crawford, 24 Tex. Civ. App. 574, 59 S. W. 916; Neb. Ins. Co. v. Christiensen, 29 Neb. 565, 45 N. W. 928, 26 Am. St. Rep. 407.

There is nothing to indicate that the insured had any knowledge of the fact, if it be a fact, that the lease of his property resulted in a change of occupancy with increase of hazard. On the contrary, the testimony is to the effect that the building was leased without any knowledge on the part of the lessor that it would be used for any purpose involving an increase of hazard over the use of the building as a warehouse, and the trial judge so held. Nor was the matter within control of lessor. He might, indeed, have stipulated to the contrary. But there was nothing at the time of the lease suggesting the necessity for such stipulation, and if the stipulation had been made the hazard could have been increased without his knowledge, and therefore beyond his control. A matter beyond one's knowledge is rarely within his control.

[4] There are a number of dangerous and combustible materials which may not, under the terms of the policy, be placed in the house insured. Other than these named articles, the use of the house as a warehouse and for storage might bring into it anything whatever; and it is quite impossible to say that the storage of cotton or the manufacture of cotton products is an increase of hazard over every use to which a building could be placed as a warehouse or for storage purposes. It is not possible to agree to the proposition which seems to have been made in some cases, to the effect that the fact that insurance companies charge more for some characters of occupancy than others is conclusive as to the increased hazard of the risk carrying the increased rate. Whether there is increase of risk is a question of fact to be determined as any other fact, and not by a prior conclusion of one of the interested parties, not participated in or binding upon the other. The facts with reference to the possible hazards of a storage or warehouse business, and the facts with reference to the hazards of the business of the occupant at the time of the fire, have been inadequately developed; but, certainly, it is not a necessary inference from the evidence that the hazard was increased, nor is one to conclude, from his general knowledge of products which may be stored and manufacturing processes which may be utilized, that the manufacturing necessarily carries an increase of dangers.

[5] At the time the policy was written, the insured was in possession as the legal owner, but the building was unoccupied. The policy required occupancy. The occupancy of the building cannot then be said to be a change that was not contemplated, and cannot be said to be a change that increased the contemplated hazard. Legal possession remained as before, and the occupancy was not changed. The policy therefore has not been voided.

It will be noted that the paragraph dealing with change of title, interest, and possession excepts, not a "change of occupancy without an increase of hazard," but a "change of occupants without increase of hazard." There is a difference between "occupancy" and "occupants," and it is not seen how a change of the latter may ordinarily increase

any hazard other than the moral hazard. There is nothing to suggest such an increase of hazard in the instant case.

The conclusion has not been reached without a very strict construction of the policy. If such a rule of construction is followed in holding that the policy is avoided by an increase of hazard having no relation to a loss, it ought not to be departed from when other effects of the policy are considered.

[6, 7] It is insisted that section 2482, Civil Code of Georgia, should control the disposition of the case. The law would, of course, supersede or modify the terms of an insurance policy if that were intended; but it is evident from the terms of the section that the mattter of the effect of increase of hazard was left within the discretion of the insurer.

The judgment is affirmed.

EDWARDS et al. v. SARASOTA VENICE CO.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1917.)

No. 3098.

1. QUIETING TITLE ⊜12(1)—ACTIONS—RIGHT TO MAINTAIN.
   Under Gen. St. Fla. 1906, § 1950, one out of possession, claiming title, legal or equitable, to land, may maintain a bill against any person, not in actual possession, who claims an adverse estate or interest therein, for the purpose of determining such estate and interest, and quieting or removing clouds from title.

2. ESTOPPEL ⊜31—ESTOPPEL BY DEED—OFFICER OF CORPORATION.
   The president of a corporation, who executes a deed in its behalf containing covenants of assurance that it is unincumbered and free from all former taxes, and with full warranty of title, is estopped from setting up any title or lien in himself, claimed by him at the time he executed the deed, on the theory that he, who by language or conduct leads another to do what he would not otherwise have done, shall not subject to loss or damage such person so relying on his representations or conduct.

3. TAXATION ⊜768—RECORDATION OF TAX DEED—EFFECT.
   Where the father of the president of a corporation furnished the money with which to buy in land of the corporation sold for taxes, under an agreement that the deed taken in the name of the president should be held as security, but nothing in the tax deed, which was recorded, showed his rights, such secret equity cannot be asserted against the grantees of the corporation, holding under a deed executed by the president with full warranty, for the president of the corporation is estopped to assert his tax title, and the record of the trust deed did not show the equity.

4. ESTOPPEL ⊜45—BY DEED—GRANTEES.
   Where the president of a corporation, who executed in its behalf deeds containing full warranties, thus estopped himself from asserting a tax title to such lands, his grantee, the president not claiming title from any other source, is bound by the estoppel against the president.

5. QUIETING TITLE ⊜29—DEFENSES—LACHES.
   The president of a corporation, having previously acquired a tax title to wild uninclosed prairie lands of the corporation, executed a deed in behalf of the corporation, conveying the same with covenants of assurance that they were unincumbered, free from former taxes, and of full warranty. Thereafter the president conveyed a portion of the lands to his codefendants. For more than 20 years complainant and its predeces-

sors paid the taxes on the lands, during which time neither the president nor his grantees paid any taxes. *Held* that, as laches does not grow out of mere lapse of time, but is based on a delay which works a disadvantage to another, and from the very nature of the doctrine each case must turn on its peculiar facts, complainant's suit to quiet title against the claims of the president and his grantees was not barred by reason of the delay.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by the Sarasota Venice Company against Robert J. Edwards and others. From a decree for complainant, defendants appeal. Affirmed.

N. B. K. Pettingill, of Tampa, Fla., and Arthur F. Odlin, of Arcadia, Fla., for appellants.

Charles T. Curry, of Brandentown, Fla., and James F. Glen, of Tampa, Fla., for appellee.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The suit is by the Sarasota Venice Company against Robert J. Edwards, Frank K. Linscott, and L. A. Shattuck to quiet the title to certain described lands, aggregating 5,120 acres, in Manatee county, Fla. The court refused to dismiss the bill as amended, and the case was tried on the bill and answer, and resulted in a decree for the plaintiff.

As amended, the bill alleged that the Florida Commercial Company, a corporation, was the owner of a large area of land in Manatee county, Fla., embracing the land in controversy, and that Robert J. Edwards was the president of that corporation. On May 25, 1893, the Florida Commercial Company, by Robert J. Edwards, its president, conveyed the land in controversy by deed to David S. Baker, Jr., which deed contained a covenant of assurance that the grantor was lawfully seised in fee simple of a good, absolute, and indefeasible estate in the land purporting to be conveyed, and had full power and lawful authority to sell and convey the land, and that the land was free and unincumbered of and from all former charges, taxes, and incumbrance of all kinds, and a further covenant of full warranty of title. This deed was duly recorded a short time after its execution. The complainant is the successor in title of Baker by mesne conveyances, duly executed and described in the bill. Prior to the conveyance to Baker, Robert J. Edwards purchased at a tax sale, in the year 1890, for the nonpayment of the taxes of 1889, all the lands of the corporation of which he was president, located in Manatee county, Fla., aggregating 230,640 acres (including the lands in controversy), for the sum of $2,232.36, and on October 20, 1892, procured a tax deed to all of the corporation's land to be made to him; he being at the time the president of the Florida Commercial Company. On information and belief, the money used by Robert J. Edwards to purchase the tax certificates and acquire the tax deed was alleged to be the money of the Florida Commercial Company, or money which Robert J. Edwards, or Jacob Edwards, his father, who

controlled the company, advanced and lent the Florida Commercial Company, for the purpose of paying the taxes on its lands. This tax deed was on record at the time of the conveyance to Baker. It was alleged that the tax sale and the deed executed in pursuance thereto were void for certain reasons, which were stated at length. After Robert J. Edwards acquired the tax deed, various parties who had acquired title to parts of the land embraced in the tax deed, other than that in controversy, filed bills in the circuit court of Manatee county, Fla., and obtained decrees declaring the tax deed to Robert J. Edwards to be null and void, and directing the clerk of that court to make a marginal entry on the record to that effect. Robert J. Edwards, after acquiring the tax deed, never made any attempt to take possession of the premises embraced therein, and never made any attempt to exercise acts of dominion over the premises until the year 1914, nor did he pay, after acquiring the tax deed, any of the taxes assessed against the lands for subsequent years, and all taxes due on the lands in controversy for such subsequent years were paid by complainant and by those under whom complainant claims title. The defendants Linscott and Shattuck claim some title or interest in the land under Robert J. Edwards, the exact nature of which is unknown, but such interest was not acquired by them prior to the year 1914, and these defendants have in fact no interest in the land. The premises in dispute are unimproved prairie lands, and have never been in the adverse possession of any one, and complainant and those under whom it claims have been in possession thereof, pursuant to section 1720 of the General Statutes of the state of Florida, and the complainant is now in possession thereof in pursuance of the provisions of the statute. (The jurisdictional averments of the bill are omitted.) The bill was filed August 21, 1914.

Except as hereinafter qualified, the answer admitted the material allegations of the bill. In the answer it was denied that the tax deed to Robert J. Edwards was void for noncompliance with the Florida statutes relating to tax sales. It was averred that the money used by Robert J. Edwards for purchasing the land at tax sale was that of his father, Jacob Edwards. The money was not advanced or loaned to the Florida Commercial Company for the purpose of paying the taxes. The Florida Commercial Company and Jacob Edwards agreed that the latter was to bid in the lands at tax sale and thereafter acquire a tax deed thereto, which deed was to be held as security to Jacob Edwards for the repayment to him of the money so used in obtaining the tax deed, with interest. The bid was made and the tax title taken in the name of Robert J. Edwards solely as a matter of convenience, and thereafter Robert J. Edwards held the tax title as trustee for Jacob Edwards, until the latter's death in 1902, when the beneficial interest passed to the executors and trustees of Jacob Edwards under his will. Afterwards, on July 7, 1914, Robert J. Edwards, who continued to hold the legal title as trustee for the devisees of his father, sold and conveyed the land to the defendant Linscott. It was further averred that the decrees obtained in the circuit court of Manatee county against Robert J. Edwards, referred to in the bill, had been vacated in the year 1914 as having been rendered without notice to Robert J. Edwards. The answer concluded with a motion to dismiss the amended bill of

complainant, on the grounds that the same was without equity, that the complainant was barred of any relief because of laches, and that the bill sets forth two inconsistent bases of relief.

The cause was heard on the bill and answer; it being announced in open court before the hearing that the plaintiff admitted the truth of the allegations of the answer. The legal questions involved in the motion to dismiss, and the exceptions to the final decree, are so intertwined that they will be discussed together.

[1] 1. Under the Florida statute a bill in equity may be brought and prosecuted to a final decree by a person or corporation, out of actual possession, claiming title, legal or equitable, to real estate, against any person not in actual possession, who claims an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting or removing clouds from the title to such real estate. General Statutes, § 1950.

[2] 2. The president of a corporation, who executes a deed in its behalf, containing covenants of assurance that it is unincumbered and free from all former taxes, and of full warranty of title, is estopped from setting up any title or lien in himself claimed by him at the time he executed the deed. The estoppel is based on the principle that he, who by language or conduct leads another to do what he would not otherwise have done, shall not subject to loss or damage such person so relying on his representations or conduct. The law will not permit a person to assert a claim which he has induced another to suppose he would not rely on. Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618; Equitable Loan Co. v. Lewman, 124 Ga. 190, 52 S. E. 599, 3 L. R. A. (N. S.) 879; Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79.

[3] 3. The fact that the father of Robert J. Edwards furnished the money with which to buy the land at tax sale under an agreement with the Florida Commercial Company that the deed was to be held as security cannot destroy the estoppel, since, whatever might be the rights of the father of Robert J. Edwards against his son and the corporation, his claim against the complainant, at best, is but a secret equity. The record of the tax deed could convey no notice of a fact not contained in any recital of the deed.

[4] 4. The tax deed purports to convey title to Robert J. Edwards, and as he is estopped from asserting title under such deed, and did not claim title from any other source, his grantee is bound by the estoppel, and acquired no interest in the land as against the complainant under the facts appearing on the trial. Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065.

[5] 5. Perhaps the chief insistence of appellant is that the lapse of time intervening the making of the deed to Baker and the bringing of the present action is so great as to debar complainant of its remedy. Laches does not grow out of mere lapse of time, but is based on a delay which works a disadvantage to another. From the very nature of the doctrine of laches each case must turn upon its own peculiar facts. The adjudicated cases, says Mr. Justice Brown, in Galliher v. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. 873, 874 (36 L. Ed. 738), "proceed on the assumption that the party to whom laches is imputed has knowl-

edge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them." See, also, Ward v. Sherman, 192 U. S. 168, 24 Sup. Ct. 227, 48 L. Ed. 391; Chase v. Chase, 20 R. I. 202, 37 Atl. 804.

We do not think the doctrine of laches can defeat the complainant's suit. The land in controversy is uncultivated prairie land; the complainant and those under whom it claimed title have paid all taxes and assessments on the land; the defendant paid none. The complainant had the right to rely on the assurance of Robert J. Edwards, as expressed in the deed of the Florida Commercial Company, executed by him as its president, that the land at that time was free of incumbrances, liens, or unpaid taxes, and that the true title was in the corporation for which he was acting. Having given this solemn assurance, and lulled the complainant into a sense of security, Robert J. Edwards will not be permitted to say that mere length of time will deprive the complainant of his remedy against him, asserted within two months after he attempted to set up an adverse title.

Judgment affirmed.

WOODWARD v. SANGER BROS. et al.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1917. Rehearing Denied January 24, 1918.)

No. 3067.

1. HOMESTEAD ⊜214—BURDEN OF PROOF—PRESUMPTION.
   Under Const. Tex. art. 16, § 51, declaring that the homestead, not in a town or city, shall consist of not more than 200 acres of land which may be in one or more parcels, where the head of a family owning several parcels of land not exceeding 200 acres in the aggregate and living upon one of them claims all as a homestead, the burden of proving that any one of the tracts is not a homestead is upon the person attacking the claim; the presumption being that all of the land is homestead property.

2. BANKRUPTCY ⊜396(5)—LAND SUBJECT TO—SEPARATE PARCEL.
   The husband of the bankrupt died leaving his surviving widow and numerous children. At the time of his death he and his wife owned as community property four parcels of land aggregating less than 200 acres, none of which were contiguous, but all were within a few miles of each other. After the death of her husband, the bankrupt continued to reside on the parcel of land which he had occupied as a residence, and, after the last daughter married, the bankrupt and her children entered into a parol partition which was afterwards consummated by the execution of deeds whereby the bankrupt received the home place and one of the outlying parcels in fee. During part of the time after the death of her husband the minor sons of the bankrupt farmed the outlying parcel, and at other times she leased it under yearly leases receiving crop rent, which crops were devoted to her needs. The outlying parcel was rented under such a yearly lease when the bankrupt asserted her homestead exemption therein. Const. Tex. art. 16, § 51, declares that the homestead not in a town

or city shall consist of not more than 200 acres of land which may be in one or more parcels with improvements thereon, providing that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired. *Held*, that as the bankrupt was aged and unable to perform labor herself, and as the outlying parcel of land was used for the purpose of a homestead, furnishing her with part of her sustenance, neither the fact that it was separated from the parcel of land on which she had a residence, nor the fact that the bankrupt instead of hiring laborers and conducting farming operations herself rented the property for crop rent, will preclude her from asserting her homestead rights therein.

3. HOMESTEAD ⊂=154—ABANDONMENT—INTENTION.
Where land is impressed with homestead character, its abandonment as a homestead must be beyond doubt before the homestead protection will be refused, and for that reason there must appear an absolute intention to abandon in the absence of acquisition of a new homestead.

4. HOMESTEAD ⊂=141(1)—DEATH OF OWNER—RIGHT OF SURVIVING WIDOW.
A surviving widow of one having a homestead in community property has the same right under the Texas laws as the deceased owner.

5. HUSBAND AND WIFE ⊂=273(1)—COMMUNITY ESTATE—TITLE.
Under the Texas laws, a wife on the death of her husband is entitled absolutely to one-half of the lands embraced in the community estate.

6. HOMESTEAD ⊂=145—PARTITION—EFFECT.
Where a surviving widow, who during the minority of children held all of the community estate of herself and her husband, which was claimed by him as a homestead after the children reached their majorities, etc., and the daughters were married, consented to a partition whereby she received in fee less than one-half of the land in all of which she had a homestead estate, such partition did not free the land which the widow received in fee from its homestead character which had previously been impressed thereon under the Texas laws.

7. HOMESTEAD ⊂=23—ACQUISITIONS—PERSONS ENTITLED TO ACQUIRE.
Under the Texas law, a surviving widow, when the head of a family, may acquire a homestead estate.

8. HOMESTEAD ⊂=57(2)—ESTATE—USE OF PREMISES.
In determining whether, under the Texas laws, an aged and infirm person had a homestead estate in land, the condition of such person should be considered in determining whether the property was devoted to homestead purposes.

Petition to Superintend and Revise from the District Court of the United States for the Western District of Texas; Duval West, Judge.

In the matter of the bankruptcy of Sarah Catherine Woodward. The bankrupt scheduled land as exempt as part of her rural homestead, and A. Robinson, trustee, filed his report on exemptions omitting the land. The referee sustained exceptions of the bankrupt to the trustee's report and held the land exempt, whereupon the trustee and Sanger Bros. petitioned for review of the referee's order. The District Court having reversed the decision of the referee and directed the trustee to schedule the land as part of the assets, the bankrupt petitions to superintend and revise. Reversed.

Ike D. White, of Austin, Tex. (D. W. Wilcox, of Georgetown, Tex., and Charles A. Wilcox, of Austin, Tex., on the brief), for petitioner.

W. B. Carrington, of Waco, Tex., for respondents.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. Sarah Catherine Woodward, bankrupt, scheduled as exempt property 59¾ acres of land, as a part of her rural homestead. The trustee filed his report on exemptions omitting the land. The referee in bankruptcy sustained exceptions of the bankrupt to the trustee's report excluding the land from exemptions, and held it exempt. The trustee filed a petition for review of the referee's order, and the District Court for the Western District of Texas reversed the decision of the referee and directed the trustee to schedule the land as a part of the assets of the estate of the bankrupt subject to the claims of creditors. This order is before us upon petition to superintend and revise.

The following are among the agreed facts:

"J. P. Woodward, the deceased husband of the bankrupt, died in 1891, leaving surviving the widow and eleven children. At the time of his death he and his wife owned as community property four tracts of land in Williamson county, Tex.; none of said tracts being contiguous, but all being within a few miles of each other. That, at the death of said J. P. Woodward, Sarah C. Woodward (the bankrupt) and her said husband resided upon, and had been for a number of years residing upon, the 100-acre tract of land claimed as exempt by the bankrupt. From the time of the death of her husband to the present time, Sarah C. Woodward has continued to reside upon and occupy said tract of land. That, during the time subsequent to the death of her husband, a part of the children were minors, and she and her minor children and unmarried daughters continued to reside upon said land, and she either had minor children or unmarried daughters living with her upon said land until April, 1913, when the last daughter married. That J. P. Woodward died intestate, and that no administration was ever had upon his estate. That no partition was had between Mrs. Woodward and her children of said four tracts of land until August, 1911, when a verbal partition was entered into between Mrs. Woodward and her said children, and in such partition the 59¾-acre tract and the 100-acre tract claimed by Mrs. Woodward as exempt were set aside to her in fee simple, and the other two tracts of land were set aside to the children in fee simple. That no deed of partition was entered into until January 9, 1915, when a partition deed was executed between Mrs. Woodward and her said children; said verbal partition being recited in said deed, and said land being partitioned in accordance with the verbal partition above mentioned. Since said verbal partition, Mrs. Woodward has been in possession of the said two tracts set aside to her, and has claimed same as her homestead, and the children have been in possession of the other two tracts.

"That the 59¾-acre tract above mentioned was bought on October 1, 1883, and is about two miles from the 100-acre tract. That during the year 1887 a part of same was cultivated by J. P. Woodward, but with that exception it has been rented out from the time it was acquired, and was rented out to tenants at the time of J. P. Woodward's death. That, after the death of J. P. Woodward, the said 59¾-acre tract was rented out a part of the time and was worked by the son of Mrs. Sarah C. Woodward a part of the time for her; but since 1903, and up until said verbal partition, it had been continuously rented out. That neither J. P. Woodward nor Mrs. Woodward nor any of their children ever actually resided upon said 59¾-acre tract of land. That, at the time of the death of said J. P. Woodward, one of the tracts of land, consisting of 60 acres, which was set apart to the children in said partition, was woodland, and was being used, and had been used for a number of years previous thereto, to supply wood for the family use; and said tract was also used for the same purpose for some years subsequent to the death of said J. P. Woodward.

"The other tract set aside to the children in said partition consists of 137 acres, and at the time of the death of J. P. Woodward, and for some time previous thereto, was partly cultivated by him and partly rented out. After his death the same was used in the same way; that is, at times all or a part of it was rented out and a part worked by Mrs. Sarah C. Woodward through her children. The 137-acre tract is separated from the 59¾-acre tract by a public road, and is about two miles from the 100-acre tract.

"At this time Mrs. Woodward is living upon the 100-acre tract with her son W. W. Woodward and his wife and two children, and has been so living for three years last past. Up to that time there was an unmarried daughter living on said tract with Mrs. Woodward, said daughter having married about three years ago and left the home place, and W. W. Woodward is the only one of Mrs. Woodward's children who resides with her on said 100-acre tract. * * * Alex Woodward, a son of Mrs. Sarah C. Woodward, has had charge of the rental of the 59¾-acre tract ever since the verbal partition, and for a number of years prior thereto. That ever since the verbal partition in 1911, the 59¾-acre tract has been constantly rented out to tenants; is now rented out to a tenant, Mr. Burke, for the year 1916, for one-third of the corn and one-fourth of the cotton. * * * Whatever corn was raised on same (the 59¾-acre tract) each year prior to 1916 went into Mrs. Woodward's crib, and was there intermingled with whatever corn was put in there off of the 100 acres, and was used in feeding her stock. * * *

"Mrs. Sarah C. Woodward never went upon the 59¾-acre tract, as she is crippled and suffers with a broken hip, and knows nothing about it, as her son Alex Woodward looks after it, as above shown. Mrs. Woodward is not wholly helpless; she walks with a stick and can get around and travel when necessary. She is 72 years of age. * * *

"That about two tons of cane have been gather off of the 59¾ acres for 1915, and was put in Mrs. Woodward's crib. * * * There has been no firewood on the 59¾-acre tract, and none has been taken therefrom."

The case was disposed of below upon agreed facts. The motion of respondent to dismiss upon the ground that "the District Judge had decided the matters of fact involved adversely to petitioner, and that this court is bound by such finding," is therefore overruled.

The only matter for determination is whether, under the agreed facts, the 59¾-acre tract therein referred to is part of the homestead of claimant. If the tract were not detached from the 100-acre tract upon which is the residence of petitioner, her claim would not be contested. It is insisted, however, that because it is detached, and because petitioner has not used the tract other than by "renting on shares," it is not a part of her homestead.

[1, 2] Section 51, art. 16, of the Constitution of Texas, provides:

"The homestead, not in a town or city, shall consist of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon; * * * provided, also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired."

This provision of the Constitution leaves very little basis for distinction between the homestead consisting of one tract of not more than 200 acres, and one made up of several parcels, aggregating not more than 200 acres. It is, however, a homestead which the Constitution exempts, and not 200 acres of land in the country. A fundamental idea involved is a place of residence. While circumstances might exist which would fix or maintain the homestead character of the land without actual residence, yet residence is normally an element.

Whatever of physical difficulty there might be in actually living on more than one tract of land was doubtless under consideration when the quoted provision was incorporated in the fundamental law. At most, only a very small part of 200 acres of land can be used as a place of actual residence. Whatever effect this actual holding for this purpose may have in impressing the homestead character has not, by the terms of the fundamental law, been confined to the tract of actual domicile. The fundamental law making no distinction, there should be a hesitancy in placing a judicial limitation upon the homestead rights based upon an assumed difference between a homestead of a single tract and a homestead consisting of more than one tract. The head of a family owning several tracts not exceeding 200 acres in the aggregate, living upon one of the tracts, and claiming all as a homestead, the burden of proving one of the tracts not homestead should be upon the person attacking the homestead claim. The presumption should be that all is homestead.

Of course, the proposition must be reasonably applied, as must all propositions of law. The tracts might be so remote from each other as to preclude, as to some of them, the homestead character. The facts in the instant case do not present such a situation. In Baldeschweiler v. Shipp, 21 Tex. Civ. App. 80, 50 S. W. 644, tracts four miles apart were held to constitute the homestead. In the instant case the tract in controversy is only two miles from the place of actual residence.

The urban home may consist of a place of residence and a place of business. The rural home combines these qualities. It must (with limitations unnecessary to state) be the place of residence, and it may be the place of the only business of the head of the family. The law was, of course, especially designed for the protection of persons engaged in agriculture. It was based on the assumption that, ordinarily, the land would be the source of revenue for the support of the family. Most of the rural homesteads in Texas furnish the means of living as well as the place of living.

The law as declared in the Constitution and statutes does not undertake to place any limitation on how the land may be used, other than that it is to be the homestead. There is no warrant for saying that, when a homestead shall be used in the way best calculated to accomplish the purpose of a homestead, it loses its character as a homestead. In perhaps a majority of cases the Texas homestead owner cultivates a part of his homestead land by his own labor and a part through tenants. There is no provision in the Constitution or laws which undertakes to prescribe this or any other method of using it, nor any provision which proscribes this or any other method of using it.

There is a provision to the effect that no temporary leasing of the homestead shall destroy its homestead character, so long as a new homestead shall not have been acquired. It may be that this provision, placed in the homestead law for the protection of the homestead owner, is susceptible of a construction which would inhibit the permanent or long lease of the property. The effect of such a lease

might be to evidence, or to be evidence of, an abandonment of the homestead. But, certainly, a specific declaration of a right to do a thing is not to be accepted as a declaration that, if you do the thing, consequences will follow which the declaration says shall not follow.

The leases referred to in the statement of facts are oral arrangements by which the tenant cultivates the land on shares. The landowner furnishes the land, and the tenant furnishes the labor; the crop is divided. The contract, not coming under the terms of the statute of frauds, is rarely reduced to writing. The provisions of the contract are customary and perfectly well understood. The contract ordinarily covers the calendar year. A usual incident is that the landlord is compelled to supervise the farming; he frequently makes "advances"; he must look after the division of the crop. The arrangement, if properly called a "lease," is a temporary lease. If a like contract is entered into from year to year, each new contract makes the beginning and the end of a temporary lease.

Of course, it may be that if the homestead owner moves off the land, and stays off, such use of the land for a number of years may, with other evidence, be used to establish the intention to abandon; but abandonment of the land is not impossible, though the landowner should continue to work the land with his own hand.

If a person should use his land in the way indicated, if he should thereby get his living, thereby provide himself in kind with corn and wheat needed for his own consumption, thereby provide the oats and fodder needed for the horse which he rides; by what provision of the law is he placed, with reference to the tract or tracts constituting the 200 acres which might have become his homestead, in any different position than he would be in if he had done a little work on each of the tracts with his own hand or by hired labor? The law could make such a difference, and, if made, whether reasonable or not, it would have to be observed. But why should an absurdity be imputed to the law when there is nothing in its terms that would justify or excuse such imputation?

The decision of the District Court in the present case is predicated upon an opinion of the Supreme Court of Texas in Autry v. Reasor, 102 Tex. 123, 108 S. W. 1162, 113 S. W. 748. Both cases present, as strongly as may be, the absurd results of insisting upon a distinction which the lawmakers have not felt proper to make. The homestead claimant in this case is 72 years of age. She is living on one tract, and she owns another tract so situate that it could be a part of her homestead. If she had, at any time while she was the head of a family, labored with her own hands on this second tract in the making of a crop, it would admittedly have become a part of her homestead. Doubtless, the same consequences would have followed if she had worked it with hired hands, or if the labor had been done by any member of her family. But she did not work it with her own hands; she was doubtless entirely unable to so utilize the land. She did not work it with hired hands. There was probably an ample reason for this. The individual labors of the members of the family could be more efficaciously used in cultivating the tract upon which the residence

was located. She probably used the detached land in the only way in which she was in position to use it. From this use she got the support the law contemplated she should get. In addition, she secured in kind what was needed to feed the one horse she used. She got what the Constitution intended she should have, without doing anything which the Constitution prohibited. She is under the terms of the law —under the reason of the law. Why should she not get the benefit of the law? If the rule insisted upon obtains, protection is withdrawn from a class for whose benefit it was peculiarly proper that the homestead law should have been framed. A robust man might work the land himself and extend to the detached tracts the homestead character. A woman with funds might, with hired labor, accomplish the same result; a woman with boys upon whom she could depend for support might utilize them in extending the homestead right for which she had only a limited need; but the infirm, penniless, childless old lady, who most needs, is denied.

In the case of Autry v. Reasor, supra, Mr. Justice Williams, concurring in the original opinion which maintained the homestead right, said:

"I am not prepared, however, to agree that the single circumstance of the use of the rents, even in kind, for the support of the family, was sufficient to impress the rented land with the homestead character."

In the original opinion by Chief Justice Gaines were detailed the following facts: One Forner, a witness for defendants, testified with reference to the 39 acres in controversy:

"That the 29-acre tract was only partly in cultivation when it was originally purchased by Reasor, and that he or his employé prepared the whole of it for use; that he thought Reasor worked there. The ten acres adjoin the other. He did not know that he ever saw Reasor work on that tract, but that he, together with Reasor, gathered corn on the land."

Upon a rehearing the conclusion primarily reached was reversed, upon the ground that, notwithstanding the evidence which had been recited by the court, the trial court had found that:

"Reasor never cultivated the 39 acres of land, or any part of it, by himself or through any one else; he rented the same from the time of the purchase to the time of his death to yearly tenants, who paid for the use of the same."

The court held that this finding of the trial court was conclusive upon it, the appellate court, and concluded that the facts established (excluding the facts recited) were not sufficient to show the 39 acres to be a part of the homestead. It will be noted that, while the court acquiesces in the proposition that the detached land must, to be homestead, be used for some of the purposes of a home "either by cultivating it, using it directly for the purpose of raising family supplies, or for cutting firewood and such like," the distinct holding is that, if the trifling additional facts which have heretofore been detailed had existed, the homestead character would have been impressed upon the land.

The case of Autry v. Reasor may conflict with the conclusion hereinbefore expressed, to the effect that a detached tract may be a part of

the homestead, although never used in any way except by growing crops on shares; but it is distinct and direct authority to sustain the conclusion reached to the effect that the land here in controversy has had impressed upon it the homestead character. By the agreed statement of facts, Woodward, the owner, had, since his ownership of the land, worked it with his own hands, and after his death it had been worked by Mrs. Woodward through her children. These acts of use are very much more definite and considerable than those held in the Autrey-Reasor Case sufficient to impress the homestead character.

[3] It is to be kept in mind always that, whenever land shall have had impressed upon it the homestead character, its abandonment as homestead must be beyond doubt before the homestead protection will be refused. There must be an unequivocal and absolute intention to abandon; and, in most cases, the inference of abandonment will not be indulged in the absence of the acquisition of a new homestead.

During the life of J. P. Woodward, four tracts of land were owned by himself and his wife in community, the tracts being of 100, 59¾, 60, and 137 acres respectively. All of the land was so situate and so used as to be capable of being the homestead of the family, but the protection of the law extended to 200 acres only. From the 356¾ acres they were entitled to a homestead exemption of 200 acres. Any part of this 356¾ acres could have been included within the 200 acres, and any part excluded, except that the residence improvements would, necessarily, have been included in the designated homestead. To simplify a consideration of this matter, let it be assumed that the 100-acre tract had had definitely fixed upon it the homestead character. The other 100 acres could have been so selected as to take a part of each of the three other tracts. Each of these tracts had, at some time or other during the life of the community and the existence of the homestead, been used for homestead purposes. A part of each of the tracts of 59¾ and 137 acres had, during this period, been cultivated by J. P. Woodward. The 60-acre tract was woodland, from which the family wood supply had been taken. All of the land had been so used as to affect it with the homestead character, and placed the owners in position where any part of it could have been designated as the homestead and become exempt from forced sale.

[4-7] Upon the death of J. P. Woodward his widow continued to have the same homestead right that had been in the community. In addition to her absolute legal right in one-half of the land (178 acres), she had a homestead right, as the surviving wife, in 200 acres, and she had a right to have these acres designated and defined, and, because of the former use, she could have had any part of the land so designated. She had the right to designate as a homestead any land which her husband might have so designated; and, as has been shown, he had made such use of all the land as placed him in position to designate any part of it as a homestead. She has never at any time lost any of these rights; she has done nothing which could constitute an abandonment, and she has, at all times, been in a position to claim any of the rights which came to her as the survivor of the family having the homestead right.

By the parol agreement referred to in the statement of facts, her homestead rights and her rights in the fee of the land were segregated from the rights of her children, who had become, by the death of the husband, his heirs, and who had been entitled to participate with the widowed mother in her homestead rights, so long as they continued to be members of her family. She voluntarily surrendered a part of her homestead rights, and received less than one-half of the land (area alone considered) in fee. She did not, by this segregation, lose any of the rights that came to her upon her husband's death. But it is quite possibly the case that, even if the 59¾ acres of land had not theretofore been affected with the homestead character this segregation and designation of her homestead rights might have given it a character which it had not theretofore had. She was at this time, not alone the survivor of a family, but she was the head of a family as well. She was in position to acquire homestead rights, distinct from any rights which she might have had as a member of the family of her husband. She and her minor children constituted a family. She, as such head, had a right to designate any land that might become hers to homestead uses within the limits of the Constitution. She owned in the country a tract of 100 acres and a tract of 59¾ acres. She lived upon the 100 acres, and she was within such distance of the other tract that she was able to put it to any use for homestead purposes to which the 100-acre tract could be put. She had a place of residence on the land, but she could not utilize any part of it with her own hands. She could not even live upon the property without some arrangement by which revenue should be received from it. Use of it in the only ways available to her for bringing in a revenue, coupled with residence on the land, ought to be held to fix upon all of the land a homestead character, absolutely and entirely without reference to the uses to which the tracts had theretofore been placed.

To indicate how intimately connected the 59¾-acre tract of land was with the homestead life of the claimant, and how essential it was to the use of any part of her homestead rights, the facts concerning it will be restated. After its purchase it was, for a time, cultivated by her husband. Upon his death it was worked for a time by her sons for her benefit. It is separated merely by a public road from a tract of 137 acres, which was part of the time rented out and part of the time worked by her through her children, under conditions which admittedly made it a part of the homestead. Being crippled and aged, the 59¾-acre tract has been looked after by her son Alex. In the year 1916 her portion of the cotton was sold, and the money went for repairs on the tract and to pay her taxes, and, for groceries and clothing for her personal use. The corn crop failed in 1916, but prior to that time corn raised on the 59¾-acre tract went into Mrs. Woodward's crib, where it was intermingled with whatever corn came from the 100-acre tract, and was used in feeding her only horse used mainly for buggy purposes.

[8] The law rarely makes a difference between people, predicated upon age; but it is certainly a fact to be considered in determining the method in which a homestead tract can be utilized, in order to accom-

plish those purposes of protection under contemplation when the law was in the framing. The case of Baldesschweiler v. Shipp, heretofore referred to, distinctly recognizes this element.

The claim of the bankrupt to the 59¾-acre tract should have been allowed. The petition is granted, and the case reversed for action in conformity herewith.

Reversed.

THE KAISER WILHELM II.

(Circuit Court of Appeals, Third Circuit. December 28, 1917.)

No. 2177.

1. ADMIRALTY ⟸117—APPEAL—TRIAL DE NOVO.
   On appeal in an admiralty case, the appellate court has authority to consider the case de novo.
2. EVIDENCE ⟸46—JUDICIAL NOTICE—EXECUTIVE ORDERS.
   The court will take judicial notice of an executive order, pursuant to resolution by Congress, whereby the President took over the possession and title of vessels within the jurisdiction of the United States, owned in whole or in part by corporations, citizens, or subjects of an enemy nation.
3. WAR ⟸10(2)—EFFECT ON PRIOR LIBEL.
   A British corporation filed a libel in the United States courts of admiralty against a vessel owned by a German corporation. By its answer, the German corporation admitted the admiralty jurisdiction of the court, the vessel being within a port of the United States, but contended that it could not be exercised, because the countries of both litigants were at war with each other, and that prior to the filing of the libel the Imperial Government of Germany issued a moratorium, whereby payment of all indebtedness by German to British subjects was forbidden during the war. On the contention that enforcement of the claim would compel a violation of the German moratorium, the libel was dismissed, and the libelant appealed. Meantime the United States declared a state of war to exist between itself and Germany, and, pursuant to joint resolution of Congress, the vessel libeled was seized by executive order. *Held* that, as the German vessel had sought protection in an American port and was enabled to do so through the very repairs made by libelant, and as such lien might be lost if the cause were dismissed, jurisdiction of the libel should be retained; this being particularly true in view of the seizure of the vessel by the United States, for if the lien were lost by dismissal of the libel, and the vessel were destroyed, the German corporation might still be liable for the payment of the repairs, and such payment could not be made out of the vessel.
4. WAR ⟸10(2)—PROTECTING RIGHTS OF ABSENT GERMAN CITIZENS.
   The courts will protect the rights of an absent German citizen while the United States is at war with the Imperial German Government, because of the innate sense of fairness, decency, and justice which respects the rights of an enemy, because of the broad principles of international intercourse, which lead courts and nations that believe in international rights to be the more careful to observe them toward belligerents, and because this is in line with the high ideals of Anglo-Saxon justice.

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

Libel by Harland & Wolff, Limited, against the steamship Kaiser Wilhelm II. From a decree dismissing the libel (230 Fed. 717), libelant appeals. Reversed, and libel reinstated, with directions.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Roscoe H. Hupper, both of New York City, and H. Alan Dawson, of Philadelphia, Pa., of counsel), for appellant.

J. D. Bedle, of New York City (Walter C. Noyes, of New York City, of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case, Harland & Wolff, Limited, a British corporation, filed a libel against the steamship Kaiser Wilhelm II, owned by the North German Lloyd, a German corporation, for repairs made to that vessel in libelant's shipyard in England. By its answer, the North German Lloyd admitted the admiralty jurisdiction of the court below in the premises, but contended such jurisdiction should not be exercised in the present instance, because the countries of both litigants were at war with each other, and that prior to the filing of this libel the Imperial Government of Germany issued a moratorium, whereby payment of all indebtedness by German to British subjects was forbidden during the war. It was therefore contended that the present enforcement of this claim would compel such German subject to violate the law of its country, and thereby subject itself to pains and penalties. To this answer the British libelant filed exceptions which, in substance, alleged that the facts set forth in the answer did not constitute a defense to the libel. On hearing, the court, in an opinion reported at 230 Fed. 717, sustained the contention of the North German Lloyd and subsequently entered a decree dismissing the libel. From such decree this appeal was taken. But pending such appeal, and at the hearing in this court, the whole situation was changed by two facts: First, the existence of war between the United States and the Imperial Government of Germany; and, second, the libeled ship, the Kaiser Wilhelm II, was taken over by the United States government by the order in the margin.[1]

[1] Executive Order.

Whereas, the following Joint Resolution adopted by Congress was approved by the President May 12, 1917:

"Joint Resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President be, and he is hereby authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the govern-

[1-3] This being an appeal in admiralty, this court has authority to consider the case de novo. Irvine v. Hesper, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175. And, of course, it will also take judicial notice of the change of situation noted above. That the court below had jurisdiction of the subject-matter and of the parties, if it saw fit to exercise it, is assumed and the question before that court was therefore as to the propriety of exercising such jurisdiction. Manifestly, the exercise of jurisdiction by the courts of a neutral nation between citizens of belligerent powers is a delicate one, and in this case whatever course was followed there would be reasonable complaint by the unsuccessful litigant. For, while the German citizen could assert the enforcement of the claim compelled it to pay a debt its government had forbidden it to pay, the British citizen could with equal weight complain that the German vessel had sought protection in an American port, it was enabled to do so through the very repairs the libelant made, the libelant had a lien for such helpful repairs on such vessel, that such lien might be lost if the cause were dismissed, and that it would be an unneutral act if it were turned out of court. Bearing in mind the further fact that the Kaiser Wilhelm II, even if this case were dismissed, could not have gone to sea for fear of capture, and that retention of jurisdiction in no way hindered, and dismissal of the libel in no way furthered, the use of the vessel by its German owners, we are of opinion the court below should not have dismissed the libel and that its decree should be reversed.

Moreover, the two facts which have come to pass meanwhile, viz. the war with Germany and the taking over of the vessel by the United States government, give further support to this conclusion, for the action of the government, in taking over the libeled vessel, changed the practical effects of the decree prayed for, when the libel was filed, in that such decree is not now enforced against a German citizen, or its

ment, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

And whereas, the following vessels were, at the time of coming into the jurisdiction of the United States, owned in whole or in part by a corporation, citizen or subject of the empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof: The Kaiser Wilhelm II [and eighty-seven other named vessels].

It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the Joint Resolution above set forth.

property, but in substance and effect would be, if a decree were finally entered as hereafter noted, against a vessel held by the United States. This vessel now taken by the government as noted, may hereafter be lost, burned, or destroyed and if the lien be not finally enforced against her in this proceeding, or the hold of the court upon her be surrendered, it is manifest that the North German Lloyd might, after the war was ended, still remain liable to the libelant for the repairs on the ship, no matter what became of her. The practical effect, therefore, of our dismissing this libel, might eventually work a hardship to the North German Lloyd. So, also, the changed situation makes the British libelant's nation and our own allies in this war, and it might well be regarded as a well-nigh hostile act on the part of the United States District Court to refuse to exercise its jurisdiction in behalf of a British citizen. It is manifest the ship cannot now be returned to the German subject, just as it could not have been really returned to such owner for use at any time since the libel was filed. Therefore there is no practical reason why jurisdiction should be declined on the ground that retention was an unneutral act, when we were at peace with Germany, or is now an unjust act toward the citizen of a country with which we are at war. The fact that the ship has now been taken from the possession of the court by the government would not prevent the court from hereafter adjudicating the several rights of the parties litigant if possession of the ship should later be restored, or if the government saw fit hereafter and of its own accord to pay into court such amount as would satisfy this lien. It is apparent, therefore, that no harm can be done to the two litigants or to the government by the lower court retaining jurisdiction of the libel for the present. If, as is no doubt the case, the counsel for the German claimant cannot at this time properly procure proofs and present his client's case, the court can, and no doubt will, delay action until this can be done. On the other hand, retention of jurisdiction may afford a tribunal for hereafter deciding questions which might possibly arise growing out of the seizure of this and other vessels by the government, if the government should desire an adjudication by a court of last resort.

This case is exceptional in its situation, and calls for the exercise of that range of discretion which the broad powers of a court of admiralty enable it to exercise. Such broad powers and range of discretion are, in our judgment, fittingly exercised by an order which will make due provision for, first, giving the German citizen and belligerent an opportunity to litigate his rights if relations with his country are hereafter resumed; second providing for adjudging, if the government hereafter so desires, its rights and liabilities, if any, in taking over libeled property of the German subject; third, adjudging hereafter what effect the taking of this ship by the government had on the claim of the British lienor, and the further obligation of the German vessel owner as between themselves.

[4] In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the Imperial Government of its country, we are impelled by three all-sufficient reasons: First, the innate sense of fairness, decency, and justice,

which respects the rights of an enemy; second, the broad principles of international intercourse, which leads courts and nations that believe in international rights, to be the more careful to observe them toward belligerents; and lastly, because the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights is in line with those high ideals of Anglo-Saxon justice which led the British courts years ago, in Re Boussmaker, 13 Vesey, 71, decided in 1806, to allow the claim of an alien enemy to be proved in time of war and the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny even to their enemies in times of war.

We are therefore of opinion the decree of the court below should be reversed, the libel reinstated, with leave to the court and parties to take further steps and proceedings in the case as are not at variance with the views above indicated, and that a certified copy of this opinion be furnished by the clerk to the State Department and the Department of Justice of the United States.

In re AMERICAN PAPER CO.

GARDNER v. GEORGE F. HILLS CO.

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

No. 2316.

1. BANKRUPTCY ⊜326—SET-OFF AND COUNTERCLAIM—DUTIES—ADJUSTMENT. Where the dealings between claimant and bankrupt resulted in mutual debts, the credits did not automatically adjust themselves, so as to effect a set-off.

2. BANKRUPTCY ⊜326—SET-OFF AND COUNTERCLAIM—DUTIES—ADJUSTMENT. Where the bankrupt had indorsed to third parties for value all the notes of the claimant prior to its bankruptcy, the bankrupt's rights under the notes had become contingent and unliquidated, and could not be used as basis for set-off against claims of claimant.

3. BANKRUPTCY ⊜326—SET-OFF AND COUNTERCLAIM—COMPOSITION—EFFECT. The H. Co. held notes of a paper company, and the paper company held notes of the H. Co., which it negotiated to third parties, secured by its own bonds. The paper company was adjudicated a bankrupt, and thereafter the H. Co. was also adjudicated a bankrupt. It offered a composition, which was confirmed, and third parties, holding its notes negotiated by the paper company, received the composition payment. They then proved the balance of the debt against the paper company, and to protect its bonds the balance was paid. The H. Co. filed claims on the notes of the paper company, and the latter sought to set off such notes of the H. Co. Bankr. Act July 1, 1898, c. 541, § 14c, 30 Stat. 550 (Comp. St. 1916, § 9598), provides that the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by its charge; section 68a (Comp. St. 1916, § 9652) declares that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off

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

against the other, and the balance only shall be allowed or paid; while section 68b declares that a set-off and counterclaim shall not be allowed in favor of any debtor of a bankrupt which is not provable against the estate. *Held* that, despite the fact that the paper company might, under section 57i (Comp. St. 1916, § 9641), have had the right to prove the notes, had the holders failed to exercise their primary right, the notes, having once been proved and having participated in the composition settlement, could not be allowed against the H. Co., and were not available as a set-off.

Appeal from the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

In the matter of the bankruptcy of the American Paper Company. Walter P. Gardner, trustee, appeals from an order (243 Fed. 753) disallowing a set-off against claim of the George F. Hills Company. Affirmed.

McDermott & Enright, of Jersey City, N. J. (James D. Carpenter, Jr., of Jersey City, N. J., of counsel), for appellant.

Philip Carpenter and Frank P. Ufford, both of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The trustee in bankruptcy of the American Paper Company has appealed from an order disallowing a claim set up by him against a claim by the George F. Hills Company that was filed and allowed against the Paper Company. The facts are as follows:

[1, 2] The bankrupt was adjudicated in July, 1914. As a result of its business dealings with the Hills Company, the Paper Company then owed the Hills Company $16,713.74 on promissory notes given for value, and the Hills Company owed the Paper Company $18,654.76 on similar notes. If, therefore, at that time these mutual debts could have been set off, the Hills Company would have had no balance in its favor. But no such adjustment could be made: (1) Because the Hills Company did not present its claim until the year had almost expired, and the credits did not adjust themselves automatically (Cumberland Glass Co. v. De Witt, 237 U. S. 456, 457, 35 Sup. Ct. 636, 59 L. Ed. 1042); and (2) because the Paper Company before its bankruptcy had indorsed to third parties for value all the notes made by the Hills Company, at the same time securing the indorsees by pledging its own bonds as collateral security. The notes made by the Hills Company had therefore passed into the hands of bona fide holders, and the claims of the Paper Company on these notes had become contingent and unliquidated. The next relevant event was the filing of an involuntary petition against the Hills Company in the spring of 1915, but this was not followed by an adjudication, for the Hills Company offered, and its creditors accepted, a composition of 20 per cent. The composition was confirmed and the money was paid in the latter part of June, and among the creditors that received the 20 per cent. were the holders of the notes referred to that had been indorsed by

the Paper Company and secured by that company's bonds. The trustee of the Paper Company knew of the composition; he filed a claim against the Hills Company on a book account for about $700 and received his percentage thereon.

[3] After the composition had been carried out, and on the last day for filing claims against the Paper Company, the holders of the Hills Company's notes already mentioned, having received all they could collect from the Hills Company, filed their claims against the Paper Company as indorser of the notes and pledgor of the bonds; and, as the bonds were a valuable security, the trustee afterwards paid the remaining 80 per cent. and took up the notes. On the same date, when the holders of the notes made by the Hills Company filed their claims against the Paper Company as indorser, the Hills Company presented its claim against the Paper Company, based upon that company's notes for $16,713.74, which the Hills Company had retained, but had not yet proved. On that date the Paper Company had not yet made good its indorsement and its pledge, but after this had been done, and after the notes made by the Hills Company and indorsed by the Paper Company had come into the trustee's hands, he petitioned the referee to permit him to set off the 80 per cent. paid thereon. The result of such permission would have been to defeat the claim made on behalf of the Hills Company, but the referee and the District Court (243 Fed. 753) refused the set-off and allowed the claim.

It seems clear that while the composition was pending the Paper Company had no provable claim against the Hills Company. The notes made by the Hills Company were then the property of third persons, who alone had the primary right to prove the debt. It is true that, if they had failed to exercise the right, the Paper Company might have exercised it (section 57, cl. "i"); but this contingency did not happen, the indorsees did prove the notes against the Hills Company, and were paid 20 per cent. thereon. What effect did the confirmation of the composition have upon this debt? At that time section 14, cl. "c," read as follows:

"The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

As applied to the case before us, this clause means that the Hills Company was discharged from the remaining 80 per cent., for this proportion of the debt was not "agreed to be paid by the terms of the composition." The cases are not completely in harmony concerning the effect of a composition on the bankrupt's debts. It has been held to be an accord and satisfaction, and to discharge the original cause of action, so that a new promise to pay made after the composition would be without consideration and would not furnish a cause of action. Taylor v. Skiles, 113 Tenn. 294, 81 S. W. 1258. But, even if the effect of a composition be no greater than the effect of an ordinary discharge in bankruptcy, it either extinguishes the legal liability (without touching the moral liability), or is a bar to the remedy, and in either event the bankrupt can no longer be compelled to pay. 53 L. R. A. 362.

When, therefore, the indorsees turned to the Paper Company, they were no longer attempting to enforce the contract of the Hills Company, the maker of the notes, but a different contract, namely, the Paper Company's undertaking made with the indorsees alone, to which the Hills Company was not a party. It is true that, if the composition had not intervened, the Hills Company would have been equitably affected by the indorsees' enforcement of their contract with the Paper Company; for, of course, the Hills Company continued to be primarily bound to pay its own notes, and if the Paper Company, a mere indorser, had been compelled to discharge this secondary obligation, it would have succeeded to the holders' rights against the maker. But the situation had been vitally changed by the bankruptcy of the Hills Company and the subsequent composition; the holders' rights against the maker could not be further enforced, and there was nothing of value to which the Paper Company could succeed.

This conclusion may not be in accord with the literal meaning of section 68, cl. "a," if that section alone be considered:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

But we think the clause should be read in connection with section 14c, already quoted, and should be regarded as modified thereby. If, before a debt due by a bankrupt can be set off by the creditor, it has been discharged by a composition or in the ordinary manner, it ceases to be available for that purpose; and this position is strengthened by the language of clause "b" of section 68, which provides:

"A set-off or counterclaim shall not be allowed in favor of any debtor of a bankrupt which (1) is not provable against the estate."

To apply this clause to the present case: A set-off in favor of the Paper Company, which was a creditor and also a debtor of the Hills Company, could not be allowed unless the set-off was provable against the latter company; and such provability we think could no longer be successfully maintained.

We have examined the cases relied on by the trustee—Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33, Railway Co. v. Graham (C. C. A. 4) 145 Fed. 809, 76 C. C. A. 385, and Cumberland, etc., Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042—but we think none of them presents or decides the point now before us.

The order of the District Court is affirmed.

SALYER v. CONSOLIDATION COAL CO.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1918.)

No. 3076.

1. DEATH ⊜37—LIMITATION OF ACTIONS—RUNNING OF STATUTE.
The limitation of one year prescribed by Ky. St. § 6, for injuries to the person, applies to an action for wrongful death.

2. COURTS ⊜366(13)—PRECEDENTS—FEDERAL COURTS.
Decisions of the state court, construing local statutes of limitation and with respect to administration, are binding on the federal court.

3. COURTS ⊜347—AMENDMENTS—CONSTRUCTION.
Where a cause begun in state court is removed to the federal court, the state decisions as to local statutes are binding; but the question as to amendments of the pleadings pursuant to Rev. St. § 954 (Comp. St. 1916, § 1591), relating to the curing of defects in forms, is one solely for the decision of the federal tribunal.

4. LIMITATION OF ACTIONS ⊜121(1)—APPOINTMENT OF ADMINISTRATRIX—VOID APPOINTMENT.
Ky. St. § 3845, declares that a married woman shall not be appointed executor or administrator, and that the marriage of a woman acting as such shall avoid the trust, and her husband shall not act as such in the right of the wife. A married woman, the sole beneficiary of the estate of her deceased son, was appointed administratrix by the Kentucky county court, and instituted in the Kentucky state court an action for his wrongful death, which by defendant was removed to the federal court. More than a year after the death, the married woman went before the county court and resigned, and a successor was appointed. Thereafter, on petition of the married woman for substitution of her successor as plaintiff, the action was dismissed on the theory that the original appointment was void, and so no action was brought within the one-year period allowed by Ky. St. § 6, for the institution of such action. *Held*, that as the attack on the appointment must be deemed in a sense collateral, and as the probate court might have found that the married woman was a feme sole, her appointment must, in view of Ky. St. § 3848, declaring that, where an order of administration is set aside or letters of administration revoked, all previous sales of personal estate, made lawfully by the administrator, and with good faith on the part of the purchaser, shall be valid, be deemed voidable only, so that the institution of the suit in her name was sufficient to toll the statute of limitations; this conclusion being upheld by Kentucky decisions construing other statutes applicable to administration.

5. PARTIES ⊜59(3)—AMENDMENTS—PARTIES PLAINTIFF.
In such case, as the action at all events was for the benefit of the married woman only, an amendment should have been allowed whereby her duly appointed successor could be substituted as plaintiff.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by Carrie Salyer, administratrix of Raleigh Reed, against the Consolidation Coal Company, begun in state court and removed to the federal court. There was a judgment of dismissal, and the succeeding administrator brings error, although the writ appears to have been sued out in the name of the original plaintiff. Reversed and remanded, with directions.

E. J. Picklesimer and Roscoe Vanover, both of Pikeville, Ky., for plaintiff in error.

Edward C. O'Rear, of Frankfort, Ky. (Alfie W. Young, of Morehead, Ky., of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Reed was killed July 3, 1915, as the result of an injury he received while working in the coal mine of the Consolidation Company. He was without widow, child, or father, and his mother was appointed administratrix by the appropriate court of probate (the county court) on August 3, 1915. As administratrix, she brought, in a state court, this action to recover the damages for his death, alleging negligence by the company. The defendant removed the case to the court below. Plaintiff was a married woman when appointed. Section 3845 of the Kentucky Statutes provides:

"A married woman shall not be appointed executor or administrator. The marriage of a woman acting as such shall avoid the trust, and her husband shall not act as such in right of the wife."

After a demurrer had been interposed and overruled, the defendant, on December 8, 1916, answered and alleged that, because plaintiff had been and was a married woman, her appointment as administratrix was void, and that she had no capacity to bring or maintain this suit. Thereupon she went before the county court and resigned, and that court, on January 11, 1917, appointed E. J. Picklesimer as administrator. In April, 1917, she filed a petition in the court below showing that she had always been the sole beneficiary under the estate of her son, and that Picklesimer had succeeded her as administrator as above, and praying that he be permitted to prosecute this suit as such administrator. At the same time, Picklesimer filed an intervening petition alleging the same facts and asking that he be permitted to prosecute and carry on this suit in his name as administrator and for the benefit of the mother, Mrs. Salyer, sole beneficiary of the estate. Upon these petitions, the court ruled that the appointment of the mother as administratrix was void, that she had no right to begin the suit, that there was nothing to amend, and that the statute of limitations prevented any action equivalent to the beginning of a new suit. Accordingly the suit was finally dismissed, and this proceeding in error was brought.

[1-3] The only applicable statute of limitations is section 2516 of the Kentucky Statutes, which provides that actions for injuries to the person shall be brought within one year after the cause of action accrues. The action for death, given by section 6 of the Kentucky Statutes, might not necessarily be thought an action "for injury to the person"; but the one-year limitation has been held to apply thereto. Carden v. Railroad, 101 Ky. 113, 39 S. W. 1027. The court below felt bound to, and did, follow the decision of the Kentucky Court of Appeals in Fentzka's Adm'r v. Warwick Co., 162 Ky. 580, 172 S. W. 1060. In that case it appeared that, within three months after the death, the relative first entitled to administration had renounced and asked that the estate be "referred to" the public administrator; and this was done. The public administrator, thus prematurely appointed, brought suit on

account of his decedent's death. Later, and more than one year after the death, the premature character of this appointment was observed, and a second appointment or order of reference to the same public administrator was made. He thereupon asked leave to be substituted, in his special capacity under his second appointment, in the pending suit in which he had declared under his first appointment. The court refused this permission, in an opinion which concludes that the first appointment was without lawful authority and was void, and therefrom seems to draw two inferences: First, that there could be no amendment because the first action was a nullity and there was nothing to amend; and, second, that since no action by the rightful administrator had been commenced within the year, all right of action was barred. Clearly, in so far as the decision in the Fentzka Case adjudged the construction and effect of the statute forbidding a married woman to be an administrator and of the statute of limitations, it is binding upon the federal courts; and it is equally clear that, in so far as the case determines the question of the right to amend the pleadings in a pending action, it does not affect the federal courts, which must construe and apply for themselves the federal statute of amendments. R. S. § 954 (U. S. Comp. St. § 1591). Truckee Co. v. Benner (C. C. A. 9) 211 Fed. 79, 81, 127 C. C. A. 503. See also cases cited at page 3184, note 17, U. S. Comp. St. of 1916.

[4] If we assume that the Fentzka Case should be considered as interpreting the Kentucky statute of limitations to the effect that a suit commenced by an administrator whose appointment is void is no suit at all, and that, in order to prevent the bar of the statute, a suit must be commenced within the year by an administrator whose appointment is not void, and if, therefore, we assume that the federal courts are bound by this decision as the law of the state on that point, the question remains, "Was the appointment of the plaintiff as administrator void, or did it give her at least color of title to the office?" This question has not been expressly decided in Kentucky, but a review of the decisions in the state indicates to us quite clearly what must be considered the Kentucky rule. In such an examination, we must bear in mind that the word "void" is often loosely used, and perhaps no court is exempt from just criticism in this particular; and it follows that, in cases where the precise distinction between "void" and "voidable" is not controlling, the use of the broader word does not end inquiry as to the force of the distinction.

The statute says that a married woman shall not be appointed executor; it does not say that the appointment, if made, shall be void. This inference is thought to be supported by reference to the other part of the same section, which declares that the marriage of a woman administrator "shall avoid the trust." The latter clause is construed, so far as we find, in only two cases: Young v. Duhme, 4 Metc. (Ky.) 239, and Tribble's Ex'rs v. Broadus, 23 S. W. 349. In the first of these cases, it appeared that administration had been granted to the widow of the deceased, that after three years she had married, and that she had completed the settlement of the estate according to accounts approved by the appointing court. Whether this was before or after her marriage does not appear. Four years after her marriage, a creditor of the de-

ceased brought suit against the administratrix for the purpose of establishing a disputed demand. The court held that this suit could not be maintained, and said that by defendant's marriage she had ceased to be so the personal representative of the deceased that suit against her could be effective to adjudicate the demand. This is plainly far short of holding that she had become an entire stranger to the estate and did not represent it to any extent or for any purpose. In the second case, after the marriage of the executrix, an action was brought by the heirs to determine her right to continue as executrix. The only question involved was whether her powers under the will were those of an executrix or those of a trustee. The broader question of whether her office became by her marriage utterly vacant was not considered.[1] This question might be presented in many aspects; for example, if she continued with the consent of everybody to act as executor and misappropriated the assets, would the sureties on her official bond escape liability because her act had been that of a stranger to the estate? It is enough to say that the Kentucky Court of Appeals has never announced any such extreme rule.

The appointment of administrators in the usual case is governed by sections 3896 and 3897, which, so far as now pertinent, are given in the margin.[2] It is the plain effect of these sections that, until the end of the second county court, the next of kin who desire administration are absolutely entitled thereto, and in their order as distributees, and that until the expiration of this time, the court has no right to appoint any one else. It is not apparent why the lack of power to appoint a creditor or a stranger, until after the second county court, is not as complete as the lack of power to refer to a public administrator before the end of the three months, or why the time prohibition against such appointment of a creditor is not as imperative as the personal prohibition against the appointment of a married woman. However, it is clearly established that an appointment which, under these sections is forbidden because premature, is not void but is only erroneous. The question first arose in Buckner's Adm'rs v. Railroad, 120 Ky. 600, 87 S. W. 777. The widow, who claimed to be next of kin, was appointed administratrix. It afterwards developed that there was a surviving child who demanded administration, and was eventually adjudged entitled. In the meantime, the widow had brought suit against the railroad and the trial court had dismissed the case because her appointment, as administratrix, was void. The Court of Appeals reversed this action, held that the appointment was only voidable, and directed that the case

[1] It would seem that a proceeding to remove should be brought under section 3846, just as much as upon the happening of the disabilities there mentioned.

[2] Sec. 3896.—*Precedence in Right of Administration.* The court having jurisdiction shall grant administration to the relations of the deceased who apply for the same, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them whom the court shall judge will best manage the estate.

Sec. 3897.—*Court may Appoint Other Person.* * * * If no such person shall apply for administration at the second county court from the death of an intestate the court may grant administration to a creditor, or to any other person, in the discretion of the court.

should proceed in the name of the new administrator. The opinion does not deny that the probate court had no right to appoint the widow until after the second county court if there was in fact a child entitled to qualify, but goes upon the theory that the existence of the child was an issuable fact which the probate court had the right to determine, and that, since that court had appointed the widow, there was an implied finding that there was no child. Just as much in the case at bar, was there an implied finding that the mother was not a married woman; and this was a finding which the court had the power to make. If it was an erroneous finding, the statutes provided a remedy.

In Young's Adm'r v. Railroad, 121 Ky. 483, 89 S. W. 475, an administrator had been appointed without waiting the statutory time for application by those first entitled to appointment; but, when it later appeared that in truth there were no persons who had the prior right, it was decided that the appointment was not only not void but was valid. This doctrine has been reaffirmed in Spayed's Adm'r v. Brown, 102 S. W. 823; Cunningham v. Clay's Adm'r, 132 Ky. 129, 116 S. W. 299; McFarland's Adm'r v. Railroad, 130 Ky. 172, 113 S. W. 82; Phillips v. Hundley, 135 Ky. 269, 275, 122 S. W. 147; and Jackson's Adm'r v. Asher Co., 153 Ky. 547, 156 S. W. 136. And see cases from many states, cited in note 6, p. 78, 11 R. C. L.

Since the doctrine of these cases, which apparently would make Mrs. Salyer's appointment operative at least until it was in some manner attacked, is said to be opposed to the rule stated in the Fentzka Case, the history and limitations of the latter rule should be ascertained. The supporting decisions rest upon Underwood v. Underwood's Adm'r, 111 Ky. 966, 65 S. W. 130, in which the court considers section 3905,[3] and seems to hold that a reference to the public administrator before the three months have expired, and before the end of the time within which creditors have a right to demand administration, is utterly void. The attack upon the appointment was direct, and there was no necessity for holding the appointment void rather than voidable; but the dissenting opinion of Judge Hobson makes it clear that the majority intended to decide just that, and the decision must be accepted as of that scope. In Paslick v. Shay, 148 Ky. 642, 147 S. W. 369, the same statute was involved, but with reference to the public guardian. It was contended that the order was void because it did not recite (nor did it appear) that there was no testamentary guardian and that no one else than the public administrator would qualify as guardian. In a unanimous opinion, it was held that the court of probate was, with reference to the appointment of administrators and guardians, a court of general juris-

[3] Sec. 3905.—*When Estate of Decedent to be Placed in Hands of—Appointment as Guardian.* The several county courts of this commonwealth, in which there is a public administrator and guardian, shall confide to him the administration of the estate of deceased persons in all cases in which, by law, the jurisdiction to grant letters testamentary or administration applies, if it shall appear, after the expiration of three months from the death of the decedent, that no one will qualify as executor or apply for administration; and shall also confide to said public administrator and guardian the care and control of the persons and estates of all minors, in case it shall appear that such minor hath no testamentary guardian, and no one will apply for or serve as such by the appointment of the court.

diction, and that if an attack is made upon an order of appointment, it must be affirmatively shown that the jurisdiction did not exist, and that the appointment in question, in spite of the fact that the preliminary conditions were not shown to exist, was not void, but was valid until attacked; and a sale of the infant's property that depended upon service of process upon the public guardian so appointed was affirmed. This decision does not mention the opinion in the Underwood Case, but it seems to be an adoption of the principles of Judge Hobson's dissenting opinion.

Each one of the several cases above cited, which holds the appointment under section 3897 only voidable, discussed and distinguished the Underwood Case. The efforts to distinguish seem to come, in the end, to the fact that the Underwood Case is under section 3905 and the others are under section 3897. It is enough to say that the Kentucky Court of Appeals has consistently refused to extend the rule of the Underwood Case to any other facts than the precise ones there involved. Certainly, the distinction between the Underwood Case and the Paslick Case (also under section 3905), and seemingly the only possible distinction from the cases under section 3897, lies in the difference between defects in power appearing on the face of the record and those not so appearing. Nothing can precipitate the coming of a time which the statute has fixed by a calendar measure; but it always may be that the nonexistence of every prior claimant was made to appear. Upon this criterion, and because nothing appeared of record showing her disqualification, the appointment of Mrs. Salyer would not be void.

Our conclusions are—and we need go no further—that under the Kentucky statutes, Mrs. Salyer's appointment ought to be deemed of enough force and effect so that an action begun by her saved the case from the statute of limitations, and that we find no settled rule in Kentucky constraining us to the contrary result.

Another Kentucky statute confirms this conclusion, although this other statute has not been thought applicable—or, at least, has not received attention—in cases under section 3905. It is section 3848, given in the margin.[4] It is discussed in McFarland's Adm'r v. Railroad, supra, and clearly makes valid and effectual the beginning of this suit by Mrs. Salyer, if her appointment can be considered as not utterly void.

[5] When we reach the question of the right to amend by substituting Mrs. Salyer's successor in her place, we think this case is within the principle of Mo., Kan. & Tex. Ry. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134. In reaching this conclusion, we pass by, without deciding its effect, the fact that Mrs.

[4] Sec. 3848.—*Acts Whilst Exercising Trust Valid—Sale of Land Pending Probate of Will.* Where an order of administration is set aside or letters of administration revoked, or where any executor or administrator shall be removed, or the will under which he acted shall be declared invalid, all previous sales of personal estate, made lawfully by the executor or administrator, and with good faith on the part of the purchaser, and all other lawful acts done by such executor or administrator shall remain valid and effectual. But, pending an action or procedure to set aside or reject the will, there shall be no power to sell the land of the deceased, except under a judgment of court.

Salyer was the beneficiary of the action, and that if she had declared as beneficiary, instead of as administratrix, the situation would have been more nearly identical with the Wulf Case. In the latter case, it was considered that the beneficiary, claiming in her own right, had commenced an action under the federal Employers' Liability Act. It had been decided that the right of action did not vest in the beneficiary, but in the personal representative. After the statute of limitations had run, the plaintiff beneficiary procured appointment as personal representative, and thereupon was permitted to amend or to substitute plaintiffs —whichever it may be called—so as to transform the action into one prosecuted by the representative. We see no material distinction between that case and this in that there was here a difference in personal identity between the original plaintiff and the one admitted in substitution. It is the unquestioned practice to permit revivor in the name of a successor in office. We must interpret the Wulf Case as holding that the cause of action was that which arose under the statute, and that where plainly a suit has been commenced upon that cause of action, it is within the statute of amendments to substitute the right party plaintiff in the place of the wrong one.

Attention is drawn to the prosecution of this writ of error in the name of Mrs. Salyer, the administratrix who is out of office. We think it sufficiently appeared that the writ is in fact prosecuted by the successor administrator.

The judgment must be reversed, and the case remanded for further proceedings in accordance with this opinion.

ERIE R. CO. v. HILT et al.

(Circuit Court of Appeals, Third Circuit. January 5, 1918.)

No. 2308.

1. NEGLIGENCE ⊜136(19)—INJURIES TO CHILD—JURY QUESTION.
   In an action for injuries received by a small boy, hurt when a car around which he was playing was moved without warning, the question of the negligence of the railroad company's servants *held*, under the evidence, for the jury.

2. NEGLIGENCE ⊜136(29)—CONTRIBUTORY NEGLIGENCE OF CHILD—JURY QUESTION.
   Despite 3 Comp. St. N. J. 1910, p. 4245, § 55, declaring that it shall not be lawful for any person other than those connected with or employed upon a railroad to walk along the tracks of any railroad, except when the same shall be laid upon a public highway, and that, if any person shall be injured by any railroad car while walking, standing, etc., upon any railroad, he shall be deemed to have contributed to his injury, the question whether a small boy seven years of age was guilty of contributory negligence in playing around and partly under box cars, so that he was injured when they were suddenly moved, *held*, under the evidence, for the jury.

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

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

Action by Edwin J. Hilt, Jr., and another, against the Erie Railroad Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Collins & Corbin, of Jersey City, N. J. (George S. Hobart, of Jersey City, N. J., of counsel), for plaintiff in error.

Samuel Greenstone, of Jersey City, N. J. (Edwin F. Smith, of Jersey City, N. J., of counsel), for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. A branch of the defendant's railroad runs through the town of Garfield, N. J. On April 6, 1916, Edwin J. Hilt, Jr., one of the plaintiffs, a boy less than seven years old, was run over and severely hurt on a switch track or siding near the station, and this suit is brought by his father and himself to recover damages for the injury.

At the place of the accident, there are two main tracks and a siding; trains run toward Jersey City on the east-bound track, and south of this track is the siding, which runs westward to the station and is used for the receipt and delivery of freight. On the day in question, nine cars stood on the siding—first, five empty cars near its junction with the east-bound track; then, two loaded coal cars, separated from the empty cars by an open space of 15 or 20 feet; the remaining two being loaded box cars, standing near the station and separated from the coal cars by a space of similar width. Immediately south of the siding there was open ground, about 20 feet wide and more than 350 feet long. This was chiefly used as a driveway to the station and the siding, but for a good many years it had been also used as a playground by children, some of them very young, who were accustomed to play on the open ground, on the siding itself, and over and about the cars that might be standing on the rails. This was a frequent practice, and was well known to the servants of the railroad. Sometimes the children would be driven or ordered away, but this had little effect on the practice, as there was no barrier to keep them off.

On April 6 a train consisting of an engine and twenty cars was moving toward Jersey City on the east-bound track. It had been ordered to pick up the five empty cars, and, as the train neared the junction of the siding with the east-bound track, the rear brakeman alighted from a car toward the rear of the train for the purpose of setting the switch. He descended on the southerly side of the train, between the east-bound track and the siding, and crossed the siding through the space between the coal cars and the empty cars, thus reaching the driveway. He testified that he looked up and down both rails of the siding, but saw no one. Thereupon he ran east and turned the switch, the train meanwhile having moved east and stopped at a point where its rear end was about 50 feet beyond the switch. The brakeman then gave the signal to back, and ran west along the north rail of the siding to the place where the empty cars were to be coupled. As

he ran he could see along the northerly side of the siding as far as its western end, but still saw no one. He ran as far as the middle of the empty cars, and waited to make the coupling. These movements required about six or seven minutes, and the engineer, obeying the signals, backed into the siding against the empty cars. When the train started to back, the conductor testified that he was on top of a car about the middle of the train, was facing west, and was watching the siding and the brakeman, but saw no one except the brakeman. The train was moving about 4 or 5 miles an hour, and stopped on the usual signal, and in the usual way; the coupling was made, but the momentum of the train pushed back the empty cars against the coal cars, and moved these seven cars a few feet further. The two loaded box cars were not disturbed.

The boy had been playing marbles near the siding with a companion of his own age, who was not called as a witness. A peddler, who was selling potatoes at a house in the neighborhood, saw the boys near the siding about five minutes before the accident, and told them to get away or they would be hurt; but he paid no further attention to the matter until he heard the coupling of cars and the cries of the injured boy just afterward, whereupon he hastened to the spot and found the boy lying on the ground close to the rail on the south side of the siding, and close to the train, which was then standing still. The boy testified that he had been playing marbles for an hour before the accident, and that a marble had rolled under one of the five empty cars and was lying toward the north rail of the siding. He tried to recover it by reaching under the car with his foot and pulling the marble toward him; but drew back quickly, because he thought the cars might be going to move. He tried a second time, however, and while he was thus engaged the train backed in, and his left leg was so badly injured that amputation was necessary. At the trial no question was raised about the duty of the train to give notice of its movements by bell or whistle; the plaintiffs' position was that the railroad's testimony, already referred to, could not be accepted, that the boy must have been visible, and that the brakeman was negligent in failing to see him and in failing to give him notice of the danger. Witnesses testified that both boys were seen at the spot immediately after the accident.

[1] On the question of the railroad's negligence, it is clear that the jury was the proper tribunal to decide which account was the most reliable, and what inferences should be drawn from the testimony after the facts were determined. Under the charge they must have found that the brakeman did not exercise reasonable care, and we think the conflicting evidence justified the court in submitting this question.

[2] Whether, considering his tender years, the boy was to be chargeable with contributory negligence as a matter of law, either as a general proposition or under section 55 of the New Jersey statute (3 Comp. Stat. p. 4245), is not an open question in this court. No decision of the highest court of the state requires us to hold that the District Court should have taken this question from the jury, and our own cases (Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. [N. S.] 367; Erie R. R. v. Swiderski, 197 Fed. 521, 117 C.

C. A. 17; Chesko v. Del. & Hud. Co., 218 Fed. 804, 134 C. C. A. 492) are to the contrary. The boy's contributory negligence was submitted to the jury as a question of fact, and this was all the defendant could properly ask. Upon this point there was pertinent testimony by the boy that he had never played on the siding or around the cars before, and had never been in the driveway or near the siding; that he had never seen cars going up and down the siding, and knew nothing about the movement of cars thereon; that on the day in question he saw no railroad men, no engine or train, and did not know that switching was being done, or that cars were to be moved. He testified that he knew he would be hurt if a car ran over him, and gave some other answers that were in the railroad's favor; but the whole subject was for the jury, and was submitted under proper instructions.

The father's contributory negligence was also submitted in language to which no exception was taken.

No other assignment of error seems to need consideration, and accordingly the judgment is

Affirmed.

LONTOS v. COPPARD.

In re PANCOAST-MORGAN CO.

(Circuit Court of Appeals, Fifth Circuit. December 13, 1917.)

No. 3058.

1. BANKRUPTCY ⟸314(1)—CLAIMS—PROOF.
   As Rev. St. Tex. art. 5490, gives a landlord a lien on the personal property contained in the leased premises for rent of the balance of the current year, a landlord may on bankruptcy of the tenant prove his claim for rent for that period and enforce the same against the proceeds of the property subject to the lien, though the debt be not provable against the bankrupt's general estate.
2. BANKRUPTCY ⟸328—ADJUDICATION—EFFECT.
   Under Rev. St. Tex. art. 5490, giving the landlord a lien on the personal property contained in the leased premises after rent for the balance of the current year, but continuing the lien for only 30 days after the tenant has ceased to occupy the rented premises, a landlord may more than 30 days after the tenant was adjudicated a bankrupt file an amended claim setting up his lien under the statute, for the rights of the parties were fixed at the time of adjudication at which time the bankrupt was occupying the demised premises, and his goods and chattels contained therein were impressed with the lien, and the subsequent possession of the trustee, which was not adverse as to the landlord, did not affect the lien.
3. BANKRUPTCY ⟸245—TRUSTEE—DUTIES OF.
   A trustee in bankruptcy represents not only the landlord, but the other creditors, and his occupancy of demised premises after adjudication cannot be construed as adverse to the landlord for the purpose of defeating his lien for rent.
4. BANKRUPTCY ⟸336—CLAIMS—FILING.
   Where a landlord filed his original proof of debt promptly, but failed at that time to assert his lien for the rent for the remainder of the current year given by Rev. St. Tex. art. 5490, it was proper to allow him to file an amended claim within the year prescribed by Bankr. Act July 1, 1898.

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c. 541, § 57n, 30 Stat. 560 (Comp. St. 1916, § 9641), asserting the lien; the omission to claim it in the first place having been due to a misapprehension of the law.

Appeal from the District Court of the United States for the Western District of Texas; William B. Sheppard, Judge.

In the matter of the bankruptcy of the Pancoast-Morgan Company. M. Coppard, trustee, excepted to the claim of C. N. Lontos, a creditor, and the creditor appeals from an order and decree affirming the order of the referee sustaining the exceptions to the allowance of his claim. Reversed.

M. W. Terrell, of San Antonio, Tex., for appellant.

R. H. Ward, of San Antonio, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. In this case the undisputed facts necessary to its consideration are these: The Pancoast-Morgan Company was adjudicated a bankrupt on June 3, 1915. At that time it was occupying a store in San Antonio rented from C. N. Lontos, by a written lease, at a monthly rental of $550, payable in advance, the lease running from March 1, 1913, to October 31, 1922. On June 25, 1915, the trustee was elected, and the same day the landlord filed his proof of debt for the rent due for the month of May, 1915, and claimed a lien, under the belief that it was all he was entitled to. On July 30th, he filed an amended claim for rent, including the month of May, and for the balance of the contract year, to wit, up to March, 1916, and asserted a lien upon the personal property contained in the leased premises, by virtue of the laws of Texas, for the full amount. At the same time he notified the trustee that he would consent to the sale of the leasehold or the subletting of the premises for the balance of the contract year. On July 31, 1915, the property of the bankrupt, on which the landlord claimed a lien, was sold by the trustee under order of the referee for $12,100, free of all liens, and the sale was subsequently confirmed. On the day of sale, by agreement between the trustee and the landlord, the premises were leased to the purchaser of the goods without prejudice to the rights of either party. The trustee objected to the amended claim of the landlord on the grounds: First, that the rent to accrue in the future was not a fixed liability, owing at the time of bankruptcy; and, second, that the claim was barred because not filed within 30 days after the occupancy of the premises by the bankrupt ceased. The referee ruled in favor of the trustee and disallowed the claim for all rent to accrue after August 1, 1915. On review the order of the referee was affirmed, and a judgment to that effect entered by the District Court. From that judgment this appeal is prosecuted.

[1] Generally speaking, claims for rent to become due fall into two classes. There are well-considered cases holding that, where the state law gives no lien, a claim for the unearned portion of the rent under a lease is not a provable debt, and the landlord is not entitled to prove

in damages for the breach of contract. On the other hand, it may be considered settled, in this circuit at least, that where the state law does give the landlord a lien for the unexpired term of the lease, or any part of it, the claim for rent for that period may be proved in bankruptcy and enforced against the proceeds of the property subject to the lien, even though the debt may not be provable against the general estate. Martin v. Orgain, 174 Fed. 772, 98 C. C. A. 246; In re Meyer & Bleuler (D. C.) 195 Fed. 653; Denechaud v. Board of Administration of Tulane Educational Fund, 200 Fed. 1022, 118 C. C. A. 665; In re Southern Hardware & Supply Co. (D. C.) 210 Fed. 381; Dellinger v. Waite-Thresher Co., 228 Fed. 506, 143 C. C. A. 88; Fudickar v. Glenn et al., 237 Fed. 808, 151 C. C. A. 50; Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233. See, also, Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595.

In the matter before us we are not concerned with the first-mentioned class of cases, as the laws of Texas give the landlord a lien on the personal property contained in the leased premises for rent for the balance of the "current contract year." Article 5490, Revised Statutes of Texas of 1911; T. L. Marsalis & Co. v. A. J. Pitman, 68 Tex. 626, 5 S. W. 404. It is clear, therefore, that the first ground of objection raised by the trustee to the landlord's claim is untenable.

[2, 3] However, it is further contended on behalf of the trustee: First, that the lien under section 5490, supra, exists for only 30 days after the tenant has ceased to occupy the rented premises; and, second, that the possession and occupancy of the trustee was not the occupancy of the bankrupt, and that by delaying for more than 30 days after the election of the trustee to file the amended proof of debt the lien was waived by the landlord.

[4] There is no dispute as to the soundness of the first proposition, but it does not apply to the facts in this case. The rights of all parties were fixed at the moment of adjudication in bankruptcy, at which time the bankrupt was occupying the leased premises, and his goods and chattels contained therein were impressed with the landlord's lien. The property passed to the trustee burdened with a valid lien. York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. The trustee represented the landlord as well as the other creditors, and his occupancy of the leased premises and possession of the property contained therein could not be construed as adverse to the landlord for the purpose of defeating his lien. After the adjudication in bankruptcy there was nothing the landlord could do to enforce his lien, but file his claim in the bankruptcy proceedings. He filed his original proof of debt promptly and claimed his lien. That he did not at that time claim all he was entitled to was due entirely to his ignorance of his rights. His amended claim was filed as soon as he discovered his error and before a sale of the property or any distribution of the assets. Under these circumstances the only limitation to its filing was the year's time provided by section 57n of the Bankruptcy Act, and the amendment should have been allowed and given effect. Considering the consent of the landlord, the trustee might have sold the leasehold, or have sublet the premises, for the benefit of the creditors. Fortunately, owing to the very sensible arrangement

between the landlord and the trustee, it is probable that no damage has resulted to the estate.

As the landlord was entitled to payment in full out of the proceeds of the personal property in the leased premises, it follows that the judgment appealed from must be reversed, and appellant awarded judgment on his amended claim, subject to the deduction of such amounts as he has already received by virtue of the orders of the referee and his agreement with the trustee.

Reversed.

SALT LAKE & U. R. CO. v. TRUMBULL.

(Circuit Court of Appeals, Eighth Circuit. November 28, 1917.)

No. 4773.

1. STREET RAILROADS ⊜117(34)—INJURIES TO PERSONS ON TRACKS—DISCOVERED PERIL.

Plaintiff, while proceeding south along the sidewalk of a street, stepped on a switch track running across the sidewalk and connecting with the main tracks on the street. A car, which had discharged its load at a point south of the switch, was started onto the switch track by a sudden application of power, and struck plaintiff as she stepped onto the track. The motorman, though seeing plaintiff approaching and that she was unaware of the oncoming car, applied the emergency brake, but gave no signal of his approach, which would have enabled her to step back to a point of safety. *Held* that, although plaintiff might have been guilty of contributory negligence, it could not be declared as matter of law the proximate cause of the injury, but the question whether plaintiff's contributory negligence, or the negligence of the motorman after discovering her position of peril, was the proximate cause of the injury, was properly submitted to the jury.

2. STREET RAILROADS ⊜117(23)—PERSONAL INJURIES—DIRECTED VERDICT—PROPRIETY.

Where the question of the negligence of the motorman after discovering plaintiff's peril was presented by the evidence, a verdict should not have been directed for defendant on the ground that plaintiff was guilty of contributory negligence.

In Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Action by Julia A. Trumbull against the Salt Lake & Utah Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Frank Evans, of Salt Lake City, Utah (Henry I. Moore and Evans, Evans & Folland, all of Salt Lake City, Utah, on the brief), for plaintiff in error.

J. J. Whitaker, of Salt Lake City, Utah, for defendant in error.

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

MUNGER, District Judge. The plaintiff in this action recovered a judgment against the defendant company for personal injuries. By

this writ of error the company challenges the refusal of the court to direct a verdict in its favor and the giving of an instruction relating to negligence of the motorman after his discovery of plaintiff's peril.

The plaintiff, at about noon of a bright March day, was walking south along the sidewalk on the west side of First West street in Salt Lake City. The length of the block she was passing was 660 feet. About 200 feet south of the north end of this block the company's switch track ran westerly across this sidewalk, connecting the main tracks along the street and the car barns situated upon a portion of this block. The sidewalk was of cement, and the rails that crossed it were of the same height as the walk. Between the rails there was planking, except for a space of 2 inches inside of each rail, where the flanges of the car wheels ran. The planking also extended outside of such rails for a distance of less than 2 feet and met the end of the cement sidewalk. This planking was very nearly of the same color as the cement walk, and was also about level with it and with the top of the rails at this crossing. This switch track curved southwesterly from the point of the switch in the street until it crossed this sidewalk, a distance of about 140 feet. The company's car had discharged its load at a point south of the point of the switch and had been started on the switch by a sudden application of the power through an overhead trolley. This impulse was sufficient to drive the car around this curve, across the walk, and into the car barn yards. The plaintiff was struck by the car as she was about to walk over the switch track at the sidewalk crossing.

[1] The court submitted to the jury issues whether the motorman was negligent in failing to give warning of the car's approach, in failing to keep the car under control and at proper speed, and also whether plaintiff exercised due care in approaching the crossing. The court also gave the instruction:

"If you find that the defendant was negligent, and you further find that the plaintiff was negligent, and the accident resulted from plaintiff's negligence, then your verdict should be for the defendant, unless you further find from the evidence that the motorman could have avoided the accident by the use of ordinary care, if he saw, or if he did see, or by the use of ordinary care could have seen, that the plaintiff was on or about to pass upon the railroad track, or about to come into such close proximity to the car as to be struck by it; and if he failed under those conditions to exercise reasonable care to avoid injuring the plaintiff, then your verdict should be in favor of the plaintiff."

The company now contends that this instruction was not justified by the evidence, because the undisputed testimony shows that plaintiff was guilty of contributory negligence which continued until the moment of collision, as she heedlessly walked upon the track directly in front of the moving car. In support of this claim reference is made to the case of Denver City Tramway Co. v. Cobb, 164 Fed. 41, 90 C. C. A. 459, and to the principle declared therein, that where there is no negligence of the defendant supervening subsequently to the negligence of the plaintiff, as, where plaintiff's negligence is continuous and operative down to the moment of his injury, the plaintiff may not recover. The opinion in that case stated that all was done

that could be done to avoid a collision when it was discovered that one was probable.

In the present case there was evidence from which the jury could find that the motorman saw the plaintiff approaching the crossing and that she was unaware of the oncoming car; that just as she stepped to the point where the edge of the car would not clear her, and before she stepped to the first rail, he applied the emergency brake; that the car was going so slowly that he could have stopped the car in time to avoid injuring her; that he did not give a signal to her by the whistle, although the means was ready at his hand, nor did he call out to her; that a slight step backwards would have carried the plaintiff beyond reach of the car, had she been made conscious of its approach. These circumstances do not require a legal conclusion that the plaintiff's negligence was continuous until the car struck her, and was in part the proximate cause of her injury, for, as soon as she had advanced to a point where the side of the car would not clear her, her prior act of walking into peril had culminated. A later act of negligence of the company then occurred, if the motorman failed to use due care to give her warning and opportunity for escape after he had discovered her perilous position, and this act was the latest in succession of the causes of the accident and gave a cause of action to plaintiff, arising after her original acts of negligence had ended. Chunn v. City & Suburban Railway, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Hart v. Northern Pac. Ry. Co., 196 Fed. 180, 116 C. C. A. 12; St. Louis & S. F. R. Co. v. Summers, 173 Fed. 358, 97 C. C. A. 328; Herr v. St. Louis & S. F. R. Co., 174 Fed. 938, 98 C. C. A. 550; Great Northern Ry. Co. v. Harman, 217 Fed. 959, 133 C. C. A. 631, L. R. A. 1915C, 843.

[2] The other assignment of error relied upon complains of the failure of the court to direct a verdict in favor of the defendant at the conclusion of the testimony, because the plaintiff had been shown to be guilty of contributory negligence as a matter of law. It is said that the car was moving at a reasonable rate of speed, in broad daylight, with nothing to obstruct plaintiff's view of the approaching car, or to prevent her hearing it, and that she recklessly walked forward to where she was struck. As we have already stated, there was sufficient evidence from which the jury could find that there was an act of negligence on the part of the motorman, after plaintiff's acts had carried her into peril. There was therefore no error in refusing the direction of a verdict for the defendant.

The judgment will be affirmed.

THE BRONX.

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

No. 20.

1. MARITIME LIENS ⊂=24—PRESUMPTION.
That an officer of the owner of a vessel agreed with libelant that either he or the owner would pay for supplies furnished does not show that the libelant was not entitled to a lien, for a maritime lien is presumed, on proof of delivery of lawful supplies, until the presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment.

2. MARITIME LIENS ⊂=65—PROCEEDINGS—PRESUMPTION.
In the absence of proof, it will be presumed that one intervening and claiming a vessel as agent for the owners was authorized to do so.

3. ADMIRALTY ⊂=83—PROCEEDINGS—REFERENCE.
While it is an ancient custom, not yet everywhere abandoned, to adduce evidence in admiralty before commissioners and examiners, and references of special questions to specially qualified persons have been recognized, nevertheless an admiralty court cannot, without consent of the parties, send the merits of the cause for trial before the commissioner or referee.

4. ADMIRALTY ⊂=118—PROCEEDINGS—REFERENCE—ERROR.
The lien asserted in the libel against a vessel having been discharged by bond or stipulation filed by claimant, libelant moved for an interlocutory decree and reference to assess damages; claimant having made default in answer. An answer having been filed before return day of the motion, the court entered an order referring the matter to a commissioner to hear and determine the issues therein. The answer tendered no issue, except as to items of recovery. *Held* that, though the order of reference was erroneous in directing the commissioner to hear and determine, the error was not jurisdictional, but was a mere irregularity; the court having jurisdiction of the parties and the res, and the commissioner having treated the reference as one to compute or assess damages.

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

Libel by Burns Bros., a corporation, against the steamer Bronx, claimed by George W. Beebe. From a decree for libelant, claimant appeals. Affirmed.

The corporation of Burns Bros. filed a libel against the domestic vessel Bronx for supplies, furnished (as alleged) at the instance of master and owner. That steamer was at the time in the possession of Beebe, as charterer, who maintained a ferry. In order to prevent interference with his ferry service, Beebe filed a claim as "agent for the owners for the interest of the [alleged owners]" in the res and gave a bond or stipulation (not contained in this record), which discharged the lien asserted in the libel. It is presumed that the stipulation followed the claim, and was on behalf of owners; if it did not, it was irregular, to say the least.

Claimant then made default in answering, and libelant moved for an interlocutory decree and reference to assess damages. Before this motion came on to be heard, an answer was filed, but so far as appears without leave of court. On the return day of libelant's motion, claimant did not appear, whereupon an order was entered, reciting the filing of answer, and referring the matter to a commissioner "to hear and *determine* the issues herein."

Claimant appeared on the reference, and the commissioner took (so far as shown) all the testimony offered; claimant tendering no witness. A report

was filed as upon a "reference to compute"—which fact we learn only from recitals, such report being omitted from the apostles. This report Chatfield, J., set aside, and sent the case back to the commissioner "for proper findings on the issues as referred, with further hearing, if necessary." Thereupon claimant introduced some testimony and the commissioner filed a second report, finding that libelant was entitled to recover as a lien under Act June 23, 1910, c. 372, 36 Stat. 604 (Comp. St. 1916, §§ 7783–7787), $750.20.

To this report no exceptions were filed, and the court, "on reading and filing" the same, entered a final decree awarding libelant what the commissioner had reported as a lien. So far as shown by the apostles, such decree was after argument, or opportunity therefor, by both parties. Beebe then took this appeal, assigning for error, in substance, one matter only, viz. that the libel had not been dismissed, because libelant furnished supplies on the personal credit of one Wolfe, and not on that of the steamer.

G. Ewald Menzel, of New York City, for appellant.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). In the one point advanced by appellant in the court below, and raised here by assignment of error, there is no legal merit.

[1] The answer asserted that Wolfe, an officer of alleged owner, agreed with libelant that either he or the owner would pay for the supplies in question. From this Beebe seems to have inferred that, if Wolfe was not as good as his word, there was no lien. Such is not the law; the lien is presumed on proof of due delivery on request of lawful supplies, until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment. The Havana, 64 Fed. 496, 12 C. C. A. 361; The Yankee, 233 Fed. 919, 147 C. C. A. 593; The Oceana (C. C. A. 2d, Oct. T., 1916) 244 Fed. 80, —— C. C. A. ——. In short, the answer tendered no issue, except the amount and price of the supplies.

[2] But this answer was by Beebe as agent for owners; it necessarily followed the claim, and Beebe never appeared as charterer, nor intervened pro interesse suo. If he had no authority from the owners to claim, stipulate, and answer, his whole proceeding was a fraud. In the absence of proof, we assume authority; he therefore spoke for owners, in an answer on peremptory exception.

[3, 4] The foregoing disposes of the only matter raised by assignment; but in this court for the first time appellant asserts that the District Court was without jurisdiction to enter decree, because the trial was unlawful, in that it took place before a commissioner, and not before the court. That there was jurisdiction over the res and the parties is plain, and whether an objection to procedure can be first made in the appellate court is a point on which we express no opinion, but the practice in this case requires criticism.

It is ancient custom, not yet everywhere abandoned, to adduce evidence in admiralty before commissioners or examiners, and references of special questions to specially qualified persons have been recognized (The City of Washington, 92 U. S. at 39, 23 L. Ed. 600); but an admiralty court cannot, without consent of parties, send the merits of

a cause for trial before a commissioner, master, or referee. This has been specifically held as to equity (Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764), and we hold that the same rule applies in admiralty. Therefore the reference herein to a commissioner "to hear and determine" was wrong in phrase; but the commissioner was right in treating the matter as a direction to compute or assess damages, pursuant to a practice firmly settled since Shaw v. Collyer, 4 Blatch. 370, Fed. Cas. No. 12,718.

Since the answer tendered no issue, except as to items of recovery, there was still power to refer, when the court erroneously sent the matter back to the commissioner. Consequently the strange phrase, "to hear and determine," borrowed from state practice, and used to the confusion of court and parties, did no harm; the error was not jurisdictional, and, even if now properly raised, does not require reversal of a decree right in substance, though reached by methods not to be approved.

Decree affirmed, with costs, but without interest.

In re NANKIN.

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

No. 25.

1. BANKRUPTCY ⟸136(2)—REFEREES—PROCEEDINGS.

Under Bankruptcy Act July 1, 1898, c. 541, § 38a, 30 Stat. 555 (Comp. St. 1916, § 9622), declaring that referees are invested, subject to review by the judge, with jurisdiction to perform such part of the duties, except as to compositions or discharges, as are conferred on courts of bankruptcy, and General Order No. 12 in Bankruptcy (89 Fed. vii, 32 C. C. A. xvi), declaring that the order referring a case to the referee shall name a day upon which the bankrupt shall attend before the referee, and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and that all proceedings, except such as are required by the act or general orders to be had before the judge, shall be had before the referee, a petition by the trustee in bankruptcy to the District Court for an order directing the bankrupt to turn over moneys, which the judge referred to the referee in bankruptcy as a special commissioner, was irregular; the proper practice being for the trustee to present his petition to the referee in the first instance, and, if desiring review of the referee's order, to petition therefor under General Order in Bankruptcy No. 27 (89 Fed. xi, 32 C. C. A. xxvii).

2. BANKRUPTCY ⟸223—REFEREES—COMPENSATION.

Under Bankruptcy Act July 1, 1898, § 72, as added by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800, and amended Act June 25, 1910, c. 412, § 13, 36 Stat. 842 (Comp. St. 1916, § 9656), providing that the referee shall not receive nor be allowed any further compensation for his services than that expressly authorized in the act, there can be no reference by the court to special commissioners to perform the statutory duties of referees, and, if reference is made, the compensation of the referee, though called a special commissioner, is limited to that prescribed in section 40, as amended by Act Feb. 5, 1903, c. 487, § 9, 32 Stat. 799 (Comp. St. 1916, § 9624).

3. BANKRUPTCY ⟸136(2)—ORDERS—VALIDITY.

As such procedure was not objected to, and the bankruptcy court had jurisdiction of the parties and of the subject-matter, the irregularity was waived.

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4. BANKRUPTCY ⟸467—PROCEEDINGS—REVIEW.
A finding of fact by the referee in bankruptcy, upheld by the District Court, cannot be revised by the Circuit Court of Appeals.

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

In the matter of the bankruptcy of Gussie Nankin. The bankrupt was directed by order of the District Court to turn over moneys to the trustee, or to show cause why she should not be punished for contempt, and she petitions to revise the order. Affirmed.

Benjamin Frindel, of New York City (Elijah N. Zoline, of New York City, of counsel), for petitioner.

Ginzberg & Picker, of New York City (I. Gainsburg and J. P. Segal, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of Judge Chatfield in the District Court for the Eastern District of New York directing the bankrupt to turn over to the trustee $2,737.34 or show cause why she should not be punished for contempt.

Mrs. Nankin, the bankrupt, was engaged in the manufacture of wrappers, and, her place of business having been destroyed by fire February 25, 1915, she settled with the insurers for $5,000. In the latter part of October she received the final payment of $3,170, out of which she paid the sum of $2,737.34 to certain relatives and friends, to whom she says she was indebted. October 27, 1915, she filed a voluntary petition in bankruptcy.

May 26, 1916, the trustee presented a petition to the District Judge for a turn-over order, which the judge referred to the referee in bankruptcy, to whom the cause had been sent, as special commissioner, "for examination, testimony, and report." The special commissioner reported that the payments in question were made by the bankrupt in pursuance of a scheme to conceal assets for her own benefit and use, and he recommended that she be directed to pay over the moneys to the trustee.

February 23, 1917, the District Judge entered an order, confirming the report of the special commissioner and directing the bankrupt to turn over the moneys to the trustee, or to show cause why she should not be punished for contempt. This is the order sought to be revised, and, the record showing no further proceeding in relation to the alleged contempt, we have only to consider that part of the order which directs the bankrupt to turn over.

[1] The bankrupt makes a preliminary objection, not made in the court below, viz. that the District Judge had no jurisdiction to refer the petition of the trustee to a special commissioner for a report, and then to dispose of it as a court of first instance, instead of upon a petition to review an order made by him as referee. Section 38 (4) of the Bankruptcy Act (Comp. St. 1916, § 9622), gives the referees jurisdiction:

"Sec. 38. *Jurisdiction of Referees.—a.* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time; with jurisdiction to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy * * * of their respective districts, except as herein otherwise provided. * * *"

General Order 12 (89 Fed. vii, 32 C. C. A. xvi), in pursuance of this authority, provides:

"1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

The proper practice would therefore have been for the trustee to have applied for the turn-over order to the referee, and, after his finding, to review it, if so advised, by filing with him a petition for review by the District Judge, as provided by General Order 27 (89 Fed. xi, 32 C. C. A. xxvii). The practice of application in the first instance to the District Judge and a reference by him to the referee as special commissioner, followed in this case, was approved in Re Herskovitz (D. C.) 152 Fed. 316. The authorities there relied upon were in the Matter of Fleischer (D. C.) 151 Fed. 81, where a reference was ordered before adjudication, and therefore before the cause was sent to a referee, and in the Matter of Fellerman (D. C.) 149 Fed. 244, where there was apparently an application to the court in the first instance and no reference.

The question referred in this case to the referee as special commissioner fell within his statutory duties. Before the amendatory act of 1903, which increased the compensation of referees under section 40 and added a new section 72, strictly limiting their compensation to the fees so fixed, it was a frequent practice to appoint referees as special commissioners. Section 72, as amended in 1903 and in 1910 (Comp. St. 1916, § 9656), reads:

"Sec. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

[2] We are of opinion that there can be no reference by the court to special commissioners to perform the statutory duties of referees, and that, if such a reference is made, the compensation of the referee, though called a special commissioner, is limited to that provided in section 40. In re Sweeney, 168 Fed. 612, 94 C. C. A. 90; Loveland on Bankruptcy (4th Ed.) p. 230; Collier on Bankruptcy (8th Ed.) p. 509.

[3, 4] But as this objection was not taken in the court below, and it had jurisdiction both of the parties and of the subject-matter, we think what it did was only an irregularity in procedure, which could be

and was waived. In point of fact the referee and the District Judge did decide the question, and, as they were not bound to believe the story of the bankrupt and her witnesses in the face of all the attending circumstances, their findings of fact cannot be revised by us.

The order to turn over is affirmed.

In re PIERCE, BUTLER & PIERCE MFG. CO.

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

No. 3.

1. BANKRUPTCY ⟸439—REVIEW—SCOPE.
   Orders in bankruptcy for payment for publication of notice of sale are subject to revision of the Circuit Court of Appeals only in respect of law.
2. BANKRUPTCY ⟸446—FINDINGS—MODE OF STATEMENT.
   Though a finding of fact in a proceeding in bankruptcy, submitted to a special master, was in his report stated as a conclusion of law, the method of statement cannot affect the binding nature of the finding in finding of fact.
3. FRAUD ⟸64(1)—PROVINCE OF COURT—QUESTIONS OF FACT.
   Whether a party acted in good faith in a particular transaction is a question of fact, and not of law.
4. BANKRUPTCY ⟸446—REVIEW—FINDINGS.
   A finding of fact by a special master, affirmed by the court of bankruptcy submitting the case, is, where supported by some evidence, conclusive on the appellate court.
5. SALES ⟸78—PRICE—CONTRACTS.
   Where a contract of sale, either executed or executory, contains no specific agreement as to price, the law implies that the sale will be at a reasonable price.
6. SALES ⟸340—RIGHT TO MAINTAIN.
   Assumpsit will lie to recover reasonable price of an article sold, where no price was specified.
7. NEWSPAPERS ⟸5(2)—PUBLICATION—COMPENSATION—LEGAL NOTICE.
   A bankrupt owned property in several states, and the order for sale directed that publication should be made in newspapers of general circulation in the cities of New York, Chicago, and Syracuse. The trustee's attorneys prepared a notice of sale, specifically describing the various properties to be sold, stating where, when, and how the sale was to take place. This notice was sent by mail to a Chicago newspaper company, with instructions to insert it in the issue of July 2, 1914, and directions that, in case any questions should come up, to consult the trustee's attorney by telephone. The newspaper company in good faith printed the notice of sale on a page devoted to financial advertisements and news, instead of under legal notices, a subheading of classified advertisements, where such matters as notices of probate, etc., were published. *Held*, that, as the notice of sale was a most unusual one and the newspaper company acted in good faith, it was entitled to compensation at the rate charged for space in the page on which the notice was published, though the rate for that space was higher than the rate under classified advertisements.

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

In the matter of the bankruptcy of the Pierce, Butler & Pierce Manufacturing Company. Petition by the Chicago Tribune for payment

for printing notice of sale, contested by the trustee. On exceptions, the report of the master was disapproved, and compensation in a less amount than claimed allowed (231 Fed. 312), and the Chicago Tribune petitions to revise the order. Reversed and remanded, with directions.

The bankrupt company owned realty in several states, and, when its trustee sold the same, the order of sale directed that, in addition to the usual notice within the district of adjudication, there should be "further publication in at least one newspaper of general circulation in each of the cities of New York, Chicago, and Syracuse." The trustee's attorneys thereupon prepared a "Notice of Sale," specifically describing the various properties to be sold, and stating where, when, and how the sale was to take place; a document requiring 34 pages for reproduction in this record. This notice was then sent by mail to the Chicago Tribune, with instructions not to "fail to get it into" the issue of July 2, 1914, and the statement, "If any question comes up about the notice, call the writer [trustee's counsel], on the telephone," at either of two given addresses in Syracuse and Norwich, N. Y., respectively. This letter and the inclosed notice was received in Chicago on July 1, and publication was made on July 2, and thereafter, on a page of the Tribune devoted to financial advertisements and news, and not under "Legal Notices," a subheading of "classified" advertisements, and where in the same issue appeared such matters as probate notices or the like. The newspaper's rate for space on the page that bore this "Notice of Sale" was nearly twice as much as that for "Legal Notices" on the "classified" page.

A bill was presented to the trustee for the larger amount; he declined to pay. The Tribune filed a petition for payment of $1,384.56, and the trustee answered, denying the "reasonable worth" of the service to be more than $500. The issue thus formed was by consent tried before a special master, who found as facts (inter alia): (1) That when petitioner received the letter ordering publication on July 2d there was no reasonable opportunity for communication with the sender and yet permit publication at the time appointed. (2) That the part of the newspaper in which publication was made was appropriate and actually used for giving the advertisement wider publicity than was thought to arise from notices in the "classified section." (3) That the charge made by the petitioner was its usual price, and was fair, reasonable, and in accord with the Chicago market rate for similar service. From these facts were drawn as conclusions that the trustee had left the petitioner fairly and reasonably to determine in what part of its paper to insert the advertisement, that the petitioner had reasonably and in good faith made such selection, and therefore its bill should be paid as presented.

The District Judge set aside this report, holding that the Tribune was "not called upon to conjecture, nor justified in assuming that the trustee had any purpose or desire other than that the notice should be published in the spaces devoted to the publication of that class and kind of work, viz. legal notices, in a pending proceeding in the bankruptcy court." The fact findings of the master were not varied by the lower court, but it was held as a legal conclusion that petitioner could take no more than the rate for classified advertising, or $774. To review this ruling the petition before us was filed.

Wilson, Cobb & Ryan, of Syracuse, N. Y. (Charles P. Ryan, of Syracuse, N. Y., of counsel), for petitioner.

Nelson P. Bonney, of Norwich, N. Y., and William Mackenzie, of Syracuse, N. Y., for trustee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] As orders in bankruptcy such as this are subject to our revision only in respect of law, it is necessary to ascertain with precision the facts as found in the court below.

[2, 3] The special master stated the good faith of the petitioner as a conclusion of law, instead of making it a finding of fact; his report in its form, and separate headings of fact findings and legal conclusions, follows the usual practice of this state. This method of statement cannot change the inherent nature of what is found, and we therefore inquire whether the good faith of petitioner in doing what it did is a fact, and the ascertainment thereof a finding of fact.

Good faith is a state of mind, an attribute of character. It exists; it is in being; yet its existence or being is necessarily discovered only by inference. But such inferential ascertainment is consistent with an existence not in the least derived from or depending on the law. Therefore good faith or bad faith is a fact to be ascertained by the triers of fact—in this case, the master or District Judge; in most instances the jury. As was well said in Nolan v. N. Y., etc., R. R., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305, the inferences produced by weighing evidence and the credit of witnesses, are adjudicated facts, and can be retried only by an appellate court having jurisdiction in the trial of such facts. Similarly an emotion is a fact, and so is the mental result of emotion or desire—thus knowledge, intent, or willfulness are facts. Barr v. Chicago, etc., R. R., 10 Ind. App. 433, 37 N. E. 814.

[4] It follows that as the District Judge did not reverse or modify the master's finding of good faith, and it is not without evidence to support it, we are bound to assume it in considering this petition.

[5-7] The legal question remaining is whether under the circumstances stated the petitioner was lawfully entitled to select for the trustee's advertisement that part of its paper which gave widest publicity to an unusual sale, or was bound to put it where statutory notices were inserted. It may be noted here that the finding of good faith renders superfluous any discussion of the inference possible from the higher cost of doing what was done.

Where a contract for sale, either executed or executory, contains no specific agreement as to price the law supplies a reasonable one (Acebal v. Levy, 10 Bing. 376; Hoadley v. McLaine, 10 Bing. 482), and this contract was for a sale of space. Assumpsit lay for such reasonable price (Jenkins v. Richardson, 6 J. J. Marsh. [Ky.] 441, 22 Am. Dec. 82); i. e., there was an implied promise to pay for what the purchaser obtained; and this trustee obtained a better article than would have been his, had the advertisement appeared where he now says he wanted it.

Though market value and reasonable value are not always the same (Lovejoy v. Michels, 88 Mich. 29, 49 N. W. 901, 13 L. R. A. 770), it is found that petitioner's price in this case was both. If, then, the Tribune acted in good faith, and sold its space at a fair market price, it is difficult to see why it should not be paid. The reason deemed sufficient below is that, as a matter of law, it was the duty of petitioner to insert "legal notices in a pending proceeding in the bankruptcy court" in "classified" advertising—that being the place for "that class and kind of work."

This presupposes that the newspaper manager in Chicago was familiar with what would be "legal notices" in the Northern district of New York, concerning which there is no proof, and certainly the trustee furnished no information. It also assumes that this "Notice of

Sale" was a usual or at least simple thing; we take judicial (or professional) notice that it was most unusual.

For these reasons, we find no legal compulsion on petitioner to take one course rather than the other, and, if there was no obligation by law, there was (also by law) room for honest choice. As such choice was made, the master's report was right.

Reference is given us to Konitzky v. Meyer, 49 N. Y. 571. That decision recognizes a vendor's right to mingle cheaper and costlier ingredients in what he sells without price agreement, "in the usual manner." This is a fairly close analogy, but the matter must remain, after prolonged search, without further citations of authority.

Order reversed, with costs, and cause remanded, with directions to confirm the report of special master.

MARYLAND CASUALTY CO. v. SPITZ.

(Circuit Court of Appeals, Third Circuit. October 29, 1917. On Motion for Reargument, December 31, 1917.)

No. 2268.

1. INSURANCE ⟸455—ACCIDENT INSURANCE—ACCIDENTAL MEANS OF DEATH.
Under a policy insuring against injury or death effected through external, violent or accidental means, the means or cause of death must be accidental, and it is not enough that the death itself is accidental, in the sense of being unintended, unexpected, or unforeseen.

2. INSURANCE ⟸455—ACCIDENT INSURANCE—"ACCIDENTAL" MEANS OF INJURY.
Within a policy insuring against injury and death effected through accidental means, the word "accidental" means happening or coming by chance or without design, casual or fortuitous, and is opposed to design, so that a means is not accidental when employed intentionally, though it produces a result not expected or intended.

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

3. INSURANCE ⟸455—ACCIDENT INSURANCE—ACCIDENTAL MEANS OF DEATH.
Where a person, insured against death through accidental means, having a boil on his neck, rubbed it while his hands were soiled with blood and other substances, for the purpose of relieving an itchiness, thereby breaking the scab and permitting germs of erysipelas to enter, his death from erysipelas did not result from accidental means, as the breaking of the scab was a probable result, and one reasonably to be expected from his intentional act.

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

Action by Irma Spitz against the Maryland Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed.

Maurice W. Sloan, of Philadelphia, Pa., for plaintiff in error.

Julius C. Levi and David Mandel, Jr., both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Irma Spitz, the widow of Samuel Spitz and the plaintiff in this action, recovered on a policy in her favor, which insured her husband in the Maryland Casualty Company against injury and death, "effected directly and independently of all other causes through external, violent, and accidental means." He died while the policy was in force, and one of the questions in the court below was whether his death was "effected * * * through * * * accidental means." Before stating the facts it may be well to consider briefly the quoted words.

[1, 2] They do not mean simply that death shall be accidental; that is, unintended, or unexpected, or unforeseen; but that the means or the cause of death shall be accidental. It is this to which the policy directs particular attention, and if the means be not accidental the death is not insured against. The words "accident" and "accidental" have been many times considered, and the numerous cases on this subject need not be reviewed. Their general meaning is not in doubt, and the Standard Dictionary's definition of "accidental" will serve as well as another:

"Accidental: (1) Happening or coming by chance or without design; casual; fortuitous."

Accidental, therefore, is opposed to design, and a means is not accidental when it is employed intentionally, although it may produce a result not expected or intended. The intentional use of a means may produce more than one result; one may be likely, and another unlikely, to happen; but a result that is the natural, direct, and probable effect of such use must be regarded as intended, and cannot be regarded as accidental. The rule is thus stated in 14 R. C. L. § 418, p. 1238:

"While it may be true that an accident is an event which takes place without one's foresight or expectation, and is undesigned, it is not true that every unforeseen, undesigned, and unexpected event is an accident. A result which, though not designed, foreseen, or expected, is yet the natural and direct effect of acts voluntarily done or of conditions voluntarily assumed, cannot be said to be accidental."

See, also, the cases on this subject to be found in Fidelity, etc., Co. v. Carroll (1905) 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, and note, 6 Ann. Cas. 955, and in Hutton v. States, etc., Co. (1915) 267 Ill. 267, 108 N. E. 296, 57 L. R. A. (N. S.) 127, and note, Ann. Cas. 1916C, 577. In the recent case of Insurance Co. v. Patterson (1914) 213 Fed. 597, 130 C. C. A. 177, this court had occasion to say:

"We agree that, when a man is injured while doing merely what he intends to do, he is not injured by an accident, unless the course of his action has been interrupted or deflected by some unforeseen and unintended happening. To illustrate from the facts before us: Since the deceased was attempting to start the engine of his car by turning the crank, whatever injury he might sustain from the ordinary strain of that operation would properly be regarded as the result of what he intended to do, and therefore would not be accounted accidental. But we can hardly suppose that he intended to slip and fall in the course of the operation, and therefore if he did slip and fall, and sustain-

ed injury as the direct result thereof, the happening would be unforeseen and unintended, and the injury would be accidental."

Turning now to the evidence, and giving it the weight most favorable to the plaintiff, we discover the facts to be as follows:

[3] The insured died of erysipelas on January 22, 1915. Late in December a boil or furuncle had appeared on the back of his neck, and for this he was treated at the office of a doctor. About January 1 his condition was improved. How long afterwards he wore a bandage does not clearly appear, but in any event a healthy scab had formed, the doctor had discharged him, and he was able to be about his business. He was a butcher, and on January 4 was engaged in cleaning chickens; a work that soiled his hands with blood and other substances. In this situation, his neck began to itch, and in order to relieve the irritation he put up his hand and rubbed or scratched the offending place (whether bandaged or not), with the result that he broke the scab. The only witnesses on this point were the plaintiff and the doctor, and the relevant testimony may be summarized as follows: On the morning of January 4 the deceased was at a block in the rear of his shop cleaning chickens, and his wife was in the front making out bills. She heard him say, "I have broken the scab on my neck," whereupon she turned and saw his hand rubbing his neck. She told him to quit it; his hand was not clean and had left some blood on the neck, and the scab was broken. Soon after the work of cleaning was done, he went upstairs and washed his neck with peroxide. The doctor testified:

"He told me he had rubbed it off or scratched it off the day prior. He said he rubbed his neck, it itched him, it was right in there; it hurt him and he found he had rubbed off the scab."

In a short time he become sick with erysipelas, and died from this disease on January 22. The verdict has established, and we therefore assume the further fact to be, that the germs of erysipelas entered the wound after the scab had been rubbed or scratched off, and that the disease then introduced was the immediate cause of death; so that the only question now is whether the means that opened the way for the germs to enter, namely, the rubbing or scratching of the boil, was an accidental means.

The court submitted this question to the jury, asking them to find whether the injury was inflicted accidentally, and in this submission we think there was error. As we read the testimony, nothing appears to show that the injury was inflicted by accidental means. The deceased rubbed or scratched his neck in the ordinary way; there is no evidence that he was disturbed or interfered with during the operation, and an ordinary and not unusual result followed; that is, he broke the scab. His hands were not clean; but he knew that fact, and must be held to the risk of such harm as might follow therefrom. In a word, he seems to have done just what he intended to do, namely, rub or scratch his neck to relieve the itching, and in our opinion breaking the scab during the process was a probable result, one reasonably to be expected. We think the defendant was entitled to binding instructions.

The judgment is reversed.

On Motion for Reargument.

PER CURIAM. The motion for reargument suggests that U. S. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, was probably overlooked, and relies upon that decision as a controlling authority. We did not overlook that case, however, but considered and still consider it to be distinguishable. On page 121 of the report in 131 U. S. (9 Sup. Ct. 762, 33 L. Ed. 60) the Supreme Court approves the following instruction as correct:

"That, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means."

And this instruction seems to us to cover the present situation, where, as we have already said:

"* * * Nothing appears to show that the injury was inflicted by accidental means. The deceased rubbed or scratched his neck in the ordinary way; there is no evidence that he was disturbed or interfered with during the operation, and an ordinary and not unusual result followed; that is, he broke the scab. His hands were not clean, but he knew that fact, and must be held to the risk of such harm as might follow therefrom. In a word, he seems to have done just what he intended to do, namely, rub or scratch his neck to relieve the itching, and in our opinion breaking the scab during the process was a probable result, one reasonably to be expected."

The motion is refused.

In re ISAACS.

Ex parte JASPER.

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

No. 31.

BANKRUPTCY ⇐323—PROCEEDING—COLLATERAL.

Bankruptcy Act July 1, 1898, c. 541, § 57, subd. "h," 30 Stat. 560 (Comp. St. 1916, § 9641), provides that the value of securities held by secured creditors shall be determined by converting the same into money according to terms of the agreement pursuant to which such securities were delivered to such creditor, or by such creditors and the trustee by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such values shall be credited upon the claims, and a dividend paid only on the unpaid balance. A creditor, who held a note of the bankrupts secured by a pledge of corporate stock, sold the shares something more than a year after the adjudication. It was agreed that the value of stock at the time when the petition in bankruptcy was filed was approximately $17,000, while the sale price of stock was nearly $24,000. *Held* that, the creditor having converted the stock into cash, he could not, although the statute provided other alternative methods for fixing the value of collateral, demand that the collateral should be treated as of its value at the date of the filing of the petition in bankruptcy, so as to allow him to receive additional dividends.

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

In the matter of the bankruptcy of Moe A. Isaacs, individually, and the firm of Isaacs Bros. Petition by Morris Jasper to revise an order

of the District Court, affirming an order of the referee. Petition dismissed, and order affirmed.

This is a petition to revise an order of the District Court for the Southern District of New York (Judge Manton presiding), which in turn affirmed an order of a referee in bankruptcy upon the following facts: On December 2, 1913, the bankrupt Isaacs signed, and the bankrupt firm, Isaacs Bros., indorsed, a note for $25,750, payable to the order of Jasper, the petitioner. The note was delivered on the same day, and carried along with it in pledge 125 shares of the capital stock of the Public Bank of New York City, the property of Isaacs, under the usual terms by which Jasper might sell it after default. Petition was filed against Isaacs and Isaacs Bros. on December 31, 1914, followed on February 15, 1915, by an adjudication. Jasper sold the shares in June, 1916, under the terms of the pledge, for $23,750, and it was agreed that their value of December 31, 1914, was only $16,875. He contended that he should be charged under section 57, subd. "h," only with the value of the shares on December 31, 1914, but the referee took the value as fixed by their actual conversion into money, and liquidated the claim upon that basis against both the individual and the firm assets.

Samuel J. Rawak, of New York City (Alexander S. Marcuson, of New York City, of counsel), for petitioner.

Leo Oppenheimer, of New York City, for trustee.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). The only question before us is the time at which the value of the security shall be fixed, and so far as we have been able to find that question has been passed upon only in Steinhardt v. National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23, where it was held that the time was that at which the creditor sold out the security. With this conclusion we agree. The section fixes two possible ways of realizing the value which must be charged against the claim: The first is by converting the security into cash under the terms of the pledge; the second is "by agreement, arbitration, compromise, or litigation, as the court may direct." What the creditor in the case at bar asks is that the value of the security shall be fixed in some way other than by converting it into money according to the terms of the agreement, although he has in fact so converted it. If he is right, conversion can never "determine" the liquidation value, however controlling the amount realized might be as evidence of that value. We think the section could not have more clearly expressed its meaning, that, when the creditor lawfully converts the securities into money, the amount realized should determine the amount to be charged against the face of the claim.

That the creditor may under his agreement lawfully convert the security into cash, so long as the court does not interpose, is settled. Hiscock v. Varick Bank, 206 U. S. 28, 40, 27 Sup. Ct. 681, 51 L. Ed. 945. Usually the court will not interpose, but the creditor may unduly delay exercising his right, or the security may not be salable within any convenient season, so that the exigencies of speedy administration of the estate require a liquidation under one of the four secondary alternatives. This the court could then direct, and wind

up the administration. At times, also, it seems that courts have declined to recognize the amount realized upon a timely sale, if the result is oppressive. Re Davis, 174 Fed. 556, 98 C. C. A. 338. But upon this we do not express an opinion.

Nothing in Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, looks to the contrary of the views we have expressed, rather the language (219 U. S. on page 345, 31 Sup. Ct. 256, 55 L. Ed. 244) bears them out. That case does, however, fix the termination of interest at the date of petition filed.

No issue was raised at the bar of any difference under Hiscock v. Varick Bank, supra, between the amount of the debt against the maker and of that against the indorser, and we therefore ignore that question.

The petition is dismissed, and the order affirmed, with costs.

In re VAN HORN.

VAN HORN v. LEVISON et al.

(Circuit Court of Appeals, Third Circuit. December 20, 1917.)

No. 2287.

BANKRUPTCY ⊂⊃76(1)—PETITION—CREDITORS.

Under the provision of Bankruptcy Act, July 1, 1898, c. 541, 30 Stat. 544, that three or more creditors who have provable claims may petition, the date of filing the petition must be regarded as the date when provability of the claims is to be determined; and where the claims of the petitioning creditors were on that date provable, the petition is not subject to demurrer, though the claims of the petitioning creditors might not have been provable on the day when the act of bankruptcy occurred, for petitioning creditors obtain no priority over any other creditors, the purpose of the act being to secure equitable distribution of a bankrupt's property among all his creditors.

Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

In the matter of the bankruptcy of William D. Van Horn. Benno Levison and others filed an involuntary petition in bankruptcy against William D. Van Horn, and, his demurrer thereto being overruled, the alleged bankrupt petitions to revise. Affirmed.

Andrew B. Dunsmore and Paul J. Edwards, both of Wellsboro, Pa., for petitioner.

S. C. Sugarman, of New York City, for respondents.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This was an involuntary petition, and the bankrupt demurred to it on the ground of insufficiency. The District Court overruled the demurrer, and the petition to revise asks us to reverse this order.

The bankrupt's principal objection is that, at the time when the acts of bankruptcy are charged to have been committed, it does not affirmatively appear that the claims of the petitioning creditors were in existence. The date of filing the involuntary petition is April 3, 1917, and the claims of the petitioning creditors are based on judgments that were entered on February 8 and February 20, while the acts of bankruptcy are averred in general terms to have been committed within four months before April 3. The petition, therefore, leaving it uncertain whether the claims supporting the judgments were or were not provable (for example, they may have arisen out of a tort), or whether the judgments themselves antedated or postdated the acts of bankruptcy, the bankrupt argues that the petition is too vague to be maintained. But the argument fails, if the Bankruptcy Act regards the date of filing the petition as the date when the provability of these claims is to be determined, and in our view this is the effective date. The point has given rise to some conflict in the reports, as may be seen by the cases cited in Collier (11th Ed. 1917), page 843, and in Black (1914), § 153; but we think the better reason is thus stated in the section just referred to from Black's treatise, which follows Re Hanyan (D. C.) 180 Fed. 498, affirmed (C. C. A. 2) 181 Fed. 1021, 104 C. C. A. 667:

"But it has been thought by some of the authorities that only those creditors could bring or join in the petition who had provable claims against the bankrupt at the time of the commission of the alleged act of bankruptcy. But these decisions proceed upon the mistaken theory that a petition in bankruptcy is analogous to a creditor's bill to set aside fraudulent conveyances, and hence maintainable only by those directly injured or defrauded. On the contrary, the whole purpose of the statute is to secure the equal distribution of the debtor's property among all his creditors alike, not to reward those whose superior activity has enabled them to unearth concealed assets or secure liens. When the bankrupt's estate shall have been collected by the trustee, it is for distribution among all the creditors whose claims have been proved and allowed, and the petitioning creditors have absolutely no higher rights than any other creditors. Further, there are acts of bankruptcy upon which a petition may be maintained which have nothing to do with the giving of preferences or the transfer or concealment of assets, and as to which, therefore, the supposed analogy breaks down. Finally the courts are not justified in adding to the statute a qualification or condition which it does not express. It merely provides that 'three or more creditors who have provable claims' may petition; it does not require that the claims should have been in existence and should have been provable at a time anterior to the filing of the petition. We think therefore that the better reason is clearly with those authorities which reject this qualification, and hold that it is only necessary that the petitioning creditors should have provable claims at the time they sign the petition."

In our opinion paragraphs I and II of section 4 of the amended petition are sufficiently definite, but paragraphs III, IV, and V are insufficient.

The order overruling the demurrer is affirmed.

RICHARDSON et ux. v. BALL.

(Circuit Court of Appeals, Fifth Circuit. December 6, 1917.)

No. 3013.

COURTS ⟸366(13)—FEDERAL COURTS—FOLLOWING STATE DECISION.

Where, in an action in the federal court to recover Texas land, claimed adversely under the ten-year statute, the court, in accordance with the then latest decision of the Texas Supreme Court, instructed that the claim of right made an essential to adverse possession, required more than mere entry with intention to acquire adverse title; and the Texas Supreme Court, after submission of the case, reannounced the original rule to contrary that a naked trespasser might by ten years' adverse possession acquire title, the instruction was erroneous.

In Error to the District Court of the United States, for the Eastern District of Texas; Gordon Russell, Judge.

Action by P. D. C. Ball against Hiram Richardson and wife. There was a judgment for plaintiff, and defendants bring error. Reversed.

W. S. Simkins, of Austin, Tex., and Ormond Simkins, of Corsicana, Tex., for plaintiffs in error.

Joe A. Worsham, of Dallas, Tex., and N. B. Morris, of Palestine, Tex. (Brooks & Worsham, of Dallas, Tex., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. Suit was instituted by defendant in error against plaintiffs in error to recover a tract of land in Freestone county, Tex. Defendants filed an admission "that plaintiff has established his record title to the land in controversy, unless the same is defeated by the defendants' plea of limitation of ten years." The case having been submitted, the jury, after some deliberation, requested further instructions, and specifically asked for a definition of "claim of right," as the term was used in the Texas ten-year statute of limitation. In response to this the court read to the jury the opinion of the Supreme Court of Texas in the case of Stevens v. Pedregon, 106 Tex. 576, 173 S. W. 211. In the opinion was the following:

"In the first place, he made no claim of right to the land. The statute specifically required that he should enter under a claim of right, but he entered with the avowed purpose of acquiring title by possession, and not for the purpose of enjoying the property which he claimed to belong to him."

After reading the opinion, the trial judge further charged the jury:

"You ask me to define claim of right. I don't know how better to define it than it is defined in the excerpt from the opinion I have read you. It says that the possession must be commenced and continued under a claim of right, and where a man entered upon the land simply for the avowed purpose of acquiring the title by possession, and not for the purpose of enjoying the property, he would not have the possession that the law requires."

This action and instruction of the trial court were assigned as error. After the submission of this case, and while there was under consideration whether this court should follow the latest expression from the Supreme Court of Texas, or the established jurisprudence as it had existed for many years prior to that decision, that court, in the case of Houston Oil Co. of Texas v. H. C. Jones et al., 198 S. W. 290, reannounced the original rule, as indicated by the following excerpts from the opinion:

"The court has a number of times declared that a naked trespasser may acquire a limitation title to land under the ten-year statute. Smith v. Jones, 103 Tex. 632 [132 S. W. 469, 31 L. R. A. (N. S.) 153], Craig v. Cartwright, 65 Tex. 413, and Word v. Drouthett [44 Tex. 365], are among the decisions so holding.

"It was not the purpose of Stevens v. Pedregon to overrule this established holding of the court, though there is an expression in Chief Justice Brown's opinion that is, to some extent, confusing.

"The 'claim of right' to which the statute refers simply means that the entry of the limitation claimant must be with the intent to claim the land as his own—to hold it for himself; and such must continue to be the nature of his possession. That it is necessary that his entry upon or holding of the land be founded upon his having some character of title is opposed to the theory of the ten-year limitation statute."

While the trial court was warranted in the action taken, it is manifest that the judgment should be reversed, and that the cause should be retried under the construction of the ten-year statute of limitation of Texas given in Houston Oil Co. v. Jones et al., supra.

It is accordingly so reversed.

CITY OF LAREDO v. HEAD et al.

(Circuit Court of Appeals, Fifth Circuit. December 6, 1917.)

No. 3034.

MUNICIPAL CORPORATIONS ⊜955(3)—BONDS—PARTIAL INVALIDITY.

Defendant city issued bonds in December, 1883, after its taxing power had been reduced by constitutional amendment. Such of the bonds as were outstanding matured in 1913, and in a mandamus proceeding brought by the city against the Attorney General of Texas to compel approval of the refunding bonds the state Supreme Court declared that the original bond issue was excessive and partly invalid. None of the bondholders were parties to that suit, and no party was interested in establishing the validity of the bonds. Thereafter holders of such bonds sued the city in the federal court. *Held* that, as some of the bonds had by a decision of the state court been declared valid, the bondholders, in the absence of evidence showing when their bonds were sold by the city or that it had then issued bonds to the extent of its authority, are entitled to recover; the bonds themselves being obligations of the city.

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by J. W. Head and others against the City of Laredo. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

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

A. Winslow and Paul W. Evans, both of Laredo, Tex., for plaintiff in error.

Hal W. Greer and A. C. Hamilton, both of Laredo, Tex., for defendants in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. The city of Laredo in May, 1883, passed an ordinance authorizing the issuance of bonds to the amount of $75,000. The taxable values at the time were $1,345,951, and the issue was within the authority of the city. By an amendment to the Constitution, effective September 23, 1883, the taxing power of cities and towns of the class to which Laredo belonged was reduced. In December of that year the city amended the ordinance of May, but the amount of the bond issue was not changed. The bonds were issued under date of December, 1883. The bonds recited that provision for their payment had been made by the ordinance of May 19, 1883. The bonds were sold. Such of the bonds as were outstanding at that time matured May 19, 1913. The city undertook to refund the bonds then outstanding, but approval of the refunding bonds was refused by the Attorney General of Texas. In a mandamus proceeding brought by the city of Laredo against the Attorney General to compel approval the Supreme Court held that the original bond issue was excessive and partially illegal. City of Laredo v. B. F. Looney, Attorney General, 185 S. W. 556. None of the bondholders was a party to that suit, and no party was interested in establishing the validity of the bonds. The record materially differs from that in the present case. The decision of the Supreme Court of Texas is not in conflict with the conclusion hereafter reached, and, in any event, would not be binding upon the plaintiffs in the present action. In a suit instituted by a bondholder in the state district court a Court of Civil Appeals of Texas has held the bonds valid. Laredo v. Frishmuth, 196 S. W. 190. The Supreme Court of Texas has held that the bonds were in part valid, and the city of Laredo in this case acknowledges that the issue was in part valid. One of the articles of the agreed statement of facts upon which this case was tried is that:

"The $75,000 in bonds were issued and sold in the early part of the year 1884; but there is no proof as to whether they were all sold at the same time and to the same person, or whether they were separately sold."

Upon their face the bonds sued on are obligations of the city of Laredo. In view of the fact that some of the bonds of the issue are valid, and that there is an absence of proof as to whether they were all sold together, or some of them sold before the others, there is a lack of the proof necessary to meet the presumption of legality arising from the face of the bonds. There is nothing to show that the particular bonds sued on were not among those first sold, and therefore valid. The trial judge has not indicated the reason for his conclusion that judgment should be for the plaintiffs, but the absence of proof upon this material matter is a sufficient reason for his action.

The judgment is affirmed.

McNEIL v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 13, 1917.)

No. 3050.

1. INDICTMENT AND INFORMATION ⟸129(1)—JOINDER OF COUNTS.
Under Rev. St. § 1024 (Comp. St. 1916, § 1690), declaring that, where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, etc., which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, etc., the United States may in one indictment join two charges of embezzlement against the cashier of a post office; one the embezzlement of money, and the other the embezzlement of stamps, the property of the United States.

2. INDICTMENT AND INFORMATION ⟸132(8)—MOTIONS TO ELECT.
Where one indictment charges two offenses, a motion to require the prosecution to elect is addressed to the sound discretion of the trial court.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

W. H. McNeil was convicted of embezzlement, and he brings error. Affirmed.

J. A. Templeton and D. W. O'Dell, both of Ft. Worth, Tex., for plaintiff in error.

Wilmot M. O'Dell, U. S. Atty., and Wm. E. Allen, Asst. U. S. Atty., both of Dallas, Tex.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. The plaintiff in error, hereinafter called the defendant, was indicted in four counts. The first count charged that as cashier of the United States post office at Ft. Worth, Tex., he unlawfully and fraudulently converted to his own use the sum of $506 belonging to the United States. The second count charged him with embezzling, stealing, and purloining about 150,000 United States two-cent postage stamps. The other two counts were quashed before trial and are immaterial. Before going to trial the defendant in error moved to quash the indictment on the ground that it charged separate and distinct offenses which could not be included in a single indictment, and also moved, in the alternative, that the government be required to elect as to which count it would proceed on. Both of these motions were denied. There was a verdict of guilty on both counts of the indictment, and sentence of two years was imposed upon each count, the terms of imprisonment to run concurrently, and not to be cumulative.

[1] Error is assigned to the action of the court in the particulars above detailed. Section 1024 of the Revised Statutes (Comp. St. 1916, § 1690) of the United States provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

It is difficult to conceive of two offenses that could more properly be combined in an indictment than those shown in this case. In one count the defendant was charged with embezzling money, and in the other with embezzling property, both belonging to the United States. Clearly these two offenses are of the same class of crimes, and may be properly joined in one indictment. Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.

[2] The granting of the motion to compel the government to elect was within the sound discretion of the court, and we do not find that in this case there has been any abuse of discretion.

Other errors are assigned on the record, some of which were pressed in argument. However, except to say we do not find them well taken, we deem it unnecessary to refer to them.

It follows that the judgment must be affirmed.

CHARLESTON SOUTH CAROLINA MIN. & MFG. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1917.)

No. 3085.

1. PUBLIC LANDS ⟸120—FORFEITURE—ACTIONS—PARTIES.
In a suit by the United States to recover from defendant land deeded to it by the state of Florida, which was located by the state under Rev. St. §§ 2275, 2276, as amended (Comp. St. 1916, §§ 4860, 4861), authorizing selection in lieu of school land of any unappropriated surveyed public lands not mineral in character, on the ground that false affidavits that the land was not mineral in character were made on behalf of, and instigated by, defendant, whereby the selection was approved, the holder of a mortgage on all the property of defendant given to secure a bond issue is a proper and necessary party.

2. PUBLIC LANDS ⟸120—FORFEITURE—NECESSARY PARTIES—UNIMPORTANCE OF CONTROVERSY.
In such case, though the lands were worth only a few hundred dollars, and the bond issue was for $15,000,000, failure to join the mortgagee cannot be upheld on that ground, for the maxim "de minimis" could as well be applied to the entire case as to the mortgagee's claim.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by the United States against the Charleston South Carolina Mining & Manufacturing Company. From decree for plaintiff, defendant appeals. Reversed, with instructions to dismiss, unless plaintiff make another a party defendant.

W. W. Hampton and W. W. Hampton, Jr., both of Gainesville, Fla., for appellant.

H. S. Phillips, U. S. Atty., of Jacksonville, Fla.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

BATTS, Circuit Judge. The United States instituted this suit to recover from appellant land deeded to it by the state of Florida, located by the state under sections 2275 and 2276 of the Revised Statutes, as amended (Comp. St. 1916, §§ 4860, 4861), authorizing it to select, in lieu of school land lost to it, any unappropriated, surveyed, public lands, not mineral in character. It was alleged that false affidavits as to the character of the land were made on behalf of and instigated by appellant, whereby the selection was approved, that the lands were valuable chiefly for their minerals, and that the deed was void. There was a prayer that the land be adjudged the property of the United States, free from the claim of defendant or any one claiming under it.

[1] The defendant, among other defenses, set up that after the purchase of the land, and before the institution of the suit, it executed to the Central Trust Company of New York a mortgage upon the land and other property to secure a bond issue of $15,000,000. When this suit was instituted, the mortgage was of record in the county in which the land is situate. The mortgagee was a proper and necessary party. The facts may be such as to entitle it to protection, notwithstanding judgment against defendant. It may have had the standing of an innocent purchaser for value without notice.

[2] It was insisted in oral argument that it was not necessary to make the trust company a party because the land in controversy constituted an unimportant part of its security, being worth only a few hundred dollars, and the debt secured being $15,000,000. Constitutional rules and equitable principles protecting property rights apply as well to small amounts of property as large—as well to large owners of property as to small. The maxim "de minimis" could as well be applied to the entire case as to the trust company's claim.

The case should be reversed, with instructions to dismiss, unless plaintiff make the trust company a party. It is accordingly so reversed.

ADAMS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1917.)

No. 3047.

INDICTMENT AND INFORMATION ⟸87(2)—SUFFICIENCY OF DATE.

An indictment presented on March 16, 1916, which charged that heretofore, to wit, on the 1st day of November, 1916, at or near Attalla, in the county of Etowah, state of Alabama, defendant did steal from the mails, etc., and further alleged that the registered package stolen was mailed on November 6th, 1915, is not subject to demurrer on the ground that the date laid as the date of the theft was an impossible one occurring after the finding of the indictment, for, in view of the other allegations, the indictment informed accused of the offense charged and would support a plea of former jeopardy.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

John Quincy Adams was convicted of stealing from the mail, and he brings error. Affirmed.

David S. Anderson, of Birmingham, Ala., for plaintiff in error.

Robert N. Bell, U. S. Atty., and Ralph W. Quinn, Asst. U. S. Atty., both of Birmingham, Ala.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. John Quincy Adams was indicted for stealing from the mail. The indictment was presented on the 16th of March, 1916. It charges that:

"Heretofore, to wit, on the first day of November, A. D. 1916, at or near Attalla, in the county of Etowah, state of Alabama, the defendant did steal," etc.

Among the several attacks on the indictment is a demurrer presenting the point that it charges the commission of the offense at an impossible date. The indictment recites that the offense was committed "heretofore"; it states definitely that a definite thing was done; it recites that the package containing the registered matter alleged to have been stolen was mailed at New Orleans, on November 6, 1915, labeled "New York City"; that the bag was being carried by the post office establishment; that it came into possession of defendant as a railway postal clerk; that while it was being so forwarded it was stolen. There could be no question about the date intended. The use of 1916, instead of 1915, is a manifest clerical error. It is an error of a kind that occurs in thousands of writings every year. The indictment sufficiently identifies the offense, if it should ever be necessary to make a plea of former jeopardy. The defendant was given ample notice of the particular charge to which he was called upon to offer a defense. He has suffered no loss; been put to no disadvantage; been deprived of no right.

Defendant cites many authorities in support of his demurrer. It may be that the facts above detailed, showing clearly the character of the error, differentiate this case from the cases cited by defendant. If the difference does not exist, then we are not inclined to follow the authorities. A manifest clerical error in an indictment, resulting in no harm to the defendant, should not be permitted to defeat or retard justice. The demurrer was properly overruled.

Other objections to the indictment are technical, lacking substance.

The judgment is affirmed.

TILLAR v. COLE MOTOR CAR CO.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1917.)

No. 3087.

APPEAL AND ERROR ⊜1096(1)—SUBSEQUENT APPEAL.

Save in exceptional circumstances, questions decided upon one writ of error or appeal are not open to consideration by the same appellate court on a subsequent writ of error or appeal in the same case.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by the Cole Motor Car Company against Ben J. Tillar and another. There was a judgment for plaintiff, and the named defendant brings error. Affirmed.

M. M. Crane, of Dallas, Tex. (A. J. Clendenen, of Ft. Worth, Tex., on the brief), for plaintiff in error.

F. M. Etheridge, J. M. McCormick, and H. L. Bromberg, all of Dallas, Tex., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. This is the second writ of error in this case. Cole Motor Car Co. v. Hurst, 228 Fed. 280, 142 C. C. A. 572. No new question is presented by the record brought up by the pending writ of error. What the plaintiff in error seeks is a reconsideration and reversal of rulings formerly made by this court. Assuming, without deciding, that under exceptional circumstances questions decided on one writ of error or appeal are open for reconsideration by the same appellate court on a subsequent writ of error or appeal in the same case, this case is not deemed to be one calling for the exercise of such power, as it presents no exceptional feature to justify a reopening of the questions which were disposed of by this court's former decision.

The judgment is affirmed.

BATTS, Circuit Judge (concurring). The former ruling in this case was predicated upon a holding that the contract under consideration was one of consignment, rather than sale. I do not desire that

my acquiescence in the present disposition of this case should be held a concurrence in that view of the contract. The real question before the court was whether or not the contract was one in violation of the Texas anti-trust laws. The terms of the contract were before the court, to be considered in connection with those laws; the substantial merits of the matter were not to be determined by the choice of a name for the contract.

As between the manufacturer and the purchaser (as he was called in the contract), the contract was almost a negation of the time-honored economic proposition that you "cannot eat your cake and have it, too"; but the part which was claimed to be obnoxious to the Texas law appears to be a reasonable provision, almost essential to efficient marketing of the company's products. Strict adherence to the rules which some courts observe with reference to the "law of the case" provides a most efficacious method of propagating and perpetuating the evil consequences of judicial mistakes; but the "law of the case" should not be changed, unless clearly erroneous, and the judgment heretofore rendered herein cannot be so characterized, however much doubt might exist as to the correctness of the reasoning upon which it is based.

HOLLIS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1917. Rehearing Denied December 15, 1917.)

No. 3121.

CRIMINAL LAW ⊂=510—EVIDENCE—ACCOMPLICE TESTIMONY.

In the federal courts, a conviction can be had on accomplice testimony, uncorroborated.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Tom Hollis was convicted of conspiring to commit an offense against the United States, and he brings error. Affirmed.

Louis Silberman, of Birmingham, Ala., for plaintiff in error.

Robert N. Bell, U. S. Atty., and Ralph W. Quinn, Asst. U. S. Atty., both of Birmingham, Ala.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. Tom Hollis, the plaintiff in error, was charged, together with Tom Collier, Jim Raper, Oscar Linn, and Simp Patterson, with conspiring to commit an offense against the United States, to wit, to assault two postal clerks having charge, control, and custody of mail matter, with intent to steal the said mail matter. The three counts of the said indictment charged variations of the same transaction. He was convicted and sentenced to a term in prison, and has sued out a writ of error to this court, assigning some 50 errors.

At the trial in the District Court Raper pleaded guilty, and the government entered a nolle prosequi as to Linn. Both of them testified as witnesses for the government. Objection was made to the testimony of these witnesses on various grounds, and it is the contention of Hollis that their evidence was not sufficient to support the conviction, and that there was no other evidence, direct or corroborative, that would do so. He therefore moved for the general charge in his favor.

The District Judge charged the jury fully on the law of the case, and specially with regard to the necessity of corroboration of the testimony of Raper and Linn, as they were accomplices. There is practically no corroboration in the record before us of this testimony as to the participation of Hollis in the conspiracy. However, while in some of the states it is necessary that the testimony of an accomplice be corroborated to warrant conviction, there is no such rule in the federal courts, and if the jury believed Raper and Linn the verdict is amply supported. Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, Ann. Cas. 1917B, 1168.

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

PATTERSON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1917. Rehearing Denied December 15, 1917.)

No. 3131.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Simp Patterson was convicted of crime, and he brings error. Affirmed.

Louis Silberman, of Birmingham, Ala., for plaintiff in error.

Robt. N. Bell, U. S. Atty., and Ralph W. Quinn, Asst. U. S. Atty., both of Birmingham, Ala.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. The questions presented by this writ of error are controlled by the decision in the matter of Hollis v. United States, 246 Fed. 832, — C. C. A. —.

Affirmed.

LINDE AIR PRODUCTS CO. v. MORSE DRY DOCK & REPAIR CO.

(Circuit Court of Appeals, Second Circuit. December 19, 1917.)

No. 83.

1. EQUITY ⟸415—DECREE—FORM.
   While there is a wide discretion in the chancellor as to the frame or language of his decree, the forms and modes of expression used do not affect the nature or character of the decision, for that depends on what has been decided.

2. EQUITY ⟸415—PRACTICE—DECREE.
   The statement in the decree of any facts proved or unproved has fallen into disuse, as unnecessary, except in matters of contempt, or in special cases, where it may be considered exceptional.

3. PATENTS ⟸323—INFRINGEMENT—DECREES.
   Under equity rule 71 (198 Fed. xxxviii, 115 C. C. A. xxxviii), declaring that, in drawing up decrees, neither the bill nor answer, nor other pleadings, nor the report of any master, nor any prior proceeding, shall be recited or stated, but the decree and order shall begin by stating that the cause came on to be heard, or to be further heard, etc., and shall be followed by the provisions of the decree, which is but declaratory of good modern practice, the ordering, directing, or mandatory part of a decree should merely point out with precision what is to be done, when, where, and by whom, and to or for whom; hence, in a suit for infringement of a patent, where the court, though finding that title to the patent was in plaintiff and that an alleged previous commercial use of the patented process had not been shown, found the patent invalid, a decree which merely dismissed the bill, and contained no recitals as to the findings of the court, was proper.

4. APPEAL AND ERROR ⟸854(2)—DECREE—VALIDITY.
   A decree should be sustained on appeal, though the lower court assigned erroneous reasons.

5. APPEAL AND ERROR ⟸893(2)—REVIEW—EQUITY CASES.
   An appeal in equity opens up the whole case, and brings before the reviewing tribunal the entire case.

6. APPEAL AND ERROR ⟸597(1)—RECORD—MATTERS TO BE INSERTED.
   In a suit for infringement of a patent, where defendant set up as defenses invalidity for lack of patentable invention, noninfringement, commercial use of substantially the same process, and lack of title in plaintiff to the patent, the court, though finding that the commercial use of substantially the same process was not established, and that plaintiff's title was good, dismissed the bill on the ground of the invalidity of the patent. The final decree briefly dismissed the bill. *Held*, that the appeal brought up the entire case, and evidence relating to plaintiff's title to the patent and previous commercial use of substantially the same process should be included in the transcript on appeal, for such evidence might sustain the decree, if the reasons assigned in the lower court were not approved.

7. PATENTS ⟸328—INVENTION—ANTICIPATION—"CUT."
   The Jottrand patent, No. 831,078, for a method of cutting metal articles, consisting in directing a heating jet upon the object to be cut along the line of section, so as to raise the metal to a temperature enabling oxidation without fusion of the metal, in directing simultaneously a jet of oxygen under pressure upon the heated part of the object, and in moving simultaneously both jets along the line of section, *held* invalid, in view of the prior state of the art and publications, and anticipated, despite the use of the word "cut," which indicates a severance perfectly

clean: the processes of melting and fusing metals, which are, respectively, liquifying by heat and melting into combination with others by means of oxyhydrogen blowpipes, being well known, and the patentee's own particular process, which used such knowledge so as to form a clean line of severance, having also been previously disclosed.

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

8. PATENTS ⊂⊃234—INVENTION—INFRINGEMENT.

That the words preferred by the patentee to define his invention apply literally to another's device suggests, but does not prove, infringement, and there must be substantial identity to justify that conclusion.

9. PATENTS ⊂⊃69—ANTICIPATION—PUBLICATION.

For prior publications to be effective, as anticipatory, they must substantially furnish such details as are necessary for the practical working of the invention.

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

Suit by the Linde Air Products Company against the Morse Dry Dock & Repair Company. From a decree dismissing the bill (239 Fed. 909), complainant appeals. Affirmed.

The action is the usual bill in equity upon patent to Jottrand, No. 831,078, and all the claims thereof. The application was filed August 22, 1905, and the patent issued September 18, 1906. The specification purports to disclose a process or method of cutting metal articles, particularly those of a readily oxidizable metal, by means of a blowpipe of any appropriate kind directed along the line of section, there being simultaneously directed upon the same line at a certain distance from the jet of the blowpipe a jet of oxygen under pressure.

The fifth claim, in its definition of the patentee's method, sets it forth more fully than any other. That claim is as follows:

"5. The method of cutting plates, pipes, and other metal articles, consisting in directing a heating jet upon the object to be cut, along the line of section, so as to raise the metal to a temperature enabling oxidation without fusion of the metal, in directing simultaneously a jet of oxygen under pressure upon the heated part of the object, and in moving simultaneously both jets along the line of section."

The bill and answer present no singularities in form, but after the evidence was completed there clearly appeared the following defenses to the suit: (1) Invalidity for lack of patentable invention over prior patents and publications. (2) Noninfringement upon a proper construction of the patent in the light of said prior art. (3) A commercial use of substantially the same process referred to throughout the case as the "Harris" use. (4) No title in the plaintiff to the patent. (5) Restraint of trade and implied license.

The trial judge, in the opinion filed, held that the Harris use had not been affirmatively established, that plaintiff's title was good, that the defense of restraint of trade and implied license was not within the pleadings, and avoided discussion of the question of infringement of the patent properly construed by holding it invalid. Thereupon defendant submitted a final decree directing briefly that the bill be dismissed, with costs, and plaintiff a form in and by which the court would have specifically passed on each one of the issues suggested by the evidence, and particularly overruled the Harris use and adjudged the title to the patent in suit in plaintiff. The District Judge signed the form of decree propounded by defendant. Thereupon plaintiff appealed from the entire decree and under equity rule 75 (198 Fed. xl, 115 C. C. A. xl) served a præcipe indicating that the transcript on appeal should not contain any of the evidence relating to the Harris use or to plaintiff's title to the patent. Thereupon defendant by counter præcipe demanded that such omitted evidence be included, and the court held with defendant. Thereafter by leave of court plaintiff specifically assigned for error (1) the refusal to

enter decree in the form suggested by plaintiff, and (2) compelling the incorporation in the transcript (at appellant's expense) of the testimony sought to be omitted by plaintiff, in addition to the usual assignment that the court erred in declaring the patent invalid, and dismissing the bill.

Thomas B. Kerr and Drury W. Cooper, both of New York City, for appellant.

Livingston Gifford, of New York City, for appellee.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The procedural question raised herein is not without importance, if plaintiff's contentions are justified. They suggest consideration of (1) the fundamental nature of that portion of a decree not specifically covered by equity rule 71 (198 Fed. xxxviii, 115 C. C. A. xxxviii), i. e., the mandatory part; and (2) the effect of an appeal upon the trial record.

[1, 2] Undoubtedly there is a wide discretion in a chancellor as to the frame or language of his decree, but the "forms and modes of expression, by which any tribunal pronounces its discretion to have been exercised, do not affect the nature or character of its decision; that depends on what it has decided." Baldwin, J., in Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579. Yet there is a tradition, of persuasive, if not binding, force, as to such matters, and the statement in decree of any facts proved or unproved "has altogether fallen into disuse, as unnecessary, except in matters of contempt, or in special cases, where it may be considered exceptional." Dan. Ch. (Ed. 1901) p. 633.

[3] Thus rule 71 is but declaratory of good modern practice, and may be supplemented thus: The ordering, directing, or mandatory part of a decree should merely "point out with precision what is to be done, when, where and by whom and to or for whom." Street, Fed. Eq. § 1965, and citations. This rule naturally presumes due consideration, not only of the trial proof, but of the allegations of the bill. This bill (and all of its kind) make in legal effect one allegation, i. e., defendant has infringed, and that allegation was held not to be proved. To be sure, noninfringement may be found as the result of many things, or of one thing out of many shown and discussed; but the result is one and the same, dismissal of bill because probata do not sustain allegata. Therefore the only "thing to be done," the only function of the mandate of the decree, is to dismiss the bill. Thus it is plain that the contention in substance is that an equity judge is compelled to insert in his decree findings of fact, a proposition we think wholly unsustainable.

It is not uncommon for the court to distinguish between invalidity and noninfringement in dismissing a patent bill. The cases referred to and recently before us (Thacher v. Transit, etc., Co., 234 Fed. 640, 48 C. C. A. 406, and Oriental, etc., Co. v. De Jonge, 234 Fed. 895, 148 C. C. A. 493) do so, and we do not intimate, either that no lawful right exists to enter such decrees in discretion, or that circumstances may not render that or any other special form appropriate or fair. We do hold that it was not error to sign the form of decree herein.

[4-6] The second part of appellant's contention assumes, if it does not assert, that, had such decree as it suggested been entered, or indeed any form assigning reasons for action (as in the cases just cited), the scope or nature of the appeal would have been changed. But the action

of the court, its final order, would have been the same; i. e., dismissal. No conceivable appeal by a plaintiff dismissed is worth anything, unless it complains of that act, and assigns it for error; and citations scarcely are needed to fortify the holding that a decree must be sustained if it was right on the record, though only wrong reasons were relied on in the opinion (Gideon v. Hinds, 238 Fed. 140, 151 C. C. A. 216), or that an appeal in equity "opens up the whole case," and "brings up the whole case" (Pittsburgh, etc., Co. v. Baltimore, etc., Co., 61 Fed. 708, 10 C. C. A. 20; Blythe Co. v. Hinckley, 111 Fed. 837, 49 C. C. A. 647). Therefore the whole record, or at least every part thereof justifying or alleged to justify the decree made—i. e., the action directed—must come up with an appeal from the entire decree. Aliter only when but a part of the decree is appealed from. Nashua, etc., Co. v. Boston, etc., Co., 61 Fed. 237, 9 C. C. A. 468.

Even when the whole record is before the appellate court, the assignments of error often (in effect) limit the appeal, in the sense of narrowing the field of discussion. This is pointed out in the case last cited, and this truth was assumed when we said in the Thacher Case, supra, that it was "necessary" to consider only the question of infringement, where the court below had decreed validity, and appellant assigned for error the infringement finding. But we did not, and do not, hold that, had we disagreed with the trial judge in his decree of noninfringement of a valid patent, we should have been in any way precluded from examining the record to ascertain whether the decree was right on the plain principle that there can be no such thing as infringement of an invalid patent.

Considering appellant's contention in its entirety, it is substantially this: That because some of the evidence solely related to matters of defense, mentally and (so to speak) physically separable from other matters directed to the same legal question, it was therefore both proper and obligatory to enter a decree and authorize a transcript putting the noninfringing defendant to an appeal, in respect of every ruling on evidential values unfavorable to defendant. This is (as above intimated) mere fact finding, and overlooks the legal certainty that there is no such thing as a dependent or ancillary appeal. Defendant, with bill dismissed, certainly could not have appealed alone or independently from an expression in decree of the fact that the Harris use was not lawfully established; therefore such finding was not part of the mandatory portion of any decree. But because the evidence relating to that use was within the pleadings, and might justify dismissal, and require affirmance of decree, if all else failed, plaintiff was rightly obliged to insert it in the appeal record.

[7-9] Turning now to the merits of the patent invalidated by decision below, it may be noted that the claim prefixed hereto is regarded by plaintiff as "specifying the essential steps in effecting a cut." For that reason we choose it as the preferred definition of invention, it having been most insistently stated by experts and counsel that before Jottrand many others had melted, fused, brazed, and welded metals by means of the oxyhydrogen blowpipe, with and without the aid of an oxygen jet; but this patentee was the first to disclose a method for cutting metal by the same means or any arrangement or adaptation thereof.

It seems, therefore, necessary to inquire how and why it is that old instruments or the gases fed through them sometimes *melt* and sometimes *cut,* and whether the distinction between these two words so strenuously insisted upon rests upon a real difference of meaning.

In view of the exhaustive history of art given by the court below, and common knowledge of the heating capacity of the oxyhydrogen or other like flame under blowpipe influence, and the nature of oxidation as (in common speech) a burning process, it seems sufficient to assume and assert, as prior and even familiar art, that any and all metals or metallic bodies capable of oxidation could be and often had been melted (i. e., liquified by heat) or fused (i. e., strictly, melted into combination with others), or converted into oxides and as oxides removed from place, by one or both of the well-known implements, tools, or devices just named.

In such an art, Jottrand proposes, as a new method, the direction of a heating jet upon an object (i. e., oxidizable metal) along any preferred line, thereby raising the metal in its path to a temperature permitting "oxidation without fusion" (fusing here evidently means melting) and "simultaneously" putting an oxygen jet under pressure, on and along the heated line, and then driving the two jets (spaced apart a little) along the line of heat. He says the result of this operation is a *cut.*

The specification explains that oxides are more "fusible" than the metal itself, wherefore, if his pressure oxygen jet oxidizes at the proper temperature (not stated in the disclosure), the resulting oxides "flow readily," and his path of preheating becomes a line of "severance, perfectly clean," and therefore (we infer) he feels justified in calling it a *cut.*

There is no magic in a name, nor in a claim; that the words preferred by a patentee to define his invention apply literally to another's device suggests, but does not prove, infringement; there must be a substantial identity, to justify that conclusion of law. Edison v. American Co., 151 Fed. 787, 81 C. C. A. 391.

Assuming, then (for argument's sake), that defendants have cleanly severed metals with flame and jet, plaintiff cannot monopolize method, action or means by the word "cut," and since the means are not sought to be covered by this process patent, some other novelty and merit must be discovered to justify the grant. If found at all, the patentable invention must rest in the novel application of some thermo-chemical action so functioning, when instigated by Jottrand's disclosure of old means, as to produce successively metallic oxides, and removal of same, within so confined an area as to justify calling the cleared space a *cut,* rather than a hole or hack.

Accordingly it is urged that, observing (dehors the specification) that the blow flame will easily heat to (say) 1000° C., at which temperature oxygen combines with iron, that iron melts at about 1520° C., and its oxide at 1250° C., there is within this indicated range room to create and remove a line of oxide without disturbing the adjacent masses of iron not directly in the path of the heating flame, which may fairly be inferred from the disclosure as preferably of small area, or width. Such use of blow flame and oxygen jet is said to differ from everything in the prior art, in that it suggests, and indeed requires, a "pro-

gressive movement parallel to the face of the" metal, instead of an "axial movement" like that of a punch or awl.

While noting that Jottrand does plainly contemplate (in his specification) punching holes as well as sawing with his flame and jet, we think that the foregoing states the best case that can be made in support of any such invention as is claimed; for we pass as equally obvious and irrelevant any possibility of invention in the machine or appliance used in the specification to illustrate the method. A patent was obtained on that, which is not here in suit, and no limitations, expansions, or explanations of the method can be based on the mechanics of Jottrand's apparatus; for it is also obvious that this is not one of those twice-patented inventions, as to which it is impossible to imagine an infringement of method that would not also infringe the only possible machine or device working by or in that method. If this patent is good, it is a true process.

Whether there is virtue in it depends on this question of fact: What is the thermo-chemical action taking place in the hole, cut, kerf, opening, or solution of continuity produced by a preheating flame applied to oxidizable metal and followed by an oxygen jet under pressure, be said jets or flames narrow or broad? We think it plainly proved that the metal burns, and is blown out of the preheated area partly as oxide and partly as melted metal.

We do not think this method of removing metal either from a hole, or a cut can be thought new after Dr. Menne's publications of 1903–04. The Menne patents we also regard as publications, as his claims were not directed to Jottrand's goal. In the patent of 1902 (703,940) Menne discloses briefly the thermo-chemical action so laboriously sworn to in this record; and in his address he describes the release of one piece of metal from another by "melting through" one of them—the same being a stated equivalent for "sawing through," and that Jottrand's *cut* is a cut by melting was admitted by all the experts—who really could not disagree, except as to how much of what was removed was oxidized and how much was unoxidized metal, a debate we cannot regard as important.

Plaintiff appeals to the rule, fully recognized by us, that prior publications, to be effective, must substantially furnish such details as are necessary for the practical working of the alleged invention. Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; McMillin v. Barclay, 5 Fish. 202, Fed. Cas. No. 8,902; Hill v. Evans, 31 L. J. 463. We find that for everything done by this defendant (very rough work) Menne was and is a much better and clearer guide than Jottrand; whether the latter has anywhere disclosed a means for finer work is not before us. His cutting and Menne's melting are as methods or processes identical; they are so for reasons that go back to chemical fundamentals, and that his cutting device may be clever, and has small, neat apertures, justly spaced and proportioned, is not now relevant.

It may be added that, if Menne's publications needed strengthening, we should find reinforcement in the Revue Industrielle of April, 1904. The foregoing relieves us of the necessity of considering the other matters of defense, concerning which we give no opinion.

Decree affirmed, with costs.

RITER-CONLEY MFG. CO. v. ATLANTA GASLIGHT CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 4, 1917.)

No. 3021.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—GAS MAKING APPARATUS.

The Carpenter & Barnum patents, No 1,091,111, for a standpipe, for use in the manufacture of gas, and No. 1,140,113, for a process of reducing stoppage in such standpipes, are void for lack of invention, in view of the prior art. No. 1,122,683, for a valve for lateral conduits leading from gas retorts to the standpipe, *held* not infringed.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Suit in equity by the Riter-Conley Manufacturing Company against the Atlanta Gaslight Company and Richard C. Congdon. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 234 Fed. 896.

Harold Hirsch, of Atlanta, Ga., J. M. Nesbit, of Pittsburgh, Pa., and Francis T. Chambers, of Philadelphia, Pa., for appellant.

Alex W. Smith, of Atlanta, Ga., for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. The bill in this case as it was amended complained of the alleged infringement by the defendants (the appellees), the Atlanta Gaslight Company and Richard C. Congdon, of three United States patents owned by the plaintiff, the Riter-Conley Manufacturing Company, namely, No. 1,091,111, which will be referred to as "the standpipe patent," No. 1,122,683, which will be referred to as the "valve" or "lateral patent," and No. 1,140,113, which will be referred to as the "process patent." Each of these patents purported to protect an invention made by Henry A. Carpenter and Dana Dwight Barnum, who were the assignors of the plaintiff. The construction and operation of an apparatus located in the gas manufacturing plant at Atlanta, Ga., of the defendant, the Atlanta Gaslight Company, constituted the alleged infringement which is complained of. The appeal is by the plaintiff from a decree dismissing the bill as it was amended. The opinion rendered by Judge Newman shows that this decree was the result of his conclusions that nothing that had been done by the defendant infringed either the process patent or the valve or lateral patent, and that the standpipe patent is invalid. Riter-Conley Mfg. Co. v. Atlanta Gaslight Co. (D. C.) 234 Fed. 896.

One of the difficulties in the manufacture of coal gas, as that business has been conducted for many years, is due to stoppages in the standpipe into which the gas generated by the burning of coal passes when it leaves the retort; such stoppages being the result of substances which are thrown off from the gas after it leaves the retort being attached to the side of the standpipe and accumulating thereon until the passageway through the standpipe is wholly or partially clos-

ed. The process patent in suit purports to disclose a new and improved method of dealing with this difficulty. The claims of that patent are as follows:

"1. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in discharging gas from a plurality of generating retorts directly into a vertical path formed by a standpipe and common to all of said retorts, and timing the charging with coal of each retort relatively to the charging of all the other retorts to maintain the temperature of said vertical path substantially uniform.

"2. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in discharging gas simultaneously from a plurality of generating retorts directly and through relatively short lateral paths into a vertical path, said vertical path being formed by a standpipe and common to all the retorts, and timing the charging with coal of each retort relatively to the charging of all the other retorts to maintain the temperature of said verticle path substantially uniform.

"3. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in discharging gas from a plurality of generating retorts directly and in lateral direction into a vertical path formed by a standpipe and with the gas entering said path at different elevations, and timing the charging of each retort with coal relatively to the charging of every other retort to maintain the temperature of said vertical path substantially uniform.

"4. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in charging a group of retorts with coal at different times and thereby creating overlapping carbonization periods, the time of charging each retort of the group being remote from the time of charging the retorts nearest thereto and thereby minimizing variation in temperature of the retorts and of the gaseous output thereof, maintaining direct communication between each retort during its carbonization period and a vertical path with said path formed by a standpipe common to all the retorts, and timing the charging of each retort relatively to the charging of all the other retorts to maintain the temperature of said path substantially uniform.

"5. In the manufacture of coal gas, the method herein described which consists in charging in sequence a plurality of gas generating retorts with coal and retaining the charges within the retorts for corresponding periods of time and thereby maintaining overlapping carbonization periods of corresponding duration for all the retorts, discharging the gas from all the retorts directly into a vertical path with said path inclosed by a standpipe and common to all the retorts, and timing the charging of each retort relatively to the charging of all the other retorts to maintain the composite gaseous stream within said vertical path substantially uniform in quality, temperature and volume.

"6. In the manufacture of coal gas, the method herein described, consisting in discharging gas simultaneously from a plurality of generating retorts directly into a vertical path formed by a standpipe, said path common to all the retorts and proportioned relatively to the latter to forestall back pressure in any retort, and timing the charging with coal of each retort relatively to the charging of all other retorts to maintain a gaseous stream within said path of substantially uniform volume."

It is contended in behalf of the plaintiff that what the defendants did infringed each of these claims except the fourth.

The alleged infringing apparatus contains, besides other features, one or more of which will be mentioned later, several tiers of coal gas generating retorts placed one above the other, and so arranged with reference to standpipes which are parallel with the vertical rows of retorts that each of the retorts in such a vertical row has a connection with the same standpipe through a short lateral conduit or passage-

way, which may be opened or closed as desired by means of a valve set at the retort end of the lateral conduit. The retorts are emptied of the coke made by burning the gases out of the coal and are recharged with coal by a movable machine, which when in operation is in a position opposite to the retort to be emptied and charged, and on a level with it. The practice of the defendants in the use of this machine is to keep it on the same level until all of the retorts on that level have been emptied and charged; the retorts on that level being emptied and charged one after another or successively. Then after a predetermined interval of time the machine is placed on a level with another horizontal tier or row of retorts, which in like manner are emptied and recharged successively. Results of following the schedule adopted by the defendants are that each retort is emptied and recharged at intervals of about eight hours, which is the time required to burn the gas out of coal, and about two hours elapse between the emptying and recharging of any two retorts which are in the same vertical row. When a retort is to be emptied and charged, the connection between it and the standpipe is cut off by means of the valve above mentioned, the lateral passageway is cleaned out, and such passageway is kept closed while the retort is being emptied of coke and recharged with coal.

The defendants profess not to rely upon this method of emptying and recharging retorts to lessen or get rid of standpipe stoppage. This result they claim to accomplish by the use of water so applied as to flow down the sides of the standpipe, a thin film of water moving down the inside of the pipe being the means of carrying to a receptacle below the retort to which the standpipe leads substances thrown off from the gas in its passage through the standpipe. But it is insisted in behalf of the plaintiff that the defendants' addition of the use of water cannot be given the effect of entitling them to follow the rotational method of charging which is described in the claims of the process patent in suit, and that what the defendants do includes a method or process which is described in one or more of the claims of that patent. The opinion of Judge Newman shows that what occurred in the Patent Office, as disclosed by the "file wrapper," between the date of the original application and the issue of the process patent, led him to the conclusion that that patent was not meant to confer on the patentees the right to prevent the use by others of such a method of charging a number of coal gas generating retorts having connection with a common standpipe, as was used in the operation of the alleged infringing apparatus. The writer has not been convinced that this conclusion is a tenable one. But the result is the same if that patent was ineffective to confer that right on the patentees or their assigns.

Each of the steps taken in the operation of the alleged infringing apparatus, the taking of which in conjunction is claimed to constitute an infringement of the plaintiff's process patent, was old in the coal gas making art when that patent was applied for. There was no novelty in discharging gas from several retorts into one standpipe, though the common practice was for each retort to have its own standpipe. A valve mechanism used to stop at will the discharge of

gas from one or more retorts into a common standpipe was an old device. The way the defendants used a machine to empty and recharge retorts was one that had been in vogue for many years. And there was no novelty in the scheme of charging successively at stated intervals retorts the gases from which pass into a common receptacle, so that the gases from the different retorts reach the common receptacle at different stages of the burning of the coal from which they were generated. In 1878 there was issued to Joseph Slade United States patent No. 8,422, the single claim of which was as follows:

"In the manufacture of illuminating gas, using the ordinary bench of retorts, the mode of preventing loss of heat at the time when the coal is throwing off gas the fastest, which consists in charging the retorts in each bench successively at stated intervals; the retort undergoing the operation of charging being the one farthest removed from the retort or retorts last charged."

The Slade patent does not mention or describe the receptacle in which gases discharged from different retorts come together and mingle, and it says nothing about using the method of equalizing temperature which it describes for the purpose of reducing stoppages in a standpipe which serves several retorts. But that patent makes it plain that, long before the plaintiff's assignors claimed to have discovered the method of reducing standpipe stoppage which the claims of their process patent describe, there had been disclosed in the gas making art a method of affecting the condition of the gas in a receptacle containing what comes from a plurality of retorts by charging such retorts successively and at stated intervals. And the evidence makes it equally plain that long prior to the date of that alleged discovery a standpipe serving a plurality of retorts was known and used as a receptacle for the gas discharged from such retorts. The use of the Slade rotational method of charging to affect the condition of gas in a standpipe which serves several retorts is the use of an old process to affect the condition of gas in a gas receptacle of an old type. Nothing in the Slade patent indicates an intention to limit the application of the process it describes to a receptacle containing gas which had already passed through a standpipe. The method it describes is applicable to any receptacle containing the gas discharged from a plurality of retorts. A standpipe serving several retorts is such a receptacle. The relation between a standpipe and the part of the gas making apparatus or plant into which gas goes when it leaves the standpipe is by no means a remote or obscure one. To a person familiar with the operation of gas making machinery and skilled in that business it must be quite obvious that a method of charging retorts which is affective on the temperature or other condition of the gas in a receptacle into which a number of standpipes discharge would, if applied in the charging of a number of retorts served by a common standpipe, be similarly affective on the temperature or other condition of the gas while in such standpipe. One who was aware of the disclosure made by the Slade patent and of the previous existence of the device of a single standpipe serving several retorts—and a subsequent patentee is chargeable with such knowledge whether he actually possessed it or

not—could not be entitled to a patent giving him a monopoly of the use of the Slade rotational method in charging a plurality of retorts which are served by a common standpipe, unless such an application of a previously known method or process involved the exercise of the inventive faculty as distinguished from mere mechanical skill. If the plaintiff's assignors were the first to use the Slade rotational method in charging retorts served by a common standpipe, this amounted only to putting an old process to a use quite similar and closely analogous to a previously disclosed use of that process.

We do not think that there is any substantial difference between the methods of charging retorts which are described in the claims of the process patent in suit, which the plaintiff contends have been infringed by the defendants, and the method of charging described in the Slade patent. In view of the state the gas making art had reached prior to the time the process patent in suit was applied for, the most that properly can be said of that patent is that it evidences the discovery that the use of a previously known method of charging retorts is effective in reducing stoppages in a standpipe into which the gas from all such retorts is discharged and in forestalling back pressure. In other words, the discovery was that an old process applied in a way quite cognate and similar to a previously known way of applying it in the same industry had a beneficial operation or effect not previously made known. Both the method of charging described in the claims of the process patent which it is contended have been infringed and the gas receptacle with reference to which that method was proposed to be applied were old in the gas making industry. Nothing was new, except the purpose for which that old method was so applied. This was not enough to entitle the patentees to a monopoly of the use of that old method. Such a new and analogous use to which an old process is put does not amount to a patentable invention. Potts v. Creager, 155 U. S. 597, 606, 15 Sup. Ct. 194, 39 L. Ed. 275; Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; Baker v. F. A. Duncombe Mfg. Co., 146 Fed. 744, 77 C. C. A. 234; Walker on Patents (5th Ed.) §§ 38, 39.

The conclusion is that the claims of the process patent which are brought into question, namely, the first, second, third, fifth, and sixth claims, are not sustainable.

We concur in the conclusions reached by the District Judge in regard to the valve patent and the standpipe patent, and do not deem it necessary to add anything to what he said in his opinion with reference to those patents.

The decree appealed from is affirmed.

BATTS, Circuit Judge (concurring). In coal gas making, by connecting a standpipe between two vertical rows of horizontal retorts with each retort (patent No. 1,091,111) by a lateral pipe with a valve in the retort (patent No. 1,122,683) and (patent No. 1,140,113) charging the retorts at such intervals as maintained in each a degree of carbonization different from the others, complainants claim to have accomplished ease in removing lampblack from the connecting pipe,

and an equality of temperature, obviating the deposit of tar, lampblack, and pitch, removal of which, under the old system of retorts with separate standpipes, was troublesome and expensive.

Defendant is charged with infringement in the operation of a plant with like rows of retorts connected on one side of a standpipe by a pipe and a valve in the standpipe, in which water is kept flowing down the interior of its sides; the charging being sequently done with a machine which is moved at regular intervals from one to another of the horizontal rows into which retorts of the vertical rows of corresponding height are disposed. It was claimed that the water jacket obviated the deposit, and that the location of the valve in the standpipe rendered cleaning the connecting pipe easier.

The use of a single standpipe for several retorts, if ever patentable, was anticipated by United States patents: Rowland, 211,591; Fowler, 808,831; Taussig, 694,443—and English patents: Wates, 5,513; Hanson, 8,880; and Scoble, 421. The use of a lateral pipe and valve to connect the retort and standpipe involved nothing novel, and was anticipated by patents: Rowland, 211,591; and Wates, 5,513. Regulating intervals between chargings of retorts would not seem to be more patentable than a schedule for trains, or meals or medicine. The method was anticipated by Slade, 4,422.

If the patent were valid, it was not infringed. At most, it involved a method by which standpipe stoppage was reduced, if conditions (including an enlarged pipe) were as at complainants' plant. Defendant continued, after patent, a manner, in substantial accord with complainants' method, of using a charging machine. The manner of use was customary, and not to produce results claimed by patentees. The essential conditions were evidently absent, for the results did not follow.

For the reasons indicated by the trial judge, and because complainants' method patent is void, the judgment should be affirmed.

DUNHAM v. KELLEY-KOETT MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1917.)

No. 2999.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—X-RAY APPARATUS.
   The Churcher patent, No. 762,881, for an X-ray apparatus, which is in fact a device for transforming an alternating into a direct pulsating current for the operation of an X-ray machine, discloses a true combination of utility, which, although the elements were old in use in other connections, required invention. Claims 1 and 2 *held* valid and infringed.

2. PATENTS ⇐46—UTILITY.
   Patentable utility is not negatived by the fact that a user found it desirable to use additional apparatus in connection with the patented invention.

3. PATENTS ⇐25—AGGREGATIONS—ELECTRICAL APPARATUS.
   Agencies associated in electrical apparatus are not easily shown to be a mere aggregation.

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

4. PATENTS ⊂=20—INFRINGEMENT—EQUIVALENTS.
A compound electrolyte cell, consisting of two electrolytes separated by a partition and connected by a bridge, *held* equivalent to a simple cell.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by Kennon Dunham against the Kelley-Koett Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

C. W. Miles, of Cincinnati, Ohio, and Wood & Wood, of Athens, Ohio, for appellant.

Harvey Myers and Allen & Allen, of Cincinnati, Ohio (Alfred M. Allen, of Cincinnati, Ohio, of counsel), for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This is an infringement suit, brought upon patent No. 762,881, issued June 21, 1904, to Churcher, assignor to Dunham, for "X-ray apparatus." The District Court thought that, if the patent was valid, it was not infringed, and dismissed the bill. The name given by the Patent Office to the invention is not very accurate, since the device pertains, specifically, only to the production of electric current appropriate for use in producing the X-ray rather than to the X-ray apparatus itself. At the time of the invention, it was the recognized practice to use an induction coil for supplying current to the X-ray bulb, and to conduct to the primary coil a direct pulsating current of comparatively low voltage. This was delivered to the bulb from the secondary coil as a pulsating current of much higher voltage, and, in this latter form, it was efficient to produce the X-ray. If the current supplied to the primary coil were alternating, as good results could not be had, and so it was well understood that if the available source of supply delivered an alternating current, this must be transformed into the direct before it was carried to the primary coil; and Churcher's invention had to do with this transformation. If, as was then commonly true, it was necessary to employ the alternating current furnished by the electric light or power company, two things must be accomplished before it was most suitable for use in the primary coil: It must pass through some device which would cause it to flow in one direction only, and it must be interrupted so that it would be pulsating instead of continuous.

Churcher was not the first to observe these necessities or to meet them. The alternating current could be and was changed into the direct by using a motor generator. This may be called mechanical transformation. It was also known that if an alternating current were passed through an electrolytic cell, the anode of which was composed of aluminum and the cathode of a mere conductor, like lead, the positive waves of the current passed through without material obstruction while the negative waves were partly suppressed, so that there would travel away from the cathode a current which was dominantly

unidirectional. This method had been employed to some extent in the charging of storage batteries. Its use for the purpose of X-ray work had been slight and more or less experimental.

For the purpose of giving the necessary pulsating character to a continuous direct current, two methods were well known. One was a mechanical interrupter. Any suitable device which would rapidly open and close the circuit would result in a pulsating current; but the limit of possible rapidity in these interruptions was soon reached. The other known device was naturally thought of as chemical in its action, and was called the Wehnelt interrupter. It was found that if a small point of platinum were used as the cathode in the electrolytic cell, it would deliver a current of exceedingly high pulsating frequency—as high as 1,500 to the second. The theory upon which this action is supposed to rest is that the flowing of current to the cathode creates a gas which surrounds the cathode with a protective and obstructive film, thus breaking the current; but that, as soon as the current breaks, the film falls away—this operation being repeated and thus causing the pulsations.

For the specific purpose of interrupting a direct current so as to give it suitable character for use in the primary coil of the X-ray apparatus, the Wehnelt interrupter was old; for the general purpose of changing an alternating current to direct, the aluminum electrode was old; Churcher first combined in one apparatus, for the purpose of using an alternating current in operating an X-ray induction coil, the aluminum electrode or valve as the anode of an electrolytic cell, with a suitable electrolyte and with the Wehnelt interrupter as the cathode. He found that this combination was operative, and that, when properly used, it did its part in producing X-rays of at least fair efficiency. His conception of the invention was formulated in the claims of his patent, of which claims 1 and 5 are given in the margin.[1] Claim 2 is not, for present purposes, materially different from claim 1. Claims 3 and 4 relate to a modification, and are not involved, the suit being based only upon claims 1, 2 and 5.

[1] We are not able to say that there was no invention in the selection and combination which Churcher made. The utility—indeed, the necessity—of changing the alternating current to direct was clear. The motor generator was expensive, noisy and unsuitable for a physician's office and for many locations where the X-ray would be used. No one had ever made this transformation (from alternating to direct pulsating) by means wholly chemical, as that word is rather loosely

[1] 1. In combination, an X-ray generator. a secondary coil supplying current thereto, a primary coil to induce a current in said secondary, an electrolytic cell having an electrode adapted to freely pass current of one polarity and to resist the passage of current of opposite polarity, an electrode exposing a restricted surface to the electrolyte to interrupt the current, and a source of alternating current connecting said primary coil and electrolytic cell in circuit.

5. In combination with an X-ray generator, a secondary coil supplying current thereto, a primary coil to induce a current in said secondary, a source of alternating current, connecting said primary coil in circuit, and means interposed in said circuit for suppressing the waves of one polarity of said alternating current, and rapidly interrupting the waves of opposite polarity thereof.

used to cover the actions here employed and to distinguish from mechanical. The Wehnelt interrupter never had been applied to a current of the peculiar quality which resulted from passing an alternating current through an aluminum body. The nearest approach to the combination (if we give defendant the benefit of some doubts in the proofs) was that an aluminum electrode had been used to suppress—incompletely—the current of one polarity, and the resulting current had been transferred from the electrolytic cell to a mechanical interrupter and thence transferred to the primary coil of an X-ray apparatus. This had never come into use, and it seems clear enough that it did not produce satisfactory results. It is easy now to say that no invention was required to substitute the well-known Wehnelt interrupter for the well-known mechanical interrupter. If these had been both simple mechanical devices, the operation of which was clear and which would surely work as well in one environment as in another, there might be no answer to this proposition. We are not forgetting that certain chemical and electrical phenomena are as simple, clear and certain to those skilled in those arts as mechanical operations and effects would be to skilled mechanics; but, in spite of this, the record does not justify pronouncing the substitution made by Churcher to be an expedient involving only the work of an ordinarily skilled electrician. Both the ultimate effect upon the primary coil and the immediate action of the interrupter in the electrolyte must—it seems to us—have been matters of such uncertainty that the result could not be precisely foretold. A current which was not the ordinary direct current, nearly or quite unidirectional, but was one in which the waves of one polarity were incompletely suppressed, was to be subjected to an interrupting process of extreme delicacy which had never been employed upon that specific quality of current. In the electrical field, the difference between inefficiency and comparative efficiency is often the result of such seemingly trifling changes and of such obscure causes that we think the merit of invention may be attributed to the forward step which Churcher took. It is illustrative of this idea that in this record we find that the more really expert the witness is, the less positive he is regarding either theory or results of conditions which he has not tested.

[2] The patent cannot, in support of its validity, call to its aid the extensive commercial use which sometimes turns the scale; but the question is not doubtful enough to be solved according to that criterion. Not only is the defendant, if it has employed the invention, not permitted to deny patentable utility, but also it appears that some 20 of the Churcher devices were sold and put into use, and that the only one of them about which there is further testimony has continued in use with satisfactory results. This continued use has been by the plaintiff, Dr. Dunham. The fact that he has found it necessary or at least desirable to add another piece of apparatus is not important, because the addition does not pertain to the patented combination. The fact seems to be that an aluminum electrode of a standard or suitable size will not satisfactorily filter or transform an alternating current of a voltage higher than about 60, and, as the line current furnished Dr. Dunham's offices was 110, he interposed a step-down transformer

which lessened the voltage to 60 before he brought the current to the apparatus which is the subject of the patent. We think that the proper relative adjustment of incoming voltage and of aluminum electrode surface are things which it was not necessary to describe in the specification and which are not of the essence of the patented invention.

[3] We do not regard the associated agencies specified in the claim as an aggregation but rather as a true combination. Even in mechanical patents, the fact that the material is transformed or affected by successive operations does not necessarily prevent a valid combination patent upon the group of successive agencies (e. g., Oshkosh Co. v. Waite Co. [C. C. A. 7] 207 Fed. 937, 941, 125 C. C. A. 385; and see Expanded Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034); but in the electric art, the difficulty of demonstrating mere aggregation must be greatly increased. In the present case, the operations of the two electrodes and the induction coil under the current and their effects upon the current are so nearly simultaneous that the mind cannot practically conceive any interval; the filtering electrode, the electrolyte, the interrupting electrode and the induction coil are receiving, modifying and passing along the current in the circuit; the induction coil would not operate as it does, except for the presence of the interrupter, and the interrupter has its performance modified by the current peculiarities caused by the preceding electrode. We must take notice that very many electrical patents cover apparatus in which the different elements act (in theory) successively upon the current, and this whole class of patents can hardly be declared void because not for true combinations. We are satisfied that the controlling question is not whether there was an aggregation, but whether there was invention in creating the patented combination.

[4] A somewhat different aspect of the question of invention is presented by the fact that defendant does not use the same form of apparatus shown in the patent, and, of course, if defendant's form does not involve any invention as compared with the art prior to Churcher, it cannot be that Churcher's intermediate patent discloses invention of a character broad enough to cover defendant's later form. The difference between the two is this: Churcher uses his aluminum filter or valve and his platinum interrupter in a single cell containing an alkaline electrolyte. Defendant uses two cells, the first containing the aluminum electrode and an alkaline electrolyte, and the second containing the platinum electrode and an acid electrolyte. The two cells are then bridged together by two electrodes of lead, in electrical contact with each other, but which are inert and have no office excepting merely that of a conductor. This view of the matter presents most sharply the question whether there was invention broadly in substituting the Wehnelt interrupter for the mechanical interrupter in this combination; because the patentee must make this broad claim in order to include the defendant's device, and, therefore, cannot rest upon any special merit which there might be in putting both electrodes in one simple cell. We have already pointed out that the invention impresses us as having consisted in uniting these elements for the first time in electrolytic operation; and we cannot think that it rests merely in lo-

cating both electrodes in one cell. The testimony tends to show that it is better to use the two cells of defendant's form, because the platinum interrupter works better in an acid electrolyte, which would not do at all for the aluminum electrode; but it also seems that the resistance and the heat which are said to cause trouble if the platinum electrode is used in the alkaline solution can be overcome by properly increasing the electrode surface and the quantity of electrolyte. What defendant has really done is to divide one cell into two parts by a partition, using in each part the most appropriate electrolyte, and making the parts electrically one by an electric bridge. This may be an improvement, but it utilizes and embodies the underlying idea which we think the substantial invention and which consisted in using these two electrodes in this mutual relation and in this combination and with any suitable electrolyte.

There remains the question whether the form of the claims prevents giving to the patented invention the scope to which it is otherwise entitled. We think not. It is true that the first and second claims name as an element "an electrolytic cell"; but, considering that two or more cells in series are, in a general way, the equivalent of a single cell, and that there can hardly be more than one complete and functionally operative electrolytic cell in an arrangement which has only one active anode and one active cathode, we think this claim language does not exclude such a unitary though composite cell as defendant uses.

The language of claim 5 is broad enough to include the old device which had a mechanical interrupter; but, perhaps in view of the specification it should be interpreted as confined to a chemical interrupter. As we find claims 1 and 2 infringed, it is not vital to determine the validity of claim 5. We see no practical objection to leaving the decree silent on that subject, without prejudice to its consideration below. Electric Co. v. Controller Co. (C. C. A. 6) 243 Fed. 188, 195, —— C. C. A. ——.

The decree below is reversed, and the case is remanded, for the entry of the usual interlocutory decree on claims 1 and 2.[2]

[2] We have employed the conventional conception, assumed by defendant, that the current "flows" from valve electrode to interrupter electrode. Of course, if "flow" there is, it may be in the opposite direction.

NILES-BEMENT-POND CO. v. IRON MOLDERS' UNION, LOCAL NO. 68, et al.

(District Court, S. D. Ohio, W. D. October 9, 1917.)

No. 138.

1. PRINCIPAL AND AGENT ⟸3(1)—AGENTS—WHO ARE—"SALES AGENT."
Complainant, a New Jersey corporation, which owned a controlling interest in the stock of an Ohio corporation, entered into a working agreement which characterized complainant as the Ohio corporation's general sales agent. By this agreement complainant was to receive a so-called commission of 10 per cent. on the contract price of goods purchased of complainant by any customer or customers and manufactured by the Ohio company, out of which sums complainant was to pay all expenses incurred in advertising and effecting sales. A portion of the orders taken in Ohio were placed directly with the Ohio company, and the residue of its output was produced for complainant, which entered into contracts for the delivery of manufactured articles. *Held* that, as a "sales agent" is one who sells goods which another person has delivered to him for that purpose and receives a compensation for his services by commission or otherwise, and as the goods manufactured by the Ohio company were not delivered to complainant for sale, complainant was not the agent of the Ohio company.

2. COURTS ⟸316—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.
In such case where members of a union working for the Ohio corporation struck at a time when it was under obligation to complainant to fill a large number of contracts for machines required by the United States as war necessities, complainant, contending that the union and its members, by intimidation of other employés of the Ohio company, etc., prevented completion of the machines, filed in the federal District Court for Ohio a bill against the Ohio corporation and the Union and others to enjoin interference with the work. *Held* that, even though both corporations were interested in the performance of the contracts, nevertheless the Ohio corporation was properly joined as a defendant, and, there being diversity of citizenship, the suit could not be dismissed under Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1916, § 1019), on the ground that complainant and the Ohio corporation attempted collusively to make complainant a party for the purpose of creating a case cognizable in the federal courts, and for the further reason that a collusive arrangement is not shown.

3. MASTER AND SERVANT ⟸338—STRIKES—RIGHT OF LABOR UNIONS.
While laborers and members of a labor union have a legal right to strike, an employer has also a legal right to run an open shop, employing without discrimination both union and nonunion men, and a labor union has no right to prevent by coercion nonunion men from working.

4. MASTER AND SERVANT ⟸338—STRIKES—RIGHTS OF UNION.
If an employer, whose union employés struck, engages others through misrepresentations, that affords no grievance to the strikers, and does not warrant them or their sympathizers to forcibly prevent a person employed through misrepresentations from working.

5. SHERIFFS AND CONSTABLES ⟸86—DUTY OF SHERIFF—RELATIVE DUTY OF MAYOR.
Gen. Code Ohio, §§ 4250, 4548, make the mayor the conservator of the peace of municipalities. Section 4549 confers on him all powers possessed by sheriffs to suppress disorders. Section 4373 authorizes the mayor, in case of riots, to appoint additional policemen and officers for temporary service; and section 4378 declares that the police force shall preserve the peace, protect persons and property. Section 2833 declares that

each sheriff shall preserve the public peace. Section 12811 declares that, whenever three or more persons are unlawfully or riotously assembled, all judges, justices of the peace, sheriffs, and other ministerial officers shall make a proclamation in the hearing of such persons, commanding them to disburse, and, if they refuse, such officers shall call on all persons near, and, if necessary, throughout the county, to aid in taking into custody persons so assembled. *Held*, that both the sheriff of the county and the mayor of a municipality are bound to maintain the peace in the municipality, and prevent riots and unlawful assemblies, and the sheriff cannot evade his responsibility on the ground that he did not take steps to prevent rioting because of the duty of the mayor.

6. MASTER AND SERVANT ⊂⊃338—PICKETING—AUTHORITY.
While lawful picketing is permissible, large numbers should be avoided, and pickets, though they may invite workmen from a plant, factory, etc., against which the strike has been declared, to stop and discuss the strike situation, are not entitled to intimidate such workmen, or by force prevent them from working.

7. MUNICIPAL CORPORATIONS ⊂⊃703(1)—HIGHWAYS—USE.
The streets and highways are for the use of all law-abiding people, and members of labor unions and strikers have no authority to intimidate or prevent persons from using them.

8. EQUITY ⊂⊃65(2)—MAXIMS—SCOPE.
The equitable maxim that he who comes into equity must do so with clean hands does not apply to every unconscientious act or inequitable conduct on the part of the offending party, but is limited to misconduct in connection with the matter in litigation; hence, though complainant be treated as the real party in interest and bound by the acts of its subsidiary corporation, the fact that the subsidiary corporation might have broken an agreement with striking workmen under which they returned to work does not preclude complainant from securing a temporary injunction restraining the strikers from violating the law and by illegal and unlawful methods preventing others from working.

9. MONOPOLIES ⊂⊃20—TRUSTS—CLAYTON ACT.
That a New Jersey corporation owned a controlling interest in the stock of an Ohio corporation engaged in the manufacture of tools, etc., and sold the product of the Ohio company, which was in fact its subsidiary, does not bring the New Jersey corporation within Clayton Act Oct. 15, 1914, c. 323, § 7, 38 Stat. 731 (Comp. St. 1916, § 8835g), declaring that no person engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other capital of another corporation engaged in commerce, where the effect of such acquisition may be to substantially lessen competition; the ownership of the stock of the Ohio corporation not lessening or in any way affecting competition between the two companies.

10. INJUNCTION ⊂⊃101(3)—STRIKES—LABOR UNION.
Complainant owned a controlling interest in the stock of an Ohio corporation, whose product it largely disposed of, and which corporation was under contract to manufacture for complainant machines that complainant had agreed to deliver to the United States government, and which were necessary in prosecution of war work. Union employés of the Ohio corporation struck, and by threats, actual intimidation, and violence, in which members of the union, their officers, and sympathizers participated, prevented other employés of the Ohio corporation from working, thus interfering with complainant's rights. The peace officers of the municipality and county failed to discharge their sworn duties, and by acquiescence at least assisted the striking lawbreakers, and in one case arrested guards employed by the Ohio corporation, instead of their assailants. *Held* that, as the union did not take any steps to enforce law and order and had no legal right to coerce other employés, thus preventing them from working, the preliminary injunction should be granted, restraining the union and its members from continuing such violence.

In Equity. Suit by the Niles-Bement-Pond Company, a corporation, against the Iron Molders' Union, Local No. 68, and others. On application for temporary injunction. Injunction granted.

Allen Andrews and W. C. Shepherd, both of Hamilton, Ohio, and Murray Seasongood, of Cincinnati, Ohio, for plaintiff.

William B. Rubin, of Milwaukee, Wis., and R. J. Shank, of Hamilton, Ohio, for defendants.

SATER, District Judge. The members of the Iron Molders' Union, Local No. 68, numbering about 115, and working for the Niles Tool Company, an Ohio corporation, at Hamilton, Ohio, struck on May 24th. Aside from other orders taken by the Tool Company, it was then under obligation to the plaintiff to fill a number of large contracts for heavy and urgently needed machines, which plaintiff had agreed to deliver at an early date to the United States, and which are required by the United States as war necessities for use in machine shops, ship and naval yards, and naval gun factories. The contracts of that character aggregate about $3,000,000, and, under section 120 of the National Defense Act of June 3, 1916 (39 Stat. 213, c. 134 [Comp. St. 1916, §§ 3115f, 3115g, 3115h]), are given priority over other contracts. It is impracticable for the plaintiff to have manufactured elsewhere the articles which it has sold to the government.

The plaintiff's principal place of business is in New Jersey, under whose laws it is duly organized and incorporated. It owns all of the common stock of the Tool Company and enough of its preferred stock to give it a controlling interest. A large amount of the Tool Company's preferred stock is, however, held by various individuals throughout the country. The president and one of the vice presidents of the plaintiff are respectively the president and vice president of the Tool Company. The secretaries of the two companies are different. The plaintiff has nine directors; the Tool Company five, of whom three are directors of the plaintiff company. On February 6, 1900, the plaintiff and the Tool Company entered into a working agreement in which the plaintiff is characterized (improperly, I think) as the Tool Company's general sales agent, and by which it is to receive a so-called commission of 10 per cent. on the contract price of goods purchased of the plaintiff by any customer or customers and manufactured by the Tool Company, out of which per cent. the plaintiff is to pay all expenses incurred in advertising and effecting sales. About 5 per cent. of the orders taken in Ohio are placed directly with the Tool Company; the residue of its output is produced for the plaintiff. The plaintiff enters into contracts for the delivery of manufactured articles. Whatever profit the Tool Company makes on contracts sublet to it by plaintiff is, after the allowance of 10 per cent. from plaintiff's contract price, the property of such company. The plaintiff's president usually fixes the price specified in all contracts made by it, although some of the smaller ones are wrought out in plaintiff's office without coming to his attention. In fixing such price, the plaintiff necessarily fixes, also, the price the Tool Company will receive for any work which it may do for plaintiff. Both companies are inter-

ested in the adjustment of the strike. The plaintiff demanded of the Tool Company, which has taken no action regarding this suit, the fulfillment of the contracts which plaintiff has placed with it.

[1, 2] The defendants claim that in fact the real and substantial plaintiff and party in interest is the Tool Company and not the plaintiff; that the suit is brought by plaintiff against the Tool Company and its codefendants, all of whom are citizens of Ohio, for the purpose of conferring an apparent jurisdiction on the United States court; that the Tool Company has an interest in the subject-matter of the bill which will properly align it with plaintiff, in consequence of which there appears a controversy on each side of which are citizens of Ohio. (Helm v. Zarecor, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77, and cases therein cited); that, within the meaning of section 37 of the Judicial Code, the plaintiff and the Tool Company have attempted improperly and collusively to make a party plaintiff simply for the purpose of creating a case cognizable by a federal court, when in reality the only parties in interest are citizens of Ohio; and that therefore the case must be dismissed for want of jurisdiction. To sustain this contention reliance is had on Southern Investment Realty Co. v. Walker, 211 U. S. 603, 29 Sup. Ct. 211, 53 L. Ed. 346, Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189, Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, and Phœnix-Buttes Gold Min. Co. v. Winstead (D. C.) 226 Fed. 855. The instant case, however, in its facts, is unlike any of those above mentioned.

The contract between the plaintiff and the Tool Company characterizes the former as the latter's general sales agent. Whatever may have been the status of the two companies at the time the contract was made, agency cannot now be imputed to the plaintiff. A sales agent is:

"One who sells goods which another person has delivered to him for that purpose and receives compensation for his services by a commission or otherwise." Ommen v. Talcott, 188 Fed. 401, 403, 112 C. C. A. 239, 241 (C. C. A. 2).

The goods manufactured by the Tool Company are not delivered to the plaintiff for sale. On the contrary, the plaintiff sells goods to be manufactured and delivered. It then permits the Tool Company, by virtue of its contract with it, to produce for it the goods so to be delivered. The Tool Company is in the nature of, if not in fact, a subsidiary company of the plaintiff. It owns none of the plaintiff's stock, and cannot control it; but the plaintiff, as the owner of a majority of the stock of the Tool Company, has the mastery and control of that corporation, and may dictate its policy. United States v. Northern Securities Co. (C. C.) 120 Fed. 721, 725, 726; Id., 193 U. S. 197, 326, 24 Sup. Ct. 436, 48 L. Ed. 679. Should the plaintiff permit the Tool Company to manufacture the articles which plaintiff has agreed to deliver, it receives, not only its established percentage on the contract price, but, as the owner of a majority of the stock of the Tool Company, the greater part also of the profit made by the latter company, if it manufactures the articles at a profit. The Tool Company, however, cannot compel the plaintiff to permit it to manufacture any article which plaintiff has sold and obligated itself to deliver.

In Carroll v. C. & O. Coal Agency Co., 124 Fed. 305, 61 C. C. A. 49 (C. C. A. 4), on which this case is bottomed, there was no interlocking of directors, nor did the plaintiff own any of the stock of any of the defendant companies. In that case the plaintiff was engaged in the business of selling coal and coke. It had contracts with the defendant coal companies by which it was to take and pay for all their product at the mines, to furnish transportation, and to sell the same at prices fixed by the companies, receiving a stipulated sum per ton for its services. By the terms of such contracts the defendant companies were not liable for damages for failing to furnish coal or coke to the plaintiff, where such failure was caused by strikes. In reliance on such contracts, the plaintiff made contracts for the sale of large quantities of coal and coke, which could only be supplied from the mines of the defendant companies. The latter were prevented from furnishing the same by the wrongful and illegal acts of individual defendants, who were conducting a strike among the miners, and who by intimidation and threats prevented others from working in the mines. It was held that on such a state of facts the plaintiff had such an interest as entitled it to maintain the suit in its own right for its protection, independently of the coal companies, which, although properly made defendants, could not be aligned with the plaintiff to defeat the jurisdiction of the federal court; their interests, although perhaps not adverse, being based on different rights. The reasoning of that case is so peculiarly applicable to the case at bar, and withal is so sound that it is here adopted, in so far as pertinent, without repetition. Jurisdiction is not wanting.

At the conclusion of the evidence the announcement was made that the facts warranted the granting of an injunction, and that counsel need argue only two questions—that above mentioned relating to jurisdiction, and the further question as to what defendants should be enjoined. The evidence coming from the witnesses for the defense, most of whom were reluctant and unwilling, and some of whom as to important matters were incredible, discloses a situation requiring regulation, and, reinforced by the evidence submitted by the plaintiff, makes clear the duty of the court to stay further lawlessness. If the granting of relief depended on the occurrences of July 8th and 9th alone, the delay in bringing the suit would require a denial of relief; but the incidents that then transpired so reflect on the attitude of the strikers and their active sympathizers, and their conduct on those occasions is so akin to that which was exhibited on September 10th and 11th, immediately preceding the filing of the bill, that those incidents, as well as others appearing in the record, enter into and form a part of the history of the strike.

[3] The light thrown by the record upon the situation as it existed between May 24th and July 8th shows, in view of the subsequent events, an abnormal condition in the city of Hamilton, which demanded the careful watchfulness and regulation of the officials, municipal and county, charged with the maintenance of order and the public peace, and the exercise of a wholesome restraining influence on the part of the union, strikers, and employers, if a repression of lawlessness were ultimately to be assured. Labor has a right to strike. The strike is sometimes

the only weapon laborers may wield to obtain their just deserts. The molders were at liberty to contend for the employment of union labor only at the Tool Company's plant, this being one of the principal points in controversy; but the company has the right to run an open shop, employing without discrimination both union and nonunion labor, when and as such labor offers itself to meet the company's needs. The union men were not required to work for the company, but they had no right to say that no one should take the places which they had left, or that those places should not be filled by nonunion men. The right to form and to join a union exists. The right to prevent another man from working, if he does not belong to a union, does not exist. This is still a free country. Every man may use his labor, his acquired or God-given talents, of whatever worthy kind, in an honest way to earn a livelihood and gain a competency. In the eyes of the law the rights of a union man are no higher and no more sacred than those of the non-union man. The rule of equality prevails. A person may join a union or not, as he pleases, and no one has a right to deny him the privilege of working, or to harass, annoy, abuse, or maltreat him because he works, or is willing to work, in the place made vacant by a striker. Whenever either labor or capital resorts to discrimination, oppressive conduct, or words or deeds of violence, it discredits and weakens itself, and invites the accompanying defeat which usually follows.

The Tool Company, some time prior to July 8th, busied itself to find molders to take the places of those that had struck. On account of contracts which it had taken to produce war necessities, it had for the protection of its plant taken on 20 guards or watchmen in April. Their number, after the strike occurred, was increased until it now reaches 60. They are all paid by the company. It had, for the purpose of housing its future employés, purchased the Atlas Hotel and placed McGaughey in charge of it. If that action was rendered necessary by strike conditions, if it had ceased to be secure for a laboring man to occupy his own house, or a boarding house of his own choosing, lawful bounds had already been passed. On July 8th some 13 men reached Hamilton to work in the foundry, 5 of whom arrived in the evening. Guards had gone to the depot with a truck to meet them and take them to the hotel. There were also at the depot a quite large crowd of strikers and their sympathizers. The guards succeeded in getting the men in the truck. One of them was pulled from it, beaten, badly bruised, and sent to the hospital to be cared for. West participated in that assault. He enters a denial, as he does, also, of his wanton and cruel attack on Wise and Reichel on September 10th, but the evidence of his guilt is convincing. Deininger, who says he was captain of the pickets, Hufnagle, and Archer (Apscher) were also in the crowd. Deininger was seen with 4 of the men corralled against a wall, telling them that they better get on a train and get out of town. Five of the men that arrived that day were taken to the Tool Company's plant, kept there over night, taken out of a rear door the following morning and to an interurban station, from which they departed for Cincinnati. The others, except the one that was assaulted, were taken on their arrival to the hotel. McGaughey, who had gone to the depot to meet a cook, on account of the large and threatening crowd which had assembled at the

hotel, was compelled to register him at another place, and was not able to return to the hotel until 1 a. m. The crowd which had been about the hotel all day swelled, until in the evening it reached, according to Stricker, the chief of police, large proportions.

Stricker's statements do not entirely consist. He says that he first heard of the trouble at the Atlas hotel about 6 p. m., that on going there he found 25 or 30 on the outside, that there were a number of men there intending to work for the Tool Company, and that, after remaining there about half an hour, he left, and subsequently learned, about 7:30, that there was trouble at the hotel. On his return there he found quite a number of people, and on entering he learned that there were inside 9 men and the guards, Graf and Thomas. Later he said that he first heard of a disturbance at the hotel as early as 3 p. m., when he was in the country, and was told it looked like there was going to be trouble there; that when he got there he found a "mob"; that it looked like more than 1,000 or 1,500 people, like it was their intention to get the men out of the hotel; that it looked "dangerous to everybody, * * * inside and outside, the property and everything." Further detailing what occurred in the evening, he testified that he learned from the nine workmen that they wanted protection and to get out of town. Inquiring under what pretenses they were brought there (which was manifestly no affair of his), he was told, he says, that things had been misrepresented to them, that they had been offered given wages on govrnment work where there was no trouble, and that they wished to know if he would protect them and get them out of town. He states that he told the crowd what the men wished, asked 2 or 3 of the molders who approached him if they would play fair, and told the molders that if there was going to be any trouble the men would be protected. He asked the molders and their committee to help him out. He says there were 2,000 or 3,000 people there, and that he was doing the best he could to save life and property. The 9 men, as they went to the depot, were marched through the crowd, holding their hands above their heads, each marching by the side of a molder, and all followed by policemen. Ugly language and threats were used that evening, especially toward the guards, Graf and Thomas. On the following day the chief found a couple of colored men at the depot. Strikers, who thought those men were going to work for the Tool Company, had taken them to that place to force them out of town, when in fact they were on their way to another point to perform construction work in the country.

[4] The strikers and those co-operating with them were picketing or watching the depots to intercept any incoming laborers for the Tool Company. They had a right respectfully to inquire of any discharged passenger as to whether he intended to work for the Tool Company or not, and, if he chose to converse with them, to endeavor peacefully to persuade him; but they had no right to interfere with his movement, or to compel him to stop against his will, or to force a conversation on or an argument with him, or to intimidate or assault him, or to tell him he would better leave town, or to compel or try to compel him to do so. If, as the defense claims, some of the men had been brought there under misrepresentations made by the company, that might give ground for complaint on the part of the deceived

persons against the company; but it afforded no cause of grievance to the strikers, and no justification for any uncivil or unlawful conduct on the part of them or their friends. The unwarranted interference with the unoffending negroes indicates the extent to which the disregard of the rights of others had gone. Although the police department knew by the middle of the afternoon that trouble was threatened at the Atlas Hotel, the record is barren of evidence of any attempt to prevent the assembling of the crowd, or to disperse or control it. It was allowed to grow until it became what the chief of police terms "a mob." Twelve policemen were present in the evening. What a squad of courageous policemen or deputy sheriffs, bent on the performance of their duty, could have done to preserve the peace, we do not know, because no effort in that behalf was made. On the contrary, the chief of police called on members of what he characterized as "a mob" to aid him in conducting in safety to the depot men who had committed no offense and whose legal right to be unmolested on the streets could not be questioned. The rare spectacle was witnessed of unoffending men, deprived of the protection guaranteed by law, being marched to the depot with uplifted hands, to be sent out of town, while the offending crowd that provoked such a situation was suffered to remain undisturbed.

[5] By the express provisions of sections 4250 and 4548, Ohio General Code, the mayor is made the conservator of the peace. Section 4549 confers on him all the powers possessed by sheriffs to suppress disorder and keep the peace. By the terms of section 4373, he may, in case of riots and other like emergency, appoint additional patrolmen and officers for temporary service. Section 4378 declares that the police force shall preserve the peace, protect persons and property, and obey and enforce all ordinances of council and all criminal laws of the state and the United States. Section 2833 provides that:

"Each sheriff shall preserve the public peace and cause all persons guilty of a breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county, and commit them to jail in case of refusal."

The mandatory injunction of section 12811 is that:

"Whenever three or more persons are unlawfully or riotously assembled, all judges, justices of the peace, sheriffs, and other ministerial officers, forthwith upon view of as soon as may be on information, shall make proclamation in the hearing of such persons, commanding them, in the name of the state of Ohio, to disperse and depart to their several homes or lawful employment, and, if such persons do not then forthwith disperse and depart, such officers shall call upon all persons near, and, if necessary, throughout the county, to aid and assist in dispersing and taking into custody all persons so assembled. Each of such persons, so called, refusing to render immediate assistance, shall be fined not more than fifty dollars."

On the night in question, the officers of the Tool Company called on the sheriff (who testified in this case) to protect its property, and were told that the mayor was the one to look after that, and that, if he needed assistance, he (the sheriff) would come down. Following the disturbance of September 10th, hereafter to be considered, he was in-

formed that there had been a riot on that date. It is incredible that he and the mayor did not know of the conditions existing in Hamilton. Indeed, there is no claim of ignorance in that respect. In so far as the record shows, he neither took action nor made inquiry, with a view of apprehending offenders, touching the happenings on either of the occasions mentioned. If he did either, it must be assumed that he would have mentioned it in his evidence. Nor does it appear that any one was arrested by him or the police department, whose duties were inefficiently performed, on account of the events which transpired on July 8th or on September 10th, except as hereafter noted. The sheriff's refusal to act on July 8th, and his attempt to cast the entire responsibility for action on the mayor was a shirking of his duty to observe the mandatory provisions of sections 2833 and 12811, which he was sworn to enforce. Whether the gatherings on the streets on July 8th and September 10th were mobs or not, they were manifestly unlawful assemblages. As regards responsibility in such cases, the sheriff and the mayor stand, by express statutory provision, on an equality. Neither is permitted to cast the burden of action on the other. It is as much the duty of the sheriff as of the mayor or "other ministerial officer, *forthwith upon view or as soon as may be on information,*" to command a mob or unlawful assemblage to disperse and depart to their several homes or lawful employment. The appointment of special deputy sheriffs or additional patrolmen was not required, because the officer making proclamation is authorized to call upon persons near to assist in dispersing the crowd, and, if such persons refuse, they may be punished for such refusal. The law imposes on the sheriff and all those exercising authority over and in the police department the active duty to maintain the public peace. Had there been watchfulness to prevent disorder, had disturbers of the peace been made to feel the strong arm of the law when trouble was threatened and in its incipiency, order could have been maintained and acts of violence and lawlessness averted. In New York, Lake Erie & Western R. R. Co. v. Wenger, 17 Wkly. Law Bul. (Ohio) 306, 308, it is said:

"The old notion of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous. The remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits the wrong and then seeks compensation for it by the pecuniary damages which a jury may assess. * * * The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed."

A mob or an unlawful assemblage is a cowardly thing. If in its formative period, or even in its somewhat advanced stage, it be fearlessly taken in hand by courageous ministerial officers, who have regard for their own efficiency and respect for the sanctity of their oaths of office, it almost always quickly melts away. Sheriffs and mayors and their subordinates are selected for and accept their positions to direct and do promptly just that kind of work, when occasion requires. There may be here and there a lawless obstreperous person who will resist officers who thus perform their sworn duty; but those officers are authorized to meet resistance with force, and with as much force

as is necessary to subdue him and conserve the peace. Where the officers of the law are derelict of duty, as they were touching the matters here under consideration, many ordinarily well-disposed, but sympathetic, persons may follow vicious and evil-disposed leaders into subverting the law, endangering not merely the property, but the liberty, limbs, and life, of others, and rendering the preservation of order difficult and dangerous. There are rare occasions when the angry passions of a community are so aroused by some heinous crime that a quickly gathered assemblage will add another to that already committed before the peace officers can assemble or prevent. We have no such situation before us. The conditions in Hamilton were well known, and demanded vigilance and prompt action on the part of the guardians of the law, to avoid disturbances. Had they met the situation fearlessly and at the threshold, wrongdoing could have been prevented, and this case would not be here. It is always a grave reflection on peace officers, when, on account of their dereliction of duty, citizens of their community are forced to appeal to the courts to maintain the supremacy of the law and to give the protection such officers are bound by oath to afford. The ministerial arm can act more quickly and is no less powerful than that of the courts, and should be prudently, impartially, and, if need be, vigorously employed. If the Ohio statutes do not sufficiently provide for the speedy and sure removal of such derelicts from office, amendments ought quickly to be made, that such may be done.

[6, 7] The Tool Company's plant was picketed, some of the picketing being done by others than the strikers. Lawful picketing is permissible, but the number of pickets should not be large. There is power in numbers, and, when the number is large and unfriendly, it intimidates and terrorizes. Every man, be he friend or foe, has the right to work and to come and go to his work without fear or molestation. He may be invited to discuss the strike situation, and, if he chooses, may stop and listen. The right to peacefully persuade him, but not by violence, threats, or intimidation, exists. If he does not wish to stop or hear, he may not be compelled to do so. No one or more may lawfully follow him, as was in specific instances done, and while following him, or while he is passing, annoy, or abuse, or threaten, or intimidate him, or apply to him offensive language or names, or opprobrious epithets. The streets and highways are for the use of all law-abiding people. To such they should be as free as the air, that whosoever will, having due regard to the rights of others, may travel them in the pursuit of his legitimate business, without hindrance or annoyance. The record shows it was necessary to escort workmen for their protection with guards, and that even then some of them were assaulted and beaten up, and that others, desiring to leave the city, were thus escorted or taken in automobiles to points beyond the corporate limits.

The existence of such a condition shows that there was something radically wrong with the conduct of the strike, with the committee charged with its management, and the enforcement of the law. There was no justification for Miller going to the home of Garver (towards

whom he entertained a feeling of enmity), not for the purpose of reasoning with him, but for the purpose of abusing and threatening him, if he should serve the Tool Company, and of daring him out of his home to fight. I am convinced there were threats to destroy the company's plant, and that they did not all emanate from the members of Local No. 68. There were some names applied in the strike that, owing to their character and human weakness, are usually met by a blow. If those names were used at times by the guards, as the defense claims, that was no justification for their use by the strikers or their friends, or vice versa. The record shows that men have been warned against working for the Tool Company, and threatened, if they should do so, and that men willing and anxious to work have been deterred from so doing through fear of violence. The long years of service rendered by some of them for a single employer suggests that they must be good workmen and good citizens. They have the same right to make a living as the men who strike. The law will not permit the latter to compel the former to remain idle.

In the vicinity of the Tool Company's works are a number of manufacturing plants employing large numbers of workmen, many of whom were in sympathy and co-operated with the members of Local No. 68. On the afternoon of September 10th, following the resumption of work at the Tool Company's plant, a large crowd assembled at or near it, about the time the employés had completed their work. Schalk's evidence minimizes the size of the crowd; but Furrey, who attached his name to a circular as secretary of the striker's committee, says the crowd numbered from 1,000 to 1,500. It was hostile to the handful of molders that left the plant, and its numbers were such as would incite fear. Guards proceeded to escort some, at least, of the workmen to their homes. Some of the guards and Wise and Reichel were intercepted. Reichel's version of what transpired is uncontradicted, except by Schalk and West, and by them as to no matter of consequence, except as to their part in the assaults, and is as follows:

"A fellow grabbed my arm and said, 'I want to talk to you.' I told him, 'I don't want to talk to you; I have got no business with you.' And so they pulled me—there was about a dozen of them around pulling and pushing, one by the side of the other, and I tried to get back to Bruning's fence in order to jump over there, and just when I turned around, why, I was struck. * * * Why, he says, 'If we can't talk to you, we will learn you a lesson,' and some fellow in the crowd hollowed, 'Go to it, Bum,' and just then I was struck on the back of the head."

"Bum" is the nickname of West. When asked what happened when he was thus struck, he answered:

"Why, I stopped, and I tried to get to the fence, and then I was hit again, * * * and it knocked me on my knees. I got up, and Mr. Graf grabbed the man, and the man there didn't know who he was, and he told the policeman to take him in the wagon and take him down to headquarters."

When Welch, the police chauffeur, saw Reichel, he was bleeding from a scalp wound in the back of his head. Lake saw West hit him with his fist, and Schalk hit him on the head with a brick, or a portion of one. Wise, who was likewise assaulted, thus describes the attack on himself:

"After I seen that man nodding his head (which Wise took to be a signal for something), I turned around and I saw William West running, and I backed up against the fence, and he stopped right in front of me, and the rest of the men started to going on; but he asked me, 'What do you mean by scabbing?' * * * 'Why don't you take out a card?' and I says, 'I don't believe in any union.' He says, 'If you go up there to-morrow, I am going to get you;' and just at that there was something stirring on my left, and I didn't turn around, and he said, 'Get in that gate.' * * * I was standing right by Bruning's gate, and I reached around to get the handle open, and just as I reached around he struck me, and then Bruning opened the gate and pulled me in, and that is all."

It was West that struck him. A disinterested and credible witness, who saw the attack on Wise and who identified West in the courtroom, in speaking of West, said:

"He looked at Mr. Wise very threateningly, and with his finger extended said, 'If you dare return to work to-morrow morning I will knock hell out of you; understand?' * * * Then about that time there was a skirmish a few houses south of where we live. They apparently were assaulting a man up there. I could tell by the crowd, the way it was moving, that something was going on; * * * and with that some one down there yelled. 'Hit him! hit him!' and with that Mr. West drew back his right arm and aimed at Mr. Wise's face, and I saw him draw back his arm, and I heard the sound of the blow. * * * A policeman stepped forward and asked me if that was the man that struck Mr. Wise. Of course, I didn't know Mr. Wise's name at the time; and I also saw the other man who had been struck. The blood was flowing down the back of his head."

Leopold, an employé of the company for about 27 years, was told, soon after the strike began, because he would not join the union, that, if the strikers won, he would not work for the company any more—was threatened and against his expressed wish followed home by Luegers, who made threats against Reichel and about tying up Mr. Wood and Lew Baden of the Tool Company. To insure Leopold's safe arrival home on September 10th required, on account of the strikers along the street lying for workers, an escort consisting of the mayor, two guards, and four policemen; he was, on September 11th, twice warned by a picket not to return to work, was at the courthouse assaulted by Walter Price and two or three others, was struck twice, knocked down, and kicked in the temple into insensibility (as I understand his evidence) after he had fallen. He still bore visible proofs of his injuries when he was on the witness stand. There is not a scintilla of evidence that Reichel, Wise, and Leopold, or any one of them, at any time by word or deed behaved himself unseemly, or provoked an assault, or committed an offense, unless it be an offense for a man to use his brain and brawn to earn an honest living. The part which West and Schalk took in the unprovoked and cruel assaults on the unresisting Wise and Reichel is firmly established.

In mitigation it is urged that two of the guards drew their guns and that Graf was striking with a black-jack. No apology will be made for such conduct; but, whatever may have been the wrongful conduct of the guards, the situation thrust upon them by the strikers and their friends was such as was calculated to incite a resort to weapons of defense. The evidence is conflicting as to whether they held their guns by their side or pointed them at the crowd, and whether, if they

did the latter, as to the time of their so doing. The evidence of Reichel and Welch indicates that the appearance of the guns and of the black-jack followed, and did not precede, the assaults on Reichel and Wise. The attention of the police was specifically directed to the fact that West was guilty of an assault, yet he was permitted to walk to the police station with Schalk, who had with West participated in one of those assaults, and Schalk went on West's bond. The guards, however, were taken by the police in an automobile to the police station, and there released, on the ground that they had been authorized to carry guns. If the guards exceeded legal limits, the question then arises, Why were they, as offenders of the law, taken in charge by the police in an automobile, and another known offender intrusted to the keeping of his co-offender and permitted to report as if not under arrest? The only answer found in the record is that Schalk so requested, and that request was sufficiently persuasive to induce the discrimination mentioned.

A belief that labor cannot win a strike without resort to unlawful means does it injustice. A statement that such means are necessary to succeed is a slander. It is the reckless and lawless few (and their like is found in all avocations) that foment trouble, which leads to wrongdoing and often ultimately throws the weight of public opinion against the striker. Labor is entitled to its just deserts, and may lawfully strike to get them; but neither labor nor any other aggregation of beings should permit its cause to be injured by the misbehavior of mischief makers, whether they be merely sympathizers or found within its own ranks. It should stand for the reign of law.

[8] Some sort of a truce having been patched up, the strikers, on or about July 23d, returned to work. About four days later they again quit. The defense claims, as I understand its position, that this was due to a breach of faith on the part of the Tool Company when the arrangement of the final terms of settlement was undertaken, and the claim is therefore made that the plaintiff cannot obtain equitable relief, because it does not come into court with clean hands. I did not deem it advisable to enter into an investigation of that matter, for the reason that, if the claim of bad faith is well founded, there was but a breach of contract, and that, assuming even the plaintiff to be the same as the Tool Company, such breach did not justify acts of lawlessness. If the defendant company is guilty, as charged, and if its codefendants seek relief on that account, the subject-matter of that action would be different from that here involved. The maxim invoked does not apply to every unconscientious act or inequitable conduct on the part of the offending party. It is limited to misconduct connected with the matter in litigation, and does not apply to misconduct which is unconnected therewith. Bentley v. Tibbals, 223 Fed. 247, 252, 138 C. C. A. 489 (C. C. A. 2). In Kinner v. Lake Shore & Michigan Southern Ry. Co., 69 Ohio St. 339, 69 N. E. 614, the rule is stated that the maxim, "He who comes into equity must come with clean hands," requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit.

[9] Nor does the ownership by the plaintiff of a majority of the defendant company's stock substantially or otherwise lessen competi-

tion between them (if they can at all be said to compete), or restrain commerce, or create a monopoly in any line thereof. As heretofore stated, the Tool Company is in effect, if not in fact, a subsidiary corporation, engaged largely, if not wholly, in performing contracts sublet to it by the plaintiff. The case is not within the provisions of section 7 of the Clayton Act (38 Stat. at Large, 730). If unfavorable or oppressive conditions exist at the Tool Company, or if that company has endeavored to enforce such conditions upon the workmen, they were not required to remain in its employ. If such conditions exist, this court has not the power to correct them; nor should it deny the plaintiff relief, if its property rights are invaded. The terms on which the molders shall work are a matter of contract between them and the company. It is significant that, whatever the terms and conditions may be which the Tool Company offers, there are persons who would gladly serve it, were they not deterred by fear from so doing.

[10] The rule which prevails in the granting of temporary injunctions was stated by Judge Sage in Casey v. Cincinnati Typographical Union No. 3 (C. C.) 45 Fed. 135, 147, and by our Circuit Court of Appeals in Blount v. Société Anonyme, etc., 53 Fed. 98, 101, 102, 3 C. C. A. 455, and City of Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 116 C. C. A. 454. Measured by that rule, relief must be granted as prayed for against all of the defendants. Its effect will be to restrain them from doing what any good citizen will not wish to do. The evidence of the active participation of many members of Local No. 68 is abundant. There is also evidence that members of that union were instructed to keep within legal bounds, but neither its officers nor its strike committee enforced the instructions. Indeed, Schalk, a member of that committee, participated in violent conduct. Some of the members of Local No. 283 also actively shared in the matters of which complaint is made. There is no showing that any officer or member of that body by word or deed discouraged the wrongful conduct herein mentioned. The efforts of the plaintiff to bring about a full disclosure of the unhappy occurrences connected with the strike received no assistance from that union, which defended at the hearing. If it deprecated the disorder that prevailed, or disapproved of wrongdoing on the part of its members, as it ought to have done, it should have cleared its skirts when the opportunity offered.

Let the temporary injunction go.

In re FACKLER.

(District Court, N. D. Ohio, E. D. July, 1917.)

1. BANKRUPTCY ⇐413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTIONS.
Specifications of objections to discharge, which alleged that the parties filing them were creditors and persons pecuniarily interested in the estate of the bankrupt, and that they had filed and proved their claims, which had been allowed by the referee, are sufficient to show that the objecting creditors were holders of claims which would be affected by discharge, and so were entitled to object.

2. BANKRUPTCY ⊜446—FINDINGS BY REFEREE—FORCE.
When matters are referred to a master or referee to make findings of fact, such findings are conclusive on petition for review or exceptions, unless not supported by sufficient evidence or contrary to law, and if the findings depend upon the credibility of witnesses, or are consistent with any aspect of the evidence, they should be upheld.

3. BANKRUPTCY ⊜414(3)—FINDINGS OF SPECIAL MASTER—EVIDENCE—SUFFICIENCY.
Findings of a special master, on specification of objections to discharge of a bankrupt, that the bankrupt made false statements in writing for the purpose of obtaining credit and that property was obtained on credit in consequence of such statements, *held* supported by the evidence.

4. BANKRUPTCY ⊜407(5)—FALSE STATEMENTS—"OBTAINING OF PROPERTY ON CREDIT."
Within the provision of Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, denying discharge where the bankrupt has obtained property as result of a materially false financial statement in writing, the obtaining of goods under conditional contract of sale is, despite the seller's reservation of title, an obtaining of property on credit.

5. BANKRUPTCY ⊜407(5)—DISCHARGE—DENIAL.
Where a bankrupt obtains money or property in any amount not utterly trivial upon a material false statement in writing as to his financial condition, discharge must be denied.

6. BANKRUPTCY ⊜407(3)—DISCHARGE—DENIAL.
A transfer made to hinder, delay, and defraud creditors more than four months prior to the filing of the petition in bankruptcy is no ground for objection to discharge.

7. BANKRUPTCY ⊜407(5)—DISCHARGE—DENIAL.
Even though it might appear inequitable, a bankrupt cannot be granted a discharge, where he was not entitled to the same because he had obtained money or property on a materially false statement in writing; a bankrupt being entitled to a discharge only by virtue of the Bankruptcy Act and taking the right subject to the condition imposed.

In Bankruptcy. In the matter of the bankruptcy of Boyd Fackler. On exceptions of the bankrupt to the special master's report sustaining creditors' specifications of objections to a discharge. Exceptions to the special master's report overruled, report confirmed, and discharge denied.

Mabee, Anderson & Coble, of Shelby, Ohio, for bankrupt.

Wm. F. Black and David F. Brucker, both of Mansfield, Ohio, Long & Marriott, of Shelby, Ohio, and Barrett & Barrett, of Indianapolis, Ind., for opposing creditors.

WESTENHAVER, District Judge. The bankrupt, Boyd Fackler, was adjudicated a bankrupt November 20, 1916, on an involuntary petition. Thereafter he filed his petition for discharge, and certain creditors filed specifications of objection to the granting of the discharge. These specifications were referred to Hon. R. E. Hutchinson, special master, to hear the evidence and report the same, together with his findings of fact and conclusions of law. He found that certain specifications were sustained, and the bankrupt excepts both to his findings of fact and to his conclusions of law.

[1] The bankrupt, before any evidence was introduced before the special master, objected to the sufficiency of the specifications, which

objections were overruled, and it is urged here that this was error, and that the specifications are insufficient, in that it does not appear therefrom that the objecting creditors were the holders of claims which would be affected by the discharge of the bankrupt. This objection is not well taken. It is not denied, but on the contrary clearly appears, that all the objecting creditors have claims which would be barred by the discharge. The specifications of the Ohio Rake Company and other creditors, in stating their objections, represent themselves as being each and all creditors and persons pecuniarily interested in the estate; that each and all of them have filed proof of their claims, which have been allowed by the referee. The other set of specifications, filed by the Eastern Rock Island Plow Company, contains the same allegations and specifically alleges that its debt will be released by the discharge. In my opinion, these statements are sufficient to show that the objecting creditors are entitled to oppose the granting of the discharge.

Inasmuch as the special master's findings are against specifications 1 and 2 of the Ohio Rake Company and others, and against specifications 2, 3, and 4 of the Eastern Rock Island Plow Company and others, and in favor of the bankrupt, and these findings are not excepted to by the objecting creditors, they may be disregarded. The inquiry, then, is limited to specifications 3, 4, and 5 of the Ohio Rake Company and others, and to specification 1 of the Eastern Rock Island Plow Company and others, which the special master finds are sustained. The bankrupt excepts to these findings, as not supported by the evidence and as being contrary to law.

[2] It is settled law that, when matters are referred to a master or referee to make findings of fact, such findings are conclusive upon this court on petition for review or exceptions, unless not supported by sufficient evidence, or contrary to law. If a special master's findings of fact depend upon credibility of witnesses, conflicting testimony, or are consistent with any aspect of the evidence, they should be upheld. For authority see the following: Callaghan v. Myers, 128 U. S. 617, 666, 9 Sup. Ct. 177, 32 L. Ed. 547; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Davis v. Schwartz, 155 U. S. 631, 636, 15 Sup. Ct. 237, 39 L. Ed. 289; In re Simon & Sternberg (D. C. Ga.) 18 Am. Bankr. Rep. 204, 151 Fed. 507; In re Wheeler (C. C. A. 7th Cir.) 21 Am. Bankr. Rep. 262, 165 Fed. 188, 91 C. C. A. 222; Collier on Bankruptcy (10th Ed.) 333.

[3-5] Specifications 4 and 5 of the Ohio Rake Company and others, and specification 1 of the Eastern Rock Island Plow Company, are sustained by the evidence. A finding to the contrary by the special master would have been so contrary to the evidence that it could not be sustained. These specifications, and the findings of the special master sustaining the same, show that on January 12, 1916, January 28, 1916, and May 24, 1916, the bankrupt made false statements in writing to the representative of the Emerson-Brantingham Implement Company and to the Eastern Rock Island Plow Company, that these statements were made for the purpose of obtaining credit from such companies, and that from the Emerson-Brantingham Implement Company at least

property was obtained on credit in consequence of such financial statements. The falsity of the statement consists in part in omitting from the list of liabilities the greater part of the bankrupt's indebtedness.

This omission could not have been otherwise than knowingly and intentionally made, and with the purpose and object of misleading and deceiving the persons receiving the statements. The statements were knowingly and intentionally made and delivered for the purpose of obtaining credit. The fact that they were made in response to requests of the representatives of these creditors strengthens rather than repels the inference that they were made with intent to deceive. It further appears that from time to time thereafter the Emerson-Brantingham Implement Company continued to sell and deliver goods on credit to the bankrupt. These relations continued until shortly prior to the filing of the petition. It is true that the seller delivered the larger part of these goods under what is called "conditional sale contracts," but in my opinion goods thus obtained, even with a reservation of title, would fall within the meaning of this provision of the bankruptcy law. Moreover, certain goods during the same period were sold and delivered, which were not covered by conditional sale contracts, and it is settled law that the quantity or value of the money or property obtained on credit upon a materially false statement in writing is not material. The discharge must be denied, if money or property in any amount, not utterly trivial, is thus obtained.

Upon this ground, I am of opinion that the discharge must be denied. This renders unnecessary a decision of the exceptions to the special master's finding on the third specification of the Ohio Rake Company and others, and of the question whether money or property was obtained from the Eastern Rock Island Plow Company. Any and all creditors having debts which will be barred by the discharge may take advantage of the specifications of the Ohio Rake Company and others sustained by the special master and by me as above noted.

[6] I am not convinced that the special master's finding is sustained by the evidence as to the third specification of the Ohio Rake Company, or that his conclusions of law are sound. This specification relates to a transfer by deed, absolute in form, dated March 31, 1916, of certain real estate to the bankrupt's wife. This transfer was probably made to hinder, delay, and defraud creditors, but having been made more than four months prior to the filing of the petition, it is not a ground for objection to a discharge. The special master's finding and conclusion are that the bankrupt retained an interest in or control over the same, and this was property which he concealed with intent to hinder, delay, or defraud his creditors. The true nature of the transaction is best expressed in Mr. Fackler's testimony taken January 3, 1917, and particularly the answer next to the last of the direct examination. I am expressing no definite opinion, but it may well be doubted whether this is a fraudulent concealment of property. See the following: In re Ernest D. Wakefield (D. C. N. Y.) 31 Am. Bankr. Rep. 42, 207 Fed. 180; In re William F. Hennebry (D. C. Iowa) 31 Am. Bankr. Rep. 231, 207 Fed. 882.

To avoid erroneous inferences from the above, it should be added that I am not holding that the transaction between the bankrupt and

the Eastern Rock Island Plow Company was an obtaining of money or property on credit. At the time the false financial statement was given, bankrupt gave his note for past due indebtedness, payable at a future date. He obtained nothing else, either then or afterwards, on the statement made to this creditor, which statement is the one dated January 28, 1916. It may well be doubted whether obtaining an extension of time for payment of a past-due debt is obtaining money or property on credit within the meaning of the bankruptcy law. See the following: In re Tanner (D. C. Wash.) 27 Am. Bankr. Rep. 615, 192 Fed. 572; In re Joseph Dunfee (D. C. N. Y.) 30 Am. Bankr. Rep. 721, 206 Fed. 745.

[7] Argument of counsel for bankrupt on what he denominates the broad equities of the situation has been given due consideration. I need not deny that from the bankrupt's point of view it is a hardship to be adjudged an involuntary bankrupt, to be compelled to surrender all his property for the benefit of creditors, including that in excess of the homestead transferred to his wife, and to be then denied a discharge. But, whatever may be my personal views in that respect, this is no sufficient reason for disregarding the provisions of the bankruptcy law. An insolvent debtor has no means of obtaining a discharge, except under favor of the bankruptcy law, and that law expressly forbids the granting of a discharge under certain conditions, some of which are, as above shown, present in this case.

An order will be entered, overruling the exceptions to the special master's reports, confirming the same, and refusing a discharge. An exception may be noted to this ruling.

Ex parte KING.

(District Court, E. D. Kentucky, at Covington. September 24, 1917.)

1. WAR ⇐32—MILITARY AUTHORITIES—JURISDICTION TO TRY OFFENSE.
Act Aug. 29, 1916, c. 418, § 3, 39 Stat. 650 (Comp. St. 1916, § 2308a), which supplanted Rev. St. § 1342, prescribed new articles of war. Article 92 declares that any person subject to military law, who commits murder or rape, shall suffer death or imprisonment for life, as a court-martial shall direct, but no person shall be tried by court-martial for murder or rape committed within any state of the Union or the District of Columbia in time of peace; while article 93 declares that any person subject to military law, who commits manslaughter, mayhem, arson, etc., shall be punished as a court-martial may direct. Article 58 of the original articles of war declares that, in time of war, larceny, robbery, murder, etc., shall be punishable by the sentence of a general court-martial when committed by persons in the military service of the United States. A soldier, after declaration that a state of war existed between the United States and Germany, killed a policeman of a Kentucky city. *Held*, that the military authorities had superior jurisdiction of the offense.

2. WAR ⇐32—JURISDICTION—WAIVER.
Where the captain and major of a soldier who shot and killed a policeman of a city delivered him into the custody of the civil authorities, and on his examining trial consented that such civil authorities should pro-

ceed with the case, such consent, having been hastily given, was not, as against the commanding officer of the brigade of which the soldier was a member, a waiver of the preference right of the military authorities to try him; there being no presumption that the captain and major acted with authority.

Petition by Simson King for a writ of habeas corpus to secure the release of George King, committed by the County Judge of Campbell county, Ky. George King, the party in custody, directed delivered to military authorities.

W. C. G. Hobbs, of Lexington, Ky., for petitioner.
Thos. D. Slattery, U. S. Atty., of Covington, Ky., for the United States.

COCHRAN, District Judge. This is a writ of habeas corpus that is before me. It was issued upon the petition of Simon King, father of George King, the person held in custody. He is so held by the jailer of Campbell county, in this district, to whom the writ was directed, upon a charge of murder. He was first committed by the county judge of that county upon an examining trial, and since then he has been indicted by the grand jury thereof for that offense. He is a private in Company C, Second Kentucky Infantry, National Guards, and subject to military law, as provided by article 2 of Articles of War, section 2308a, United States Compiled Statutes 1916, p. 3949, and has been since April 13, 1917. The person whom he is charged with murdering was Christopher Kolhoven, then a policeman of the city of Newport, in that county. It is charged that he did so on July 11, 1917. The claim is that the killing took place on one of the streets of that city, and that it was not done in the performance of any duty as a soldier.

On July 28, 1917, the captain of his company preferred the charge against him of having committed the crime of murder, and Gen. Roger D. Williams, commander of the brigade to which the Second Kentucky Infantry belongs, has filed an intervening petition, praying that the prisoner be delivered to the military authorities, to be tried by a court-martial on the charge so preferred against him. The commonwealth of Kentucky has appeared by the commonwealth's attorney of Campbell county, and resists the delivery of the prisoner to the military authorities. The prisoner claims that the killing was committed by him in the performance of his duty as a soldier. The time of the killing was a time of war. The United States has been in a state of war with Germany since April 6, 1917.

The question which the case presents for consideration is whether the Campbell circuit court has jurisdiction now to try him for the offense for which he has been indicted. It is not whether it had jurisdiction to indict him and may not hereafter have jurisdiction to try him. It is not necessary to determine this question at the present hearing. The question before me may be narrowed to that stated, to wit: Whether that court has jurisdiction to try him under existing conditions, and to that end to withhold his custody from the military authorities.

[1] The solution of the question depends upon the true construction of the articles of war in force at the time of the killing. They are to

be found in section 3, c. 418, 39 Stat. 650, being Act Aug. 29, 1916 (U. S. Compiled Stat. 1916, § 2308a), which takes the place of section 1342, U. S. Rev. Stat. It is thereby provided that section 1342 be amended to read as therein provided. It is well to approach its pertinent provisions from the viewpoint of how the matter stood under section 1342 as it formerly was and here from the viewpoint of how it stood in time of peace. It stood then, as under the present statute, differently in time of war from what it stood in time of peace, and we are only concerned as to how it stood and stands in time of war. But it will aid in understanding how it stood and stands in time of war to understand first how it stood and stands in time of peace.

By section 1342 before it was thus amended a soldier of the United States army could be court-martialed in time of peace for offenses committed by him in violation of the criminal laws of a state or of the United States. Such jurisdiction was conferred by article 62. Thereby jurisdiction was conferred of "all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of to the prejudice of good order and military discipline." Under this article a capital crime could be dealt with only as a disorder or neglect prejudicial to good order and military discipline. In re Stubbs (C. C.) 133 Fed. 1012. A case where such jurisdiction was exercised is that of the soldier who attempted to kill the assassin, Guiteau. Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213.

The jurisdiction so conferred, however, is not exclusive, but is concurrent with that of the civil courts. Grafton v. United States, 206 U. S. 333, 348, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640; Franklin v. United States, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. Ed. 615. And by article 59 the civil courts were given priority in the exercise of jurisdiction. It was thereby provided that:

"When any officer or soldier is accused of a capital crime, or of any offenses against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs are required, except in time of war upon application duly made by or on behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate and to aid the officers of justice in apprehending and securing him, in order to bring him to trial."

As the requirement was that the officers specified should so do "except in time of war," this provision had application only to time of peace; and by virtue thereof in time of peace the military authorities were bound to give way to the civil. But this was not the only jurisdiction conferred on courts-martial of offenses against the criminal laws of a state. By article 58 they were given other jurisdiction thereof, but it is expressly limited to time of war. That article is in these words:

"In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing with an intent to commit murder, * * * or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment for the like offense by the

laws of the State, Territory, or district in which such offense may have been committed."

It has been held by the Supreme Court in the case of Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118, that, where an offense covered by this article is committed in time of war in enemy country, the military authorities have exclusive jurisdiction of the offense. There, in time of the Civil War, a federal soldier had committed the crime of murder in the state of Tennessee whilst it was in the military occupation of the United States, with a military governor at its head, appointed by the President, and, as there held, enemy's country. It was held that the soldier was not amenable to the laws of that state after it ceased to be enemy's country upon the close of the Civil War. This position was based upon the principles of international law, and not on the interpretation of the statute. Though the question was not involved therein, Mr. Justice Field considered how the matter would have been, had the crime been committed in a loyal state, which is the case we have here. It was held that it would have been otherwise. He said:

"But the section does not make the jurisdiction of the military tribunals exclusive of that of the state courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by the state courts. It simply declares that the offenses shall be 'punishable,' not that they shall be punished by the military courts; and this is merely saying that they may be thus punished. Previous to its enactment the offenses designated were punishable by the state courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress, in the absence of clear and direct language to that effect. We do not mean to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution 'to raise and support armies' and 'to make rules for the government and regulation of the land and naval forces,' its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary. All we now affirm is that by the law to which we are referred, the thirtieth section of the Enrollment Act, no such exclusive jurisdiction is vested in the military tribunals mentioned. No public policy would have been subserved by investing them with such jurisdiction, and many reasons may be suggested against it."

It will be noted that the considerations upon which he based the conclusion that the military jurisdiction conferred was not exclusive as to a loyal state in time of war were what the article did not provide and what it did. It did not provide that "the offenses named shall not be amenable to punishment by the state courts," nor did it provide "that they shall be punished by the military courts." What it did provide was that they should be "punishable" thereby, which was merely "saying that they may be thus punished." But it did not follow, from the position that the jurisdiction in such a case was not exclusive, but concurrent with that of the civil courts, that the military au-

thorities did not have the prior right in the exercise of jurisdiction. On the contrary, Mr. Justice Field recognized that they did have such prior right. He said:

"Persons in the military service could not have been taken from the army by process of the state courts without the consent of the military authorities; and therefore no impairment of its efficiency could arise from the retention of jurisdiction by the state courts to try the offenses. The answer of the military authorities to any such process would have been, 'We are empowered to try and punish the persons who have committed the offenses alleged, and we shall see that justice is done in the premises.' Interference with the army would thus have been impossible; and offenses committed by soldiers, discovered after the army had marched to a distance, when the production of evidence before a court-martial would have been difficult, if not impossible, or discovered after the war was over and the army disbanded would not go unpunished. Surely Congress could not have intended that in such cases the guilty should go free."

Indeed, it is an unescapable implication from the exception in article 59 of time of war from its requirement that the officers thereby referred to shall deliver an accused soldier to the civil authorities, if in their power to do so, and, if not, shall aid them in arresting him, thus limiting it to a time of peace, not only that the military authorities have the prior right to try him for the offense of which he is accused, but that they have the right to withhold him from the civil authorities and keep him in the army under all circumstances during the pendency of the war. It is clear, therefore, that under the articles of war as contained in section 1342, U. S. Rev. Stat., the civil authorities in time of war had no right to withhold a soldier accused of a crime from the military authorities, or to demand him from them in order to try him for an offense against the criminal laws of the land.

How does it stand under the act of August 29, 1916, in force at the time of the commission of the offense complained of? Thereunder article 96 takes the place of article 62 in the former statute, and article 74 of article 59. Though there is a change in verbiage, these new articles are substantially the same as the old ones. It is not important to take further note of them. The place of article 58 is taken by two sections in the new legislation. They are articles 92 and 93. Article 92 is in these words:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial shall direct; but no person shall be tried by a court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace."

Article 93 is in these words:

"Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

The offenses covered by article 93 are not limited to time of war, as in the former article 58, but the two covered by article 92 are. It will be noted, however, that in neither article is the provision that the offenses covered by them are "punishable" by court-martial; but in article 92 the provision is that the offender "shall suffer death or imprison-

ment for life as a court-martial may direct," and in article 93 that he "shall be punished as a court-martial may direct." Such language as this Mr. Justice Field in Coleman v. Tennessee seems to intimate might confer exclusive jurisdiction. It is therefore a question under the existing articles of war whether the military authorities do not in time of war have exclusive jurisdiction of the crime of murder, when committed by a person subject to military law, no matter where he may be when committed. It is not necessary that I take any position on this question. Assuming that the jurisdiction is no more exclusive than under article 58 of the former articles, the military authorities under article 92 have the preference in the exercise of jurisdiction.

[2] It is urged on behalf of the commonwealth of Kentucky that this preference has been waived by the military authorities. The action relied on as amounting to such waiver is the delivery of the prisoner to the jailer of Campbell county by the sergeant of his company, who arrested him, the delivery by his captain of the rifle with which the killing was done to the civil authorities, to be used as evidence against him, and the presence of his captain and a major, probably his major, at the examining trial, and their statement to the county judge who held the trial, when asked if they wanted him and were going to interfere, "Let the civil court attend to it," all of which took place on the day of the killing. To this it is sufficient to say that, assuming that the jurisdiction of the military authorities is not exclusive, but prior only, it has not been made to appear that these officers had any authority to waive the prior jurisdiction. The sergeant swears that he delivered the prisoner to the jailer to be held for the military authorities, and the action of the other officers was in view of the exercise of jurisdiction by the civil authorities, who had him in custody and after lapse of but little time for reflection. It cannot be said that presumptively they had authority to waive the prior jurisdiction of the military authorities, conceding that they intended to do so; and in the absence of a showing that they had such authority I cannot do otherwise than recognize such prior jurisdiction, when asserted by the commanding officer of the brigade to which the prisoner belongs.

My conclusion, therefore, is that if the Campbell circuit court will, in any contingency, have jurisdiction to try the prisoner under the indictment against him returned therein, it does not have such jurisdiction now, and that the military authorities are entitled to have him delivered to them, at least for trial under the charges pending before them against him.

An order will be entered to that effect upon the writ.

In re PEARLMAN.

(District Court, E. D. New York. December 18, 1917.)

1. CHATTEL MORTGAGES ⟸99—FILING ANEW—STATUTE.
Under Lien Law N. Y. (Consol. Laws, c. 33) § 235, as amended by Laws 1915, c. 608, which provides that a chattel mortgage shall be invalid as against creditors of the mortgagor and subsequent purchasers of the mortgagees in good faith after the expiration of the first or any succeeding term of one year, unless within 30 days next preceding the expiration of such term a statement, containing a description of such mortgage, etc., or a copy of the mortgage with its indorsements, is filed in the proper office in the city or town where the mortgagor then resided, and if the chattels are located in the city of New York at the time of the execution of such mortgage a copy of such mortgage and its indorsements, etc., must be filed in the same office or offices where the original mortgage or copy thereof was filed at the time of the execution of the same, a statement or copy must, where the chattels are in New York City, be refiled in the several offices in which the mortgage or copies may have been originally filed.

2. CHATTEL MORTGAGES ⟸97—RENEWAL—LIEN LAW—TIME FOR FILING.
Lien Law N. Y., § 235, as amended by Laws 1915, c. 608, requiring annual refiling of chattel mortgages within 30 days next preceding the expiration of each term of a year as condition to validity, must be construed strictly, and a renewal filed prior to the 30-day period is invalid.

3. CHATTEL MORTGAGES ⟸97—RENEWAL—LIEN LAW—TIME FOR FILING.
Where a copy of a chattel mortgage was filed in the county in which the property was located on February 16th, a renewal notice filed on January 16th of the following year was too early, and was ineffective, under Lien Law N. Y., § 235, as amended by Laws 1915, c. 608, requiring such renewal notice, etc., to be filed within 30 days next preceding the term of one year from the first filing, etc., for, no matter how the time be computed, the notice was filed more than 30 days before the expiration of the year; this being true, even though the law would not consider the part of the day on which the original filing occurred.

4. CHATTEL MORTGAGES ⟸97—RENEWAL—LIEN LAW—TIME FOR FILING.
In such case, where the original mortgage was filed in the county of the mortgagor's residence on February 10th, and the renewal notice was filed in that county on February 18th, and, as stated above, in the county where the property was located on February 16th, both renewal notices were filed within time for the term of one year cannot be delayed by filing copies for a time.

5. CHATTEL MORTGAGES ⟸97—FILING OF RENEWAL—EFFECT ON ORIGINAL.
A delay of 6 days in filing, pursuant to Lien Law N. Y., § 232, a copy of a chattel mortgage in the county where the property was located, does not render invalid the original filing, in the absence of evidence showing that any person was deceived, or that there was any intent to deceive, by reason of such delay.

In Bankruptcy. In the matter of the bankruptcy of Joseph I. Pearlman. Application for payment of a chattel mortgage from the proceeds of the sale of the estate, including the property covered by the mortgage. Application granted.

Siegel, Corn & Siegel, of New York City, for petitioner.
Samuel Zirn, of Brooklyn, N. Y., for trustee.

CHATFIELD, District Judge. This is an application for payment of a chattel mortgage from the proceeds of sale of the estate, including

the property covered by the mortgage. The only question is as to the validity of the mortgage, and arises as follows:

[1] The original mortgage was made on February 10, 1916. It was filed in the office of the register of the county of Kings, where the mortgagor resided, on February 10, 1916, and in the county clerk's office in Queens county, where the property was located, on February 16, 1916, under section 232 of the Lien Law of the state of New York, contained in chapter 38 of the Laws of 1909. By section 235, a chattel mortgage is invalid as against creditors "after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless, (1) within thirty days next preceding the expiration of each such term, a statement" is filed (2) "in the proper office" of residence, and if the chattels were in New York City a copy must also be "filed in the same office where the original mortgage or a copy thereof was filed at the time of the execution of the same." By chapter 608 of the Laws of 1915, the words "or offices" have been inserted in the part last quoted.

The direction that the copy be filed "in the same office where the original mortgage or a copy thereof was filed" evidently caused some discussion. The mortgagee claims that the original provision was not in the plural, and that the refiling might be in either one or the other of these offices. No reason has been shown for such an interpretation. The provision was plainly one in addition to that requiring refiling in the county of residence, but the amendment has removed the question, if it existed.

[2, 3] But this does not answer the principal question raised as to validity. The trustee points out that the renewal notice was filed in the county of Kings upon the 18th day of January, 1917, and in the county of Queens on the 16th day of January, 1917. The former copy was clearly within the 30-day period preceding the expiration of the term. The trustee, however, contends that the copy filed in Queens county upon the 16th day of January was on the day before this 30-day period.

The mortgage, which was filed during office hours upon February 16, 1916, would be good for one year, reckoning from the "time" of that filing. This would include a part, at least, of February 16, 1917, and under all rules of construction would go beyond the end of February 15, 1917. For all usual purposes it would include the whole of the 16th. Hence 30 days immediately preceding the expiration of such term could be computed by counting the 16th of February as the first of said 30 days. This would give all of the 18th of January as the 30th day preceding.

The statute says, "within 30 days next preceding the expiration." If we take the "next" 30 days preceding the date of expiration, we would include only the 17th of January as the 30th day. Again, if we count back from the hour, i. e., "the time" of filing, we also run into the 17th, and all of that calendar day would be available. To give the mortgagee by construction a part of a day over "one year," on the theory that the law does not take into account the parts of a day, and then to penalize him by including that part of a day to fill up the 30-

day period, and thus to disregard that part of the thirtieth day which stretched back into January 17th, would be contrary to the usual application of the rule.

It has been repeatedly held that this section must be construed strictly, and that a renewal filed prior to the 30-day period is invalid. Industrial Loan Ass'n v. Saul, 34 Misc. Rep. 188, 68 N. Y. Supp. 837; Newell v. Warner, 44 Barb. (N. Y.) 258; Nat. Bank of Metro. v. Sprague, 20 N. J. Eq. 13. A strict interpretation does not mean that the law must shorten the period by a forced construction, but one day too much is as great an evasion of the statute as a longer lapse from the prescribed term. Hence a filing on January 16th would be invalid, if that were the sole criterion. But the law says that the mortgage must be filed in two places, and must be renewed within 30 days preceding the expiration of one year after the first filing. The refiling must be in both offices.

[4, 5] The term of one year cannot be extended by delaying the filing of the copy for a period. Hence, as the mortgage was filed first on February 10th, the date of expiration was February 10th of the following year, and not February 16th, which was the date of the additional filing. In this view of the case, the refiling was in time in both counties. A delay of 6 days in filing the copy is not outside of a reasonable time for filing, and would not constitute by itself such a departure from the statute as to work a fraud on other creditors, in the absence of some showing of injury to subsequent lienors, or in the absence of evidence indicating an intent to deceive by the delay.

The original filing was therefore valid, and the motion must be granted.

BARNES et al. v. MARTIN.

(District Court, S. D. New York. November 30, 1917.)

CORPORATIONS ⟸579(4)—REORGANIZATION—LIEN—TRUST.

Where defendant's testator, who purchased the assets of a bankrupt company and organized a new corporation to carry out plans for reorganization, and for that purpose collected moneys from the stockholders of the bankrupt corporation which according to the reorganization plan were to be used to pay the debts of the bankrupt corporation and free its property from liens, the moneys so received were not impressed with any trust which could be enforced by holders of liens on the property of the bankrupt corporation.

In Equity. Bill by William Barnes and Annie C. Barnes, as executor and executrix of the last will and testament of Albert Barnes, deceased, against Myra B. Martin, as sole surviving executrix of the last will and testament of Walter S. Logan, deceased. Bill dismissed.

John C. Rowe, of New York City (Herbert H. Flagg, of New York City, of counsel), for complainants.

Cadwalader, Wickersham & Taft, of New York City (George Coggill, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. Certain oil lands were purchased by the Forward Oil Producing Company subject to prior liens in the nature of a purchase-money mortgage held by complainants' testator, which the Forward Oil Producing Company agreed to pay. The lands were then conveyed by the latter company subject to these liens to the Sabine Produce & Irrigation Company. The Forward Oil Producing Company was apparently a subsidiary company of the Forward Reduction Company, who held its stock. This last-named company was adjudicated a bankrupt, and defendant's testator sent a letter to its stockholders containing a proposal for a plan of reorganization of which the following is a copy:

"Proposed Plan of Reorganization of the Business of the Forward Reduction Company.

"A new company is to be organized under the laws of the state of West Virginia with a capital of $5,000,000, divided into 500,000 shares of the par value of $10 each, to be called the Orange Oil & Refining Company.

"This company is to acquire the assets of the Forward Reduction Company.

"A part of such assets consists of the stock of subsidiary companies. The new company may acquire either the stock of any of these companies or its property as may be easiest.

"Each stockholder of the Forward Reduction Company may take stock in the Orange Oil & Refining Company, not exceeding the number of shares held by him in the Forward Reduction Company, upon contributing and paying to the treasury of the Orange Oil & Refining Company within thirty days after notice to pay the same $2 a share, and assigning to said Orange Oil & Refining Company his stock in the Forward Reduction Company. The money so contributed and whatever more may be necessary out of the proceeds of the treasury stock sold shall be used to pay the incumbrances upon the real estate of the Forward Oil Producing Company and in payment of the debts of the Forward Reduction Company, the Forward Oil Producing Company, and the other subsidiary companies above mentioned, and any balance shall go into the treasury of the Orange Oil & Refining Company.

"All the stock of the Orange Oil & Refining Company not so taken or used shall remain in the treasury as a working capital and to be sold and disposed of for treasury purposes.

"New York, Sept. 25, 1902."

Defendant's testator purchased the assets of the Forward Reduction Company, which included the stock of the Forward Oil Producing Company. The complainants in a suit brought to foreclose their lien proceeded to sale, and were unable to satisfy it owing to prior liens upon the oil lands and insufficiency of price secured.

Defendant's testator organized the Orange Oil & Refining Company to carry out the plan of reorganization, and for the purpose of such reorganization recovered and collected $128,699.55 which he did not apply to pay the incumbrances of the Forward Oil Producing Company, but converted to other uses. The failure to do this complainants allege to have been a breach of trust. They ask for an accounting from the defendant and a direction that the latter pay over to the complainants a sum sufficient to discharge the amount of their lien.

The cause of action is based upon the theory that Mr. Logan by the receipt of moneys called for by the plan of reorganization became a trustee for the benefit of complainants. I do not think this position can be maintained. It is to be said at the outset that it is nowhere al-

leged, though such an allegation would probably make no difference, that Logan did not apply the moneys he received to corporate purposes of the Orange Oil & Refining Company. It is to be assumed, therefore, that he turned these moneys over to the corporation, as would have been his plain duty. I do not think that the mere indication of how the new company was to employ the money so to be received from Logan can in any fair sense be regarded as intended to create any arrangement to benefit the lien creditors of the Forward Oil Producing Company, or to create a trust in their favor. The line of cases which have grown up since the doctrine of Lawrence v. Fox, 20 N. Y. 268, was enunciated are much more strictly limited than this, whether the right be asserted as in some of our jurisdictions at law or as in the federal courts in equity. There must be a clear purpose to make an agreement for the benefit of a third party to give him any right to enforce a contract between others. As Judge Noyes said in Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 749, 117 C. C. A. 503:

"* * * One thing is essential to the right, and that is that the third person be the real promisee; that the promise be made to him in fact, although not in form. It is not enough that the contract may operate to his benefit. It must appear that the parties intend to recognize him as the primary party in interest and as privy to the promise."

Can it be for a moment imagined that the stockholders here intended to end all discretion either of themselves or their directors as to payment of liens which the new corporation had not assumed if the property on which these liens were imposed should turn out upon further investigation to be worth less than the incumbrances. It may be if the directors refused to pay these liens that a stockholder's bill would lie to compel payment if the property turned out worth redemption. If such a decree were made, a trust might be created by the parties and the court as was done in the Hugh Thomas Case, Pennsylvania Steel Co. v. New York City Railways Co., 206 Fed. 663, 124 C. C. A. 463. There it was adjudged that the City Railways Company should be paid $8,000,000 by the Metropolitan Street Railway Company by reason of the obligations the former had incurred for the latter. Payment was decreed to the creditors to whom the City Railways Company had obligated itself upon the theory that that company was not entitled to receive the $8,000,000 from the Metropolitan Street Railway at all except to discharge the obligations which it had incurred for the benefit of the Metropolitan Street Railway Company, and unless it should disburse the fund for that purpose. Under these circumstances a petitioning creditor was allowed to obtain payment of his claim from the fund upon the ground that it had been set apart by the action of the court and the parties for his benefit.

The present case more nearly resembles the cases of Dillon v. Barnard, 21 Wall. 430, 22 L. Ed. 673, Columbus, Sandusky & Hocking Ry. Appeals, 109 Fed. 177, 48 C. C. A. 275, New York Security & Trust Co. v. Louisville, etc., Ry. (C. C.) 97 Fed. 226, and Mott v. New York Security & Trust Co., 29 Misc. Rep. 39, 60 N. Y. Supp. 357, cited by the counsel for the defendant. The complainants have neither privity nor right of any kind to invoke the reorganization plan,

and, as the case arises upon the construction of that document, no amendment can avail them.

A final decree should therefore be granted dismissing the bill without costs and without leave to amend.

In re RESNEK, SHAPIRO & CO.

(District Court, S. D. New York. June, 1917.)

1. BANKRUPTCY ⊜288(1)—PROCEEDINGS—SUMMARY PROCEEDINGS.
While a court of bankruptcy may not in summary proceedings determine the sufficiency of a truly adverse claim, yet such court may take jurisdiction of a petition by the trustee for an order requiring claimants to turn over to him property belonging to the bankrupt, where the claim made after a fraudulent transfer was founded upon patent and flagrant fraud.

2. BANKRUPTCY ⊜303(3)—PROCEEDINGS—SUMMARY ORDER.
In a proceeding for a summary order requiring delivery to the trustee of property belonging to the bankrupt, evidence *held* to show that the property was in truth that of the bankrupt, and that the assertion of claims thereto was fraudulent.

In Bankruptcy. In the matter of the bankruptcy of Resnek, Shapiro & Co. On petition by the receiver for an order requiring Samuel Resnek and Ida Resnek to turn over to him property alleged to be owned by the bankrupt and in their possession. Petition sustained.

Lawrence B. Cohen and Saul S. Myers, both of New York City, for trustee.

Charles Fen Griffiths, for Samuel Resnek and Ida Resnek.

MANTON, District Judge. The trustee petitions the court for an order requiring Samuel Resnek and Ida Resnek to turn over to him property alleged to be owned by the bankrupt now in their possession. It consists of cash in banks and property as follows:

Cash in banks:		
Mechanics' Bank of Brooklyn	$ 798.06	
Dry Dock Savings Bank	867.00	
German Savings Bank	1,140.00	
City Savings Bank of Brooklyn	1,200.00	
		$4,005.06
Cash held by Ida Resnek		800.00
Jewelry valued at		250.00
Notes receivable:		
Saunders Shoe Company, two notes ($500 each)	$1,000.00	
A. Langer, note	300.00	
H. Resnek, note	147.52	
		1,447.52
Total		$6,502.58

A lengthy examination has been had under section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. 1916, § 9605]), and this forms the basis for the necessary claim of fraud and

deceit in the receipt of this money and its fraudulent possession by each of the Resneks.

[1] I have examined this voluminous testimony with care, and I am satisfied that the claim founded upon what appears to be obvious fraud in the transfer of these properties to the Resneks justifies the bankruptcy court in requiring the turning over of this property to the trustee in summary proceedings. The trustee recognizes the rule of law that this court may not in summary proceedings determine the sufficiency of a truly adverse claim, but the court has granted similar relief where the claim, made by the possessor of the property, after fraudulent transfer, is founded upon patent and flagrant fraud. In re Friedman (D. C. N. Y.) 18 Am. Bankr. Rep. 712, 153 Fed. 939, affirmed 20 Am. Bankr. Rep. 37, 161 Fed. 260, 88 C. C. A. 306; In re Berkowitz (D. C. N. J.) 22 Am. Bankr. Rep. 233, 173 Fed. 1013; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224.

[2] The testimony of the Resneks given at this hearing is not truthful and the trustee has well argued that of itself it shows fraud in the transfer of these moneys and justifies a summary action. One has been indicted for perjury arising out of these proceedings. The moneys on deposit in the banks are in truth the property of the bankrupt, and were fraudulently paid over and delivered to Samuel H. Resnek or to Ida Resnek.

From 1911 to 1915 Samuel H. Resnek, a son of the bankrupt, worked as a salesman, earning on an average of $70 a month. In September, 1915, he became a clerk in the office of the bankrupt at $15 a week and certain commissions. The only money he had in the savings bank then was $99, and that in the Dry Dock Savings Bank. Under an agreement entered into between the bankrupt and Samuel H. Resnek the bankrupt purchased numerous quantities of material and sold them at such prices as he could obtain, paying over large sums of money to Samuel H. Resnek under the guise of salary and commissions, pursuant to the agreement and understanding that Resnek would retain these moneys and at a later date divide with the bankrupt. He received moneys as alleged salary and commissions which were not due and payable, and which he had not earned, and some of these moneys are directly traceable to the bank accounts. With some of the money the jewelry above referred to was purchased and given to Ida Resnek, and by manipulations circumstantially shown, I am satisfied that the notes of the Saunders Shoe Company, the A. Langer note, and the H. Resnek note are in truth and fact the property of the bankrupt and should be summarily turned over.

The motion will be granted, and an order may be entered accordingly.

PENNSYLVANIA R. CO. v. UNITED STATES. (No. 43.)

(Circuit Court of Appeals, Third Circuit. December 19, 1917.)

1. MASTER AND SERVANT ⟸13—OPERATION—HOURS OF SERVICE ACT—CONSTRUCTION.

Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), declares that it shall be unlawful for any common carrier to require or permit any employé to remain on duty for a longer period than 16 consecutive hours, and whenever such 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, 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 again go on duty without having at least 8 consecutive hours off duty. Engineers and firemen employed on extra engines, whose duty it was to assist freight trains in going up mountain grades of defendant's line, after assisting a freight train over the grades from one point to another, there waited until another freight train should come from the opposite direction, when the same engine assisted such train over the grade to the pusher's starting point, and here the engine waited until the arrival of another freight train, when the process was repeated. The crews of the extra engines had much unoccupied time, and the plan was adopted of relieving them entirely during the interim from all work or care of their engines, and the crews, though subject to call, were given opportunity to recuperate in rest houses furnished by defendant, and in some places they were allowed, though subject to call, to go to lodgings and elsewhere at the points where their service ended. *Held* that, though the Hours of Service Act is remedial and for the benefit of travelers, yet, in view of the adoption of the plan while the United States was engaged in the prosecution of a war making great demands upon its transportation systems, and of the fact that the crews of the pushing engines were relieved of all duties while awaiting other trains, it cannot as a matter of law be declared that defendant violated the Hours of Service Act, although such employés, if the rest periods, during which they received pay and were subject to call, be counted, worked more than 16 consecutive hours a day, but that question can only be determined by consideration whether the periods off were restful.

2. MASTER AND SERVANT ⟸13—OPERATION—HOURS OF SERVICE ACT.

As the Hours of Service Act declares that it shall be the duty of the Interstate Commerce Commission to enforce the provisions of the statute, and all powers granted to the Commission are extended to it in the execution of such act, the Commission should promulgate a practical working scheme for compliance with the act, instead of leaving railroad companies to determine at their peril whether their plan violates the act, and such procedure should be followed in preference to prosecutions under the act; this being particularly true where, as a war measure, a railroad company is attempting to operate its system at maximum capacity.

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

Action by the United States against the Pennsylvania Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Patterson, Crawford & Miller, of Pittsburgh, Pa., for plaintiff in error.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the United States brought suit against the Pennsylvania Railroad Company, to recover penalties for alleged violation of Act March 4, 1907, 34 Statutes at Large, p. 1415, entitled "An act to promote the safety of employés and travelers upon railroads, by limiting the hours of service of employés thereon." The facts were agreed upon by stipulation, and the court below entered a judgment for the plaintiff for the penalties in question. Thereupon the railroad sued out this writ of error.

The case turns on the construction of the section of said act quoted in the margin.[1] The object of said act, as stated in its title, is "to promote the safety of employés and travelers upon railroads," and the enacted means for promoting their safety are, as stated in the title, "by limiting the hours of service of employés thereon."

[1] Turning to the act as a whole, we find the hours of service of employés are of two kinds: First, those who, as recited in the above-quoted section, "have been *continuously* on duty for sixteen hours," as to whom the act provides they "shall be relieved and not required or permitted again to go on duty until he has been at least ten consecutive hours off duty." The other employés and their hours of service are where the employé "has been on duty sixteen hours in the *aggregate* in any twenty-four hour period," and as to them, they shall not be "required or permitted * * * again to go on duty without having had at least eight consecutive hours off duty."

The manifest purpose of the act is to afford adequate periods of absolute rest to the employés, at the end of certain hours of employment. That the employment is of different kinds is recognized by the fact that in one sort of work ten hours must elapse before the employé could work again; in the other class of work, eight hours only must elapse. Manifestly, it was thought the two kinds of work, viz. "continuous" and "in the aggregate" were of such difference in character that two hours more of an interim were required where consecutive hours' work had been done than where aggregate hours was the case.

This statute manifestly does not concern any questions of wages or other relation between the railroad and its employés. Its whole concern is the safety of passengers and of train employés generally, and

[1] "Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

that the safety of such passengers and of such employés shall not be jeopardized by the undue length of service of the latter. The statute should be so construed as to further these ends in letter and spirit.

Turning, then, to the facts of this case, we find they concern the working hours of engineers and firemen employed on certain extra freight engines called "pushers," whose duty it was to push or assist freight trains in going up the mountain grades on the defendant's Philadelphia & Erie Line, a work which, of course, had a direct bearing on the safety of passengers and employés on passing trains. In performing such service, the pusher's crew would help over the mountain grades a freight train from one point to a certain other point, and there wait until another freight train came in the opposite direction, when it would assist such train over the grade to the pusher's initial starting point. Here it would wait until another freight train came along, when the process was repeated. In such work the crew had necessarily much unoccupied time, and the plan was adopted of relieving them entirely during such interim from all work or care of their engines; that work being done by the hostlers. But in this interim the men were, of course, subject to be called as soon as another freight came along. To that end they were required to specify some place where they could be reached by the hostler, and for such interim they were paid at the same rates as though they had been at work. At some places the railroad provided rest houses, where the men were required to stay, and could retire if they so desired. At other places there were rooming houses, where the men could get lodging if they desired, and be called there. At another place, on the outskirts of the city of Warren, they were free to go into the city and spend their time as they saw fit, but they had to keep in touch with certain places, to which calls for them could be sent.

As illustrative of the practical working of this system, we cite typical instances at each point. For example: The pusher reached St. Mary's at 6:20 a. m. Thereupon the trainmen went to the rest house, where they stayed until 7:15 a. m., when they were recalled for duty. They again rested at St. Mary's in the same way from 1:35 p. m. to 2:30 p. m. If during these two periods at the rest house, aggregating one hour and fifty minutes, these men are to be regarded as continuously on duty, then the railroad violated the statute. On the other hand, if this interim time is not so regarded, then these men have only been on duty in the aggregate fifteen hours and ten minutes.

Substantially similar circumstances and times were involved in four other cases at the rest house at Kane, another point on the road. Other cases were at Emporium and Warren, where there was no rest house furnished by the railroad, but the employés went to lodgings near the railroad and were off duty for two hours. In all of these cases, during the times they were off duty, they were subject to call, and of course had to remain within call; but they were relieved from care of their engines and were paid for such time at the regular rates.

In disposing of the case, the court below regarded as decisive the fact that during the rest period the employé "was not free to go where he pleased or do what he pleased." But this, as it seems to us, overlooks the spirit and purpose of this act. Its object is to have the train

service done by men who are not overstrained and overworked, and in applying the act and fulfilling its purpose the question of fact necessarily arises whether, when the trainman was relieved from duty and time was given him to rest, was this rest of a substantial character; did it tend to fit him for the safety of the service, or did it tend to further unfit him for service? If the time was of such short duration as not to tend to really resting and recuperating the physical and mental faculties of the men, then it might well be regarded as a negligible quantity, and as part of the continuous service. But where it was of such a substantial period that it would rest and would recuperate, and would relieve from strain, then the service, instead of being a continuous one, was a broken one, made up of an aggregate of the work periods before and after the substantial real rest period.

We find nothing in the cases cited to us at real variance with this view. In United States v. Grand Rapids, etc., 224 Fed. 668, 140 C. C. A. 177, section 3 of the act relating to railroad telegraphers was involved. By that section in day and night offices there was a nine-hour limitation which was exceeded. In United States v. Denver, etc. (D. C.) 197 Fed. 629, the train was simply side-tracked to await the passage of another train. Manifestly there was no break in the continuity of the trainmen's service; they continued in charge of their own train and were obliged to watch for the expected train. In United States v. Chicago, etc. (D. C.) 197 Fed. 626, a work train was stopped for meals, and this was held not to break the continuity of the service; the court saying:

"If a railroad may relieve its employés from service during meal hours, it may also relieve them from service every time a freight train is tied up on a side track waiting for another train, and thus defeat the very object the Legislature had in view. The brief interruptions for meals were 'trifling interruptions,' in the language of the court in the Atchison Case, 220 U. S. 37 [31 Sup. Ct. 362, 55 L. Ed. 361]."

Without discussing in detail the many other cases cited, each of which depends on the particular circumstances thereof, it suffices to say that in our judgment the whole subject is very well summarized in United States v. Northern Pacific (D. C.) 213 Fed. 539, where the court said:

"The purpose of the statute is plain, and it must be so construed as to promote its policy. The hours of service of railway trainmen are long at best, leaving only eight hours for rest and recreation, and if this brief period can be broken into fragments the purpose and policy of the law will be entirely frustrated. If a train crew may be laid off for an hour and a half at one point to suit the convenience or necessities of the company, it may be laid off for a like period at another, and the members of the crew thus wholly deprived of any substantial period for either sleep or rest. If this crew had not been released from duty at Auburn, the members would have been compelled to remain idle until the time of departure arrived, and the release for the brief period allowed by the company permitted them to do little else. The release was of no benefit to the crew, and could subserve no substantial purpose, except to obviate the penalty imposed by law. Perhaps it cannot be said as a matter of law in all cases whether a release from duty for a fixed period of time will or will not be sufficient to break the continuity of the service. No doubt in extreme cases the court may declare as a matter of law that a given period is so short as not to break the continuity of the

service, or that another period is so long as to break the continuity of the service; but between these extremes there is a twilight zone, where the question becomes a mixed one of law and fact."

In the present case in like manner there were facts peculiar to it which in our judgment ought to be considered and given due weight in determining whether the active service break here involved was or was not one of such substantial character as to stop the continuity of the service. In the first place, the service itself—a pusher service—was one that in the nature of things was necessarily broken, so that the men could foresee and adjust themselves to its probable requirements, and could count in advance on rest times. The freight trains did not run on schedule; the work was broken into short runs, and the management or care of the train during the rest periods was not in the hands of the trainmen; the periods of rest were in a measure so regular that they could be looked forward to by the men. That they were regarded as restful periods was shown by the railroad providing rest houses at certain places, and the men securing rest places for themselves where this was not done. The men being paid full wages for these usual rest periods, both men and railroads seem to have treated them as substantial intermissions, during which the men did relax and did get that cessation from mental and physical strain which their duties necessitated. It was an exceptional state of facts, different from the regular stops incident to the usual running of trains. The difficulty was a practical administrative one, and where many factors entered into the determination of the question whether the regular rest taken by the men and provided by the company was a substantial break and cessation from the strain of overtime work.

The court below in effect held that the passage of the sixteen hours, alone and apart from all other considerations, did, as a matter of law, make the work continuous, and constituted a violation of the statute. This, in our view, was error. Whether there was a violation of the law in this particular case—and we have no other case or state of facts before us—depended on whether, as a matter of fact, there was during those sixteen hours a substantial break, one that was substantial in amount and recuperative and restful in effect. If such was the case, it broke the continuity of the strain of service. The case will therefore be remanded to the court below, with full power to receive further proofs, and, if necessary, to receive from the joint suggestion of the railroad and the officials of the Interstate Commerce Commission such help, light, and suggestion on the settlement of this administrative and practical operative question as may aid in its solution.

[2] And we take this opportunity to say, in these war times, that while it is then, and indeed at all times, the duty of courts to see to it that laws are neither violated nor relaxed, it is also their like part to see to it that in war times the courts of a country, in their administration of law, recognize the new and unusual conditions which confront them. For if the administration of the law was so rigid and inflexible as to be self-incapable of adjusting itself to the new conditions governing that to which it relates, then much of what is wrong-

ly charged against the law would be justified. It is now quite apparent that a large number of cases will arise under war conditions which never arose under peace conditions, and which were not and could not have been in view when statutes affecting transportation were passed. These questions, dormant in times of peace, become vitally acute under stress of war conditions, and no court can close its eyes to these new conditions. It therefore becomes the imperative price of successful practical railroad operation that governmental administrative officers, railroad executives, and railroad employés unite in a practical operation of both railroads and laws, so that the railroads may be operated to their full limit of ability. Moved by this practical, efficient, and patriotic spirit, they can thus fairly meet and promptly solve each particular case as it arises, and can accomplish far more than the courts can do, which in applying a rigid rule of law to one case and one instance may unconsciously work injury in many other instances arising out of the great complexity and new conditions arising under war transportation conditions.

Take this case as an example. It involves the very important operative work of getting freight trains over heavy grades by the help of auxiliary engines, a service so vital that the delay of such trains may seriously impede the real efficiency of a whole railroad system, since no continuous and interrelated movement of freight can be more effective than it is at its weakest point. Confronted by this difficulty, the railroad has attempted to meet it by means of rest houses, rest hours, and by relieving the men during such time from any work and from responsibility for the trains. In that regard, as the court below has found, the railroad acted in entire good faith, and there was no complaint by the engine pusher men, or any evidence that they were in any way overstrained. The case is one of those border line and exceptional ones, in which judges, jurors, executives of railroads, and interstate commerce officials might reasonably differ as to whether the law has been violated. Yet this question the railroad is compelled to settle for itself, and this at the risk of the imposition of heavy penalties. The multiplicity of these prosecutions for violation of this and similar statutes, the money spent and the time used by judges, district attorneys, court officers, and interstate commerce officials, and the frequent inability of courts to render any real help on the determination of such purely administrative questions, suggest the advisability of some change of method. Now, as we have said, the application of this and like statutes to railroad working conditions is obviously a practical railroad operative question. In the final analysis, the government, working through the agency of the Interstate Commerce Commission, is itself the responsible administrator. The law here involved provides that "it shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this statute and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act," so that control of the executive branch of the railroads is supervised by the Interstate Commerce Commission. Under the present practice, as it comes to the courts, alleged violations of these laws are reported by the inspectors, and prosecutions are instituted in court for the collection of penalties.

It goes without saying that such a system is capable of improvement, and that, with the full and plenary power vested in the Interstate Commerce Commission, it would seem it could be practically worked out to much better advantage for the traveling public and the employé engaged in that service, if, instead of criminal prosecutions for penalties, there was substituted the supervisory power of some one authoritatively representing the Interstate Commerce Commission, who could co-operate with the executives of the railroads, who are charged with the public duty of operating roads, and thereby the close, difficult, and border line questions, which are really the principal ones now involved in such cases, could be promptly and effectively settled without resort to courts. For example, in this case, if the railroad officials, as found by the court, were acting in entire good faith, and some official of the Interstate Commerce Commission, with supervisory power and wise discretion, joined in solving this administrative question, it would seem to us it would have been better settled than by a resort to the criminal side of the federal court.

The judgment below is reversed, and the cause remanded to the court below for further procedure.

MOERSCHEL et al. v. O'BANNON.

In re SCHULTZ DRY GOODS, CARPET & READY-TO-WEAR CO.

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

No. 4896.

BANKRUPTCY ⟸316(1)—CORPORATION—PROVABLE CLAIMS.

Notes given for money borrowed by the maker to purchase the stock of a mercantile corporation, and so used, are not provable against the corporation in bankruptcy as against other creditors, in the absence of its assumption of the debt, although the maker continued to hold practically all of its stock, controlled its business, and made payments of principal and interest from its assets; nor is the position of the holder improved by the fact that the maker afterward substituted for one of his own notes a note of the corporation made by himself as president, but without consideration, nor by the fact that the former owners of the stock paid the existing indebtedness of the corporation from its proceeds.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

In the matter of the Schultz Dry Goods, Carpet & Ready-to-Wear Company, bankrupt; W. D. O'Bannon, trustee. From an order disallowing their claims, Jacob F. Moerschel and Emma C. Linhof appeal. Affirmed.

For opinion below, see 236 Fed. 425.

D. F. Calfee, of Jefferson City, Mo., and D. W. Peters, of St. Louis, Mo. (Calfee & Westhues, of Jefferson City, Mo., on the brief), for appellants.

Ira H. Lohman and W. S. Pope, both of Jefferson City, Mo., for appellee.

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

SANBORN, Circuit Judge. The Schultz Dry Goods, Carpet & Ready-to-Wear Company was adjudged a bankrupt on March 20, 1916. Its stockholders were Frank J. Linhoff, its president, who owned 238 shares, Emma C. Linhoff, his wife, who owned 1 share, and Ernest C. Moerschel, his brother-in-law, who owned 1 share. The corporation was organized on May 23, 1913, when it succeeded to the business, assets, and liabilities of the Schultz Dry Goods & Carpet Company, a corporation, whose stock was the same in amount and was held by the same stockholders in the same quantities as was the stock of the new company. On February 27, 1909, the old company was a prosperous mercantile concern, all whose stock, except 2 shares, was held by H. E. Schultz, Sr., its president, H. E. Schultz, Jr., its vice president, and George P. Walker, its secretary and treasurer, and on that day they and Frank J. Linhoff agreed in writing that they should sell and convey to him all the stock of the corporation for $55,000, $3,000 of which they acknowledged in the writing that Linhoff had then paid, $32,000 of which was to be paid by Linhoff by February 27, 1909, and for the remainder of the purchase price Linhoff was to make his two promissory notes payable to H. E. Schultz, Sr., for $10,000 each, due in one and two years, respectively, signed by Jacob F. Moerschel surety thereon. That contract was performed. Linhoff had no property. Jacob F. Moerschel was his father-in-law. Moerschel furnished the $3,000 that was paid when the contract was made. Linhoff and Moerschel borrowed of banks upon their promissory notes the $32,000, and Linhoff paid that amount over to the Messrs. Schultz, and he gave to H. E. Schultz, Sr., his two $10,000 notes signed by Jacob F. Moerschel as surety. When the various notes signed by Linhoff and Moerschel were collected Moerschel paid them, and Linhoff gave to Moerschel his individual notes for the amounts paid aggregating $50,000. Before these notes were given, the $3,000 Moerschel advanced when the contract was made and $2,000 that was indorsed on one of the notes to the bank had been paid out of the assets of the corporation. The notes aggregating the $50,000 were given at various dates between February 27, 1910, and February 12, 1913. Moerschel still holds all of these notes, except one for $8,000, which he gave to his daughter, Mrs. Linhoff, and for that note Linhoff substituted in February, 1915, the note of the old corporation made by himself as president. Mrs. Linhoff presented a claim against the new corporation for $8,000, based on this note, and Mr. Moerschel presented a claim for $42,000 and interest, founded on the other notes given to him by Linhoff. The court below disallowed these claims, aand Moerschel and Mrs. Linhoff have appealed.

Counsel for the appellants argue that these claims should have been allowed: (1) Because Moerschel loaned his money to and gave his security for the old corporation, and not to or for Linhoff; (2) because the old corporation and the new corporation assumed and agreed to pay

the debts to Mrs. Linhoff and Moerschel, evidenced by these notes; and (3) because, if the claims may not be allowed in full, Moerschel's claim for at least $12,404.40, which was paid by the Messrs. Schultz to discharge the debts of the old corporation soon after the $32,000 of the purchase price of the stock was paid over to the Messrs. Schultz by Linhoff, should be allowed. In support of this contention they call attention to these facts:

Linhoff controlled and managed the corporations after his purchase of the stock without let or hindrance by the other stockholders or by the boards of directors. Moerschel did not know of the written contract of purchase of the stock, he deemed the property and business of the Schultz store security for his obligations and loans, and recorded the notes he took of Linhoff on sheets in his account book under the head "Schultz Dry Goods & Carpet Co., Fr. J. Linhoff." Linhoff testified that he did not buy the shares, but that he bought the stock of goods, and the vendors turned over the shares of stock; that, as Moerschel took up the notes which he and Moerschel had given he gave Moerschel notes of the old corporation, signed by himself as president; that the Schultz Dry Goods & Carpet Company was bought with Moerschel's money; and that the money was not loaned to him personally. The bookkeeper of the new corporation testified that she copied from an old sheet that she found folded in one of the account books of the corporations a memorandum of the notes given by Linhoff to Moerschel, their dates, amounts, and the dates when the interest came due, and the copy she made was received in evidence. Linhoff paid the interest on all these notes until a short time before the adjudication of bankruptcy out of the assets of the corporation with its checks signed by himself.

But this, and other less material evidence tending to prove that Moerschel made his loan to and signed as surety on Linhoff's notes for the corporation, and not to and for Linhoff, cannot prevail over these indisputable facts. When first asked what he did at the time his son-in-law, Linhoff, became interested in the Schultz store in 1909 in the way of helping him out Moerschel answered:

"He came up here and wanted to go in business, and he bought it, and I promised to help him out, and I had to stick to it; he loaned some money from the banks, and I went security. I signed the notes."

When the $3,000 was paid, when the notes to the banks for the $32,000 were made and the money borrowed on them was paid over to Mr. Schultz, Sr., and when the two $10,000 notes were made and delivered in March, 1909, the board of directors and officers of the corporation were, and until August 7, 1909, they continued to be the Messrs. Schultz. They were the only persons who could incur the liability of the corporation for borrowed money or for the sureties for the company, and they did not do so. The contract which evidenced the transaction which induced the payment of the $3,000 and the making of the notes of March, 1909, and the notes themselves, are in writing. The written contract is for a sale, not of the property of the corporation, but of the stock in the corporation, and it was in payment for the pur-

chase by Linhoff of that stock that he paid to Schultz the $3,000 he borrowed of Moerschel and the $32,000 he borrowed of the banks on his note, with Moerschel as surety, and gave him the two $10,000 notes signed by himself and Moerschel. Mr. Linhoff was mistaken in his testimony that, when Moerschel paid the indebtedness he had incurred as surety, he (Linhoff) gave Moerschel notes of the corporation signed by Moerschel as surety. All the notes but one are in evidence, and they are all signed by Frank J. Linhoff. There was no mistake in the finding of the court below that the loan which Moerschel made of his money and his credit in March, 1909, was to Linhoff, and not to the corporation.

As the original loan was made by Moerschel to Linhoff, and not to the corporation, and was evidenced by the individual notes of Linhoff, it was indispensable to the liability of the new corporation, the bankrupt, that there should have been some contract of novation or assumption of unpaid demands of Moerschel and Mrs. Linhoff to sustain their claims, and the burden was on them to prove such a contract. The court below was of the opinion that they had failed to bear this burden, and a careful reading of all the evidence has failed to convince of the contrary. It is true that the facts that Linhoff paid out of the assets of the corporation interest on his notes to Moerschel and on his note to his wife, and $5,000 on his debt to Moerschel, that the notes to Moerschel were listed on the sheet in one of the account books of the corporation, that Moerschel listed them under the name of the old corporation and Linhoff in his account book, and that Linhoff substituted for his $8,000 note, which Moerschel gave to his wife, the note of the old corporation in February, 1915, more than three years after that corporation had expired and nearly two years after the new corporation took its assets, tend to indicate either a reckless disregard of the distinction between the corporations and Linhoff, or the mental substitution of the former for the latter. But these facts are overcome by the probability that the payments were made by Linhoff out of any moneys upon which he could conveniently lay his hands, without special regard to or thought about corporate or individual ownership, in view of the fact that he owned 238 out of the 240 shares of the corporation; by the fact that no consideration was ever paid or agreed to be paid to either corporation for any undertaking by it to assume or pay Linhoff's debt to Moerschel or to his wife; by the fact that no substitution of corporate notes for the notes of Linhoff held by Moerschel, and no written agreement of assumption or payment thereof was ever made by either corporation; by the fact that as late as February, 1915, when Linhoff substituted the $8,000 note of the old and defunct corporation for his own note held by his wife, he had not yet conceived the notion that the new corporation had assumed that debt; and by the fact that in answer to an inquiry of Marshall Field & Co., a creditor of the new corporation, for a statement of its financial condition, Linhoff sent them, in a letter dated July 31, 1915, a statement of the assets and liabilities of that corporation on February 1, 1915, which set forth its debts to the amount of $26,877.18, but did not set out as debts of the cor-

poration any of the claims of Moerschel or Mrs. Linhoff, which amounted to $50,000. The conclusion is that no assumption of the payment of these claims of Moerschel and Mrs. Linhoff by the bankrupt corporation was established by the evidence.

Was Mr. Moerschel entitled to the allowance of his claim to the amount of $12,404.40? This claim rests on the contention that this much of the $55,000 which Linhoff borrowed of Moerschel in cash and credit was borrowed by him and loaned by Moerschel to him for the purpose of paying, and was used to pay, the debts of the corporation existing on February 27, 1909, when Linhoff bought its stock of Messrs. Schultz, and that, as the old corporation received the benefit of that much of the money loaned to Linhoff, Moerschel can maintain a claim in equity against the bankrupt therefor under the decisions in Leonard v. State Exchange Bank, 236 Fed. 316, 319, 149 C. C. A. 448, 451, Cherry v. City Nat. Bank, 144 Fed. 587, 75 C. C. A. 343, and Flower v. Commercial Trust Co., 223 Fed. 318, 138 C. C. A. 580. If Linhoff had borrowed this $12,404.40 of Moerschel for the benefit of the old corporation with the knowledge of all the parties, and with the understanding of all the parties that this money should be used to pay the debts of that corporation, that Linhoff should give his notes for it but the old corporation should pay the debt, and if under such an arrangement the $12,404.40 had been used to pay the debt of the old corporation, it may be that this claim could have been sustained. But that was by no means the transaction. The transaction was the purchase by Linhoff of the shares of stock in the corporation from Messrs. Schultz for $55,000, and the borrowing of that $55,000 in cash and credit of Moerschel by Linhoff, and the payment by Linhoff of all of it to the Messrs. Schultz for the stock. It is true that in the negotiations for the purchase of the stock, and in the fixing of the purchase price, $55,000, Messrs. Schultz and Linhoff estimated the property of the corporation to be worth $50,000, added $5,000 for good will, making $55,000, when they knew the debts of the corporation were $12,404.40, and that after the trade was closed, and after the $35,000 had been paid, Messrs. Schultz paid, either with some of the money thus paid to them or out of their own funds, the $12,404.40 which the corporation owed.

It does not follow, however, from these facts, that the old corporation became indebted in equity to Moerschel for this $12,404.40, because all the money paid over to Messrs. Schultz became their money, and ceased to be either Linhoff's or Moerschel's, before any of the debts of the corporation were paid, and because those debts were paid by the Messrs. Schultz, and not by Linhoff or by Moerschel. If the corporation became indebted to any one on account of that payment, it was to the Messrs. Schultz, and not to Moerschel or Linhoff. The logical inference, however, from the facts proved, is that no indebtedness of the corporation to any one in law or in equity arose. The Messrs. Schultz controlled the corporation all the time while those debts were being paid. They owned its stock until they transferred it to Linhoff. They were morally, if not legally, liable for the debts of the corporation that had been incurred prior to that time, and it is evident that their purpose was not to create any liability of the cor-

poration, but to clear it of all debts and liabilities, so that there could never be any claim of the creditors of the corporation against them, either as officers or stockholders of the corporation on account of its obligations. To this end they fixed the price of their stock at the value of the assets of the corporation, regardless of its liabilities, received that price, and themselves paid all the existing liabilities, and the legal effect of the entire transaction was to leave the corporation free of all indebtedness either at law or in equity to Moerschel or Linhoff, or any other party. There is no equity in the claim of Moerschel for the $12,404.40, and it was rightly disallowed.

The order from which the appeal was taken must therefore be affirmed; and it is so ordered.

MARYLAND CASUALTY CO. v. FIRST NAT. BANK OF MONTGOMERY, ALA.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1917. Rehearing Denied January 12, 1918.)

No. 3146.

1. INSURANCE ⊂=508½—INDEMNITY INSURANCE—POLICY—CONSTRUCTION.
Defendant executed a bond reciting that, plaintiff desiring security on behalf of certain employés, defendant agreed in consideration of a premium that it would, after satisfactory proofs of loss, reimburse plaintiff for any and all loss of moneys, securities, or other personal property which plaintiff shall have sustained by reason of any acts of fraud, dishonesty, forgery, embezzlement, etc., of any employé. The term of the bond was from April 10, 1913, to January 10, 1914. Attached to the bond was a rider reciting that defendant agreed that claim might be made under the bond according to the terms and conditions thereof, for any loss or losses which plaintiff might during the period between January 10, 1907, and April 10, 1913, sustain on account of any employé specified in the schedule, provided that such employé should be named in the schedule attached to the bond of another surety company, and covered thereby on April 10, 1913; that defendant shall not be liable under its bonds for any loss or losses unless discovered after the expiration of the time within which claim can be made under the bond of such company; and that the aggregate liability of defendant on account of any employés shall in no event exceed the sums set opposite the names of such employés. The amount of defendant's liability for defalcations of a particular employé was $7,500. *Held* that, as the bond and rider bore different dates and it was obvious that the rider was intended to protect plaintiff on account of those defalcations not discovered within the period prescribed by the old bond after it changed surety companies, defendant was under such bond liable for defalcations occurring between January 10, 1907, and January 10, 1914, when the bond should expire, only to the amount of $7,500, and could not be subjected to liability for the amount of $7,500 for defalcations occurring prior to April 10, 1913, and for another similar sum for defalcations occurring thereafter.

2. INSURANCE ⊂=508½—INDEMNITY INSURANCE—POLICY—CONSTRUCTION.
In such case, the original bond was a term bond, and a renewal for a new premium for an additional term subjected defendant to liability to the amount of the principal sum for employés' defalcations during that term, notwithstanding it was already liable in that sum under the first bond for defalcations occurring during that period.

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3. INSURANCE ⟸430—INDEMNITY BONDS.
Where a bond insured a national banking association against losses sustained by reason of any act or acts of fraud, dishonesty, forgery, embezzlement, wrongful abstraction, or willful misapplication on the part of any of its employés (while in any position in the service of the employer and committed directly or through connivance with others), the association is entitled to recover for losses sustained in honoring checks drawn on the account of a bookkeeper, who obtained the honoring of his checks by representing that a check which he deposited to his account, drawn on another bank, was good, when in fact it was worthless; the bond not being limited to defalcations, etc., committed by employés while acting in their capacity as such.

4. INSURANCE ⟸540—INDEMNITY INSURANCE.
A bond insuring a national banking association against losses on account of the defalcation, embezzlement, etc., of its employés, provided that notice of any loss covered should be sent to the surety company by telegraph and by registered letter within 10 days after discovery, that an itemized statement of such loss should be filed with the company by the association within 90 days after date of notice, and that, if required, the association should produce for investigation all books, vouchers, and evidence in its possession. The bond insured against losses of money, securities, or other personal property. An individual bookkeeper embezzled funds, his peculations extending over a series of years, and he also caused the association loss by representing a check deposited to his individual account, drawn on another bank, was good, thus inducing the association to honor his checks. The books showing accounts of depositors were kept in loose-leaf ledgers, and after discovery of the bookkeeper's defalcations many of the leaves were found to be missing. The association, having notified the surety company of its loss, in detail described the loss resulting from the check transaction with the bookkeeper, and set out the exact amount claimed to have been lost during each year covered by the bond sued on. *Held* that, as the language of the bond is to be taken most strongly against the insurer and would have to be most explicit to warrant a conclusion that the association's statement of losses should be more particular than proof necessary to recovery, the itemized statement of losses must be deemed sufficient, particularly as the stipulations requiring the association to produce for investigation all books, vouchers, and evidence in its possession indicated the absence of an intention to require the association to state anything which without its fault it was impossible to ascertain.

In Error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Action by the First National Bank of Montgomery, Ala., against the Maryland Casualty Company. There was a judgment for plaintiff, and defendant brings error. Reversed, with directions that new trial be granted, unless plaintiff enter remittitur.

This was an action by the First National Bank of Montgomery, Ala., the defendant in error (which will be called the plaintiff), against the Maryland Casualty Company, the plaintiff in error (which will be called the defendant), based upon a bond, having a rider attached thereto, and a renewal receipt, which bond, rider, and renewal receipt were issued by the defendant to the plaintiff and are in words and figures as follows, except that so much of the schedules copied as refers to employés other than Mark Blakely Campbell is omitted:

Schedule Bond. Register No. ———.

Maryland Casualty Company, Baltimore.

Whereas, First National Bank, Montgomery, Alabama, hereinafter called the "Employer," desires security on behalf of certain persons hereinafter called "Employés."

Now, therefore, for and in consideration of a premium, payable in advance, based upon an annual rate per hundred dollars of suretyship, the Maryland Casualty Company, a corporation of Maryland, hereinafter called the "Company," hereby agrees that it will, within two (2) months after the receipt of satisfactory proofs of loss reimburse the Employer for any and all loss of money, securities or other personal property (including that for which the Employer may be responsible to others), which the Employer shall have sustained by reason of any act or acts of Fraud, Dishonesty, Forgery, Embezzlement, Wrongful Abstraction or Wilful Misapplication on the part of any Employé (while in any position in the service of the Employer and committed directly or through connivance with others) named in the Schedule hereto attached, or hereafter added to said Schedule by an Acceptance Notice executed by the Company.

Provided, that the Company's liability on behalf of any Employé shall in no event exceed the amount set opposite to the name of such Employé in the said Schedule or in the said

Acceptance Notice.

Provided, further, that as to Employés named in the Schedule the Company shall not be liable for any loss occurring before noon on the tenth day of April, 1913, and as to Employés subsequently added to said Schedule by said Acceptance Notices, the Company shall not be liable for loss occurring before noon on the date stated in the Acceptance Notices, and the liability of the Company shall immediately terminate as to subsequent acts of any Employé upon (a) the retirement of such Employé from the service of the Employer; (b) discovery by the Employer of any default hereunder by such Employé; or (c) the cancellation of this bond by the Employer or the Company as to any or all of said Employés.

This bond is executed upon the following express conditions:

1. That notice of any loss covered hereunder shall be sent by telegraph and by registered letter, both addressed to the Company, at its Home Office, Baltimore, Maryland, within ten (10) days after the discovery of such loss; that an itemized statement of such loss shall be filed with the Company by the Employer within ninety (90) days after the date of said notice of loss; and, if required by the Company, the Employer shall produce for investigation all books vouchers and evidence in the Employer's possession.

2. That the Company may at any time terminate its liability on behalf of any and every

Employé under this Bond by giving thirty (30) days' notice in writing to the Employer; and likewise the Employer may cause the termination of the Company's liability on behalf of any and every Employé by notice in writing to the Company at its Home Office in Baltimore City, specifying the date of cancellation. Upon the termination of the notice of cancellation, and provided no loss has been reported, the pro rata unearned portion of the premium shall be returned to the Employer.

3. That the Employer and the Company shall share any recovery (excluding insurance and reinsurance) made by either on account of any loss in the proportion that the amount of the loss borne by each bears to the total amount of the loss.

4. That should the Employer and the Company disagree regarding the amount of any claim made under this Bond, the amount may, at the election of the Employer or the Company be determined by arbitrators; one to be selected by the Employer, one to be selected by the Company, and a third (in the event of failure to agree upon the amount of the claim) by the two so selected; the written decision of the majority of said arbitrators shall be binding and conclusive as to the mount of such claim, and the total expense of such arbitration shall be paid by the Company.

In witness whereof, the Maryland Casualty Company has caused this Bond to be signed by its President and its Asst. Secretary, and its corporate seal to be hereunto affixed this 19th day of March, A. D. 1913.

Not valid unless countersigned by an authorized official or agent of the Company.

Robt. Ferguson, Asst. Secretary.

Countersigned at Montgomery, Alabama, this 19th day of March, A. D. 1913.

Thomas, Jackson & Wilcox, Agents.

Maryland Casualty Company, Baltimore.

Rider.

To be attached to Schedule Bond No. 34455, executed on the 19th day of March, A. D. 1913, by the Maryland Casualty Company, as surety (hereinafter called Company), in favor of the First National Bank, Montgomery, Ala. (hereinafter called Employer) on behalf of its Employés for the term continuous beginning the 10th day of April, A. D. 1913.

The Company does hereby agree that claim may be made under said bond, according to the terms and conditions thereof, for any loss or losses which the Employer may, during the period between the 10th day of January, A. D. 1907, and the 10th day of April, A. D. 1913, have sustained on account of any Employé named in the schedule attached to said Schedule Bond No. 34455, provided, however, that such Employé be also named in the schedule attached to the Bond of American Bonding Company of Baltimore, of Baltimore, Maryland, dated the 28th day of December, A. D. 1906, and covered thereby on the 10th day of April, A. D. 1913, that such loss or losses shall be covered by the terms of the bond of said American Bonding Company of Baltimore; that the Company shall not be liable under its said bond for any such loss or losses unless discovered after the expiration of the time within which claim can be made under the bond of said American Bonding

Company of Baltimore; and that the aggregate liability of the Company on account of any Employé shall in no event exceed the sum set opposite the name of such Employé in the schedule attached to said Schedule Bond No. 34455.

In testimony whereof, said Maryland Casualty Company has caused these presents to be signed by its President, attested by its Asst. Secretary, and its corporate seal to be hereto affixed, the 15th day of April, A. D. 1913.

Maryland Casualty Company.

By Jno. T. Stone, President.

Attest:

S. M. McClellan, Asst. Secretary.

Amount, $276,500.00 Premium, $518.41.

Fidelity Section, Bonding Department.

Maryland Casualty Company, Baltimore.

Schedule Bond No. 34455.

Schedule of Employés covered by attached Schedule Bond No. 34455 in favor of First National Bank, Montgomery, Alabama, for the year beginning April 10, 1913, and ending January 10, 1914.

Individual. Bond No.	Name and Position.	Location.	Amount.	Premium.
* * * * * * * * * *				
7 34462.	Mark Blakely Campbell, Bookkeeper	Montgomery, Ala.	$7,500.	$14.06.
* * * * * * * * * *				

Amount, $276,500.00. Premium, $691.25.

Fidelity Section, Bonding Department.

Maryland Casualty Company, Baltimore.

Schedule Bond No. 34455.

Schedule of Employés covered by attached Schedule Bond No. 34455 in favor of First National Bank, Montgomery, Ala., for the term beginning January 10, 1914.

Individual Bond No.	Name and Position.	Location.	Amount.	Premium.
* * * * * * * * * *				
34462	Mark Blakely Campbell, Bookkeeper.	Montgomery, Ala.	$7,500.	$18.75.
* * * * * * * * * *				

Montgomery Ala., January 10, 1914.

Received of First National Bank, Montgomery, Alabama, six hundred and ninety-one and 25/100—$691.25.

Renewal premium on Schedule Bond covering employés from January 10, 1914, to January 10, 1915. Maryland Casualty Company Bond No. 34455.

Thomas, Jackson & Wilcox, Agents.

Maryland Casualty Company.

By Geo. A. Thomas.

The action was for the recovery of the aggregate amount of $22,500 of funds of the plaintiff, which it was alleged said Campbell, while in the service of plaintiff as bookkeeper, by acts of dishonesty, appropriated to his own use. The only evidence offered in the trial was that introduced by the plaintiff. This evidence showed that, when the bond was delivered by the defendant to the plaintiff, it had the rider attached to it; that said Campbell was continuously an employé of the plaintiff

as a bookkeeper from prior to January 10, 1907, to November 14, 1914; that between the 10th day of January, 1907, and the 10th day of April, 1913, he, while in such service, dishonestly appropriated to his own use money of the plaintiff amounting to more than $7,500; that between April 10, 1913, and January 10, 1914, he so misappropriated money of the plaintiff amounting to $6,900.57; and that between January 10, 1914, and November 14, 1914, he so misappropriated money of the plaintiff amounting to $6,589.92, including in the last-mentioned sum the item of $1,200, reference to which is made in the opinion. At the conclusion of the evidence the court, at the request of the plaintiff, gave the following written charge to the jury:

If the jury believe the evidence in the case, they should find a verdict for the plaintiff, and assess its damages at the sum of $20,990.49, with interest thereon from April 20, 1915, to this date.

The sum stated in this charge is the aggregate of the several amounts last above stated. The action of the court in giving the charge just set out, and also other rulings which are referred to in the opinion, are duly presented for review.

Fred S. Ball, of Montgomery, Ala., for plaintiff in error.

Horace Stringfellow and B. P. Crum, both of Montgomery, Ala. (Steiner, Crum & Weil, of Montgomery, Ala., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge (after stating the facts as above). [1] The trial court decided that the instruments executed by the defendant made it liable to the extent of $7,500 for losses by the plaintiff caused by Campbell's misappropriations during the period between January 10, 1907, and April 10, 1913, those losses having been discovered after the expiration of the time within which claim could be made under the bond of the American Bonding Company of Baltimore, by which the fidelity of Campbell as bookkeeper had been insured; also to the extent of $7,500 more for losses similarly caused during the period beginning April 10, 1913, and ending January 10, 1914, these two dates being the ones stated in the schedule which was attached to the bond when it was delivered; and also to the extent of $7,500 for losses similarly caused during the period beginning January 10, 1914, the date of the renewal receipt and of the second schedule which was attached to the bond, and November 14, 1914, when Campbell ceased to be an employé of the plaintiff.

The fact that the bond and the rider attached to it bore different dates —the date of the former being March 19, 1913, and that of the latter being April 15, 1913—is some indication that the matter for which the rider made provision was the subject of negotiation and arrangement between the parties after the plaintiff had consented for the defendant to insure the fidelity of the former's employés and after the bond had been drawn, dated and signed, preparatory to delivery. The American Bonding Company's bond to the plaintiff, which became effective Jan-

uary 10, 1907, and renewal receipts successively attached to it, were in evidence. They show that the fidelity of Campbell as bookkeeper was insured thereby to the extent of $7,500. It is quite obvious that a purpose of the rider was to prevent the plaintiff's transfer of the fidelity insurance it carried from one insurer to another, having the effect of depriving it of protection it would have had if the change had not been made. Under the American Bonding Company's bond a claim could not be made for a loss not discovered within six months after the determination of the obligation of the bond or a renewal of it. So the rider had the effect of making the defendant liable for losses which occurred while the American Bonding Company's bond was in force, but were not discovered within six months after the transfer of the insurance to the defendant. The rider evidences the defendant's consent, given after it had signed and dated the bond, to be liable, without addition to the premium stated in the bond, for specified undiscovered losses which had been sustained before the bond and rider became effective; but it does not manifest a consent to double the amount of the liability incurred without increasing the premium charged. We think the clause of the rider which states the obligation it evidences would have meant the same thing if its language had been as follows:

"The company hereby agrees that claim may be made for any loss or losses which the employer may, during the period between the 10th day of January, 1907, and the 10th day of April, 1913, have sustained on account of any employé who is named also in the bond of American Bonding Company of Baltimore, Maryland, to the employer, dated December 28, 1906, and such loss or losses are covered by that bond on April 10, 1913, and shall be discovered after the expiration of the time within which claim can be made under the terms thereof: Provided that the aggregate liability of the company on account of any employé shall in no event exceed the sum set opposite the name of such employé in the schedule attached to said Schedule Bond No. 34455."

It is manifest that the concluding clause of that paragraph as it is found in the rider was a part of the proviso which qualified the previously expressed agreement of the defendant to be liable for losses which had occurred during a period not covered by the bond, and that it was not intended as a statement of the amount of such losses for which the defendant was to be liable. By the terms of the bond the defendant was not to be liable for any loss occurring before noon on the 10th day of April, 1913. The rider was added to make it liable for specified losses which had occurred prior to that date. The amount of liability incurred was stated in a part of the bond which the rider did not purport to affect. Instead of the rider manifesting an intention to increase that amount, we think the concluding clause of its contracing paragraph distinctly negatives the existence of such intention. The conclusion is that the expression "aggregate liability," as used in the rider, meant the liability created by the bond and the rider, taken together, and was not meant to be a statement of the amount of loss or losses insured against by the rider; the amount of insurance contracted for being a matter covered by a part of the bond which remained unmodified by the rider.

[2] The contract made by the delivery and acceptance of the policy with the rider attached stated in the body of it the date of the

commencement of the period within which the losses insured against must occur or have occurred. The policy recited that its consideration was "a premium, payable in advance, based upon an annual rate per hundred dollars of suretyship," and attached to and made a part of it was a schedule, which, so far as it is material in this case, is set out above. The language of that schedule, considered, as it must be, in connection with the body of the instrument of which it was a part, makes it plain that the fidelity of Campbell was for a period ending January 10, 1914, insured as provided in the body of the bond to the amount of $7,500, and that it was for that insurance that $14.06, the amount of the premium set opposite his name, was paid. The policy did not, either conditionally or unconditionally, entitle the insured to, nor obligate the insurer to grant, indemnity for any loss or losses occurring after January 10, 1914. The extent of the defendant's liability under its contract, which became effective on the 10th day of April, 1913, was, subject to a compliance with conditions stated, to pay specified losses, not exceeding the amounts stated, occurring during a period which ended on January 10, 1914. For subsequently occurring losses that contract made no provision whatever. Payment of previously incurred losses would be a complete satisfaction of the liability imposed upon the defendant by its original contract. That contract was what is known in the insurance business as a "term policy," under which the insurance contracted for covers only losses occurring before the expiration of the stated term. Further action of the parties, having the effect of creating a new contract, was required to make the defendant liable for any loss or losses occurring after January 10, 1914. Such further action, if taken, would not, in the absence of a stipulation to that effect, either increase or diminish the amount for which the insurer, under its original contract, had already become liable in consequence of losses incurred during the period covered by that contract, though such losses had not been discovered when a new contract was made having the effect of insuring against losses occurring in a later period. Florida Cent. & P. R. Co. v. American Surety Co., 99 Fed. 674, 41 C. C. A. 45; United States Fidelity & Guaranty Co. v. Williams, 96 Miss. 10, 49 South. 742; Commercial Bank v. American Bonding Co., 194 Mo. App. 224, 187 S. W. 99; Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473.

Rulings made in cases involving contracts which contained stipulations for renewals and such provisions as one stating that the named amount of insurance was to cover losses occurring during the continuance of the bond or any renewal thereof, or one stating that the liability of the insurer should not be cumulative, or one stating that the liability should not be for more than a stated sum, whether the loss occurred during the term of the policy or bond or a continuance thereof, or other similar provision, are not applicable to the facts of the instant case. As above indicated, the contract made by the bond with the rider attached made no provision for a renewal or extension of the liability it imposed and contained no provision similar to those just mentioned. The insurer was not acting under any obligation

imposed upon it by its original contract when, in consideration of the payment of a premium of $691.25, $18.75 of which amount was the premium for insuring the fidelity of said Campbell in the sum of $7,500, it insured the plaintiff for another term beginning January 10, 1914, as evidenced by its renewal receipt bearing that date and by a new schedule, which was attached to the original bond. The period covered by the bond before the rider was attached was three-fourths of a year. The period covered by the renewal receipt and the additional schedule was one year. The total amount of insurance was the same in both. The premium stated for the three-fourths of a year was in amount exactly three-fourths of the premium charged for insurance for the whole year. From these facts it fairly may be inferred that the charge for insurance against losses occurring after January 10, 1914, was exactly what it would have been if no contractual relation had existed between the parties prior to that date and the insurance against losses occurring after that date had been evidenced by an entirely new instrument. Nothing in the instruments evidencing the new contract indicated that the amount of insurance for which it provided was to be diminished or affected in any way as a result of the circumstance that under a previously existing contract between the parties there had been in force the same amount of insurance against similar losses occurring during a former period. The conclusion is that the effect of the bond and rider was to insure, to the extent of $7,500, Campbell's fidelity during a period ending January 10, 1914, and that the contract made by the renewal receipt and the attaching of a new schedule to the bond was one for the same, but an additional, amount of insurance against losses occurring during a period commencing January 10, 1914.

[3] It is insisted in behalf of the defendant that the court erred in ruling that an item of $1,200 was covered by the bond. On the 9th day of November, 1914, Campbell presented for deposit to the credit of his individual account as a depositor a $1,200 check drawn by him on another bank, and procured a credit on his account of the amount of that check by representing that it was good, when he knew that it was worthless. At the time this was done there were checks of Campbell on the defendant outstanding for greatly more than the amount of the credit balance shown on his account before the addition of the $1,200 item. When the $1,200 check was presented to the bank on which it was drawn, it was not paid; the amount then standing to the credit of Campbell in that bank being only $5.38. Before the defendant ascertained the worthlessness of the $1,200 check, it had paid the outstanding checks drawn by Campbell, amounting to $1,117. It is not open to question that the defendant's payment of such outstanding checks, under the circumstances stated, resulted in loss to it caused by the fraud or dishonesty of Campbell. The bond insures against losses "sustained by reason of any act or acts of fraud, dishonesty, forgery, embezzlement, wrongful abstraction, or willful misapplication on the part of any employé (while in any position in the service of the employer and committed directly or through connivance with others) named in the schedule hereto attached." Nothing in the terms of the contract con-

fines the losses insured against to such as resulted from acts of fraud, dishonesty, etc., committed by the employé while in the performance of service for which he was employed. The bond was drawn by the defendant, and its language is to be construed most strongly against it. The language used is broad enough to cover a loss due to the fraud or dishonesty of a named employé, though his misconduct was in a dealing between him and the employer not connected with the rendition of the service for which he was employed. But the amount of the loss due to the transaction in question was $1,081.25, not $1,200, as there was a balance of $35.75 standing to Campbell's credit when the $1,200 check was deposited.

[4] It is contended that the plaintiff was deprived of the right to recover for the losses alleged by its failure to comply with the requirement as to filing an itemized statement contained in the condition stated in the bond:

"That notice of any loss covered hereunder shall be sent by telegraph and by registered letter, both addressed to the company at its home office, Baltimore, Maryland, within ten days after the discovery of such loss; that an itemized statement of such loss shall be filed with the company by the employer within ninety days after the date of said notice of loss; and, if required by the company, the employer shall produce for investigation all books, vouchers and evidence in the employer's possession."

The bond insured against losses "of money, securities or other personal property." The quoted provision requiring an itemized statement contemplates an enumeration of the things claimed to have been lost. Where money is the only thing claimed to have been lost, it is not to be supposed that it was contemplated that the insured would be required to describe the money lost, or to state exactly when or how the act or acts of fraud, dishonesty, forgery, embezzlement, wrongful abstraction or willful misapplication on the part of the employé were committed. Within the time prescribed the plaintiff furnished to the defendant a detailed account of the loss resulting from the above-mentioned $1,200 check transaction, and also a statement showing the total amount of money claimed to have been lost in consequence of Campbell's fraud and dishonesty, and setting out the exact amount claimed to have been lost during each year covered by the contract sued on. The language of a provision requiring a statement by the insured to the insurer of the loss or losses claimed to have been sustained would have to be very explicit to warrant a conclusion that such requirement is not complied with, unless the statement discloses more than is necessary to be alleged and proved in a suit on the contract to recover for losses claimed to have been sustained, or in a prosecution of the employé for the criminal offense which his alleged misconduct involved. The evidence showed that the books kept by the plaintiff and remaining in its possession enabled it to ascertain the amount of such losses, and indicated that its inability to ascertain and state how the losses, other than that resulting from Campbell getting credit for the amount of the $1,200 check, were brought about, was due to Campbell's successful concealment of his defalcations and of the method of their accomplishment. During the entire period covered by the contracts sued on Campbell acted in the capacity of individual bookkeeper. He was in charge of books

showing the accounts of depositors with the plaintiff bank. These accounts were kept in loose-leaf ledgers. Leaves showing a number of such accounts were missing when the plaintiff's books were examined after the discovery of Campbell's defalcation. There was evidence to prove that shortly before that discovery Campbell at night took from the bank's storage room a large mass of papers. It was to be inferred that the papers so taken included those showing false entries the making and concealment of which enabled him to defraud his employer. The provision in the quoted stipulation that, "if required by the company, the employer shall produce for investigation all books, vouchers, and evidence in the employer's possession," evidences the absence of an intention to require the insured to state anything which, due to no fault of his, it is impossible for him to ascertain. The conclusion is that the evidence adduced sufficiently showed that, within the time prescribed, the plaintiff furnished such itemized statement of the loss claimed to have been sustained as was called for by the contract.

The court erred in ruling that the rider had the effect of adding $7,500 to the amount of loss caused by Campbell which was insured against, and in including in the amount for which a verdict was directed the sum of $1,200, instead of $1,081.25, as the loss occasioned by the above-mentioned $1,200 item. The result was that the principal amount awarded by the verdict and judgment was $7,013.32 more than the evidence warranted.

Because of the errors mentioned, the judgment is reversed, with direction that a new trial be granted unless the defendant in error shall, within 30 days after the filing in the District Court of the mandate of this court, enter a remittitur of $7,013.32 of the principal amount for which the judgment was rendered.

FOSTER, District Judge, concurs in the reversal of the judgment; but is of opinion that the instruments sued on did not make the plaintiff in error liable for more than $7,500.

CITIZENS' NAT. BANK OF STAMFORD, TEX., v. PIGG et al.

(Circuit Court of Appeals, Fifth Circuit. November 28, 1917. Rehearing Denied January 24, 1918.)

No. 3041.

1. BANKS AND BANKING ⟸152—CERTIFICATE OF DEPOSIT—WHAT CONSTITUTES.

Plaintiff and her husband had on deposit in a state bank a sum of money in excess of $15,000. On that date, in a conference between plaintiff and her husband and the cashier, it was agreed that $10,000 should be thereafter payable to plaintiff, whereupon an entry was made in one of the ordinary passbooks of the bank on the pages at the top of which were the words: "In account with ———, Avoca, Texas." "Avoca State Bank, Dr., in acc't with ———, Cr." At the left-hand side were the words, "April 1st, amount $10,000.00 described on following page," while on the opposite page were the words, "Amount at interest at the rate of 8 per cent. per annum interest payable monthly to the credit of" plaintiff,

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

and following which was a notation, "Interest paid April 1st," signed by the cashier without the addition of the word "cashier" after his name. Thereafter, the bank became financially embarrassed, and a special agent named by the Commissioner of Banking of Texas took possession, and as a result defendant agreed, in consideration of the delivery of the assets of such bank, to assume and pay all depositors the balances due them as shown by the books of such bank, also all unpaid certificates of deposit, cashiers' checks, etc. *Held* that, though the books of the bank did not show plaintiff's claim, yet the passbook, being signed by the bank and by the cashier, amounted to a certificate of deposit, and plaintiff was entitled to recover thereon against defendant.

2. BANKS AND BANKING ⊜154(4)—CERTIFICATE OF DEPOSIT—ACTION ON—PARTIES.
In such case, as defendant assumed the debt of the bank to plaintiff and took over the assets to which she had a right to look for payment under a contract made by a state officer for her credit, she was entitled to sue at law without the intervention of a trustee.

3. BANKS AND BANKING ⊜152—CERTIFICATES OF DEPOSIT.
In such case, the statement that the amount of $10,000 was at interest was sufficient to show a consideration for the obligation of the bank to pay it.

4. BANKS AND BANKING ⊜154(5)—CERTIFICATE OF DEPOSIT—ACTION ON—PLEADING.
In such case, as the certificate of deposit was signed by the bank, although the notation as to interest was signed by the cashier, liability was fixed by the signature of the bank, and no allegation was necessary to show that the cashier who did not add to his name the word "cashier" signed the interest notation in his official capacity.

5. BANKS AND BANKING ⊜113—CONTRACTS—IMPEACHMENT.
Where, a Texas state bank being in financial difficulties and in the charge of a special agent of the Commissioner of Banking, defendant, another state bank, entered into an agreement with the special agent to assume the liabilities of the embarrassed institution in consideration of the transfer of its assets, defendant cannot thereafter defeat an action by a creditor of the embarrassed bank on the ground that the special agent had no authority to make a contract; defendant not undertaking to return the assets and restore the embarrassed institution to its former condition.

6. BANKS AND BANKING ⊜82(7)—PRESUMPTION OF DEBTS—EVIDENCE.
In such case, evidence of subsequent agreements made between defendant and the directorate of the embarrassed institution are inadmissible to affect its liability to a creditor of the embarrassed institution.

7. BANKS AND BANKING ⊜154(7)—ACTIONS—EVIDENCE.
In such case, evidence of deeds of trust made by certain directors of the embarrassed bank to secure defendant in repayment of losses arising out of the transaction is admissible in an action by the holder of a certificate of deposit payment of which defendant assumed.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by Rada Pigg and another against the Citizens' National Bank of Stamford, Tex. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

W. M. Sleeper and Chas. A. Boynton, both of Waco, Tex., and J. W. Boynton, of Anson, Tex., for plaintiff in error.

A. H. Kirby, of Ft. Worth, Tex., E. T. Brooks and Stinson & Chambers, all of Anson, Tex., and J. M. Wagstaff, of Abilene, Tex., for defendants in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. The Avoca State Bank, financially involved, was in charge of a special agent named by the Commissioner of Banking of Texas. Pending negotiations with the Citizens' National Bank of Stamford, the commissioner wrote that:

"If the bank assuming your deposits will also assume payment of the outstanding bills payable of the Avoca State Bank, we will be willing to immediately surrender to the bank assuming this liability all available cash collections and all other assets of the bank."

Thereafter the Citizens' Bank, by its cashier, executed to H. E. Harland, the special agent, a receipt for described assets of the Avoca Bank, being all its assets, and obligated itself as follows:

"In consideration of the delivery of the assets mentioned above, the Citizens' National Bank of Stamford, Texas, does hereby assume and agree to pay all depositors the balance due them as shown by the books of the Avoca State Bank of Avoca, Texas (list attached as far as determined); also, all unpaid certificates of deposit, cashier's checks, outstanding drafts, and all other liabilities of the Avoca State Bank of Avoca, Texas."

[1] Antecedent to April 1, 1914, Mrs. Rada Pigg and her husband had on deposit with the Avoca State Bank a sum of money in excess of $15,000. On that date, at a conference between Mr. and Mrs. Pigg and H. H. Hall, who was cashier of the Avoca Bank, it was agreed that $10,000 of the amount should be thereafter payable to Mrs. Pigg. This agreement reached, the following entry was made in one of the ordinary passbooks of the Avoca State Bank, on pages at the top of which were the words "Avoca State Bank, in account with ———, Avoca, Texas": "Avoca State Bank, Dr., in acc't with ———, Cr." On the left-hand page were the words: "April 1st, amount $10,000.00 described on following page." On the opposite page were the words:

"Amount at interest at the rate of 8 per cent. per annum, interest payable monthly to the credit of Mrs. J. H. Pigg in the Avoca State Bank, Avoca, Texas. Interest paid to April 1st, 1914, H. H. Hall."

The language of this writing, together with an inspection of the original instrument, leads to the conclusion that the meaning is as if punctuated as follows:

"Amount at interest, at the rate of 8 per cent. per annum, interest payable monthly, to credit of Mrs. J. H. Pigg in the Avoca State Bank, Avoca, Texas."

In other words, the conclusion is that the statement was to the effect that the amount of $10,000, written on the preceding page, was an amount at interest to the credit of Mrs. J. H. Pigg, and that it was at interest at the rate of 8 per cent. per annum, payable monthly. It was not the interest payable monthly which was to the credit of Mrs. Pigg, but the $10,000 written on the preceding page. The interest was paid to that time and was thereafter in fact at the bank paid monthly for a number of months.

The writing was a statement of the Avoca State Bank, in a book of the kind ordinarily furnished by a bank to evidence deposits. The

name of the bank was written in the statement by a person authorized to sign it, and the whole constituted a written acknowledgment of an obligation due from the bank to Mrs. Pigg. The name "Avoca State Bank," if not in fact written at the end of the acknowledgment, had, written in the body of the instrument, the same effect.

It appears that this transaction was not shown on the books of the Avoca State Bank, and there is no evidence that the Citizens' National Bank knew anything of it. In terms, the Citizens' National Bank undertook to pay all depositors, "as shown by the books of the Avoca State Bank." It also undertook to pay all certificates of deposit, and to pay all other liabilities of the Avoca State Bank. The limitation as to what was "shown by the books" applies to depositors whose deposits would be evidenced alone by the books. A special provision is made with reference to certificates of deposit, and there is no requirement that they should be so shown. Neither is the provision as to other liabilities of the Avoca State Bank limited by what was "shown on the books." The writing has all the necessary elements of a certificate of deposit, and, as such, was immediately and directly under the terms of the contract executed by the Citizens' Bank.

[2] It is insisted that there were no contractual relations between Mrs. Pigg and the Citizens' Bank, that she could not sue, and that the matter was cognizable only in equity. The bank assumed the debt to Mrs. Pigg and took over the assets to which she had a right to look for payment under a contract made by a state officer for her benefit. She was entitled to sue without the intervention of a trustee and at law.

[3] It is insisted that no consideration for the obligation was alleged or shown. A statement that there is "an amount at interest" in a bank necessarily implies a receipt by the bank of the amount.

[4] It is insisted that the pleadings are insufficient to hold the bank upon the signature of H. H. Hall, who was cashier, but who did not indicate his official capacity in the writing. Liability is fixed by the signature of the bank, and no pleading was required, other than that filed.

[5] It is insisted that the special agent had no authority to make the contract with the bank; that the bank got no title to the assets and is not liable on its promise. The agent had the same authority as the commissioner. The limitations of the statute requiring an order of the court doubtless apply to compromises and sales, where less than the face of the obligations are received. In this case, in any event, no one who has a right to complain is questioning the validity of the transaction. The bank does not undertake to return the property received by it, and cannot restore the original condition. The Bank Commissioner is guilty of no misrepresentation or fraud, nor is Mrs. Pigg. The bank was doubtless mistaken as to the amount of obligations assumed by it, but it is to suffer from its mistake, rather than Mrs. Pigg, who is guilty of no character of wrong, and has not had the misfortune to make a mistake.

[6] Error is claimed in the refusal of the court to permit testimony to the effect that the Citizens' Bank, contemporaneously with the making of the contract, entered into an agreement with the directors of the Avoca Bank by which the Citizens' Bank was to receive the money on

hand and pay off the depositors, and that all other assets were to be turned over to the Avoca directors. This agreement could not have affected the rights of Mrs. Pigg under the contract made by the Banking Department for her benefit, and the evidence was properly excluded. The exclusion of a written agreement between the directors of the two banks, dated October 31, 1914, and limiting liability to deposits "shown by the books" on a given date, and of evidence indicating that the Citizens' Bank had no knowledge of the Pigg certificate, was proper for the same reason.

[7] Complaint is also made of the action of the court in permitting evidence of deeds of trust by certain Avoca Bank directors to the Citizens' Bank, to secure the bank in the repayment of losses for the transactions hereinbefore considered. The acceptance of instruments as drawn were substantially acknowledgments of liability by the Citizens' Bank on the contract with the special agent.

No error has been found.

The judgment is affirmed.

NORTHERN CENTRAL COAL CO. v. BARROWMAN.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4662.

1. MASTER AND SERVANT ⟸278(10), 280, 281(3)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for the death of an electrician employed in a mine and killed by the fall of the cage in the hoisting shaft up the side of which he was making his way, evidence *held* to warrant a finding that the master was negligent and the electrician was not negligent and did not assume the risk.

2. MASTER AND SERVANT ⟸124(1)—INJURIES TO SERVANT—NEGLIGENCE.

The duty of an employer towards employés is not discharged by merely furnishing suitable machinery and appliances in the beginning, but comprises a continued oversight and inspection to keep them so; hence a mining company, though the brake shoes which it supplied to control the operation of cages in the hoisting shafts had originally been sufficient, is negligent where it allowed the use of the brake shoes after they had so worn as to be insufficient.

3. MASTER AND SERVANT ⟸270(10)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for the death of an electrician employed in a mine, who was killed by the fall of a cage in the hoisting shaft up the side of which he was climbing to reach an air shaft, where he was going to make a necessary change in electric cables, it was contended that the removal of timbers from another cage which counterbalanced the one that fell and so lightened the other cage that the brakes failed to hold the one that fell, was not permitted until it was believed the electrician was in place of safety and had finished working on the electric cables in the air shaft, during which work he used the cages for assent and descent. *Held*, that evidence that the falling cage struck others working at the bottom of the shaft was admissible to show that no particular care was exercised for the electrician.

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

4. MASTER AND SERVANT ⊂=241—INJURIES TO SERVANT—NEGLIGENCE.
Where the two cages in the two shafts of a mine counterbalanced one another, an employé who in the discharge of his duties proceeded to climb up the side of the shaft under one of the cages, which was elevated while timbers were being removed from the other cage cannot be deemed negligent, the brakes being set to prevent movement of the cages, where the difference of the weight of the two cages caused by the removal of timbers from one of them was not much greater, if at all, than would be reasonably expected in the customary movement of miners and the hoisting of coal, which movements were controlled by the brakes.

5. MASTER AND SERVANT ⊂=205(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.
An employé has a right to presume that his employer has performed his primary duty with respect to machinery and appliances, and does not assume risks which by the exercise of ordinary care he might have ascertained.

6. TRIAL ⊂=260(1)—INSTRUCTIONS—REFUSAL.
Refusal of instructions covered by the general charge is not error.

7. TRIAL ⊂=240—INSTRUCTIONS—REFUSAL.
Argumentative charges are properly refused.

8. TRIAL ⊂=234(2), 244(2)—INSTRUCTIONS—REFUSAL.
Instructions giving undue prominence to some features of the evidence or predicated on an erroneous statement of the evidence are properly refused.

9. APPEAL AND ERROR ⊂=110, 724(3)—REVIEW—MATTERS REVIEWABLE.
The denial of a motion for new trial and the overruling of a motion in arrest cannot be assigned as error, nor is a general assignment that, upon pleadings, evidence, and record, verdict should have been for plaintiff in error available.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Anna Barrowman against the Northern Central Coal Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Charles H. Elgin, of Centerville, Iowa (C. F. Howell, Howell, Elgin & Howell, all of Centerville, Iowa, and Hunter & Chamier, of Moberly, Iowa, on the brief), for plaintiff in error.

W. M. Bowker, of Nevada, Mo. (Hamp Rothwell, of St. Louis, Mo., and Sheppard & Sheppard, of Poplar Bluff, Mo., on the brief), for defendant in error.

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

HOOK, Circuit Judge. The Northern Central Coal Company complains of a verdict and judgment in favor of Mrs. Barrowman in an action brought by her for the negligent killing of her husband in its mine in Randolph County, Missouri. The deceased was in the service of the defendant company as an electrician and motor operator, and was killed by the fall of a cage in a hoisting shaft. The negligence charged was, among other things, in the use of a defective brake designed to control the movement of the cable on which the cage was suspended. The defenses were a general denial and the deceased's negligence and assumption of risk.

The shaft at the mine was divided by partitions into three parts called the north shaft, the south shaft, and the air shaft. Cages were operated in the first two shafts for the workmen and materials and the hoisting of coal. In the air shaft there was an electric cable supplying power to a motor that ran in the entries below. Wire cables, one attached to each cage, extended to wheels or pulleys above the mouth of the shafts and thence at a tangent to a drum in the engine house about 40 feet distant. These two cables were arranged inversely on the drum in the engine house so that when it revolved one cable was wound up and the other was unwound, with the result that when one cage came up the other went down in the shaft. The revolution of the drum was controlled by a brake actuated by a lever. The brake consisted of a metallic casting equipped on the inner or friction side with wooden brake shoes which by use of the lever were clamped in an encircling way about the drum to retard or stop its motion. The revolution of the drum could also be controlled by direct application of the steam. There was a turnbuckle designed to take up the wear of the wooden brake shoes so they would continue to engage the drum. When one of the cages rested on the surface at the mouth of the shaft the other would be about 25 feet from the bottom. Their weights, unloaded, substantially balanced.

The accident occurred on a Sabbath. Mining operations had been suspended, and the day was devoted to various repairs for their resumption the following day. The heavy framework of the south cage was to be replaced; the sump at the bottom of the shafts was to be cleared of water and the fragments of coal that had fallen there; and the electric cable in the air shaft was to be repaired and the motor and operating electric current tested. Different men were delegated to these several tasks, the last one being the duty of the deceased and a helper. Certain parts of the tasks were being done at the same time. In repairing the electric cable the deceased used the cages in the hoisting shafts for descent and ascent, and it was not until he was through with that part of his work, as he thought and so reported, that the south cage was placed at the surface and the men went to work upon it. This left the other cage hanging in the north shaft about 25 feet from the bottom. The testing of the motor and the electric current would ordinarily have kept deceased in an entry quite a distance from the bottom of the shafts, but he found that in splicing the electric cable in the air shaft it had been shortened too much so he went to the north shaft and was in the act of climbing up the side to get into the air shaft when the south cage at the surface, from which about three-fourths of the weight in timber had been taken, suddenly went up and the cage above him plunged down and killed him. One if not both of the two men working in the sump were also struck.

[1, 2] Though the record of the trial is not voluminous there are 58 assignments of error, almost all of which are argued with equal emphasis. In the first place it is urged that there was not sufficient evidence of defendant's negligence; that the evidence showed the deceased himself was negligent in going under the suspended cage;

and that he knew enough of the machinery and its operation and the work then being done at the mine to charge him with assumption of the risk. There was ample evidence sustaining the verdict against the defendant on all those points. The jury were fully justified in finding that the accident was caused by the negligent use of insufficient brake shoes. They had been allowed to wear down from an original thickness of about four inches to an inch or less in places, a wear too great to be taken up by the turnbuckle, and there was evidence that immediately after the accident an attempt to use them showed their insufficiency. When the accident occurred the engineer was not in the engine room, and steam was not being applied to hold the drum. Reliance was had wholly upon the setting of the lever and the brake. The duty of an employer is not discharged by merely furnishing suitable machinery and appliances in the beginning, but comprises also a continued oversight and inspection to keep them so.

[3] Much is made in argument of the testimony of defendant's witnesses, particularly that of the mine foreman, but it conveys the impression of an ingenious attempt to adjust what occurred to an assumed but nonexistent thoughtfulness for the safety of the deceased. For example, it is said that the removal of the timbers of the south cage was not begun until it was believed the deceased was back in the entry in a place of safety. But it is just as credible, if not more so, that no such consideration was given the deceased. While working on the electric cable he was using the cages, and until he was through, one of them could not well be placed at the surface for repairs. Again, as bearing on the contention mentioned, it may be recalled that the fall of the cage endangered the lives of the men working in the sump beneath it and known to be there. Anticipating the effect of this upon the jury, counsel for defendant asked an instruction that a belief on their part of negligence towards others (the men in the sump) should "not be given the slightest weight in determining as to whether the company was guilty of negligence toward the deceased Barrowman." The instruction was rightly denied. The evidence as to the men in the sump tended at least to show that the claim at the trial of a selective, discriminating care for the deceased was an afterthought.

[4] It is said the deceased was negligent in quitting his place of safety and going under the suspended cage when he knew work was being done upon the other cage at the surface. There was evidence that in the performance of his duty he had to go back to the electric cable in the air shaft, that the latter had been closed some distance from the bottom by boards nailed across, and also held down by refuse, and that the only way of access was up the hoisting shaft to a point above the closing. It is true he knew of the cage above him and of the timbers being removed from the other cage, but that did not signify a condition of danger if the machinery and appliances for holding them were in order as he had a right to assume them to be. The difference in the weight of the two cages caused by the removal of structural timbers from one of them was not much greater, if at all, than would reasonably be expected in the customary movement of

miners and hoisting of coal. If the holding appliances in the engine room were sufficient for the latter, there was nothing in the removal of the timbers to advise the deceased of a danger. The duty as to the sufficiency of such appliances was upon the defendant, not upon the deceased. Again, defendant seeks to charge the deceased with that care for self-protection which ordinarily keeps workmen from beneath a cage that is being repaired. But that is because of the danger of falling tools and materials. The cage that fell upon him was not being repaired, and no such danger threatened him.

[5] Instructions were asked that deceased assumed the risk if he could have known of the danger by exercise of ordinary care. We have frequently held that an employé is under no such obligation, but has a right to assume that his employer has performed his primary duty with respect to the machinery and appliances. That is also the rule of the Supreme Court. Gila Valley, etc., R. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521.

[6-8] Some instructions asked were sufficiently covered by the general charge; others were argumentative. Some gave undue prominence to certain features of the evidence. "Singling out a single matter and emphasizing it by special instruction as often tends to mislead as to guide a jury." Perovich v. United States, 205 U. S. 86, 92, 27 Sup. Ct. 456, 51 L. Ed. 722. Others were predicated upon incomplete or erroneous statements of the evidence including reasonable inferences.

[9] Several of the instructions asked and refused were directed to the denial of a motion for a new trial, one to the overruling of a motion in arrest of judgment, and one states generally that upon the pleadings, evidence, and record the verdict should have been for the defendant. Such grounds are not properly assignable under the federal practice. It is not necessary to review the other assignments in detail. We think the verdict was for the right party, and that nothing occurred in the trial court erroneously prejudicing the defendant.

The judgment is affirmed.

GARANFLO v. UNITED STATES.*

DUNCAN v. SAME.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1917.)

Nos. 4777, 4778.

1. CRIMINAL LAW ⟨⟹1169(2)—REVIEW ON APPEAL—HARMLESS ERROR.
The admission of evidence is not ground for reversal in a criminal case, where the same facts were afterwards shown by defendant's testimony.

2. BANKS AND BANKING ⟨⟹257(3)—PROSECUTION—EVIDENCE OF INTENT.
In a prosecution for willful misapplication of the funds of a national bank by defendants, who were its managing officers, evidence was admissible to show that in their reports to the directors defendants did not

⟨⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied March 26, 1918.

mention a large overdraft by a corporation of which they were the principal stockholders.

3. BANKS AND BANKING ⟸257(3)—TRIAL—RECEPTION OF EVIDENCE.
Rulings on the admission of evidence on the trial for misapplication of funds of national bank *held* not erroneous.

In Error to the District Court of the United States for the Eastern District of Arkansas; F. A. Youmans, Judge.

Criminal prosecution against William H. Garanflo and Robert D. Duncan. Judgment of conviction, and defendants severally bring error. Affirmed.

George W. Murphy, of Little Rock, Ark. (M. J. Manning, George W. Emerson, Wallace Townsend, and E. L. McHaney, all of Little Rock, Ark., on the brief), for plaintiffs in error.

W. H. Martin, U. S. Atty., of Hot Springs, Ark. (W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark., on the brief), for the United States.

Before HOOK, SMITH, and STONE, Circuit Judges.

SMITH, Circuit Judge. The plaintiffs in error were jointly indicted in the District Court of the United States for the Eastern District of Arkansas. There were six counts in the indictment. The first five charged each of the defendants with the willful misapplication of the money, funds, and credits of the State National Bank of Little Rock, in violation of Revised Statutes, § 5209 (U. S. Compiled Statutes 1916, § 9772). The sixth count charged them with conspiring to misapply the money, funds, and credits of the said State National Bank under Criminal Code, § 37 (U. S. Compiled Statutes 1916, vol. 10, § 10201, p. 12552). They were tried to a jury, who found them both guilty on all six counts, and upon the verdict of the jury they were each sentenced to six years in the Atlanta Penitentiary upon each of the first five counts and to two years in the same penitentiary upon the sixth count, all of the sentences to run concurrently in point of time. They sued out separate writs of error to this court. They will be styled as defendants in the further consideration of this case.

In view of the concurrent character of the sentences upon the first five counts, if the case is affirmed on any one of them, the sentence will have to stand. Evans v. United States, 153 U. S. 584, 595, 14 Sup. Ct. 934, 38 L. Ed. 830. As, however, the questions raised upon the appeal are common to all the counts, the case must be either affirmed or reversed upon them all. No objection was ever made to the indictment, or to any count thereof, and there is no criticism of any of the instructions given; but all objections are to the rulings on evidence and the refusal of the instructions asked.

In 1902 the State National Bank of Little Rock was organized. It had at all times material here a capital of $500,000 and a surplus of $45,000. The defendant William H. Garanflo was president, and the defendant Robert D. Duncan was its vice president and cashier. The bank closed its doors and went into voluntary liquidation June 19, 1914.

On February 17, 1915 the Comptroller of the Currency appointed Gen. Lloyd England receiver of the bank.

In 1907 there was organized under the state laws of Arkansas the R. D. Duncan Investment Company. Its name was changed to the State Investment & Trust Company. It bore this new name for a year or such a matter, when its name was again changed to the State Trust Company. These two defendants were the principal holders of the stock in that company, and owned together $29,000 of the $50,000 of its capital stock. Defendant R. D. Duncan was president of this company, and defendant W. H. Garanflo was its vice president. This company had its offices in the State National Bank building. The first five counts of the indictment charge the willful misapplication of the funds of the bank, by the turning over by the defendants of the money and credits of the State National Bank to the State Trust Company in the aggregate of between $81,000 and $82,000.

In its charge to the jury the court said:

"To constitute the crime of willful misapplication it is necessary, not only that there should be a conversion of the moneys, funds, or credits of the bank, to some one other than the bank, but it must also appear that the conversion was made with the intent at the time to injure or defraud the bank."

With the question of fraud thus in the case on the first five counts, and with the sixth count based upon conspiracy, it is not to be wondered at that the plaintiffs in error in their argument say:

"While a wide range is allowed in the introduction of evidence and the examination of witnesses in cases like these, it does not go to the extent of authorizing the admission of testimony which merely tends to facilitate conviction by arousing in the minds of the jury a feeling of prejudice against the accused."

Bearing in mind that a wide range is allowed in the introduction of evidence in such cases, we now turn to the various questions made upon the admissibility of evidence. Plaintiffs in error say in their brief:

"There was not and is not any dispute about the issuing of the drafts and the transfers of credit charged in the first, second, third, fourth, and fifth counts of the indictment. They were clearly proved by the government's witnesses, the bank examiners, and were also testified to by both defendants. The only question about them relates to willfulness and intent."

The North Arkansas Land & Timber Company, a local corporation in which the defendant Duncan was interested, bought 8,400 acres of land at $6 per acre, a total investment of $50,400. With this as its sole assets, it issued its bonds in the sum of $80,000 and stock in the sum of $150,000. Up to the time of the trial no portion of the interest on these bonds had even been paid. This land company had borrowed $48,000 from the State National Bank, through the State Trust Company. The State Trust Company had bought $200,000 of the stock of the State National Bank at $240,000. It borrowed $20,000 to make the first payment of the State National Bank, and gave its note for $220,000 to the Bankers' Trust Company of St. Louis, of which it bought the stock. A few days after the failure of the State

National Bank, the State Trust Company went into the hands of a receiver. It is perhaps only just to say that Mr. Duncan claims this was due to the failure of the State National Bank, the enormous decline of its stock, and the financial difficulties of the Bankers' Trust Company in St. Louis, and its refusal to renew the remaining notes of the State Trust Company given for the stock in the State National Bank.

That in general the State National Bank was defectively managed is perhaps best shown by the fact that early in 1914 its directors were compelled to take out securities which were not regarded as good by the representative of the Comptroller of the Currency to the amount of $210,000, and, when the bank had thus been helped by the retirement of the worst of the paper held by it, it failed in June, 1914. Before its failure, from various causes, there had been great withdrawals of deposits. The claims filed against it were about $850,000. It should have had the amount of assets to pay this, and to pay its capital of $500,000 and its surplus of $45,000, or about $1,395,000. Two years after its failure it had paid 20 per cent. upon the claims filed, or less than 12 per cent. of what its assets should have been. The government showed that, aside from the State Trust Company indebtedness, Duncan's direct and indirect liability to the bank when it failed was about $103,000, and Garanflo's indebtedness of the same character was about $58,000, and the balance of assets, aside from the liability of the stockholders, was not sufficient to meet the obligations to the depositors. The evidence tends to show that the ultimate deficit in the payment of depositors will exceed $300,000. If to this be added the $500,000 of capital, the $45,000 of surplus, and the more than $200,000 paid in to take up the worst of the bank paper by the directors, it is manifest that the bank had lost more than $1,000,000 under the management of the two defendants.

Bearing now in mind that the sole questions in the case are "willfulness and intent" and our holdings in Withaup v. United States, 62 C. C. A. 328, 127 Fed. 530, Olson v. United States, 67 C. C. A. 21, 133 Fed. 849, Exchange Bank v. Moss, 79 C. C. A. 278, 149 Fed. 340, Thomas v. United States, 84 C. C. A. 477, 156 Fed. 897, Colt v. United States, 111 C. C. A. 205, 190 Fed. 305, Schultz v. United States, 118 C. C. A. 420, 200 Fed. 234, Trent v. United States, 143 C. C. A. 170, 228 Fed. 648, Kinser v. United States, 146 C. C. A. 52, 231 Fed. 856, and Samuels v. United States, 146 C. C. A. 494, 232 Fed. 536, Ann. Cas. 1917A, 711, all the specifications of error not hereafter specially considered seem to us to be disposed of adversely to the plaintiffs in error.

[1] Gen. Lloyd England, receiver of the bank, was on the witness stand and was asked:

"Q. Have you assessed the stockholders as the federal laws provide with national banks?

"Judge Manning: We object to the testimony as to the assessments by the Comptroller, as irrelevant and incompetent, or any other testimony that has been introduced along that line.

"Court: The objection is overruled.

"Judge Manning: We except.

"A. The Comptroller of the Currency has assessed them. Q. Leaving out of consideration the amount received from the assessment, what could have been realized from the assets of the bank proper? (Objected to by the defendants upon the ground that the same was incompetent and irrelevant, which objection was by the court overruled, and the defendants, at the time, each duly and severally excepted.) A. The estimate made based on which the assessment was made was $525,000. Q. Or about 65 per cent. of the amount of the deposits? (Objected to by the defendants upon the ground that the same was incompetent and irrelevant, which objection was by the court overruled, and the defendants, at the time, each duly and severally excepted.) A. Yes."

It is objected in this court that this was not the best evidence. No such objection was made in the court below.

Mr. Duncan, when on the stand, was asked:

"Q. You would think it [the stock in the State National Bank] was as good as Arkansas and Arizona, wouldn't you, even now?"

Thereupon Mr. Duncan voluntarily and without objection on behalf of either defendant said:

"No; I don't think so, because the bank stock has been assessed."

It is probable there was no error, but in any event the proper objection was not made, and the voluntary statement of the defendant Duncan showed substantially the same facts.

[2] Robert Neill, who was a national bank examiner in 1913, testified he was present at a director's meeting of the State National Bank, and both of the defendants were also present, and that two members of the board, one of whom was Mr. H. H. Foster, the other he could not recall, said that that was the first knowledge he had of the existence of the overdraft of $77,000 of the State Trust Company. The statement was made by Mr. Foster:

"That in the condensed statements, which were read to the directors at their meetings, this had never been called to their attention; that this overdraft of the State Trust Company existed."

If Mr. Neill's statement was untrue, both the defendants and all the other directors could have denied it. If it was true, and Mr. Foster, with or without another director, joined in the statement in the presence of the defendants and all the other directors, and they none of them dissented, the jury had a right to say they all acquiesced in its truth. This evidence was clearly admissible on the question of whether the directors knew that such credit was being extended to the State Trust Company, and its extent.

[3] Mr. John E. Coates was a director in the State National Bank and a witness for the defendants. On cross-examination he was asked:

"Q. How much are you indebted to the bank now, Mr. Coates? A. $9,750, secured."

It was manifestly admissible for the government to show on cross-examination of defendant's witnesses, if it could, that they had been parties to the loose management of the bank, as showing their interest

in defending the management and as affecting their credibility. There was no error in this.

During the examination in chief of the defendant Duncan the following took place:

"Q. State what, in your opinion, was the solvency, or the value of the note, of the North Arkansas Land & Timber Company? A. We regarded it good. Q. I will ask you about the North Arkansas Land & Timber Company. Had you been furnished with estimates of the value of its holdings? A. Yes. Q. What is that book, Mr. Duncan (handing a certain book to the witness)? A. This book is a blueprint book of cruise of timber land, made by J. P. Brayton, of Chicago, of the property of the North Arkansas Land & Timber Company. Q. What does that report show as to the amount of timber held by the North Arkansas Land & Timber Company?

"District Attorney Martin: We object to it, your honor.

"Court: On what ground do you think that is competent?

"Mr. Townsend: The only ground upon which it is competent is this: It just gives the basis that Mr. Duncan had for his opinion in considering the North Arkansas Land & Timber Company good. It is a report made by a reporter.

"Court: That is secondary evidence. Now Mr. Duncan— It would be proper for him to state the investigation he made and where he sought information. I don't think that that particular report is competent.

"Mr. Townsend: We desire to save an exception.

"Court: He may testify to the fact that he made an investigation, and as to what his belief was from that investigation—his opinion—but the report itself would not be competent testimony, because that is made by some one who is not a witness, who doesn't identify it himself, who is not sworn.

"Q. I will ask you, Mr. Duncan, if you made any investigation, or any effort, to find out the value of the holdings of the North Arkansas Land & Timber Company? A. Yes, sir; I employed J. P. Brayton, a well-known timber estimator of Chicago, to cruise the property for me, and paid him a fee of $552 for doing so, and got his regular report. Q. Based on his report, but not the report itself, what was your opinion of the value of the timber holdings of the North Arkansas Land & Timber Company? A. Based upon his official report to me, I estimated the timber on said land to be worth—

"District Attorney Martin: He is doing there indirectly what the court says he may not do; he can't give the estimate of the timber from what some one else gave him, or told him.

"Court: He can give the value from the investigation he made.

"District Attorney Martin: He can't say, 'Based on such report, I am of the opinion there was so much timber there.'

"Court: It couldn't be based on anything else from his testimony; he states the manner in which he sought the information. Now, that will go to the jury for what it is worth. It goes to the question of the intent of the defendant in the transactions that he had with the bank in using this particular stock or bonds, or whatever they were, as collateral. You may answer.

"Witness: Based upon the report furnished me, the value of the timber on said land, was $122,047; the value of 6,400 acres of the land was $32,000; making a total valuation of $154,047. The cruise is of 8,800 acres of land, but 400 of it we had no fee-simple title to; about 8,400 acres of land, 6,400 tillable land estimated. Q. Did you, or not, believe that this property was actually worth this amount? A. Yes."

On cross-examination the following took place:

"Q. Did you consider the North Arkansas Land & Timber Company good for that? A. I considered it good for all of its debts, and if the property is sold to-day for its worth it will pay all it owes. Q. Although it has 8,000 acres of land mortgaged for twice what it cost, and no income, and yet you consider it is good for a loan? A. It was estimated by Chicago estimators to be worth $150,000."

It thus appears the defendant was allowed to testify fully as to what he thought the timber and land were worth, basing his opinion upon the report of Mr. Brayton, but he was not allowed to offer the unsworn statement of the to the court and jury unknown party, Brayton, as direct evidence upon the value. The ruling was so manifestly correct that it requires no further consideration.

Error is assigned upon the failure to direct a verdict for defendants, as asked by them at the close of all the evidence. We have read every word of the evidence as preserved in the record, and find that there was so much evidence of the willfulness and unlawful intent of the defendants that the ruling of the court was correct.

The defendants excepted to the refusal to give each of the five instructions asked. Having read with great care the clear and impartial charge given by the court, we find that every element of the charge as asked, so far as accurate and correct, was given by the court in its instructions.

No error is made to appear, and the judgments as to both defendants are affirmed.

UNION PAC. R. CO. v. MARONE.

(Circuit Court of Appeals, Eighth Circuit. October 26, 1917.)

No. 4883.

1. COURTS ⟸372(3)—PRECEDENTS—DECISIONS OF STATE COURT.
   The liability of a master for personal injuries of his servant is a question of general law; and, in the absence of state statute, it is not governed in the federal courts by decisions of state courts, but by the common law and rules of decision of the Supreme Court and other federal courts.

2. NEGLIGENCE ⟸1—WHAT CONSTITUTES.
   Negligence is a breach of duty, and where there is no duty or no breach, there is no negligence.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

3. MASTER AND SERVANT ⟸101, 102(8). 236(1)—INJURIES TO SERVANT—DUTIES OF MASTER AND SERVANT—PROVISION AND OPERATION.
   The duty of a master is one of provision, while that of a servant is one of operation, it is the duty of the master to exercise reasonable care to provide a reasonably safe place in which, and reasonably safe machinery or appliances with which, the servants may do the work assigned to them, and it is the duty of the servant to exercise reasonable care so to use the place, machinery, and appliances furnished and so to conduct the operations intrusted to him as to protect himself from risk, danger, and injury, and neither the master nor the servant is liable for a breach of the other's duty.

4. MASTER AND SERVANT ⟸177, 227(1)—INJURIES TO SERVANT—NONLIABILITY OF MASTER—SERVANT'S NEGLIGENCE OF OPERATION.
   Where the place in which a servant is required to work, or the machinery or appliances with which he is required to work, or the method of doing the work, becomes dangerous, and results in injury only because of the negligence of the injured servant, or of his fellow servants, the master is not liable.

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5. MASTER AND SERVANT ⊂=191(1)—INJURIES TO SERVANT—"FELLOW SERVANTS"—"COMMON SERVICE."

All who enter into the service of a common master except those who become heads of and vested with absolute control of separate departments or branches of a great and diversified business thereby become engaged in a common service, and are fellow servants in all they do except that which they do in discharge of the master's nondelegable duty of provision.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Common Service; First and Second Series, Fellow Servant.]

6. MASTER AND SERVANT ⊂=216(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

In the absence of statutory provision to the contrary, each servant by accepting his employment voluntarily assumes the risk and danger of the negligence of his fellow servants in the discharge of their duty of operation, whether those duties are of superintendence and direction, or those of equal or subordinate service.

7. MASTER AND SERVANT ⊂=203(1, 3)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant assumes the ordinary risks and dangers of his employment, and the extraordinary risks and dangers which he knows and appreciates.

8. MASTER AND SERVANT ⊂=222(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Neither the order of a vice principal to a servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant's safety, nor the servant's fear of losing his job will relieve the servant from his assumption of risk and danger, where they were readily observable and were known and appreciated by him, unless the vice principal makes a promise to remove them.

9. MASTER AND SERVANT ⊂=243(1)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.

Plaintiff, a section man, while assisting in the cutting of a rail with a sledge hammer and chisel, was injured by a piece of steel, which was chipped off and driven into his eye. A rule of the railroad company declared that goggles provided for that purpose should be worn when cutting rails with a track chisel, and such goggles were in the toolhouse when the accident occurred. A short time before the accident, while cutting other rails, a piece of steel chipped off and struck plaintiff on the wrist. On the day of the accident plaintiff told his foreman that he wanted something to protect his eyes, but the foreman replied, "Go on; that is all right; we never use them;" and plaintiff, fearing to lose his job, did as he was directed. *Held*, that the railroad company, having made its order and furnished goggles, was not negligent.

10. MASTER AND SERVANT ⊂=189(3)—INJURIES TO SERVANT—"FELLOW SERVANTS."

In such case, as the work of cutting the rails was merely one of operation, the foreman was plaintiff's fellow servant for whose negligence the railroad company was not liable.

11. MASTER AND SERVANT ⊂=219(15)—INJURIES TO SERVANT—VICE PRINCIPAL—NEGLIGENCE.

In such case, as the danger was obvious to plaintiff, having been brought to his attention by the previous chip of steel which struck him in the wrist, he assumed the risk, and the company was not liable, though the section foreman be treated as a vice principal.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by Michael Marone against the Union Pacific Railroad Com-

pany. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

A. G. Ellick, of Omaha, Neb. (Edson Rich, of Omaha, Neb., on the brief), for plaintiff in error.

William F. Gurley and David A. Fitch, both of Omaha, Neb., for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff below, Mr. Marone, recovered a judgment against his master, Union Pacific Railroad Company, for an injury to his eye, which he claimed was caused by the negligence of the company, and the company insists that the trial court erred, in that it failed to direct a verdict in its favor at the close of the trial. These were the facts: Marone was and had been for some time working for the company as a section man under John Anderson, the foreman of his gang. The company had made and put in force a rule that, "When cutting rails with a track chisel, those doing this work must wear goggles provided for that purpose," and had provided suitable goggles, and they were in the toolhouse at Omaha where the accident happened. The company had also provided suitable saws with which to cut rails. There was testimony that the ordinary custom and practice of railroad companies was to cut such rails as the plaintiff was cutting at the time of the accident with saws, and on the other hand there was testimony that the usual custom was to cut them with a sledge hammer or a maul and a chisel, and for the purpose of this decision the former testimony must prevail. A short time before the day of the accident, while Marone was cutting a rail with a sledge hammer and chisel, a piece of steel was chipped off, and it struck him in the wrist. In the afternoon of July 7, 1916, before the accident which happened on that day, the foreman, Anderson, directed Marone and two other members of his gang to cut some rails with a sledge hammer and chisel. Marone told him he wanted something to protect his eyes, because he was scared the other day when he received the piece of steel in his wrist. Anderson answered, "Go on; that's all right; we never use them." Marone testified he went on "because he was scared to lose his job," and while he was swinging the sledge hammer to cut the rail with the chisel the piece of steel was chipped off and driven into his eye. Did these facts present any substantial evidence of negligence of the company which caused the injury to the plaintiff?

[1] 1. The liability of a master for the personal injuries of his servants is a question of general law; and, in the absence of a state statute, it is not governed in the federal courts by the decisions of the courts of the states, but by the common law and the rules established by the decisions of the Supreme Court and of the other federal courts. Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 370, 13 Sup. Ct. 914, 37 L. Ed. 772; Gardner v. Michigan Central R. R. Co., 150 U. S. 349, 358, 14 Sup. Ct. 140, 37 L. Ed. 1107; Beutler v. Grand Trunk Ry. Co., 224 U. S. 85, 32 Sup. Ct. 402, 56 L. Ed. 679; Brooks v. Central Sainte Jeanne, 228 U. S. 688, 694, 33 Sup. Ct. 700,

57 L. Ed. 1025; Railroad Co. v. Lockwood, 17 Wall. 357, 367, 368, 21 L. Ed. 627; Hough v. Railway Co., 100 U. S. 213, 226, 25 L. Ed. 612; Myrick v. Michigan Central Ry. Co., 107 U. S. 102, 109, 1 Sup. Ct. 425, 27 L. Ed. 325; Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101, 106, 13 Sup. Ct. 261, 37 L. Ed. 97; Newport News & M. V. Co. v. Howe, 52 Fed. 362, 3 C. C. A. 121; Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933, 936, 82 C. C. A. 81, 84; Illinois Central R. Co. v. Hart, 176 Fed. 245, 251, 100 C. C. A. 49, 55, 52 L. R. A. (N. S.) 1117; Tweeten v. Tacoma Railway & Power Co., 210 Fed. 828, 831, 127 C. C. A. 378, 381.

[2-4] 2. Negligence is a breach of duty, and where there is no duty or no breach thereof there is no negligence. The duty of the master is one of provision. The duty of the servant is one of operation, and neither is liable for the negligence of the other. It is the duty of the master to exercise reasonable care to provide a reasonably safe place in which, and reasonably safe machinery or appliances with which, the servants may do the work assigned to them, and for causal negligence in the discharge of this duty the master is liable and the servants are not. It is the duty of the servants to exercise reasonable care so to use the place, machinery, and appliances furnished, so to conduct the operations intrusted to them, as to protect themselves from risk, danger, and injury, and for a breach of this duty the servants are liable and the master is not. Where the place in which the servant is required to work, or the machinery or appliances with which he is required to work, or the method of doing the work, is made or becomes dangerous and results in injury only because of the negligence of the injured employé, or because of the negligence of his fellow servants, or because of the concurring negligence of both, the master is not liable, for such negligence is a breach of the duty of operation and not a breach of the duty of provision. Quebec Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656; Central Railroad Co. v. Keegan, 160 U. S. 259, 262, 264, 267, 16 Sup. Ct. 269, 40 L. Ed. 418; Northern Pacific R. Co. v. Charless, 162 U. S. 359, 361, 363, 364, 365, 16 Sup. Ct. 848, 40 L. Ed. 999; Northern Pacific R. Co. v. Peterson, 162 U. S. 346, 349, 358, 16 Sup. Ct. 843, 40 L. Ed. 994; Alaska Mining Co. v. Whelan, 168 U. S. 86, 89, 18 Sup. Ct. 40, 42 L. Ed. 390; Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338, 339, 346, 347, 24 Sup. Ct. 683, 48 L. Ed. 1006; Martin v. Atchison, Topeka & S. F. Ry. Co., 166 U. S. 399, 401, 403, 17 Sup. Ct. 603, 41 L. Ed. 1051; Texas & Pacific Ry. Co. v. Bourman, 212 U. S. 536, 539, 541, 29 Sup. Ct. 319, 53 L. Ed. 641; Beutler v. Grand Trunk Ry. Co., 224 U. S. 85, 88, 32 Sup. Ct. 402, 56 L. Ed. 679; St. Louis, I. M. & S. Ry. Co. v. Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100, 103, 52 C. C. A. 48, 51, 57 L. R. A. 712; Pennsylvania Co. v. Fishback, 123 Fed. 465, 467, 59 C. C. A. 269, 271; Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Howard v. Denver & Rio Grande Ry. Co. (C. C.) 26 Fed. 837; Northern Pacific R. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; Grady v. Southern Ry. Co., 92 Fed. 491, 34 C. C. A. 494; Armour v. Hahn, 111 U. S.

313, 318, 4 Sup. Ct. 433, 28 L. Ed. 440; City of Minneapolis v. Lundin, 58 Fed. 525, 528, 7 C. C. A. 344; Lach v. Burnham (C. C.) 134 Fed. 688; Cleveland, C., C. & St. L. Ry. Co. v. Brown, 73 Fed. 970, 972, 20 C. C. A. 147; Deye v. Lodge & Shipley Machine Tool Co., 137 Fed. 480, 70 C. C. A. 64; Illinois Central R. Co. v. Hart, 176 Fed. 245, 251, 100 C. C. A. 49, 52 L. R. A. (N. S.) 1117; Wood v. Potlatch Lumber Co., 213 Fed. 591–594, 130 C. C. A. 171; Baltimore & Ohio R. Co. v. Brown, 146 Fed. 24–29, 76 C. C. A. 482; Brooks v. Central Sainte Jeanne, 228 U. S. 688, 693, 33 Sup. Ct. 700, 57 L. Ed. 1025; Dayton Coal & Iron Co. v. Dodd, 188 Fed. 597, 602, 609, 110 C. C. A. 395, 37 L. R. A. (N. S.) 456; Kelly v. Jutte & Foley Co., 104 Fed. 955, 44 C. C. A. 274; Olson v. Oregon, etc., Co., 104 Fed. 574, 575, 44 C. C. A. 51.

The case of Kreigh v. Westinghouse & Co., 214 U. S. 249, 254–258, 29 Sup. Ct. 619, 53 L. Ed. 984, is a striking illustration of this principle. In that case two charges of negligence, one of provision, in that the master failed to rig its derrick "with two ropes, one attached on either side of the end of the boom, to be used to haul it back and forth, and for the purpose of steadying its operation, or" with a lever attached "to the mast in such a way that a man operating the lever could control the swing of the boom" (214 U. S. 254, 257, 29 Sup. Ct. 619, 53 L. Ed. 984), the other a negligence of operation, in that the men operating the boom swung a bucket attached to the boom outward against the plaintiff, a fellow workman, without giving him any signal or warning (214 U. S. 255, subds. 2, 3, 29 Sup. Ct. 619, 53 L. Ed. 984), the Supreme Court concluded that the employer was not liable for the latter because it was a negligence of the fellow servants, but that there was evidence of "experts that the proper construction of such a derrick required that its boom should be rigged with two guy ropes instead of one, or that the mast should be provided with a lever by means of which the men in control could safely operate the boom"; that it was, therefore, a question for the jury whether the injurious effect of the derrick "was not attributable to faults of construction and equipment, as well as to negligent operation at the time of injury." That court held that, while the employer was not liable for the negligence of the fellow servants in pushing the bucket against the plaintiff without warning, it might be liable for negligence in the construction and equipment of the derrick if that negligence directly contributed to cause the injury, and closed its discussion of the facts with these words:

"We think that upon this branch of the case it was a question for the jury to determine whether the alleged defective appliances contributed directly to produce the injuries complained of." 214 U. S. 258, 29 Sup. Ct. 619, 53 L. Ed. 984.

In the earlier part of the opinion it declared the law applicable to the case in this way:

"The employé is not obliged to examine into the employer's methods of transacting his business, and he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business. Choctaw, Oklahoma, etc., R. R. Co. v. McDade, 191 U. S. 64, 68 [24 Sup. Ct. 24, 48 L. Ed. 96]. But while this duty is

imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless, the master is not held responsible for injuries resulting from the place becoming unsafe though the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employés to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen. Armour v. Hahn, 111 U. S. 313 [4 Sup. Ct. 433, 28 L. Ed. 440]; Perry v. Rogers, 157 N. Y. 251 [51 N. E. 1021]."

Other illustrations of this rule are numerous. A servant was injured by the failure of a porter and a carpenter of a steamship company securely to replace a portion of a railing on a ship which had been temporarily removed, and the stewardess fell into the water (Quebec Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656); by a reckless order of the foreman of a railroad gang and his failure to discharge his duty to be in his place on the rear car (Central R. R. Co. v. Keegan, 160 U. S. 259, 262, 264, 267, 16 Sup. Ct. 269, 40 L. Ed. 418); by the careless act of a section foreman in running a hand car to the serious injury of one of his gang (Nor. Pacific R. R. Co. v. Charless, 162 U. S. 359, 361, 363–365, 16 Sup. Ct. 848, 40 L. Ed. 999); by the negligent act of the foreman in stopping his hand car suddenly without warning (Northern Pacific R. Co. v. Peterson, 162 U. S. 346, 349, 358, 16 Sup. Ct. 843, 40 L. Ed. 994); by the negligent order of the foreman in charge of the work to open the gate of a chute without warning to one of his gang, whereby the latter and the rocks upon which he was working were carried through the chute (Alaska Mining Co. v. Whelan, 168 U. S. 86, 89, 18 Sup. Ct. 40, 42 L. Ed. 390); by the negligent act of a local telegraph operator in giving false information to the train despatcher, whereby a fireman and an engineer lost their lives by reason of a collision (Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338, 339, 346, 347, 24 Sup. Ct. 683, 48 L. Ed. 1006); by the failure of a section foreman to look out for an approaching train, by his order to his workmen to look away from the train, his promise to warn them of its approach, and his failure to give the warning (Martin v. Atchison, Topeka & S. F. Ry. Co., 166 U. S. 399, 401, 403, 17 Sup. Ct. 603, 41 L. Ed. 1051); by the order of the section foreman directing one of his gang to jump off a moving train, and the reckless jerking of the train by the engineer (Texas & Pacific Ry. Co. v. Bourman, 212 U. S. 536, 539, 541, 29 Sup. Ct. 319, 53 L. Ed. 641); by the negligent act of the switching crew of a railroad company in running a car for repair into the special yard, where a repairer in the employ of the company was working upon another car, whereby he was killed (Beutler v. Grand Trunk Ry. Co., 224 U. S. 85, 88, 32 Sup. Ct. 402, 56 L. Ed. 679); by the failure of a servant engaged in operating a train to properly turn a switch (St. Louis, I. M. & S. Ry. Co. v. Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833); by the failure of a switchman to properly place red lights (Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100, 103, 52 C. C. A. 48, 51, 57 L. R. A. 712); by the direction of a yardmaster to an engineer and a conductor to take their train from a track on which another is standing (Pennsylvania Co. v. Fish-

back, 123 Fed. 465, 467, 59 C. C. A. 269, 271); by the failure of an engineer to obey his instructions, whereby a collision results (Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Howard v. Denver & Rio Grande Ry. Co. [C. C.] 26 Fed. 837); by the negligence of a conductor whereby the place where a laborer is building a culvert is made dangerous and he is struck by the locomotive (Northern Pacific R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009); by the disobedience of a rule which requires personal notice to workmen on certain tracks that cars are to be moved thereon (Grady v. Southern Ry. Co., 92 Fed. 491, 34 C. C. A. 494); by the omission of bricklayers to secure a timber in the wall, whereby an injury results to a carpenter who is directed to work about it (Armour v. Hahn, 111 U. S. 313, 318, 4 Sup. Ct. 433, 28 L. Ed. 440); by the careless act of a foreman of a gang of laborers engaged in the construction of a sewer, which causes dynamite to be placed in the hole in a rock, and, after it has failed to explode by his order to a workman ignorant of its presence to dig it out, whereby an explosion which injures the workman results (City of Minneapolis v. Lundin, 58 Fed. 525, 528, 7 C. C. A. 344); by the act of workmen in a mine in firing a blast, which loosens a superincumbent mass and makes the place beneath it dangerous so that one of them proceeding to work under it is injured by its fall (Finalyson v. Utica Min. & Mill. Co., 67 Fed. 507, 510, 14 C. C. A. 492); by the order of a foreman to his gang to remove iron braces from the top of a pile that is safe while undisturbed, whereby the pile is caused to topple upon a fellow servant (Lach v. Burnham [C. C.] 134 Fed. 688); by the act of a foreman directing one of his gang to cut away a post from under a shed whereby a portion of the structure falls upon him (Cleveland, C., C. & St. L. Ry. Co. v. Brown, 73 Fed. 970, 972, 20 C. C. A. 147); by the act of a foreman in causing the piling of heavy castings so negligently that they fell upon one of his gang (Deye v. Lodge & Shipley Machine Tool Co., 137 Fed. 480, 70 C. C. A. 64); by the act of a baggageman who kicks a block of ice out of his passing car against a signalman (Illinois Central R. Co. v. Hart, 176 Fed. 245, 251, 100 C. C. A. 49, 52 L. R. A. [N. S.] 1117); by the act of workmen carelessly throwing a piece of timber from a height upon the head of a fellow workman without warning, when all were working, with 500 or 600 other servants, in operating a sawmill (Wood v. Potlatch Lumber Co., 213 Fed. 591–594, 130 C. C. A. 171); by the failure of a foreman to have an iron plate which had been temporarily removed replaced, and by his order to one of his gang, without warning him of the absence of the plate, to assist in rolling a heavy hogshead over it (Baltimore & Ohio R. Co. v. Brown, 146 Fed. 24–29, 76 C. C. A. 482; by the act of the driver of an automobile whereby a fellow servant, making a trip therein in the course of his work, was injured (Brooks v. Central Sainte Jeanne, 228 U. S. 688, 693, 33 Sup. Ct. 700, 57 L. Ed. 1025); by the negligence of fellow servants in permitting cars on a switch track to collide with another train on which the plaintiff was being carried to or from his work by his master (Dayton Coal & Iron Co. v. Dodd, 188 Fed. 597, 602,

609, 110 C. C. A. 395, 37 L. R. A. [N. S.] 456); by the order of a superintendent to workmen under him to use a derrick furnished to raise heavy weights before it was securely fastened in its place (Kelly v. Jutte & Foley Co., 104 Fed. 955, 44 C. C. A. 274); by the failure of the officer of a steamship to close a hatchway through which a servant falls (Olson v. Oregon, etc., Co., 104 Fed. 574, 44 C. C. A. 51); by the failure of a foreman or other workmen employed to watch and remove or repair a rope in a derrick or other appliance, when it becomes worn or weak by use, to remove or repair it in time (Vogel v. Am. Bridge Co., 180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725; Johnson v. Boston Towboat Co., 135 Mass. 209, 46 Am. Rep. 458; Cregan v. Morston, 126 N. Y. 568, 572, 27 N. E. 952, 22 Am. St. Rep. 854; McGee v. Boston Cordage Co., 139 Mass. 445, 1 N. E. 745; Webber v. Piper, 109 N. Y. 496, 17 N. E. 216); and by numberless other acts of negligence of servants of railroad companies and of other employers which caused the places where their fellow servants were employed, or the appliances with which they were working, or the methods of operation which they were pursuing, to become dangerous and injurious. But the duty of the master does not extend to guarding the places or the machinery, or the method of operation against the dangers of such acts. They are violations of the primary duty of the servants, and the courts in these and other such cases have decided that the respective masters were not liable for injuries resulting from these acts of negligence.

[5, 6] All who enter into the service of a common master, except those who become heads of and vested with absolute control of separate departments or branches of a great and diversified business, thereby become engaged in a common service and are fellow servants in all they do, except that which they do in discharge of the master's nondelegable duty of provision. And in the absence of a statutory provision to the contrary each servant, by accepting his employment, voluntarily assumes the risk and danger of the negligence of his fellow servants in the discharge of all their duties of operation, whether those duties are those of superintendence and direction, or those of equal or subordinate service. Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 383, 384, 13 Sup. Ct. 914, 37 L. Ed. 772; Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 360, 14 Sup. Ct. 983, 38 L. Ed. 1009; Martin v. Atchison, Topeka & S. F. R. Co., 166 U. S. 399, 401, 403, 17 Sup. Ct. 603, 41 L. Ed. 1051; New England R. R. Co. v. Conroy, 175 U. S. 323, 327, 328, 343, 346, 347, 20 Sup. Ct. 85, 44 L. Ed. 181; Central R. Co. v. Keegan, 160 U. S. 259, 262, 264, 267, 16 Sup. Ct. 269, 40 L. Ed. 418; Northern Pacific R. Co. v. Charless, 162 U. S. 359, 361, 364, 16 Sup. Ct. 848, 40 L. Ed. 999; Northern Pacific R. Co. v. Peterson, 162 U. S. 346, 349, 358, 16 Sup. Ct. 843, 40 L. Ed. 994; Alaska Mining Co. v. Whelan, 168 U. S. 86, 89, 18 Sup. Ct. 40, 42 L. Ed. 390; Northern Pacific R. Co. v. Dixon, 194 U. S. 338, 339, 346, 24 Sup. Ct. 683, 48 L. Ed. 1006; Texas & Pac. Ry. Co. v. Bourman, 212 U. S. 536, 539, 541, 29 Sup. Ct. 319, 53 L. Ed. 641; Beutler v. Grand Trunk Junction Ry., 224 U. S. 85, 88, 89, 32 Sup. Ct. 402, 56 L. Ed. 679; Brooks v. Central Ste. Jeanne, 228 U. S. 688, 693, 33 Sup. Ct. 700, 57 L. Ed.

1025; City of Minneapolis v. Lundin, 58 Fed. 525, 527, 7 C. C. A. 344, 346; Weeks v. Scharer, 111 Fed. 330, 335, 49 C. C. A. 372, 377; Gulf Transit Co. v. Grande, 222 Fed. 817, 819, 820, 138 C. C. A. 243; Deye v. Lodge & Shipley Mach. Tool Co., 137 Fed. 480, 482, 483, 70 C. C. A. 64; Dayton Coal & Iron Co. v. Dodd, 188 Fed. 597, 602, 110 C. C. A. 395, 37 L. R. A. (N. S.) 456; Baltimore & Ohio R. Co. v. Brown, 146 Fed. 24–29, 76 C. C. A. 482; Wood v. Potlatch Lbr. Co., 213 Fed. 591, 593, 594, 130 C. C. A. 171; Victor American Fuel Co. v. Eidsen, 237 Fed. 999, 150 C. C. A. 649; Missouri Valley Bridge & Iron Co. v. Walquist, 243 Fed. 120, — C. C. A. — (C. C. A. 8th Circuit) filed May 14, 1917.

[7, 8] A servant assumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and appreciates. Neither the order of a vice principal to the servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant's safety, nor the servant's fear of losing his job, will release the servant from his assumption of the risk and danger where they were readily observable and were known and appreciated by him, unless the vice principal makes a promise to remove them as an inducement for the servant's continuance in the service. Chicago, B. & Q. R. Co. v. Shalstrom, 195 Fed. 725, 729, 115 C. C. A. 515, 45 L. R. A. (N. S.) 387, and cases there cited; Seaboard Air Line v. Horton, 233 U. S. 492, 496, 503, 504, 507, 508, 34 Sup. Ct. 652, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Bunt v. Sierra Butte Gold Min. Co., 138 U. S. 483, 484, 485, 11 Sup. Ct. 464, 34 L. Ed. 1031; Musser Sauntry, etc., Co. v. Brown, 126 Fed. 141, 143, 144, 61 C. C. A. 207; Walker v. Scott, 67 Kan. 814–816, 818, 64 Pac. 615; Showalter v. Fairbanks, Morse & Co., 88 Wis. 376, 60 N. W. 257, 258; Toomey v. Steel Works, 89 Mich. 249, 50 N. W. 850, 851; Kean v. Rolling Mills, 66 Mich. 277, 33 N. W. 395, 399, 400, 11 Am. St. Rep. 492; Lamson v. American Axe & Tool Co., 177 Mass. 144, 145, 58 N. E. 585, 83 Am. St. Rep. 267, opinion by Holmes, Chief Justice, now Mr. Justice Holmes; Bradshaw, etc., v. Railway Co. (Ky.) 21 S. W. 346, 347.

[9-11] The argument of counsel for Mr. Marone is that the order of the foreman of his gang to him to go and assist in cutting the rails with a sledge hammer and a chisel and his reply to Marone's declaration that he wanted something to protect his eyes, to "Go on, that is all right; we never use them"—constituted substantial evidence of liability of the railroad company for his injury. But the established rules of law and the decisions of the courts which have been cited and by which it is the duty of this court to be governed leave no escape from the conclusion that this argument cannot prevail: (1) Because there was undisputed evidence that the company by adopting a rule that those cutting rails with a chisel must wear goggles and by providing the goggles had exercised reasonable care to discharge its duty of provision, and there was no substantial evidence that it had failed to do so; (2) because the foreman in his act of directing Marone what to do and in his answer to his protest was discharging a duty of operation, a duty of the servant, and not a duty of provision, not a duty of the master. In the discharge of that duty he was not a vice principal, but a fellow

servant of Marone, the risk of whose negligence Marone had assumed; and (3) because if the foreman had been a vice principal of the company in his acts directing Marone what to do and answering his protest, the undisputed testimony is that the risk and danger of his work with the sledge hammer and the chisel were readily observable, had been sensibly experienced by Marone by receiving from them a steel chip in his wrist, and were fully known and appreciated by him. The judgment below must therefore be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

STONE, Circuit Judge, concurs in the result for the following reasons: There is no claim of any promise by the foreman to remedy the defect which later caused the injury. It is an instance of an employé remaining voluntarily at work after he knows the defect and knows the danger threatened to him by it. For an assurance to protect the workman he must have actually relied upon it, and must, under the circumstances, have been justified in that reliance. The testimony here clearly shows that he did not rely upon it, and is very persuasive that he would not have been justified in so doing.

AMERICAN R. CO. OF PORTO RICO v. PONCE & G. R. CO.

(Circuit Court of Appeals, First Circuit. November 15, 1917.)

No. 1293.

1. EVIDENCE ⟸441(14)—PAROL EVIDENCE AFFECTING WRITINGS—EVIDENCE TO MODIFY WRITTEN CONTRACT.
   Where, on its expiration, a written contract was renewed by another writing which provided that it should be attached to the original contract, which was "to be considered as continuing * * * with all its covenants, conditions and provisions without change except as to the date of expiration thereof," and the contract was clear and unambiguous, in an action at law on the renewed contract evidence was not admissible to show that the original contract had been modified by parol prior to the renewal and that it was the intention that the modification should be carried into the renewal.

2. EXECUTION ⟸158(1)—STAY TO PERMIT EQUITABLE DEFENSE—POWER OF COURT.
   It appearing, however, that defendant had misconceived its remedy, the court might properly stay execution on the judgment in favor of plaintiff to permit defendant to file a bill in equity to reform the contract, and if its contention was sustained, and the contract reformed, stay execution permanently.

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

Action at law by the Ponce & Guayama Railroad Company against the American Railroad Company of Porto Rico. Judgment for plaintiff, and defendant brings error. Affirmed.

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

Malcolm Donald, of Boston, Mass. (Charles Hartzell, of San Juan, Porto Rico, on the brief), for defendant in error.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a writ of error from a judgment of the United States District Court for Porto Rico entered in favor of the Ponce & Guayama Railroad Company, a New Jersey corporation, in an action brought by it against the American Railroad Company of Porto Rico, a New York corporation, to recover the sum of $12,812.59, with interest, being the amount claimed to be due it under the terms of a written contract entered into between said companies and a corporation known as the "Central Fortuna," each of which owned parts of certain connecting railroads forming a line between Ponce and Guayama in the island of Porto Rico.

In order to supply the public service which each corporation was under duty to render, the parties, on September 7, 1910, entered into an agreement for one year from the date of the beginning of regular train service, whereby the American Railroad Company was to supply the equipment and men, and was to be allowed certain sums for passenger, freight and mixed train service. In addition to receiving its proportion of the revenue for the service rendered over its own line, the American Railroad Company was to receive a certain remuneration from the other parties, to wit:

For passenger trains, "fifty cents per kilometer run per train * * * based on the number of kilometers on the main line of each."

For freight trains, "one and one-half cents per ton per kilometer for all freight it transported on the lines of the other roads, each company paying on the basis of freight transported on its own line." But the remuneration on account of the freight so transported was not to "be less than seventy-five cents per train per kilometer." The earnings from through freight were to be divided proportionately to the distance, but, if the haul on any line was less than 20 kilometers, an allowance for a haul of that length was to be made.

And for a mixed train service, it was to receive its proportion of the revenue accruing from passenger and mail service—that is, the sum that would accrue to it for transportion over its own line—and also such remuneration as was provided for freight train service. The contract made no provision for compensation to the American Company for service in carrying passengers by mixed trains over the lines other than its own.

On or about September 28, 1911, and before the expiration of the original contract, the parties entered into a renewal agreement, in writing, by which the original agreement of September 7, 1910, was extended for a period of one year from September 30, 1911, to September 30, 1912, in which the parties, "in consideration of the mutual covenants contained in the agreement, heretofore described [of September 7, 1910], and in consideration of these presents, do hereby extend for

the term of one year said memorandum of agreement, dated September 7, 1910, from the thirtieth day of September, 1911, to the thirtieth day of September, 1912, with all its covenants and conditions. This agreement is to be annexed to the said agreement of September 7, 1910, and is to be considered as continuing such original agreement, with all its covenants, conditions and provisions, without change, except as to the date of the expiration thereof."

During the year from October 1, 1911, to October 1, 1912, the American Company operated mixed trains over the lines in question, and received the revenues arising therefrom. In accounting for the revenues thus received, it charged the Ponce & Guayama Company, in addition to the amount allowed by the contract for freight train service, the "fifty cents per kilometer run per train" allowed for a regular passenger train. The amount thus withheld during the year from the Ponce & Guayama Company was $12,812.59, and is the sum for which this action is brought and for which recovery was allowed in the court below.

[1] The American Company claims the right to withhold this sum, not upon the terms of the original contract of September 7, 1910, which was incorporated into the renewal agreement of September 28, 1911, but upon the terms of an oral agreement which it is claimed the parties entered into on September 16, 1910, and before any service was rendered under the original agreement of September 7th, and that the oral agreement was a modification of the contract of September 7th, and was incorporated into the renewal agreement upon which the suit is brought.

At the trial in the court below, the American Company offered evidence tending to prove the modification of the original contract of September 7th, and that it was intended to incorporate that contract and the modification of September 16th into the renewal contract. It also sought to introduce in evidence a judgment rendered in the United States District Court for Porto Rico in a prior action brought by the Ponce & Guayama Company against it, to recover the sum retained by the American Company for a like service rendered for a mixed train under the original contract of September 7th, as modified, in which action judgment was rendered for the American Company. The foregoing evidence was excluded, subject to the defendant's exception, and the question is whether the court erred in these rulings.

The Ponce & Guayama Company contends that the evidence was properly excluded, primarily for the reason that the renewal agreement was clear and unambiguous in its terms, and in no way referred to or incorporated the terms of the oral agreement which was in addition to and in modification of the original agreement of September 7th; that to admit such evidence would be in contravention of the parol evidence rule, the provisions of the Act of the Legislative Assembly of Porto Rico of March 9, 1905, Regulating the Introduction of Evidence in Civil Proceedings (sections 25, 26 [Rev. St. & Codes 1913, §§ 1393, 1394]), and of sections 1248 and 1058 of the Civil Code of Porto Rico (Rev. St. & Codes 1913, §§ 4354, 4154); and that, if the parties in fact understood the agreement in a sense other than that expressed by the

language employed, the remedy of the American Company is in equity and not in a court of law.

The principal question in the case is whether the evidence tending to show that the parties intended to incorporate into the renewal contract the modification of September 16th, as well as the original contract of September 7th should have been received; for, if it should not have been, the judgment rendered in the prior suit based on the parol agreement would not be relevant to any issue in the case.

The terms of the contract here under consideration, namely, the renewal contract of September 28, 1911, are clear and explicit. It in no way refers to the oral agreement of September 16, 1910, or to any modification of the original contract of September 7th. The contract of September 7th is, however, referred to in the renewal contract as the "said memorandum of agreement dated September 7, 1910," and it is provided that the renewal contract shall be "annexed to said agreement of September 7, 1910," meaning the "memorandum of agreement" of that date. The memorandum of agreement of September 7th is also spoken of in the renewal contract as "such original agreement," and it is there provided that it is "to be considered as continuing * * * with all its covenants, conditions and provisions, without change, except as to the date of the expiration thereof." The renewal contract is unambiguous both on its face and when applied to the subject-matter to which it refers, and, such being the case, we are of the opinion that the evidence offered was properly excluded under the general rules of evidence applicable in such cases and under the statutes and Code of Porto Rico to which we have been referred.

[2] It is plain, however, that the defendant has misconceived its remedy for enforcing its rights; for, if the parties, as a matter of fact, understood that the contract of September 7th as modified by the parol agreement of September 16th was to be incorporated into the renewal contract of September 28, 1911, equity and justice require that it should have an opportunity to show the fact and have the contract reformed to comply therewith. And, although the judgment of the court below must be affirmed, we see no reason why execution thereon should not be stayed pending an immediate application by the American company by bill in equity to reform the contract, and that, if reformed in accordance with its contention, why execution should not be permanently stayed.

The judgment of the District Court of Porto Rico is affirmed, with costs to the defendant in error; but execution thereon is stayed pending an immediate application by the plaintiff in error to reform the contract.

ATLANTIC COAST LINE R. CO. v. WINN.

(Circuit Court of Appeals, Fifth Circuit. November 28, 1917. Rehearing Denied January 12, 1918.)

No. 3035.

1. DEATH ⊂=50—RIGHT TO SUE—EMPLOYERS' LIABILITY ACT.

Under Georgia Employers' Liability Act (Acts 1909, p. 160), declaring that in case of the death of an employé of a common carrier suit may be instituted by the surviving widow, in case no administrator or executor has been appointed at the time suit is filed, a petition by the surviving widow of the railroad employé, killed in an accident, which did not allege that no executor or administrator had been appointed at the time suit was filed, is defective, if seeking to state the cause of action under the statute.

DEATH ⊂=46—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—ACTIONS —PETITION—STATUTE.

Petition of the surviving widow of an employé on a train of a second company operated over the tracks of defendant company, which sought recovery for the death of such employé from defendant, alleged that trains operated over defendant's tracks were operated under its rules and under the exclusive management, direction, and control of defendant, that the train was the property of the second railroad company, but that the officers and agents of defendant in charge of the operation of its trains had exclusive right to control the direction of such trains, even to the extent of discipline and discharge of train employés of the second company. *Held* that, while the petition showed that the employés of the second company engaged in operating trains over the tracks of defendant were entitled to many rights to which they would have been entitled if employés of defendant, including among them the right of a safe place to work and protection against negligence of the officers, agents, and employés of defendant, such employés were not defendant's employés, so that an action for death should have been brought under the Employers' Liability Act of Georgia, in which state the accident occurred, but the action was properly brought by the surviving widow in her own name under the general death statute.

In Error to the District Court of the United States for the Southern District of Georgia; W. W. Lambdin, Judge.

Action by Minnie L. Winn against the Atlantic Coast Line Railroad Company, begun in state court and removed to federal court. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wm. W. Osborne, A. A. Lawrence, E. H. Abrahams, and Shelby Myrick, all of Savannah, Ga., for plaintiff in error. Francis M. Oliver and Edgar J. Oliver, both of Savannah, Ga., for defendant in error.

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

BATTS, Circuit Judge. The questions involved herein arise upon the action of the trial court in overruling a general demurrer to the petition of defendant in error. The only matter necessary to consider is whether the fifth paragraph of the petition shows that the husband of defendant in error, damages for whose death she sues, was an employé of plaintiff in error. The paragraph is as follows:

"Your petitioner further shows that the line of railroad leading from Savannah, Georgia, to Jesup, Georgia, over which the said Southern passenger train, No. 31, was being operated, was owned, operated, and controlled by the Atlantic Coast Line Railroad Company. The said Atlantic Coast Line Railroad Company had the exclusive chartered rights and privileges to the said line of railway, and the trains of the said Southern Railway, running into and out of Savannah, between Savannah, Georgia, and Jesup, Georgia, over the main track of the Atlantic Coast Line Railroad Company, were operated under the rules of the Atlantic Coast Line Railroad Company, and under the exclusive management, direction, and control of the said Atlantic Coast Line Railroad Company. The engine, cars, and equipment of said Southern Railway trains, were the property of the Southern Railway Company, and the employés in charge of said trains were the employés of the Southern Railway Company; but the officers and agents of the Atlantic Coast Line Railroad Company in charge of the operation of its trains, had also the exclusive right to control and direct the operation of the trains of the Southern Railway over said Coast Line tracks, even to the extent of discipline and discharge of the train employés of the Southern Railway."

[1] The Employers' Liability Act of Georgia (Acts 1909, p. 160) provides that, in case of death of an employé of a common carrier, resulting from the negligence named in the statute, suit may be instituted by the surviving widow "in case no administrator or executor has been appointed at the time suit is filed." The petition makes no allegation to the effect that at the time the suit was filed there was no executor or administrator of the deceased husband of the plaintiff. If the necessary implication of the concluding clauses of the quoted paragraph is that the deceased husband of the plaintiff was an employé of the Atlantic Coast Line Railroad Company, the petition is lacking in an essential allegation, and was not good, even as against a general demurrer.

[2] The allegations indicate that the Southern Railway Company, by whom the deceased was employed as a locomotive engineer, operated its trains over the railroad of defendant. These trains, according to the allegations of the petition, were operated under the rules of the defendant company, and under its exclusive management, direction, and control. The engines, cars, and equipment were the property of the Southern Railway Company, and the employés in charge of the train were its employés; but, says the petition:

"The officers and agents of the Atlantic Coast Line Railroad Company in charge of the operation of its trains had also the exclusive right to control and direct the operation of the trains of the Southern Railway over said Coast Line tracks, even to the extent of discipline and discharge of the train employés of the Southern Railway."

It was, of course, essential to the safe operation of the trains, the tracks not being exclusively used by the Southern Railway Company, that entire control should be in the owning or one of the interested companies, and, under the allegations, this matter of directing the operation of trains was in the defendant company. This right to direct also, almost necessarily, carried with it authority to discipline and discharge train employés while engaged in the operation of such trains. The right to discipline and discharge is an ordinary incident to the relation of employer and employé, but that right does not conclusively fix such relationship. Conditions may arise, and have arisen in this case, where

it is necessary that the employer should delegate to another a limited and temporary right to discipline and discharge. The employés operating the Southern Railway trains were not hired by the Atlantic Coast Line Company, were not paid by that company, were not working for the benefit of that company, and were subject to discipline and discharge only when the conditions made it impossible for the Southern Railway Company to exercise that right, and made it necessary that the right should be in the Coast Line Company.

Under the circumstances detailed in the fifth paragraph, the employés of the Southern Railway Company were entitled from the Coast Line Company to many of the rights of employés. Among these was the right to a safe place to work and to protection against negligence of the officers, agents, and employés of the defendant company. But while such persons had certain rights measured by the rights of employés, they did not have all the rights which employés have, and one of the rights which they had not acquired was the benefit of the liberalized rules as to liability for negligence established by the Georgia Employers' Liability Act.

The allegations of the fifth paragraph are, we think, consistent with relations between the Atlantic Coast Line Company and employés of the Southern Railroad Company, other than that of employer and employé. The widow of the deceased engineer is entitled to sue under the general statute with reference to damages for injuries resulting in death, and she has properly brought the suit in her own name. In other respects the petition sets forth a good cause of action, and the general demurrer was properly overruled.

The judgment is affirmed.

PENNSYLVANIA R. CO. v. LACKNER.

(Circuit Court of Appeals, Third Circuit. December 20, 1917.)

No. 2302.

1. RAILROADS ⊜274(2)—INJURIES TO PERSONS ON TRACKS—LICENSEES.

At a point directly opposite a railroad station, and about 200 feet south of a street crossing, there was an open space of at least 30 feet used for all purposes by arriving and departing trains, and on this space bundles of newspapers were thrown from the early train which brought them from a nearby city, and the dealers to whom they were directed were accustomed to go upon the ground and pick out their own bundles. The custom had continued for several years, and was well known to the railroads using the station. A news-dealer in a town a few miles away went to get his papers and took the deceased with him to help. When they reached the station, the train that brought the papers had gone, and a number of bundles were lying in the open space within a short distance of the south-bound track. No regular train was due to arrive upon this track for nearly an hour, and the dealer and deceased proceeded to inspect the bundles in order to select what was theirs. While thus engaged, an unscheduled train of defendant came along and struck them both, injuring the dealer and killing plaintiff's decedent. The railroad company owning the track and station operated no trains of its own, but allowed

defendant and another railroad company to use the property and operate their trains thereon. *Held*, that defendant railroad company, deceased, and the news-dealer were licensees of the company owning the tracks and station, and defendant was bound to exercise reasonable care for the safety of the news-dealer and deceased.

2. RAILROADS ⟸278(1)—CONTRIBUTORY NEGLIGENCE—STATUTE.

In such case, Act N. J. March 30, 1869 (P. L. p. 806; 3 Comp. St. 1910, p. 4245), declaring that it shall not be lawful for any person not connected with or employed by any railroad, except when the same shall be laid upon a public highway, to walk along the tracks, and if any person shall be injured by an engine or car while walking, standing, or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor in damages, has no application; deceased not being, walking or playing on the railroad tracks at the time of his death.

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Action by Ida Lackner, administratrix, against the Pennsylvania Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

John S. Applegate & Son, of Red Bank, N. J., for plaintiff in error.

McDermott & Enright, of Jersey City, N. J. (James D. Carpenter, Jr., of Jersey City, N. J., of counsel), for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The plaintiff is the widow and administratrix of John Lackner, who was killed by one of defendant's trains at Matawan, N. J., about 5 o'clock in the morning of September 7, 1915.

The train, which was composed of an engine and five empty coaches, was not on the regular schedule, and was running south from New York at 25 or 30 miles an hour. The point where Lackner was struck is directly opposite the station, about 200 feet south of Main street crossing. The station building is west of the south-bound track, and between the building and the westerly rail is an open space of at least 30 feet, used for all purposes by arriving and departing trains. Upon this space, bundles of newspapers were thrown from the early train that brought them from New York, and the dealers to whom the papers were directed were accustomed to go upon the ground and pick out their own bundles. This custom had been continued for several years, was well known to the railroads using the station, and was permitted without objection. On September 7 David Solomon, a news-dealer in a town a few miles away, went to Matawan to get his papers, and took Lackner with him to help. When they reached the station, the train that brought the newspapers (a train of the Central Railroad of New Jersey) had gone, and a number of bundles were lying upon the space referred to within a short distance of the south-bound track. No regular train was due to arrive on this track for nearly an hour, and Solomon and Lackner proceeded to inspect the bundles, in order to select

what was theirs. While thus engaged, the unscheduled train in question came along and struck them both, injuring Solomon and killing Lackner. The New York & Long Branch Railroad Company, which owns the tracks, stations, and other parts of the roadbed, operates no trains of its own, but allows the Pennsylvania Railroad and the Central Railroad of New Jersey to use the property and to operate their trains thereon under an agreement that does not expire until 1987. The verdict has determined that the train gave no warning of its approach, and that Lackner was not guilty of contributory negligence.

[1] The District Court submitted the case to the jury on the theory that Lackner and the Pennsylvania Railroad were both licensees of the Long Branch Company, and therefore that the railroad owed Lackner the duty of ordinary care. If this theory be wrong, the judgment must be reversed, and accordingly we have examined the subject with care, and have reached the conclusion that the New Jersey cases support the position taken by the trial judge. In Schmidt v. Penna. R. R. (C. C. A. 3) 181 Fed. 83, 104 C. C. A. 251, this court had occasion to consider and apply the doctrine that prevails in that state concerning the duty owed by a railroad to a licensee. This decision, however, does not rule the present controversy, which we think resembles closely the recent case of Coyne v. Penna. R. R., 87 N. J. Law, 257, 93 Atl. 595, decided in 1914 by the highest court of the state. Without detailing the facts of that case, it is enough to say that the Court of Errors and Appeals evidently had before it in one form or another the contents of the agreement now in question between the Long Branch Company, the Pennsylvania Railroad, and the Central Railroad, and held the Pennsylvania Railroad to be a licensee thereunder. As the decedent, Coyne, was also held to be a licensee, the court was of opinion that the general New Jersey doctrine (referred to in Schmidt v. Railroad) did not apply, but that the railroad owed the decedent the duty of reasonable care. We think we should follow this decision, although we may not be bound to do so, and the result is to sustain the ruling below on the principal question raised by the writ of error.

[2] On the question concerning the construction of the New Jersey act of 1869 on the subject of contributory negligence (P. L. 1869, p. 806, 3 Comp. Stat. N. J. p. 4245) we refer to Furey v. Railroad, 67 N. J. Law, 278, 51 Atl. 505, in support of the position that the act does not prohibit Lackner's representative from recovering.

The judgment is affirmed.

OPPENHEIMER et al. v. SAN ANTONIO LAND & IRRIGATION CO., Limited.

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

No. 3116.

COURTS ⊂=508(2)—FEDERAL COURTS—ENJOINING SUIT IN STATE COURT—PRIORITY OF JURISDICTION.

A federal court, which by its receiver has taken possession of real estate in a suit to foreclose a mortgage on the same, and has entered a decree for its sale, has exclusive ancillary jurisdiction to adjudicate all claims against the property, and may properly enjoin the prosecution by third persons in a state court of a suit to enforce an alleged prior lien thereon.

Appeal from the District Court of the United States for the Western District of Texas; W. R. Smith, Judge.

Ancillary suit in equity by Floyd McGown, as receiver of the San Antonio Land & Irrigation Company, Limited, against Jesse D. Oppenheimer, Abraham Lang, and Isaac Lang. Decree for complainant, and defendants appeal. Affirmed.

Under a decree of the United States District Court for the Western District of Texas, entered in a suit brought in that court by the Empire Trust Company, trustee in a deed of trust securing bonds issued by the San Antonio Land & Irrigation Company, Limited, against the last-named company, Floyd McGown was in August, 1914, appointed receiver of all the properties claimed by that company, and took possession thereof, including the land with reference to which the appellants make the claims hereinafter stated. On January 29, 1917, a decree was rendered in that suit foreclosing the deed of trust upon properties set out in the decree, including the land just mentioned. On the 16th of April, 1917, the appellants filed in the district court of the Seventy-Third judicial district of the state of Texas against said McGown, as such receiver, and others, a suit in which they claimed the superior legal title to land described in a deed made by them, which reserved a vendor's lien for the unpaid part of the purchase money, and sought the recovery of that land, and prayed in the alternative that judgment be rendered in their favor for the balance due on the vendor's lien note and foreclosing the lien securing the same. By a supplemental and ancillary bill, filed by McGown, as receiver, in the suit, under a decree in which he was appointed, against the appellants, he prayed that the appellants be restrained from the further prosecution of their above-mentioned suit in the state court, from further interfering with the receiver's possession, management, and control of the property, and from further interfering with the court's possession and control of property held by its receiver. On the hearing of the cause a decree was rendered, ordering the issuance of the injunction prayed for. The appeal is from that decree.

T. T. Vanderhoeven, Sylvan Lang, B. A. Greathouse, and Don A. Bliss, all of San Antonio, Tex., for appellants.

Thomas H. Franklin, of San Antonio, Tex. (Denman, Franklin & McGown, of San Antonio, Tex., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge (after stating the facts as above). When the appellants brought their suit in the state court for the recovery of

land, or, in the alternative, for the foreclosure of a lien thereon, that land was in the custody of the United States District Court, being in the possession of its receiver appointed in a suit previously brought therein, in which suit the foreclosure of an asserted lien on that land was sought and had been decreed. Possession of that land by the United States court was necessary to the exercise of its jurisdiction. An effect of its so taking possession was a withdrawal of the property from the jurisdiction of all other courts. That court, during the continuance of its possession, has, as an incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. Wabash Railroad v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379; State of Texas v. Palmer, 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Empire Trust Co. v. Brooks, 232 Fed. 641, 146 C. C. A. 567.

Provision for invoking the exercise of the ancillary jurisdiction mentioned was made in the foreclosure decree entered in the suit in which McGown was appointed receiver. A clause of that decree required the clerk of the court to issue at once notice to all persons having any claims against the San Antonio Land & Irrigation Company, Limited, or any of its properties, or who might claim any interest in any of its properties, to intervene in the suit upon such claims or demands within six months after the date of the decree. This shows that it was open to the appellants to assert in that court the claims which they were undertaking to have the state court pass upon.

The appellants, in their answer to the receiver's supplemental and ancillary bill, disclaimed any intention of interfering with the possession of the receiver, or of the court which appointed him, without that court's consent and order. There is a similar disclaimer in the argument made in their behalf in this court. But it is not made to appear that it was disclosed to the state court that it was not expected to undertake the enforcement of the judgment it was asked to render. The disclaimers mentioned do not make the bringing and prosecution of the suit in the state court any the less an attempt to have the controversy which that suit raised adjudicated by a court other than the one having, as a result of its previously acquired custody or possession of the subject-matter in controversy, exclusive jurisdiction to pass upon the claims asserted. Obviously the purpose was to have those claims adjudicated by the state court, and to rely upon that adjudication as binding and conclusive, in whatever other tribunal it might be invoked. The United States court, having first obtained jurisdiction of the matter in controversy, was not in error in restraining proceedings in another court involving the same subject-matter. Such restraint was appropriate to prevent the defeat or impairment of the United States court's exclusive jurisdiction. Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629.

The decree is affirmed.

BINGHAM MINES CO. v. BIANCO.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1917.)

No. 4818.

1. DEATH ⟸32—ACTIONS—STATUTE.
Under Comp. Laws Utah, 1907, § 2912, giving a right of action for wrongful death for the benefit of widow and minor children, an action, the statute being general in its terms and containing nothing indicating an intention to restrict its application, may be maintained for the death of one occurring in Utah, though the beneficiaries were nonresident aliens, subjects of a foreign power.

2. MASTER AND SERVANT ⟸270(7)—INJURIES TO SERVANT—REPAIRS.
In an action for injuries to a servant alleged to have been caused by defective machinery, appliances, or places of work, evidence of repairs or alterations subsequent to the accident is inadmissible to show the master's negligence.

3. EVIDENCE ⟸116—MASTER AND SERVANT ⟸270(7)—COMPETENCY—COLLATERAL FACTS.
While collateral or irrelevant facts that fix the time at which a relevant fact occurred are admissible in evidence so far as necessary, that rule cannot be employed as a pretext for the admission of evidence in itself incompetent and prejudicial; hence in an action for the wrongful death of a mine worker, where it was contended that he came in contact with an overhead trolley wire heavily charged, which was negligently maintained so near the floor level as to be dangerous, a witness testifying as to measurements of the height of the wire should not be interrogated in such a manner as to bring out the fact that when he made the measurements after the accident he made repairs raising the wire, for that injected incompetent and prejudicial evidence into the case.

In Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Action by Domenico Bianco, administrator of the estate of James Ozzello, deceased, against the Bingham Mines Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Mahlon E. Wilson, of Salt Lake City, Utah (King, Nibley & Farnsworth, of Salt Lake City, Utah, on the brief), for plaintiff in error.

Culbert L. Olson, of Salt Lake City, Utah (A. J. Weber, of Salt Lake City, Utah, on the brief), for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

HOOK, Circuit Judge. [1] The administrator of the estate of James Ozzello, deceased, recovered a verdict and judgment against the Bingham Mines Company for negligently causing the death of his intestate. The action was brought under a statute of Utah (section 2912) for the benefit of the widow and minor children. It is urged by defendant that since the beneficiaries are nonresident aliens, subjects of the kingdom of Italy, the right conferred by the statute does not

inure to them, but is for the exclusive benefit of the residents and citizens of this country. The statute is general in its terms and contains nothing indicating an intention so to restrict its application. The weight of authority is against defendant's contention. McGovern v. Railway, 235 U. S. 389, 35 Sup. Ct. 127, 59 L. Ed. 283; Patek v. American Smelting & Refining Co., 83 C. C. A. 284, 154 Fed. 190, 21 L. R. A. (N. S.) 273.

[2, 3] The deceased was in defendant's service as a mucker, and at the time of the accident was at work in an underground drift in its mine. No one witnessed his death, and the proof of the cause was drawn largely from the surroundings and the condition of the body. The plaintiff claimed he came in contact with an overhead trolley wire heavily charged with electricity which was negligently maintained so low, so near the floor level of the entry, as to be dangerous. The defendant claimed that the wire, with which the deceased had no duty, was at a height that afforded entire safety. The height of the wire at the time and place of the accident was an important issue at the trial. The plaintiff produced a witness who was in defendant's service, and who testified to measurements he made shortly after the accident. He was also allowed over defendant's objection to testify that at the time of the measurements he also made repairs and changes in the structure, altering its condition in that particular. Counsel contended that the evidence was proper to show the time when the measurements of the original condition were made, and it was so admitted.

It is a familiar rule that collateral or irrelevant facts that fix the time at which a relevant fact occurred are admissible in evidence so far as necessary for the purpose, but it cannot be employed as a pretext for the admission of evidence that is in itself incompetent and prejudicial. In the case at bar the time when the witness made the measurements could have been elicited by simple and direct questions so confined in their scope. Proof of or reference to the making of changes was wholly unnecessary, yet by repeated questions the fact was emphasized and made prominent. Not only was it unnecessary, but the evidence so brought in was distinctly prejudicial and incompetent upon the issue being tried. It is the settled doctrine of the courts of the United States that in actions for injuries alleged to have been caused by defective machinery, appliances, or places of work evidence of subsequent alterations or repairs has no legitimate tendency to prove negligence at the time of the accident and is calculated to prejudice the defendant. Columbia Railroad Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; Atchison, etc., R. Co. v. Parker, 5 C. C. A. 222, 55 Fed. 595; Motey v. Pickle Marble & Granite Co., 20 C. C. A. 366, 74 Fed. 155.

The other questions presented by the assignments of error may not arise again.

The judgment is reversed, and the cause is remanded for a new trial.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RY. CO. v. MUNGER.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4828.

CARRIERS ⟸347(2)—PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff, proposing to take a train operated by one of defendant's tenant companies between the city where he was in business and a nearby municipality, repaired to its station a few minutes before train time. The waiting room of the station opened upon an inclosed space separated from the tracks by a high iron fence equipped with sliding gates, which could be locked and were in charge of a gateman who controlled the movements of passengers through them. The gateman announced the train in the waiting room, passed through the crowd of passengers in the inclosure, unlocked the gate near which plaintiff was standing, went through, and stood outside. As the approaching train slowed down, a woman near the gate opened it and the passengers went through. About the time the train stopped, a switch engine, with headlight burning and bell ringing, approached on the track next to the inclosure. Plaintiff went through the open gate and started to cross the near track diagonally, with his back towards the engine, and was struck by its beam. *Held* that, while plaintiff was a passenger, yet as he was complete master of his movements and his powers of observation, unlike a passenger on a train, it was improper to declare, as matter of law, that plaintiff was free from contributory negligence, but that question should have been submitted to the jury.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Carlton A. Munger against the St. Louis Merchants' Bridge Terminal Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

T. M. Pierce, of St. Louis, Mo. (J. L. Howell, of St. Louis, Mo., on the brief), for plaintiff in error.

Edward E. Campbell, of Alton, Ill. (Marion C. Early, of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

HOOK, Circuit Judge. Munger recovered a judgment against the Terminal Railway Company for personal injuries received at its passenger station at the foot of Washington avenue, St. Louis, Mo. One of the defenses was plaintiff's contributory negligence, but the trial court charged the jury that the evidence of it was not sufficient to submit to them. Of this charge, among other things, the defendant complains.

The waiting room of the passenger station opens upon an inclosed space separated from the railroad tracks beyond by a high iron fence equipped with sliding gates. Outside the inclosure two railroad tracks run north and south parallel with the gates. North-bound or outgoing

trains use the east or more distant track; incoming or south-bound trains use the west track nearer the inclosure. The gates, which may be locked, are in charge of a gateman, who controls the movements of passengers through them. As bearing upon the question of contributory negligence there was substantial evidence of the following facts, and in a case where a trial court takes an issue from a jury the substantial evidence in opposition must be regarded: On the evening of November 9, 1914, the plaintiff who was in business in St. Louis and lived at Alton, Ill., went to the station to take a north-bound train to his home. The train was operated by one of the defendant's tenant companies. It ran on the east track and was due at the station about 5:53 p. m. The plaintiff arrived a few minutes before train time and joined a crowd of about 40 passengers, most of whom were in the inclosure near the gates. As a frequent patron of the place, he was familiar with the surroundings and the customary methods of operation. The gateman announced the train in the waiting room, passed through the crowd of passengers in the inclosure, unlocked the gate near which the plaintiff was standing, went through, and stood outside. He closed, or nearly closed, the gate after him, without locking it. As the train slowed down, a woman nearest the gate opened it, and the passengers went through. About the time the train stopped, a switch engine, with headlight burning and bell ringing, came south on the track next the inclosure. The plaintiff went through the opened gate, and started to cross the near track diagonally, with his back or left shoulder towards the north, when he was struck by the beam of the moving switch engine and sustained the injuries complained of. He was intent on boarding the rear coach of the north-bound train, and neither looked about him nor paid attention to the signals.

The court should not have declared as matter of law that the plaintiff was free from negligence, but should have submitted the question to the jury. See Terry v. Jewett, 78 N. Y. 338; Warner v. Railroad, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; D., L. & W. R. Co. v. Price, 137 C. C. A. 406, 221 Fed. 848; C., R. I. & P. R. Co. v. Eddy, 143 C. C. A. 165, 228 Fed. 643. While the legal relation between the plaintiff and the defendant is referable to that of passenger and common carrier, yet the plaintiff, unlike a passenger upon a railroad train, was complete master of his movements and his powers of observation; and, without detracting from the duty of the defendant towards him, it was for the jury to determine what care he should have taken for his own safety under the particular circumstances of the case. That one in such a situation may wholly abandon himself to the care of the railroad should not be laid down as an unvarying, inelastic rule of law. The other matters of which complaint is made may not arise again.

The judgment is reversed, and the cause is remanded for a new trial.

LETTERMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. December 20, 1917.)

No. 2290.

1. CRIMINAL LAW ⟸1059(2)—TRIAL—CHARGE—PRESENTATION OF OBJECTIONS.
Where defendants below merely noted a general exception to the whole charge, their specifications of error in the charge with reference to specific instructions given and omitted cannot be considered by the Circuit Court of Appeals, for rule 10, § 2, of the Rules of the District Court of the United States for the Eastern District of Pennsylvania, and rule 10, § 1, of Rules of the United States Circuit Court of Appeals for the Third Circuit (224 Fed. vii, 137 C. C. A. vii), both in substance prescribe that judges of the District Court shall not allow any general exception to the whole of the charge to the jury in any criminal or civil trial; but the party shall state distinctly and separately the several matters in such charge to which he excepts and only such matters shall be included in the bill of exceptions and allowed by the court, and the manifest purpose of the rules was to give the trial court opportunity to correct inadvertent errors below.

2. CRIMINAL LAW ⟸1030(1)—APPEAL—REVIEW.
Under court rule 11 for the Circuit Court of Appeals for the Third Circuit (224 Fed. vii, 137 C. C. A. vii), a plain error in a criminal case may be reviewed by the Circuit Court of Appeals on its own motion, without regard to the regularity or irregularity of the proceeding by which it was brought before the court.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Charles Letterman and Samuel Frank were convicted of conspiring to commit an offense against the United States, by stealing property and money of the United States, in violation of Act March 4, 1909, c. 321, §§ 37, 47, 35 Stat. 1088 (Comp. St. 1916, §§ 10201, 10214), and they bring error. Affirmed.

Henry M. Stevenson, of Philadelphia, Pa., for plaintiffs in error.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiffs in error (defendants below) were jointly indicted, tried and convicted upon a charge of conspiring to commit an offence against the United States, by stealing money and property of the United States, in violation of sections 37 and 47 of the Act of March 4, 1909, 35 Stat. Pt. 1, p. 1088, c. 321 (Comp. St. 1916, §§ 10201, 10214). The case turned upon the identification of the defendants. Each presented for his own defence an alibi, different from but related in a way to the alibi of the other. In its charge, the court instructed the jury upon the law of alibi as applied to the defences

made. The defendants noted a general exception to the whole charge, which was allowed, and now by this writ they specify error in the charge with reference to specific instructions given and omitted. This is a case, therefore, in which the record shows nothing more by way of exception than a general exception to the charge. It is admitted that the matters now complained of were not specifically excepted to at the trial. Nor were they called to the attention of the court at the conclusion of the charge in order that the court might correct them while it had the opportunity, by adding to or amplifying its instructions to the jury.

[1] This situation is met by rules of both the trial court and this court (Rule 10, Section 2 of Rules of the District Court of the United States for the Eastern District of Pennsylvania, and Rule 10, Section 1 of Rules of the United States Circuit Court of Appeals for the Third Circuit, 224 Fed. vii, 137 C. C. A. vii). We recently had occasion to consider these rules at length. Philadelphia & Reading Ry. Co. v. Marland, 239 Fed. 1, 12–16, 152 C. C. A. 51.

The two rules are the same in substance and prescribe in effect, that the judges of the District Courts shall not allow any general exception to the whole of the charge to the jury in a civil or criminal trial; but the party excepting shall state distinctly and separately the several matters in such charge to which he excepts, and only such matters shall be included in the bill of exceptions and allowed by the court. The manifest purpose of these rules is to afford the trial court an opportunity, before the trial closes, to correct errors inadvertently made in its progress, and to insure stability of verdicts by discouraging speculation upon errors observed and not brought to the court's notice and their subsequent use as grounds for reversal on appeal.

The very mischief, which the rules are intended to prevent, is in the record before us. Here there is a charge apparently unexceptionable to which a general exception is perfunctorily made, and thereafter specific errors are complained of without specific exceptions to sustain them. We are therefore of opinion that the plaintiffs in error are without right to prosecute their writ in this court.

[2] As the writ of error in this case is directed to a judgment in a criminal proceeding involving the liberty of the defendants, we hesitate somewhat to dispose of it upon what the parties might conceive to be purely a technical ground. We have, therefore, examined the record for "plain errors," which, if present, would justify us under another rule of this court (Rule 11 [224 Fed. vii, 137 C. C. A. vii]) reviewing the case of our own motion, without regard to the irregularity of the procedure by which it is brought before us. We find no such error. Therefore, the judgment below is

Affirmed.

COCA-COLA CO. v. MOORE et al.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1917.)

No. 4905.

1. EVIDENCE ⊜558(1)—EXPERTS—EXAMINATION—CROSS-EXAMINATION.
In an action for legal services in conducting a suit in court, and professional labor, consultations, and advice with respect to it, and two other suits contemplated, but not brought, a witness for plaintiffs was asked his opinion of the reasonable value of the services as a whole, in a hypothetical question which recited them in an exhaustive detail. The witness testified to a gross sum covering all the services mentioned, and defendant was denied the right to have the witness state on cross-examination his opinion as to the separate value of the services connected with the suits not brought. *Held* that, as ordinarily the right of cross-examination is not confined to specific questions and details of the direct examination, but extends to the subject-matter inquired about, and as an opportunity for cross-examination is especially essential in cases of expert or opinion testimony, the restriction on defendant's right of cross-examination was improper, though it was contended that all the services were rendered under one contract; it being proper, for the purpose of testing the probative weight of the expert's estimate of value, to deal with the services severally.

2. WITNESSES ⊜329—EXAMINATION—CROSS-EXAMINATION—SCOPE.
Any question is proper that fairly tends to test the accuracy of the opinion of a witness or his credibility, and in asking it the cross-examiner is not confined by the precise form or contents of the question or answer in chief.

In Error to the District Court of the United States for the Eastern District of Arkansas; F. A. Youmans, Judge.

Action by J. M. Moore and others against the Coca-Cola Company. There was a judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Elias Gates, of Memphis, Tenn. (Samuel Frauenthal, of Little Rock, Ark., and Gates & Martin, of Memphis, Tenn., on the brief), for plaintiff in error.

J. H. Carmichael, of Little Rock, Ark. (Charles C. Reid, of Little Rock, Ark., on the brief), for defendants in error.

Before HOOK, SMITH, and STONE, Circuit Judges.

HOOK, Circuit Judge. In an action for legal services in conducting a suit in court, and professional labor, consultations, and advice with respect to it and also two other suits contemplated, but not brought, a witness for plaintiffs was asked his opinion of the reasonable value of the services as a whole, in a hypothetical question which recited them in exhaustive detail and assumed them to have been performed. In answer the witness testified to a gross sum covering all the services mentioned. The defendant was denied the right to have the witness state upon cross-examination his opinion of the separate value of the services connected with the suits not brought.

[1, 2] The established general rule is that the right of cross-examination is not confined to the specific questions and details of the direct examination, but extends to the subject-matter inquired about. Powers v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448; Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728; De Witt v. Skinner, 146 C. C. A. 437, 232 Fed. 443. An opportunity for thorough cross-examination is especially essential in cases of expert or opinion testimony. 11 R. C. L. 646. Any question is proper that fairly tends to test the accuracy of the opinion of the witness or his credibility, and in asking it the cross-examiner is not confined by the precise form or contents of the question and answer in chief.

We think the ruling of the trial court deprived the defendant of much of the value of the right of cross-examination, even though as contended there was but a single contract of employment, resulting in the bringing of but one suit. The severance of the services was proper for the purposes of cross-examination, and in this case it was the more logical, because of the distinctive recitals in the question in chief. The testing of the probative weight of an expert's estimate of value necessarily requires a liberal latitude of inquiry into the factors and considerations upon which it is based. Of course, there is a reasonable limit to all cross-examinations, which a court should enforce; but we do not think it was approached in this case.

We have thought it best to notice the above matter, although the brief for the plaintiff in error does not fully comply with rule 24 of this court (188 Fed. xvi, 109 C. C. A. xvi).

The judgment is reversed, and the cause is remanded for a new trial.

HANN v. DARNELL.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1917. Rehearing Denied January 24, 1918.)

No. 3112.

MASTER AND SERVANT ⊂=107(2)—MASTER'S LIABILITY FOR DEATH OF SERVANT —PLACE FOR WORK.

Defendant, who was a nonresident, by a manager and clerk conducted a shoe store in a leased building. An adjoining building was burned, but a wall next to the shoe store and two or three stories higher was left standing, and after inspection by builders was allowed to remain to be used in rebuilding. Defendant's manager called in the city building inspector, who examined the wall and pronounced it safe. The employés remained at work in the store, but were both killed by the falling of the wall during a storm. The wall was not on the leased property, and defendant had no control over it. *Held*, that he was not chargeable with failure to exercise reasonable care to furnish the employés a reasonably safe place to work, which rendered him liable for the death of an employé.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Action at law by Mrs. Jimmie Sue Darnell, administratrix of the

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

estate of George W. Darnell, deceased, against Charles Hann. Judgment for plaintiff, and defendant brings error. Reversed.

Borden Burr and Augustus Benners, both of Birmingham, Ala., for plaintiff in error.

G. R. Harsh, of Birmingham, Ala., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. In this case Mrs. Jimmie Sue Darnell, defendant in error, brought suit, as administratrix, against Charles Hann, plaintiff in error, to recover damages for the death of her husband, George W. Darnell, alleged to have been caused by the negligence of Hann in not furnishing the deceased with a reasonably safe place to work. At the close of the evidence the defendant moved for a verdict in his favor, which was denied. The case went to the jury, and resulted in a verdict for the plaintiff. Error is assigned to the action of the court in denying the motion for the general charge.

The undisputed facts are these: Hann was the proprietor of a shoe store in Birmingham. He lived in Boston, visited Birmingham occasionally, and operated his store in Birmingham through Alexander McLeod, as manager. The building next to Hann's store in Birmingham burned, but there was left standing a wall, which extended two or three stories above the roof of his store. The débris was cleared out of the burned building, and the wall was inspected by competent builders and left standing; the intention being to use it in the reconstruction of the building. Hann had no control over the burned building and no interest in it. The wall was separate from the wall of the building in which his store was located. He leased his store. After the fire McLeod called in the city building inspector, whose duty it was to investigate the safety of buildings in Birmingham, and who had the authority to order the wall demolished if he deemed it unsafe. That official inspected the wall and told McLeod that the wall was not cracked, that it was in good condition and standing plumb and straight, and later he told the clerks in Hann's store, in order to allay any fears on their part, that the wall was all right. So far as appeared from the evidence, Hann's employés knew as much or more than he did of the condition of the wall, and McLeod and the other employés seemed to have relied in good faith on the assurance of safety given by, or implied from, the statements made to them by the building inspector. Hann continued to occupy his store, and McLeod and Darnell continued at work in it. Some four months after the fire the wall of the burned building fell during a storm, and crushed in Hann's store, killing both McLeod and Darnell.

Upon the facts stated, we think defendant was entitled to the peremptory instruction asked. Hann was required to use all reasonable care to provide his employés with a reasonably safe place to work. He was charged with no duty to demolish the wall, and did not have

the right to do so. He invoked the action of the proper city official, and, under the circumstances, was entitled to rely upon his opinion. Therefore he was not guilty of negligence in continuing to occupy his store.

It follows that the judgment must be reversed.

H. WARD LEONARD, Inc., v. MAXWELL MOTOR SALES CO.

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

APPEAL AND ERROR ⊜71(3)—FINAL JUDGMENT—WHAT CONSTITUTES.

An order suspending an interlocutory injunction pending appeal, which required defendant to file a bond conditioned to pay plaintiff in event of dismissal of the appeal, or affirmance of the decree, certain specified sums, is not a final determination of defendant's right, since no action is possible under the order of suspension until the appeal from the interlocutory decree is decided, and so the appeal therefrom should be dismissed.

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

Suit by H. Ward Leonard, Incorporated, against the Maxwell Motor Sales Company. From an order suspending an interlocutory decree, defendant appeals. On motion to dismiss. Appeal dismissed.

Motion by the appellee to dismiss an appeal. The plaintiff secured an interlocutory decree upon a patent and the defendant asked for a suspension of the injunction pending an appeal. The District Court suspended the injunction on the following terms:

"(1) That within five days from the date hereof the defendant file a bond with sufficient sureties to be approved by plaintiff's counsel or the clerk of this court, in the sum of five thousand ($5,000) dollars, conditioned to pay to the plaintiff in the event of the dismissal of the said appeal by the said Circuit Court of Appeals, or in the event of the affirmance of the said decree by the said court, or in the event of failure by the defendant to take an appeal from the said decree within 30 days herefrom, five ($5) dollars for each apparatus shipped or delivered by the defendant, subsequent to and including the date hereof and prior to the issuance of the mandate of said Circuit Court of Appeals, which embodies or contains or is adapted to practice the invention of letters patent No. 1,122,774, as to claims 2, 3, 4, 9, 10, 11, 16, 21, 22, and 24 thereof, and letters patent No. 1,157,011, as to claims 1, 4, 5, 6, 7, 8, 9, 10, and 12 thereof or any of said claims. If the said money is paid as a result of the dismissal of an appeal or an affirmance of the said decree, the defendant shall pay the total amount due as a result of this suspension upon the issuance of the mandate of the Circuit Court of Appeals; otherwise, the clerk of this court is directed to enter judgment for the said amount in favor of the plaintiff and against the defendant.

"(2) That the defendant shall on the 1st day of November, 1917, file with the plaintiff's solicitors a list showing the number of all cars and apparatus embodying the said inventions of said claims, or either of them, sold, shipped, or delivered by it, on or after the date hereof, and up to and including said 1st day of November, 1917, and shall likewise file on the 1st day of each succeeding month while this order is in force, similar lists covering sales, deliveries, and shipments during the preceding calendar month.

"It is further ordered that nothing herein is to be construed as suggesting

or passing upon the measure of damages or the rule of profits here applicable, either in favor of or against either of the parties hereto.

"This order of suspension is upon condition that defendant shall take its appeal within thirty days from the entry of the interlocutory decree awarding injunction herein, and that it shall perfect its appeal and claim preference for the same in strict accordance with the law and the rule of the Circuit Court of Appeals for the Second Circuit."

The defendant gave the required bond under protest and then appealed from the order of suspension.

Clifton V. Edwards, of New York City, for the motion.

Drury W. Cooper, of New York City, opposed.

Before ROGERS, Circuit Judge, and LEARNED HAND and MAYER, District Judges.

LEARNED HAND, District Judge (after stating the facts as above). It seems to us clear that the order is not a final determination of the defendant's right, since no action is possible under it until the appeal from the interlocutory decree shall have been decided. If that decree is reversed, there can be no recovery upon the bond, or upon any judgment entered in excess of the bond. The defendant was called upon, it is true, to decide whether it should give the bond or suffer the injunction; but the bond itself as an obligation was contingent upon the affirmance of the decree upon which it depended. We express no opinion upon whether or not the order is appealable after the decree is affirmed, if it be affirmed; this decision does not preclude such an appeal.

Assuming the defendant may then appeal we do not see that its case is a hard one. It can be called upon to pay no money until the interlocutory decree for injunction is affirmed, if it is. It will then be subject to judgment upon the bond and perhaps beyond that amount, but by giving security it may stay execution pending an appeal. Upon such an appeal it can review the ad interim liquidation of profits and secure a modification if proper, or it can urge that the court's power was limited to requiring a supersedeas bond. All that it must now do irrevocably is to file a bond for $5,000, and make monthly reports. The first is a general condition of all appeals; the second is no hardship.

The appeal is dismissed.

UNITED STATES FIRE ESCAPE COUNTERBALANCE CO. v. JOSEPH HALSTED CO.

(District Court, N. D. Illinois, E. D. January 28, 1917.)

No. 30386.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—FIRE ESCAPE APPARATUS.
The Cowles patent, No. 705,042. for a fire escape apparatus, which relates to the lower movable section of a fire escape having a pivotal support and means, consisting of an automatically shifting counterbalancer, for holding such section horizontal when in the raised or inoperative position, discloses invention and covers a meritorious and efficient device, and is entitled to a liberal construction and a considerable range of equivalents. Claims 1, 2, and 3 also *held* infringed.

2. PATENTS ⟸165—CONSTRUCTION AND SCOPE—WORDS OF LIMITATION.
A patentee is not limited by a particular description of his device in the patent, where it is expressly stated to be the preferred form of construction.

In Equity. Suit by the United States Fire Escape Counterbalance Company against the Joseph Halsted Company. On final hearing. Decree for complainant.

Brown, Nissen & Sprinkle, of Chicago, Ill., for plaintiff.
John W. Hill, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on John T. Cowles patent, No. 705,042, issued July 22, 1902, for a fire escape apparatus. If the patent is assumed to be valid, two questions are presented: Whether claim 2, relating to the shifting counterweight, is broader than the real invention, and, if not, whether that claim is infringed; and whether claims 1 and 3, relating to the lateral support of the side of the ladder opposite to the counterweighted side, are infringed.

[1] The device is thus described by Mr. Smythe, plaintiff's expert:

"Prior to the invention of the patent in suit it was customary to employ as the lower section of the fire escape a pivoted stair or ladder, the free end of which was kept elevated by suspending it by means of a cable, to the other end of which a counterweight was attached. But this arrangement was unsatisfactory, as the cable was apt to break and let the lower section or ladder fall, thus endangering the safety or lives of those who might be on or beneath it. The difficulty lay in the slender and relatively fragile character of the connection between the two heavy parts of the lower section—the pivoted step or ladder and its counterweight. This difficulty the inventor, Mr. Cowles, obviated in the form of fire escape set forth in the patent in suit and defined in the claims. Instead of providing for holding up the free end of the pivoted section by means of a counterweight connected with the free end by means of a suspensory cable, Mr. Cowles employs a counterbalance that is rigidly secured to the frame of the movable step or ladder, so as to constitute, in effect, an integral part of it. With this arrangement the danger is obviated of the two parts of the movable section parting company and falling. In its operation, the lower movable section of the fire escape is adapted alternatively to stand in two positions. When it is not in use it is required to stand in a substantially horizontal position at the second floor level, in order to avoid obstructing the passageway beneath it, and in order to cut off access to the building; and when it is in use it is required to stand with its free end resting on the ground. It is desirable that the movable section shall stay in

each of these alternative positions of itself and without the use of any extraneous mechanism for locking it in the position to which it may have been moved. This desirable feature Mr. Cowles has secured in the structure disclosed in the patent in suit, by so arranging the counterbalance part of the structure and adapting it to the other parts of the movable section that the counterweighting force of the counterbalance automatically adjusts itself to the position of the ladder, so that when the ladder is down in its operative position the counterweighting effect is decreased to the point where the weight of the free or forward end predominates and thus holds the ladder down, and so that when the ladder is moved in its horizontal or inoperative position the counterweighting force of the counterbalance is increased to the point where it predominated over the weight of the other end of the ladder, and thus holds the ladder up in its horizontal position. In referring to this feature of the fire escape section illustrated in the patent in suit, the specification says that the movable section has a shifting counterbalance arrangement 'whereby when the escape is in raised position it will be securely held in such position and whereby when it is pulled down in operative position the counterbalance will shift automatically so as to hold it in operative position until it is again raised into horizontal position.'"

The common "teeter board," used by children in play, will roughly illustrate both plaintiff's and defendant's construction. The ladder and counterweighted part, which form the horizontal floor connecting with the second story door or window from which exit is made, are in a single section, trussed or braced so as to give strength, and pivoted near the center of gravity. The normal position of the fire escape is its inoperative one, and is horizontal. When a person steps from the counterbalance end to the upper stair of the ladder, the latter will descend until it rests on the ground. The ladder will remain in this position, whether there is any weight upon it or not, but may be readily pushed up by hand, and with the aid of the counterbalance slowly raised to normal position. In the preferred form of the patent device this result is hastened by a ball inclosed in a sleeve or cylinder secured to the counterbalance at such an angle that when the ladder is approaching the ground the ball will roll towards the pivot, and thus move the center of gravity a little in the same direction. When the ladder is lifted up, and reaches a certain point in its ascent, the ball will roll away from the pivot and assist in the operation of bringing the ladder and platform to a normal position. In defendant's form the ball and cylinder form is omitted, and a like result obtained by lowering the pivotal point or fulcrum.

Defendant takes the position that its device has no "adjustable counterbalance." The counterbalance in its fire escape is a solid piece of iron, without any bodily shifting part. Plaintiff does not claim that the counterbalance itself is adjustable, but that the weight or center of gravity is a shifting or movable one. As plaintiff's expert says:

"It is done, * * * not by employing counterweights that actually slide or roll along the counterbalance arm, but by so placing the counterbalance weight on the structure that in the swinging of the step or ladder about its pivot rod the weight of the counterbalancing portion moves towards or away from the vertical plane of the pivotal point at a rate at which the weight of the other end of the section moves with respect to the vertical plane of the pivot, thus changing the 'effective weight of the counterbalance' as it moves, and making its weight predominate in effect when the ladder is in its horizontal position, and the weight of the ladder, or the ladder end of the section, to predominate in effect when the section is moved down."

It is evident from this that it is the weight or gravity, not the counterbalance as a physical substance, which shifts, so that defendant's structure does not read on claim 4. It is a "shifting counterbalance" which the patentee describes as one of the objects of his invention. After describing the old form of fire escapes, in which the weight of the movable section was carried by cables, he says:

"One of the objects of my present invention is to avoid the difficulties and dangers above enumerated, and this I aim to accomplish by the construction of a lower section of a fire escape mounted upon a pivotal support and provided with a shifting counterbalance, whereby when the escape is in raised position it will be securely held in such position, and whereby when it is pulled down in operative position the counterbalance will shift automatically, so as to hold it in operative position until it is again raised to horizontal position."

He then goes on to say, in substance, that he obtains these objects, as well as those which may later appear, by means of a construction illustrated in preferred form, and that in carrying out the invention he provides that in lowering the device into operative position the cylinder containing the movable ball will be a little inclined toward the pivotal point, so that the ball counterweight will roll down to that end and reduce the effective force of the counterweight or balance, so as to permit the section to remain in operative position without locking. When the section is raised the cylinder changes its place, causing the ball to roll over to the other end, increasing the effective force or weight of the counterbalance, and causing the ladder to remain in its horizontal position.

The only prior art which contains the principles of defendant's construction is Schwartz, No. 136,278, for lifting bridges, and this seems to be in a distinct field. This patent was not cited to the Cowles application, and the problems were entirely different. Schwartz designed a short, strong bridge for a canal, and used a counterweight, much like that of defendant, to hold the bridge in raised position and allow boats to pass beneath. Its normal position was horizontal for the passage of teams and loads. Necessarily it was of very strong and massive construction. The Cowles fire escape, on the other hand, must be attached to the side of a building, necessarily light, though strong. Its normal position would be out of use, held up horizontally, ready for an emergency, to be used by frightened people, who could not be expected to do anything more than get upon it. The Schwartz bridge is worked by a windlass; but a fire escape, which is not automatic when weight is put on it, but requires to be operated, is of little use. The problems were so distinct that Cowles was not bound by anything in the bridge art.

It follows that Cowles was the first to solve the fire escape problem, and if he has not limited himself to a bodily shifting element, there would be no difficulty in finding infringement of claim 2, regarding the shifting counterweight. The invention is a meritorious one, highly efficient and commercially successful, deserving a liberal construction and considerable range of equivalents.

[2] It is plain that the purpose of the inventor is to increase the weight of one section after the other, so as to keep the device in either

one of the two positions. He prefers the ball and cylinder form, but shows no purpose to disclaim any other form in which the invention may be embodied, because he expressly says that the one described is the preferred form. The law gives him the advantage, even if he does not claim it. Winans v. Denmead, 15 How. 330, 14 L. Ed. 717, approved in Western El. Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294, United States v. Société Anonyme, 224 U. S. 309, 32 Sup. Ct. 479, 56 L. Ed. 778. This preferred form is not essential to the operation of the ladder, as shown by the defendant's form. Werner v. King, 96 U. S. 218, 24 L. Ed. 613. Unless it can be seen that the ball and cylinder form constitutes the very gist and fundamental theory of the invention, a claim for "means comprising an adjustable counterbalance," as in claim 2, is not too broad. State Bank of Chicago v. Hillman, 180 Fed. 732, 104 C. C. A. 98; Burroughs Adding Machine Co. v. Felt & Tarrant Mfg. Co., 243 Fed. 869, —— C. C. A. ——.

The patentee says he accomplishes his object by a shifting counterbalance, one which will shift automatically, and that the ball and cylinder is his preferred form. Defendant has a shifting counterbalance, described in the Seymour patent, No. 1,015,645, in which the same result is secured by the very simple and ingenious means of lowering the pivotal support.

It is necessary now to consider whether defendant's form is the mechanical equivalent of plaintiff's; whether it has merely changed the form while retaining what Cowles really discovered, the shifting of gravity from one side of the pivotal plane to the other. In both the center of gravity is shifted to and from the vertical plane of the pivoted support. In both there is a shifting counterweight, in the sense of a moving avoirdupois rather than a bodily sliding piece of metal. Plaintiff increases the effective force of the counterweight by a ball and cylinder construction as his preferred form, while defendant secures the same result by the different means of lowering the pivotal support. If a plank is fulcrumed at its center of gravity, and the pivot is placed as high as the center or top of the plank, the latter will stand in almost any position, with a slight tendency to keep on going down at that end which is lowered by hand. If the pivot is placed vertically above the middle of the plank, this tendency will be lessened, and if placed vertically below the middle it will be increased. The last position illustrates just what the defendant has done. It has put the pivot two or three feet beneath the lateral center plane of the structure, so that when the step or ladder part is lowered from the horizontal it will keep on going down until it rests on the ground. In like manner, when the ladder is raised to a certain height, the counterbalance end will keep on going down until the structure is horizontal, and there it will stay. The "effective weight" has been thus transferred by means of the position of the pivot with the same result gained by Cowles with the bodily moving ball. Such gravity shifting is what he discovered, and illustrated in a different preferred form. In the language of one of the decisions above referred to, he described "what he conceived to be the best form of his invention, and contemplated that it could be repre-

sented in other forms and proportions. This, however, was unnecessary, for the law would secure him against imitation by other forms and proportions." 224 U. S. 309, 32 Sup. Ct. 479, 56 L. Ed. 778, supra.

In his preferred form the patentee to some extent makes use of the above-described tendency to shift the center of gravity to and from the vertical plane of the pivot, since the fulcrum is slightly below the lateral gravity center of his structure; though he relies mainly on the sliding ball. The defendant by lowering the fulcrum relies on the same tendency, and upon nothing else. This is the real difference in the two structures. It is evident, therefore, that defendant would not infringe a combination claim like No. 4 (not in suit), which expressly counts on "a cylinder, * * * a ball within said cylinder, means for retaining said ball within said cylinder," because it employs not only a different mode of operation but omits one or more elements of the claim. But it does infringe claim 2, calling for "means comprising an adjustable counterbalance for holding up the free end of said ladder," because the "effective force of the counterweight or balance," as described by the patentee, is shifted automatically by the operation of the defendant's device.

The Lateral Support Feature.—The first and third claims relate to the holding up of the ladder, so that it will not sag on the side opposite the counterweighted side. They are as follows:

"1. A movable step or ladder having a pivotal support, means for holding up the free end of said movable step applied at one side thereof, a device for aiding in the support of the other side thereof, and mechanism co-operating with the said last-mentioned supporting device for securing the same to that side of the ladder which is opposite the one which is to be supported by it, whereby the inner free end of the ladder is carried from the outer side, substantially as described."

"3. A movable step or ladder carried by a pivotal support, a counterweight applied at one side only of said step, means for supporting the other side thereof, comprising a rod subject to torsional strain and arranged to extend longitudinally alongside of the counterweighted side of the step and inwardly to the opposite side near the bottom of the step, substantially as described."

This side support feature is a simple one, which would hardly require invention apart from the adjustable balance. The second claim covers both features. Much more was made of the support on the trial than it deserved. Claim 1 counts on a device for aiding in the support of the inner side, and mechanism co-operating with it securing it to that side, by which the inner free end of the ladder is carried from the outer side. And claim 3 relies on a torsional rod along the outer side to support the inner. I think both claims are infringed by both the Channon and Smythe structures. Claim 1 sufficiently refers to the counterweight feature to make it an element of the combination, so that it is unimportant whether the side support feature is independently patentable.

There should be a decree declaring the patent valid, the three claims infringed by the Channon and Smythe structures, and for injunction, accounting, and costs.

GILCHRIST v. WAYCROSS STREET & SUBURBAN RY. CO. et al.

(District Court, S. D. Georgia, E. D. December 27, 1917.)

1. STREET RAILROADS ⟸66—CHARTER—DUTY TO OPERATE ROAD.
Though the consent of municipal authorities was a condition precedent to the exercise by street railroad company of its charter power to construct a railway upon the streets of the city, yet, as the company was bound to secure its charter before it could apply to the municipality for consent to use the streets, the charter is not ex proprio vigore mandatory on the company to operate a street railroad system in a particular city.

2. STREET RAILROADS ⟸55—FORECLOSURE SALE—DUTY TO OPERATE.
A street railroad company, whose charter authorized it to construct a railway upon the streets of a municipality for its railway, under authority mortgaged its property. The company became insolvent, and, as the line could not be operated without a loss, the mortgage was foreclosed and the property sold, with the right of the purchaser either to operate the system or dismantle and remove the physical property. The property was bought in by the mortgagee and the sale confirmed. *Held* that, while the permanent property of a railroad corporation may be charged, not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations, and cannot be relieved of such burden without the consent of the state, yet, as the charter of the street railway company did not of its own force require the company to operate a system, and as the company was authorized to mortgage its property, the property could be sold free from the burden of operating the system.

3. STREET RAILROADS ⟸55—FORECLOSURE—EXTENSION.
In such case, the fact that a landowner in the municipality entered into a contract with the street railway company for the extension of a car line over his property, and to effectuate that object purchased during receivership a receiver's certificate, did not prevent the sale of the company's property free from the burden of operating a street railway system, for, while the breach of the contract by the company rendered it liable in damages, it created no right or easement in the street railway company's property.

In Equity. Bill by Albert W. Gilchrist against the Waycross Street & Suburban Railway Company and others. On application for temporary injunction. Injunction denied.

Oliver & Oliver, of Savannah, Ga., for plaintiff.

Smith, Hammond & Smith, of Atlanta, Ga., and Parks & Reed and J. L. Sweat, all of Waycross, Ga., for defendants generally.

Smith, Hammond & Smith, of Atlanta, Ga., for defendant Southern Iron & Equipment Co.

EVANS, District Judge. [1] The case is before me on an application for a temporary injunction. The Waycross Street & Suburban Railway Company was chartered under the general railroad law, but before it could construct a railroad in the streets of Waycross it had to receive municipal permission. The consent of the municipal authorities was not a condition precedent to the granting of the railroad company's charter, but was a condition precedent to the exercise by the company of the charter power to construct a railway upon the streets of the city. Brown v. Atlanta Ry. Co., 113 Ga. 462, 39 S.

E. 71. The company must secure its charter before it can apply to the municipality for consent to use the city's streets; hence the charter ex proprio vigore is not mandatory on the company to operate a street railroad in a particular city.

[2] With regard to commercial railroads, it has been held that when once constructed under a lawful charter, the permanent property of the corporation is charged, not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations, and cannot be relieved of such burden without the consent of the state. State v. Dodge City St. Ry. Co., 53 Kan. 377, 36 Pac. 747, 42 Am. St. Rep. 295.

As a corollary of this proposition, it is said that the courts have no power to give such assent, as such action is distinctively nonjudicial in character. We may concede all this to be true, but it does not follow in every case that the court is lacking in jurisdiction to enforce its decree, because an incidental effect may be to put it out of the power of a street railway to operate its line in a particular city under a permissive grant by virtue of a charter obtained under the general state law. Iowa v. O. C. Trust Co., 215 Fed. 307, 131 C. C. A. 581, L. R. A. 1915A, 549; Old Colony Trust Co. v. Wickard Bros., 224 Fed. 913, 139 C. C. A. 1; Maryland v. Philadelphia, B. & W. R. Co., 122 Md. 438, 89 Atl. 726.

The street railway company had the authority to mortgage all of its property for corporate purposes. A decree of foreclosure by sale would amount to nothing, if the conditions were such that the railroad must be operated by the purchaser at foreclosure sale, where the railroad could not be operated without loss. No purchaser would buy under compulsion of operating a street railroad at a loss, and unless the court, under such circumstances, could sell the physical property, with the right of removal, the mortgage lien, as well as the debt, would be destroyed. Such were the conditions in the present case. The street railway company was insolvent; it could not operate the road, so as to make it pay expenses, must less the annual interest on its debt. A receiver attempted to operate it, and in aid of that effort was authorized to borrow money on certificates. He could not make the property pay operating expenses, and a decree was taken, foreclosing the mortgage, and fixing the priorities of the liens against the company, and ordering the receiver to advertise for sealed bids. None were submitted. Thereafter by supplemental decree the receiver was directed to sell the street railway property at public sale, with the right of the purchaser either to operate the system or dismantle and remove the physical property. The property was purchased by the mortgagee, who sold it to the Southern Iron & Equipment Company, and the sale was confirmed by the court. The purchaser paid the purchase price and was engaged in removing the property when this bill was filed. Under these circumstances a court of equity had jurisdiction of the subject-matter, and its decree is not void. To hold otherwise is to say that a mortgage creditor of an insolvent street railway company could never realize on his security by a sale of it, if the circumstances are such that the railroad cannot be operated except at a loss and the pur-

chaser be compelled to operate the same. State of Kansas v. Dodge City, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564.

[3] The petitioner owns a large body of land in Waycross, has erected thereon a number of houses, and is much interested in the operation of the street railway. He has a contract with the company for the extension of the street car line over his property, and purchased a receiver's certificate to effectuate this object. I do not think this circumstance should prevent the execution of the foreclosure sale and the delivery of the property to the purchaser. The failure of the company to comply with its contract constitutes a breach, rendering it liable in damages. The contract is a personal engagement, and created no easement in the property. Express Co. v. Railroad Co., 99 U. S. 191, 25 L. Ed. 319. I do not think the evidence sufficient to show that petitioner was deterred from objecting to the confirmation of the sale by his conversation with the attorney of the purchaser, who was also attorney of the mortgagee.

After due consideration, I do not think the plaintiff entitled to an injunction, and a temporary injunction is refused, and the restraining order heretofore granted is revoked.

GORDON'S DRY GIN CO., Limited, v. EDDY & FISHER CO.

(District Court, D. Rhode Island. December 29, 1917.)

1. TRADE-MARKS AND TRADE-NAMES ⟸92—BILL—EXHIBITS.

Though a bill charging unlawful imitation of complainant's trade-marks and labels and unfair competition was indefinite, in that complainant's registered trade-mark was not described therein, but merely appeared in exhibits attached to the bill, yet where defendant's answer specifically denied that its trade-marks were an imitation of the labels and trade-marks of complainant, and the case was tried upon evidence as to the registered trade-mark of complainant as well as upon evidence of a general imitation of labels, the case at final hearing may be considered as presenting questions both of infringement of trade-marks and of unfair competition.

2. TRADE-MARKS AND TRADE-NAMES ⟸58—UNFAIR COMPETITION—WHAT CONSTITUTES.

Where complainant's registered trade-mark included a boar's head, and complainant's gins had long been before the public, the adoption by defendant of a label also bearing a boar's head amounts to unfair competition, even though there was considerable difference in the drawings, for a trade-mark is a sign which may become known to the public by name as well as by sight, and as complainant's gins might be associated with the representation of a boar's head, the adoption by defendant of a similar device was unfair.

3. TRADE-MARKS AND TRADE-NAMES ⟸55—UNFAIR COMPETITION—INTENTIONAL WRONG.

Where, after notice that its label conflicted with the registered trade-mark of complainant, defendant refused to remove the misleading device, defendant is guilty of an intentional wrong, even though in the first instance there was no intention on its part to palm off its goods as those of plaintiff.

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

In Equity. Bill by the Gordon's Dry Gin Company, Limited, against the Eddy & Fisher Company. Decree for complainant.

Barney, Lee & McCanna, of Providence, R. I., for plaintiff.
Tillinghast & Lynch, of Providence, R. I., for defendant.

BROWN, District Judge. The bill charges unlawful imitation of plaintiff's trade-marks and labels and unfair competition.

Upon a comparison of the respective labels of plaintiff and defendant there appears a general resemblance, which, on a casual observation, might lead to a confusion of goods. This general resemblance is not destroyed by the points of difference upon which the defendant insists.

At the hearing the plaintiff introduced in evidence, without objection from the defendant certificate of registration No. 21,734 of trade-mark for spirituous liquors and cordials, consisting of the representation of "a boar's head resting on a roll," and also certificate of registration No. 68,640 of trade-mark for gin, showing in the drawing a complete label having a similar boar's head as a central feature.

[1] While the bill is somewhat indefinite, in that the "boar's head" as a registered trade-mark is not therein described, but merely appears in exhibits attached to the bill, yet as the defendant's answer specifically denies that its labels and trade-marks are in imitation of the labels and trade-marks of the plaintiff, and as the case was tried upon evidence as to the registered trade-mark of a "boar's head," as well as upon evidence of a general imitation of labels including with a boar's head other features, the case made at final hearing properly may be considered as presenting questions both of infringement of trade-mark and of unfair competition.

[2] The defendant uses upon its labels the representation of a boar's head. Upon comparison there is considerable difference in the drawings, and it is probable that one familiar with the plaintiff's drawing would at once perceive the difference. This, however, is not a sufficient justification for the use of a boar's head by the defendant. The defendant's trade-mark answers the general description of plaintiff's in that it is a boar's head.

A trade-mark is a sign which may become known to the public by name as well as by sight. Thus "The Bull Dog Bottling," with a bulldog's head, became known as "Dog's Head" beer; and its proprietors were granted an injunction against the use of a "rough terrier's head." Read v. Richardson, 45 Law T. (N. S.) 54.

The actual physical resemblance of the two marks is not the sole question for the court; for if the plaintiff's goods have, from his trade-mark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market is as much a violation of the plaintiff's rights as an actual copy of his mark. Seixo v. Provezende, L. R. 1 Ch. 192; De Voe Snuff Co. v. Wolff, 206 Fed. 720, 124 C. C. A. 302.

Though the plaintiff offered no evidence to show that its gin was called by the name "Boar's Head," and no evidence of actual deception of customers, it offered evidence that the gin had been sold in large quantities for many years (since 1769) associated with the representation

of a boar's head, and had been extensively advertised at a large expense.

Where a trade-mark consists of printed words, it may be infringed by the same words in different form, type, or writing; and it would seem also to follow that the oral use of the same words as descriptive of goods other than those of the proprietor of the original trade-mark might constitute infringement. The written word and the spoken word have the same meaning, and as goods are bought and sold by oral as well as by written description, pictorial trade-marks which are sufficiently alike to have the same name are likely to lead to confusion in oral description of goods. Thus one who tries and likes beer with a bulldog trade-mark may remember it as "Dog's Head," and extol its qualities under that name to one who calls for "Dog's Head" and is satisfied when given a bottle with a dog's head, though it be a rough terrier's head. See Read v. Richardson, 45 Law T. (N. S.) 54.

[3] Upon comparison of the labels considered as a whole I am of the opinion that the plaintiff has established such imitation as might prove deceptive. I am not satisfied, however, that the defendant is guilty of a fraudulent intention of palming his goods off as the goods of the plaintiff, or that actual deception has resulted. The correspondence shows that the defendant, after notice, though denying imitation, was willing to concede the plaintiff's view and to eliminate the boar's head. He afterwards concluded to stand upon his rights. As was said in Straus v. Notaseme Co., 240 U. S. 179, 182, 36 Sup. Ct. 288, 289 (60 L. Ed. 590):

> "When they stood upon their rights of course they made themselves responsible for the continued use of a label that might be held likely to deceive, and if it should be held manifestly to have that tendency, they would be chargeable for what in * * * law was an intentional wrong, or a fraud, although the case is actually devoid of any indication of an actual intent to deceive, or to steal the reputation of the plaintiff's goods."

While I am not satisfied that the plaintiff has made out a case entitling it to an account of profits (see Straus v. Notaseme Co., 240 U. S. 179, 183, 36 Sup. Ct. 288, 60 L. Ed. 590), that question may be further heard upon the settlement of a decree.

I am of the opinion that the plaintiff is entitled to an injunction restraining the defendant's use of a boar's head as a trade-mark for gin, and also the use of its present labels.

A draft decree may be presented accordingly.

GOTTESMAN et al. v. CANADA ATLANTIC & PLANT S. S. CO., Limited.

(District Court, E. D. New York. December 18, 1917.)

ADMIRALTY ⊂⊃47—FOREIGN ATTACHMENT—ISSUANCE.

Supreme Court Rules in Admiralty, rule 7 (29 Sup. Ct. xxxix), declares that in suits in personam no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding $500, unless by special order of the court upon affidavit. Although the judge made no indorsement upon the papers directing the clerk to issue process with

writ of foreign attachment, the clerk entered the order in the usual form as if direction had been given. The court was actually in session at the time the special order was entered upon the minutes, and the clerk was following the usual practice of the court as to jurisdictional facts upon which a judge would have directed the entry of the order, had it been brought to his personal attention. *Held*, the order will not be vacated on the ground that there was no compliance with the rule, the court having power to sanction the action of the clerk, as well after as before the issuance of process; it appearing that an order was made by the court directing that process be issued to the marshal.

In Admiralty. Libel by Mandel Gottesman and David S. Gottesman, doing business under the firm name and style of M. Gottesman & Son, against the Canada Atlantic & Plant Steamship Company, Limited, in which a foreign attachment was issued. On application to vacate the writ of foreign attachment. Application denied.

Kirlin, Woolsey & Hickox, of New York City, for libelants.
Bullowa & Bullowa, of New York City, for respondent.

CHATFIELD, District Judge. Application is made to vacate a writ of foreign attachment, upon the ground that the libelants did not comply with rule 7 of the United States Supreme Court Rules in Admiralty (29 Sup. Ct. xxxix), and procure a special order of court for the issuance of the attachment.

It appears that an order *was* made by the court directing that process be issued to the marshal. Ordinarily, as set forth in Benedict's Admiralty, § 343, the judge, in order to pass upon the "affidavit or other proof showing the propriety thereof," makes an indorsement upon the papers: "Let process with writ of foreign attachment issue." In the present case this indorsement was not placed upon the papers, and it is admitted for the purposes of the motion that no judge gave any special direction to the clerk for the making of the order, but that this was made in the usual form by the clerk, as if such direction had been given. It was admittedly too late to issue a new process when the matter was called to the attention of the court, inasmuch as by that time the respondent had appeared by attorney and could therefore be found in the district. Birdsall v. Germain Co. (D. C.) 227 Fed. 953.

When the point was called to the court's attention, an order was made by the District Judge denying an oral application to vacate the attachment. This court held that a special order had been made, and that the court could sanction the action of the clerk after as well as before the issuance of process, since the facts made it appear that the court was actually in session at the time the special order was entered upon the minutes, and that the clerk was following the usual practice of the court as to the jurisdictional facts upon which a judge would have directed the entry of the order, if it had been brought to his personal attention. Bryan v. Ker, 222 U. S. 107, 32 Sup. Ct. 26, 56 L. Ed. 114.

The case is not like Brown v. Pond (D. C.) 5 Fed. 31, and U. S. v. Rose (D. C.) 14 Fed. 681, where a statutory requirement was absent, nor like The Berkeley (D. C.) 58 Fed. 920, in which the court was not

in session when the clerk assumed to enter an order which, under the rule, could be made only by the judge in person.

But the court went further, and directed the libelant to give a further bond for costs (which has been done), and provided that the respondent might at any time renew the claim of jurisdictional defect, a right which could not be taken away, but which the court attempted, by that method, to show had not in any way been waived.

The present motion was made under that permission, and has been coupled with a question as to the merits of the cause of action, which will be saved for the trial of the cause.

The renewal of the original motion will be disposed of as before, and hence must be denied.

UNITED STATES v. DOREMUS.

(District Court, W. D. Texas, San Antonio Division. January 2, 1918.)

No. 2254.

1. CONSTITUTIONAL LAW ⟸27—RESERVE POWERS OF STATE.

Under Const. Amend. 10, declaring that powers not delegated to the United States by Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people, the states have power to regulate matters of internal police within their limits not only as to the health, morals, and safety of the public, but also to whatever promotes the public peace, comfort, and convenience.

2. INDICTMENT AND INFORMATION ⟸140(1), 150—SUFFICIENCY OF INDICTMENT —DEMURRER.

On demurrer or motion to quash, the allegations of an indictment are to be assumed true.

3. CONSTITUTIONAL LAW ⟸27—POISONS ⟸2—OFFENSES—STATUTES—VALIDITY.

Harrison Anti-Narcotic Act Dec. 17, 1914, c. 1, 38 Stat. 785 (Comp. St. 1916, §§ 6287g–6287q), providing for registration of, with collectors of internal revenue, and imposing a special tax upon, all persons who produce, import, manufacture, compound, deal in, sell, distribute, or give away opium or cocoa leaves, provides in section 2 (section 6287h) that it shall be unlawful for any person to sell, barter, exchange, or give away such drugs except in pursuance of a written order of the person to whom such article is sold, on a form issued in blank for that purpose by the commissioner of internal revenue, and that every person who shall accept any such order shall preserve the same for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employé of the Treasury Department, but that nothing contained in the section shall apply to the dispensing or distribution of such drugs to a patient by a physician, dentist, or veterinary surgeon, provided that such physician, etc., shall keep a record of all drugs dispensed or distributed, showing the amounts dispensed or distributed, etc., or to the sale, dispensing, or distribution of any such drugs on a prescription issued by the physician, provided that such prescription shall be dated as of the date on which signed, and shall be signed by the physician, etc., and preserved by the dealer. An indictment in the words of the statute alleged that defendant, a Texas physician, who had duly registered and paid the special tax of one dollar, did unlawfully and knowingly sell and give away a quantity of heroin tablets, a derivation of opium, which sale was not made in pursuance of a written order on

a form issued in blank by the commissioner of internal revenue. A second count of the indictment, which was identical with the first, except that it charged that defendant did unlawfully, knowingly, and willfully sell, dispense, and distribute heroin tablets not in the regular course of his professional practice, and not in the treatment of any disease, but to one then addicted to the drug habit. The two counts in the indictment do not state offenses against the laws of the United States. The acts charged to have been omitted and committed are violations of police regulations incidental to the taxing purpose of the act, and which do not tend to render effectual its prime object, revenue. To that extent the act is in violation of article 10 of the Amendments to the Constitution of the United States.

4. POISONS ⟸2—PENAL STATUTE—CONSTRUCTION.

The rule of strict construction applies to the criminal provisions of the Harrison Anti-Narcotic Act.

Charles T. Doremus was charged with unlawfully dealing in narcotics in violation of Act Dec. 17, 1914. Hearing on demurrer to indictment in style motion to quash. Demurrer or motion to quash sustained, and indictment dismissed.

Hugh R. Robertson, Asst. U. S. Dist. Atty., of San Antonio, Tex.

Haltom & Haltom, of San Antonio, Tex., for defendant.

WEST, District Judge. Omitting formal parts, the first and second counts of the indictment are substantially as follows:

First Count: "That heretofore, to wit, on or about the 11th day of March, A. D. 1915, at the city of San Antonio, Western District of Texas, and the San Antonio division thereof, one C. T. Doremus, a physician, who had duly registered, and who had paid the special tax as required by the act of Congress approved December 17, 1914, entitled 'An act to provide for the registration of, with the collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives or preparations, and for other purposes,' did unlawfully, fraudulently, and knowingly sell and give away and distribute to one Alexander Ameris, alias Alexander Myers, a certain quantity of heroin, to wit, five hundred (500) one-sixth grain tablets of heroin, a derivative of opium, which said sale was not made in pursuance of a written order of the said Alexander Ameris, alias Alexander Myers, to the said C. T. Doremus on a form issued in blank for that purpose by the commissioner of internal revenue of the United States, as required by the act of Congress of December 17, 1914, aforesaid."

Second Count: This count is identical with the first count, except that the offense charged is that defendant "did unlawfully, knowingly, and willfully sell, dispense, and distribute to one Alexander Ameris, alias Alexander Myers, five hundred (500) one-sixth grain tablets of heroin, a derivative of opium, not in the regular course of the professional practice of the said C. T. Doremus, and not for the treatment of any disease from which the said Alexander Ameris, alias Alexander Myers, was then and there suffering, but, as was then and there well known to the said Doremus, the said Alexander Ameris, alias Alexander Myers, was then and there a person addicted to the use of the drug aforesaid as a habit, being a person popularly known as a 'dope fiend,' and the said C. T. Doremus did sell, dispense, and distribute the drug aforesaid for the purpose of gratifying his appetite for said drug as a habitual user of the same."

These counts are followed by eight others, identical with the first and second counts, except as to dates, names of parties to whom the

drug was dispensed, different quantities, etc.; it being necessary, in passing upon the motion, to consider only the first and second counts.

The first count charges a violation of the first sentence of section 2 of the act, in a sale by defendant of the prohibited drug as having been made without a written order from the purchaser to defendant seller. The second count charges a violation of paragraph (a) of the same section, in the sale, dispensing, and distribution by the defendant of the prohibited drug, "not in the regular course of his professional practice." Section 2 and paragraphs (a) and (b) are as follows:

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the commissioner of internal revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employé of the Treasury Department duly authorized for that purpose, and the state, territorial, district, municipal, and insular officials named in section five of this act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the commissioner of internal revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years, in such a way as to be readily accessible to inspection by the officers, agents, employés, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend: and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act.

"(b) To the sale, dispensing or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act: Provided, however, that such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: And provided further, that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employés, and officials hereinbefore mentioned." Comp. St. 1916, § 6287h.

The first paragraph of the motion to quash, or demurrer, is as follows:

"The pretended law upon which this indictment is based is void because the Congress of the United States had not, and has not, the power to pass the act of December 17, 1914, except such portions thereof as provide for fixing and collecting a tax, and except such portions as forbid interstate shipments of the drugs mentioned in the said act; and the overt acts charged against the defendant, if true, would not, and did not, in any way defeat, prevent, hinder or delay the collection of the special tax required to be paid.

"(a) Because, when a person has paid the tax and registered as required by law, his right to dispose of the enumerated drugs cannot be prohibited by the Congress, unless such disposition may or does or tends to prevent, hinder, or delay the collection of the revenue.

"(b) Because said act of Congress, except so far as it provides for the payment of a special tax, and the register of the names of the parties paying the tax, and except so far as it regulates interstate commerce in the named drugs, is purely a police measure, upon which the Congress is without power to act."

Only those grounds mentioned in the first paragraph will be considered.

The motion avers that the act is a revenue or taxing measure; that the act of omission charged as an offense in the first count, and the act committed, charged as an offense in the second count, if true, are merely violations of local police regulations, which the Congress has no power to establish—the act to that extent being an invasion of the reserved power of local regulation inherent in the state governments, and in violation of the Constitution of the United States.

[1] Amendment to the Constitution, art. 10, provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In construing this article, the Supreme Court of the United States in many cases has held that "the power of the states to regulate matters of internal police within their limits applies not only to the health, morals, and safety of the public, but also to whatever promotes the public peace, comfort, and convenience." Boston Railroad Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989. See, also, many authorities to the same effect cited in paragraph 10, Notes of Decisions, U. S. Compiled Statutes, Annotated, 1916, vol. 11, p. 14419. This reserved police power retained in the states has reference to the practice of medicine, etc. See Meffert v. Packer et al., 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350.

The government's counsel declares that the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Thurston v. United States, 241 Fed. 335, 154 C. C. A. 215, is conclusive. The first and second counts of this indictment are identical in substance with the first count of the indictment in that case, there held to be sufficient. The indictment in the Thurston Case charges a conspiracy to commit the same alleged offenses as are sought to be charged in the first and second counts here. An examination of that case discloses that the constitutional question involved there related to the right of search and seizure, and not to the reserved power of domestic regulation—the question here. The remaining question considered by the court in the Thurston Case, was whether an offense against the law was charged in the indictment. Upon that point the court merely remarked that the count fully informed the defendants of the charges they were brought to answer, and fully showed that it was sufficient to put the defendants on trial on the charge of conspiracy to violate the Harrison Narcotic Law. Whether or not the offenses there charged invaded the province of the state's reserved police power was not

considered. The court, therefore, does not hold that the act is not an attempted exercise of the police power, as contended by the government.

In the case of United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, the act is referred to by counsel for the government in that case as one to which Congress gave the appearance of a taxing measure in order that it might have a coating of constitutionality, but that in reality it was a police measure that strained all the powers of the Legislature; to which reference Mr. Justice Holmes adverted, stating:

"It may be assumed that the statute has a moral end as well as a revenue end in view, but we are of opinion that the district court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

See, also, Lowe v. Farbwerke-Hoechst Co., 240 Fed. 671, 153 C. C. A. 469.

The act of August 2, 1886, c. 840, 24 Stat. 209, known as the "Oleomargarine Act," though a taxing and revenue act, and as such held constitutional (In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813), had for its moral end the idea of protecting the public against sales of oleomargarine by unscrupulous dealers as butter. In that case Chief Justice Fuller expressed himself as follows:

"The act before us is on its face an act for levying taxes, and, although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. * * * The oleomargarine legislation does not differ in character from this [laws relating to distilled spirits and tobacco], and the object is the same in both, namely, to secure revenue by internal taxation, and to prevent fraud in the collection of such revenue. Protection to purchasers in respect of getting the real, and not a spurious, article cannot be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding, must be regarded as means to effectuate the objects of the act in respect of revenue."

In Dougherty v. United States, 108 Fed. 56, 47 C. C. A. 195, where the Oleomargarine Act, § 6 (Comp. St. 1916, § 6218), was attacked as being a police regulation and as such in violation of the Constitution, District Judge Bradford, referring to the Kollock Case and confirming same, said:

"The marking, stamping and branding, required by the regulations, must, therefore, be regarded as 'means to effect the object of the act in respect of revenue.'"

In testing the constitutional question raised by the motion, the controlling factor, as declared by Justice Fuller, is whether or not the acts charged as offenses in the two counts are to be regarded as "means to effect the objects of the act in respect of its revenue."

Opium is said to be an outlaw drug. One of the purposes of the act is to prohibit its importation. United States v. Brown (D. C.) 224 Fed. 137. The act likewise prohibits its interstate transportation except under stringent regulations. Opium and its derivatives, in surgery and in medicine, have proven invaluable for the alleviation of pain, and are used to a greater extent, perhaps, than any other known

drug possessing similar narcotic properties. The necessity for its importation and the safeguarding its use and abuse is evidenced by a casual incursion into its history and uses. Act Feb. 9, 1909, c. 100, 35 Stat. 614, as amended by the present act of January 17, 1914, c. 9, 38 Stat. 275 (Comp. St. 1916, §§ 8800–8801f), indicates the settled policy of our government to rigidly restrict the importation of opium into this country and to strictly guard its use and abuse. This brings home the truth of the statement that the act in question has a moral end as well as a revenue end. The responsibility is with the courts to see that those ends are reached through a revenue measure and within the limits of a revenue measure.

[2-4] Do the two counts of the indictment state offenses against the laws of the United States? Applying the test prescribed by Justice Fuller, is the sale by the defendant to Alexander Ameris of the inhibited drug, in the first count, "not in pursuance of the written order" required by the statute, to be regarded as a means to effect the object of the act in respect of its revenue? And in the second count, Is the sale by the defendant to Alexander Ameris of the inhibited drug, "not in the regular course of his professional practice as a physician and not for the treatment of any disease from which a patient was then suffering; the said Ameris being a person addicted to the use of the inhibited drug, these facts being well known to the defendant," to be regarded as a means to effect the object of the act in respect of its revenue?

In testing the sufficiency of the demurrer, the allegations of the first and second counts are assumed to be true.

The main purpose of the act is to provide for a tax and enforce its collection for the legitimate sale or disposal of opium and its derivatives. Consequently any regulation of law or provision that aids in the enforcement of the collection of this tax is within the rights of Congress. In re Kollock, supra. The two counts show that the defendant was a physician who had duly registered and paid the special tax. It is not made to appear in what particular the requirement that a written order must be given by the purchaser to the seller renders effective the enforcement or collection of the tax, especially in this instance, where the tax is shown to have been paid by a person duly registered. It is clear, looking to the provision of the statute as to this requirement, that it has an important bearing, as a police measure, in safeguarding the dispensing and distribution of the drug so that it may be limited in its use to persons actually in need of same as a medicine. A consideration of the whole act, and of the many regulations of the Treasury Department governing the sale and control of the drug, leads to the conclusion that greater efforts are made in the measure to protect against misuse of the drug than to its enforcement as a revenue act.

This reasoning applies more forcibly to the second count. There the regulations requiring the drug to be dispensed by a physician only in the course of professional practice, after having duly registered and paid the tax, can only be a police measure looking primarily to the protection of the public against the abuse of this drug, not remotely serving as an aid or means to effect the object of the act in respect of its revenue.

The offenses charges in the first and second counts of this indictment are stated in the very words of the statute, and as such prescribe regulations governing the sale, dispensing, and distribution of opium and its derivatives. Are those regulations to be considered as incidental or as means to enforce the collection of the revenue?

Nine years before the passage of this act the state of Texas, in the exercise of its reserved power of domestic regulation, passed certain laws, penal in character, which restricted and limited the sale and disposition of opium and its derivatives. Laws of Texas, Acts 1905, pp. 45–46, R. Cr. S. 1911, Penal Code, tit. 12, c. 5, arts. 747, 748, 749. The provisions of this regulatory act are in many particulars substantially the same as in this revenue bearing and taxation act. For instance: The state statutes require that the inhibited drugs may only be obtained (1) upon the original written order or prescription of a lawfully authorized practitioner of medicine, * * * containing the date and name of the person for whom prescribed; (2) the original order must be permanently retained by the person, firm, or corporation authorized to sell or dispense the drug; (3) it is made unlawful for any practitioner of medicine to prescribe the drug for the use of an habitual user.

The enactment of local police laws, regulating and restricting the use of opium and its derivatives, and their similarity with the provisions of the act of Congress, are conclusive of the state's purpose to exercise its power to regulate, and persuasive that the inclusion of the same provisions in a taxing measure by Congress was to further the same moral ends that prompted the state in enacting them.

The national act provides for an annual tax of one dollar for each registered "dealer," and then so restricts and narrows the uses of the drug that no vital or important excess of revenue could reasonably be expected. The tax is nominal, yet the penalty for violating any provision of the act is so disproportionate to the gravamen of the offense (U. S. v. Woods [D. C.] 224 Fed. 279) as to be further convincing that Congress was more concerned with the moral ends to be subserved than with the revenue to be derived.

The Supreme Court of the United States, in Mugler v. Kansas, 123 U. S. 623–661, 8 Sup. Ct. 273, 297 (31 L. Ed. 205), referring to the so-called prohibition statute of Kansas, attacked in that case as unconstitutional as being in effect a confiscation of property under the pretense of protecting the public morals, health, and safety, says:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Applying this rule of construction, it would seem to be the court's duty to see that the real purpose of the act as a revenue measure should be carried into effect, but that those provisions of the act regulating and restricting traffic in the outlaw drug should be confined to their incidental functions, "as means to effect the object of the act in respect of its revenue," and to that extent strictly construed.

It does not appear (1) that the sale of the drug by the defendant to a person not made in pursuance of that person's written order, as required by the statute, as charged in the first count; and (2) that the sale by defendant "not in the regular course of professional practice," being to a "dope fiend," the fact being well known to defendant, etc., as charged in the second count—tend to render effectual the collection of the revenue tax imposed by the act. On the contrary, the same substantial and similar provisions are embodied in the penal statutes of the state of Texas, which, in their enactment, exercised those sovereign police powers of domestic regulation conceded as its right. To extend the incidental moral objects of the taxing measure by a liberal construction would be to unfairly and without certain right encroach upon the state's sovereign powers. This should not be permitted, especially where doubt exists (as in this case) as to whether the questioned provisions of the law were means which reasonably tend to render effectual the enforcement of the law by the payment of the tax imposed. The rule of strict construction applies to criminal statutes such as this.

It is accordingly held that the indictment does not state an offense against the laws of the United States, in that the acts of the defendant charged in the words of the statute to have been omitted and committed therein are violations of police regulations incidental to the taxing purpose of the act, but which do not tend to render effectual its prime object, revenue. To that extent the act is in violation of article 10 of the amendments to the Constitution of the United States.

The defendant's demurrer or motion to quash the indictment is sustained, and an order dismissing the indictment will be entered in due course.

In reaching the foregoing conclusions the questions involved have been given careful thought, and, in addition to the authorities cited, the following cases have been considered: Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165; U. S. v. Woods (D. C.) 224 Fed. 278; U. S. v. Wilson (D. C.) 225 Fed. 82; United States v. Jin Fuey Moy (D. C.) 225 Fed. 1003; Tucker v. Williamson (D. C.) 229 Fed. 201; United States v. Charter (D. C.) 227 Fed. 331; United States v. Curtis (D. C.) 229 Fed. 288; United States v. Friedman (D. C.) 224 Fed. 276.

THE BELGIER.

(District Court, S. D. New York. July 13, 1917.)

No. 313.

1. SEAMEN ⊜21—SEAMEN'S ACT—WAGES.

Seamen signed in France for two years' service on a British steamship, at that time receiving an advance of one-half of a month's wages, which was legal under the British law. When the vessel arrived in New York, the seamen, who were afraid of submarines, demanded their full wages, which was refused by the master. Though the master refused them shore leave, they went ashore, and, having received legal advice, demanded one-half of their wages, which demand the master also refused. Thereupon the seamen libeled the vessel, claiming full wages under the Seamen's Act (Act March 4, 1915, c. 153, 38 Stat. 1165). *Held* that, though the Seamen's Act has abolished remedies for recapturing deserters and allows a seaman to recover full wages when his demand for one-half wages is not met, it does not entitle deserters to recover wages, where their demands were not in good faith and they intended to abandon their contract.

2. SEAMEN ⊜23—ADVANCES—PAYMENTS.

While the Seamen's Act forbids advances, and provides that they shall not constitute payments on account, and declares that the section shall apply as well to foreign vessels while in the waters of the United States as to vessels of the United States, the advance by the master of the British vessel of one-half of the wages to the foreign seamen upon the signing of articles in a foreign port is binding, and must be credited to payments, such advance being legal under the British law, for it cannot be contemplated that the Seamen's Act was intended to apply to advances made upon foreign vessels outside of the United States, but only to advances made while such vessels were in the waters of the United States.

3. SEAMEN ⊜23—ADVANCES—CONGRESS.

Congress has power to prohibit advances from wages to seamen while a foreign vessel is within an American port.

In Admiralty. Libel by Johanners H. Van Boyen and others against the steamship Belgier, her tackle, apparel, etc., claimed by A. W. Duckett & Co. Libel dismissed.

Silas B. Axtell, of New York City, for libelants.
Kirlin, Woolsey & Hickox, of New York City, for claimant.

AUGUSTUS N. HAND, District Judge. The libelants, Van Boyen and De Pauw signed on the 10th of January, 1916, and Anderson and Amundson on the 12th of January, 1916, as part of crew of the British ship Belgier. The articles were signed at Havre, France, for a service of two years. Each seaman received at the time an advance of one-half a month's wages, which was legal under the British law. They allege that they demanded one-half their wages when the ship was in New York, that this demand was refused, and they claim their full wages and the reasonable value of their clothing on board ship, without any

deduction for the advance of one-half month's wages paid them at Havre.

[1] The first question which arises is whether the seamen were entitled to any wages when they made the alleged demand. Van Boyen admitted that he asked the captain for shore leave and was refused. He said the reason he wanted to leave the vessel was because he was afraid of submarines. He also said he asked the captain to pay him off and that he afterwards asked the captain to pay him half wages. On cross-examination he was asked:

"Q. * * * I think you said, you asked the captain to be paid off, and he refused? A. Yes, sir; Tuesday morning. Q. You didn't ask him, then, for half your wages? A. Not before the night, the same night, 6 o'clock; then I went back. I didn't know about it. * * * Q. You are a citizen of Holland? A. Yes, sir."

De Pauw went ashore and asked for full wages, which were refused; he then consulted the Legal Aid Society, as Van Boyen had done, and asked for half wages. Mr. Axtell, the counsel for all these men, said, when De Pauw's deposition was taken:

"I will concede that all these men * * * are anxious to leave the ship, legally or otherwise, at any and all times. These men came to the Legal Aid Society to find out if they could be paid off. They were advised to demand half their wages, and, if the demand was refused, they would become entitled to the whole sum."

Anderson testified as follows:

"I asked if he was willing to pay me off; he said, 'No;' then I asked, 'Are you willing to pay me off half my wages?' 'No,' he said; 'I won't pay a single man off;' and I asked for a doctor, a specialist. Q. You wanted to go back to the vessel again? A. No, sir. Q. Then you wanted your discharge; wanted to be paid off? A. Yes, sir. Q. You told the master you wanted to be paid off? A. No, sir; yes, the last day. Q. The last day you asked to be paid off? A. Tuesday. * * * Q. What did you say to the captain when you went there? A. I asked, first, if he won't pay me off; and he said, 'No;' then I said, 'No;' and I said, 'Then you pay me off, if I give you half my wages;' and he said, 'No; not a single one of you.'"

Amundson testified that he said to the captain:

"Say, 'You want to pay me off, Captain'; and he says, 'No.' 'I will give you half my pay if you do it.' He said, 'No; I will not pay anybody off.'"

Amundson further testified:

"Q. You want to leave the vessel, don't you? A. Yes; I do."

Robinson, the captain, testified that the men made no demand for half wages. He said that Van Boyen said he was frightened to go back; he was liable to be torpedoed; that was his reason for wanting to get paid off. Robinson also entered in the log that all the seamen went ashore without leave and swore to the entries.

I think these seamen were confused as to their legal rights and thought they could leave the vessel if they forfeited half their wages. While they may have stated this as their erroneous legal opinion, I be-

lieve they first demanded full wages, and, after seeking legal advice, very likely demanded half wages. If so, this would have been a foundation for their claim, if their demand had been made in good faith. It seems clear, however, from the depositions and the admission of their counsel, that they feared to continue their dangerous employment, were really deserting the ship, and only used the demand for half wages as a means of getting paid without performing their contracts. The libel must therefore be dismissed, because these men were engaged in deserting, and were not acting in good faith. The Seamen's Act has abolished remedies for recapturing deserters. It does not, however, enable men to collect wages by making demands for half wages which are part of a scheme to leave the ship. The offer of the seamen to forfeit the remaining half of their wages if they could secure the first half, and then their apparently unfounded claim of sickness, all indicate a concerted purpose and action to leave the ship without entire loss of wages.

[2, 3] Even if they had not been in the category of deserters their claims are equally without foundation, except in the case of Amundson. All the others had already received more than one-half their wages. The libelants insist that this was not so, unless the advance of one-half month's wages be credited to the payments, and say these advances should not be credited because advances are forbidden by the Seamen's Act and do not constitute payments on account. These advances, however, were made under a British contract for services on a British ship and are valid by British law. They were, moreover, not made in a port of the United States, but in France. Seamen's Act, § 11 (Comp. St. 1916, § 8323), provides in relation to such advances:

"That this section shall apply as well to foreign vessels while in waters of the United States as to vessels of the United States."

It is settled by the case of Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, that Congress has power to prohibit advances upon wages while a foreign vessel is within an American port, but only the clearest language of the statute could be regarded as extending the operation of it to advances made to seamen upon foreign vessels outside of the United States.

Judge Brown, in The State of Maine (D. C.) 22 Fed. 734, held that advances made in a foreign port to American seamen, who had shipped there on an American vessel were not forbidden by the act and were valid payments in our courts. I am inclined to agree with Judge Veeder, who has recently held in the unreported case of Nielsen v. Sailing Ship Rhine (D. C.) 244 Fed. 833, that the act covers such cases, and that such payments are invalid. Here, however, the vessel was foreign, the seamen were apparently foreign and the payments were valid by the foreign law. Judge Veeder said:

"I shall hold that the statutory provision in question applies to the situation presented here, and that the advances in issue, although made in a foreign port, having been made by vessels of the United States, were unlawful, and may be recovered by the seamen."

The act may well have been intended to cover advances by American vessels, even in foreign ports, and advances by foreign vessels in American ports without going so far as to embrace advances by foreign vessels in foreign ports. I am not inclined to the belief that Congress could not legislate in such a way as to affect such cases when the vessels entered our ports, but that it did so is not clear from the language of the statute and seems to me highly improbable. I do not think the argument that such legislation might be of general benefit to American shipping is sufficient to justify a construction so contrary to the ordinary purview of Congressional regulation.

The decision of Judge Erwin in the case of Koskiner v. The Ship Imberhorne (D. C.) 240 Fed. 830, is the only case which appears contrary to the views I have expressed. Judge Erwin said:

"The moment we concede that the seaman under this act is entitled to the payment of one-half of the wages he may have earned, then it seems to me that we must also concede that the other provision of the act which rejects the advance on the wages must also be in force, no matter where such advances may have been made."

I do not think such a result follows. The contract was valid where executed, and the advances made under it were valid where made. I find no inconsistency in holding that these advances should be respected, while at the same time the seamen should be entitled to half wages and other immunities granted by our laws while within our ports. Judge Neterer correctly held in The Ixion (D. C.) 237 Fed. 142, that the statute prohibits advances made upon wages earned on foreign vessels "while in the harbors of the United States or within the jurisdiction of the waters of the United States."

The libel is dismissed.

UNITED STATES v. BOOTH-KELLY LUMBER CO. et al.

(District Court, D. Oregon. November 26, 1917.)

No. 7337.

1. PUBLIC LANDS ⟸120—SUIT FOR CANCELLATION OF PATENT—LIMITATION.
The provision of Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1916, § 5114), limiting the time for the bringing of suits by the United States for the cancellation of patents to six years "after the date of the issuance of such patents," is subject to the well-established equitable rule that, where there is concealed fraud, the statute will not begin to run until the fraud is discovered, or notice of it is imputable to the government.

2. PUBLIC LANDS ⟸120—SUIT FOR CANCELLATION OF PATENT—LIMITATION.
Facts considered, and *held* not such as to charge the United States with notice that an entry of a stone and timber claim was fraudulent until within six years prior to the bringing of suit for cancellation of the patent.

3. PUBLIC LANDS ⟸120—SUIT FOR CANCELLATION OF PATENT—DEFENSES.
That a majority of the stock of a corporation which fraudulently acquired public land is in the hands of persons who purchased since the acquisition of the land, and without knowledge of the fraud, is not a defense to a suit by the United States for cancellation of the patent.

4. NOTICE ⟸6—CONSTRUCTIVE "NOTICE"—KNOWLEDGE SUFFICIENT TO PUT ON INQUIRY.
Whatever puts a party upon inquiry amounts, in judgment of law, to "notice," provided the inquiry becomes a duty and would lead to a knowledge of the real facts by the exercise of ordinary intelligence; but the circumstances known to him must be such as ought reasonably to have excited his suspicion and led him to inquiry.

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

In Equity. Suit by the United States against the Booth-Kelly Lumber Company and Daniel H. Brumbaugh. Decree for complainant.

Clarence I. Reames, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or.

Smith & Bryson, of Eugene, Or., and Mark Norris, of Grand Rapids, Mich., for defendants.

WOLVERTON, District Judge. This is a suit by the government to set aside a patent issued to one Daniel H. Brumbaugh September 9, 1904, under the provisions of the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89). On December 17th following Brumbaugh conveyed the land by quitclaim deed to the defendant the Booth-Kelly Lumber Company. The basis of the suit is alleged fraud upon the government, committed by Brumbaugh in the procurement of the patent, in that the entry was not made for Brumbaugh's personal use and benefit, but under contract and understanding with the Booth-Kelly Lumber Company to convey the land entered to said company when patent was procured from the government.

The lumber company has interposed several defenses, namely, that it had no such contract or understanding with Brumbaugh, as alleged; that the statute of limitations for instituting the suit had elapsed when it was commenced; that the government had notice and knowledge

of the alleged fraud for more than six years prior to the institution of the suit; that the government is chargeable with laches in the discovery of the alleged fraud; and that a large percentage of the stockholders, holding more than a majority of the capital stock of the lumber company, have become such since the perpetration of the alleged fraud, and are innocent purchasers for value of such stock. Of these in their order:

As to the first contention, it hinges upon a question of fact. Brumbaugh testifies in effect that he had a contract or understanding with Mr. John F. Kelly, who was the timberman for the lumber company, that he should make a timber and stone entry of the land in dispute, and that Kelly should pay all the expenses for making the entry and final proof, also the cash payment of $400 required by law, and pay him $100 additional for his claim, and that Brumbaugh was to deed the land to the lumber company when patent was issued.

I have no reason for doubting Brumbaugh's testimony, although for a time he made statements out of court contradictory thereof, in an effort, as he says, to cover up the transaction and to keep the true state of affairs from the knowledge of the government. He finally made a clean breast of the whole situation to government officials, and when called into court on a former case testified to the matters substantially as here narrated. Mr. Booth, who is a stockholder in the lumber company, and who was at the time manager, has given testimony tending in a measure to contradict Brumbaugh; but the books of the lumber company, which were introduced in evidence, corroborate Brumbaugh. They show that payments were made in accord with his statement. What is most significant, however, is that Kelly, who made the arrangement with Brumbaugh for the company, did not take the stand; nor was his absence accounted for. The agreement as detailed by Brumbaugh is therefore satisfactorily established.

[1] Whether the statute of limitations had run against the government depends upon whether notice or knowledge of the fraud is imputable to it prior to six years preceding the institution of the suit. The statute (Act March 3, 1891, 26 Stat. 1093), limits the institution of a suit to set aside a patent to six years after the date of its issuance. It is insisted that, a specific event having been designated from which the statute will begin to run, the time of the occurrence of the event is controlling, whether the suit be founded upon fraud or not, and that such is the intendment of the act. The Circuit Court of Appeals of this Circuit, however, following the case of Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636, has differently interpreted the act, and has held that it is subject to the well-established equitable rule that, where there is concealed fraud, the statute will not begin to run against the party complaining until he has acquired notice or knowledge of the fraud. Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; Id., 203 Fed. 394, 121 C. C. A. 498. The same interpretation has been given to the statute by the Circuit Court of Appeals, Eighth Circuit, in a well-considered case. United States v. Exploration Co., 203 Fed. 387, 121 C. C. A. 491.

I am, of course, bound by the principle enunciated by these cases. The exact doctrine of the Bailey Case is that, where there has been

no negligence or laches on the part of the one complaining in coming to the knowledge of the fraud which is the foundation of the suit, and where the fraud has been concealed or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing or those in privity with him. In ascertaining the rule, Mr. Justice Miller has this to say:

"We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

But, in applying the rule to the case then under consideration, the court indicates that the fraud must have been concealed, or of such character as to conceal itself, to toll the statute. As I read the case in the Circuit Court of Appeals, a like application is made to the present statute.

Nor does the later case of United States v. St. Paul, M. & M. Ry. Co., 225 Fed. 27, 139 C. C. A. 301, in any way trench upon the holding in Linn & Lane Timber Co. v. United States. The provision of the statute which was adjudged to be controlling was not a limitation statute at all, but constituted an exception to the limitation provisions, and under the conditions recited barred any action whatsoever. The exception was appended in the way of a proviso, and the court, construing the proviso, simply held that the suit instituted by the government to set aside the patent on the ground of fraud and mistake came within the proviso, and would not lie. It was further contended by the government that the proviso was without application where the suit was founded upon fraud or mistake, but the court held to the contrary view. There was no attempt whatever at a construction of the provisions respecting the limitations of actions contained in the same statute, namely, Act March 2, 1896, c. 39, 29 Stat. 42 (Comp. St. 1916, §§ 4901–4903).

[4] Notice and knowledge of the fraud will set the statute in operation. No one questions the principle. But a party claiming fraud and lack of knowledge concerning it may be guilty of laches in ascertaining its existence, which will preclude him from asserting want of knowledge, where he has been let into facts and circumstances which are calculated to put a reasonably intelligent man upon inquiry as to the main fact, which inquiry, if seasonably pursued with reasonable diligence, would lead to a discovery of such main fact. Stated generally, the rule is that whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty and would lead to a knowledge of the real facts by the exercise of ordinary intelligence. The circumstances known to him must be such as ought reasonably to have excited his suspicion and led him to inquiry, and he must be allowed a reasonable time within which to make such inquiry before being affected with notice. 29 Cyc. 1114, 1115, 1116. As stated by the Supreme Court of Wisconsin, his information must be "of such a nature as would impress a reasonable man with the belief that a fraud had been committed and would, upon diligent

inquiry, lead to the discovery of the facts." O'Dell v. Burnham, 61 Wis. 562, 21 N. W. 635.

[2] Now, coming to the facts in this case, the patent was issued September 9, 1904. Brumbaugh deeded to the lumber company December 17, 1904. The company caused the deed to be recorded December 2, 1907; not before. The first absolute knowledge the government had of the fraud was on December 20, 1910, when Brumbaugh made a clean breast of the affair to Hon. John McCourt, then United States district attorney for the district of Oregon. At all times prior to that he had consistently denied that there was any taint of fraud in his transaction with the government, to every detective, special agent, and officer of the government who inquired of him touching the same. The present suit was instituted December 12, 1916. So that, if knowledge of the fraud was first acquired by the government December 20, 1910, and was not imputable to it prior to December 12, 1910, the suit was commenced in time.

In a careful survey of the testimony, I find two circumstances which might have afforded a clue to the fraud if they had been traced out. One is when Special Agents Veatch and Watts were informed in 1904 or 1905 by Brumbaugh that he had sold to the lumber company. If the special agents had at that time consulted the county records, they would have ascertained that the deed was not then on record, for it was not recorded until December 2, 1907. But the special agents were then looking into the Jones-Cook cases, and it was only incidentally that they inquired of Brumbaugh about his own entry, and were informed that he had taken the claim for himself, and were thus misled. The other circumstance is that Mr Heney, the special prosecutor for the government in the land fraud cases, had access to and did actually examine the books of the lumber company. If his attention had been specially called or attracted to the Brumbaugh account, he might have found credits and debits from which the inference might have been drawn that the Brumbaugh transactions with reference to his claim were not altogether regular. The account, however, contained many items (Brumbaugh having been in the employ of the lumber company for a considerable length of time), and the entries with reference to the claim itself were disguised, so that on the face of the account it had the appearance of a record of perfectly legitimate transactions. Mr. Heney, again, was inquiring into entirely different transactions, with no special reference to the Brumbaugh matter.

One other circumstance needs special notice. There is a report on file in the General Land Office, of date March 3, 1915, which bears the information that Special Agent Laughlin had under investigation the Brumbaugh claim in September, 1910, and that, on the 7th of that month, he had an interview with Brumbaugh, wherein Brumbaugh insisted that his entry was made in good faith. It seems that Laughlin's suspicions were aroused at the time, and his persistence finally led to Brumbaugh's confession on December 20, 1910. Neither the special agents, Veatch and Watts, nor the special prosecutor, Mr. Heney, made any report to the heads of their departments respecting the Brumbaugh matter. But, if it be conceded that these officers had the requisite authority to bind the government by their laches—a thing the court

does not subscribe to as law—the knowledge that they have been shown to have had was not of that definite character calculated to put them upon notice of the real fact, and therefore that knowledge of such fact cannot be imputed to them, much less to the government.

As to the question of concealed fraud, but little need be said. The deed given for this claim was withheld from record for the space of nearly three years, and the account of the company with Brumbaugh was so entered as to cover up and disguise its real nature; besides which Brumbaugh consistently denied the fraud for years, nor did he divulge the truth until pressed to the verge. It could not be clearer that the case is one of concealed fraud.

[3] But one other question remains; that is, whether the fact of the majority of the stock in the company having changed hands and being now held by persons who were without knowledge of the fraud at the time of their purchase constitutes a defense to the government's suit. The question is settled by the Linn & Lane Timber Co. Case, supra, in the negative; the court citing Wilson Coal Co. v. United States, 188 Fed. 545, 110 C. C. A. 343.

The prayer of the government will be granted, and the patent annulled, with costs to the government.

BASSICK v. ÆTNA EXPLOSIVES CO., Inc., et al.

JOHN v. SAME.

(District Court, S. D. New York. December 19, 1917.)

Nos. 1, 2.

1. BROKERS ⟸19—DISCLOSURE—DUTY.
   The task of a broker is to find a purchaser, and he is not under any obligation to disclose to his principal the purchaser.
2. BROKERS ⟸51—COMMISSIONS—RIGHT TO.
   Where the parties originally contracted at arm's length, a broker cannot be denied compensation, where he without help of his principal produces a purchaser, even though the purchaser was obviously in the market for the principal's goods, and the principal without his help might readily have secured the purchaser.
3. BROKERS ⟸85(10)—COMMISSIONS—EVIDENCE.
   Testimony by other brokers as to the adequacy of commissions received by plaintiffs for brokerage services, while admissible where the issue is quantum meruit, is not admissible where the question is whether the contract is invalid because the amount paid is so excessive as to shock the conscience.
4. CORPORATIONS ⟸406—PRESIDENT—CONTRACTS—VALIDITY.
   Where the president of a trading or business corporation is given general management and control of its affairs, the corporation is prima facie bound by contracts entered into by him in the name of the corporation, if the contracts are within the apparent power of the corporation to make, and a third party is not bound by secret limitations of his authority contained in the by-laws or minute books.
5. CORPORATIONS ⟸407(2)—CONTRACTS—APPARENT AUTHORITY.
   A contract with brokers, made by the president of a company engaged in the manufacture of explosives, who had general management and

control of its affairs, whereby they were engaged to sell explosives at a reasonable and fair market price, and to retain any excess as compensation is valid, being an ordinary incident of such business, and it is unnecessary that the contract be ratified by the directors.

6. BROKERS ⊂⊃63(1)—COMMISSIONS—RIGHT TO.
Where plaintiffs, as brokers, effected a sale of explosives on behalf of corporation, and the contract was canceled by the purchaser because of delays in delivery, plaintiffs are entitled to full commissions; the cancellation being solely the fault of the corporation.

7. BROKERS ⊂⊃19—DUTIES—DISCLOSURE.
It is the duty of a broker to act with utmost good faith towards his principal, and to disclose all facts within his knowledge which are or may be material to the matter in which he is employed, or which might influence the action of his principal in relation thereto, and a broker does not discharge all duties by merely carrying out his specific instructions.

8. CORPORATIONS ⊂⊃426(12)—CONTRACTS—RATIFICATION—DIRECTORS.
Where the directorate of a corporation was not informed of all the circumstances relating to a contract made by the president, who was in the active charge of the corporate affairs, whereby brokers were allowed to retain as commissions all sums obtained on the sale of explosives in excess of an agreed price, ratification of such contract, on the theory that the president was in honor bound to keep it, is not binding on the corporation.

9. CORPORATIONS ⊂⊃407(2)—PRESIDENT—AUTHORITY.
Where brokers, who had agreed to sell explosives at a given price, discovering that the market was rapidly enhancing, suggested that they should retain as commissions all sums received in excess of an agreed price, and in pursuance of that plan refused to disclose to the president of the corporation for which they were acting the prices offered, the contract was so unusual that it was not within the apparent scope of the president's authority, though he was in charge of the corporate affairs.

10. CORPORATIONS ⊂⊃426(1)—CONTRACTS—PRESUMPTION OF FRAUD.
Contracts may be so extortionate and unconscionable on their face as to be unenforceable; hence a contract allowing brokers to receive as commissions $1,800,000 for effecting under certain circumstances a sale, amounting to $5,800,000 is so unconscionable as to amount to a gift of corporate property, and cannot be upheld, though ratified by the directorate of the seller company.

11. CORPORATIONS ⊂⊃404(1), 426(1)—POWERS—GIFTS.
While a private person may give away his property, it is beyond the power of the directorate of a trading corporation to make a gift.

12. BROKERS ⊂⊃65(1)—COMMISSIONS—RIGHT TO.
Plaintiffs, engaged in selling explosives, having agreed to sell explosives for the defendant corporation for commissions of 10 per cent., induced the president of the corporation, who had the management of its affairs, to allow them to retain as commissions all sums received in excess of a fixed price. Although the market for explosives was rapidly enhancing, the brokers did not disclose that fact to the president of the corporation, but, contending that he had no interest in the matter, refused to divulge to him the prices they expected to obtain. As a result the brokers under the terms of the contract became entitled to commissions amounting to about 31 per cent. of the entire purchase price. *Held* that, as the brokers were not guilty of actual fraud, they were entitled to receive commissions at the original basis, in view of the particular facts.

13. BROKERS ⊂⊃6—RELATION—WHO ARE.
Where the president of a corporation engaged in the manufacture of explosives, after having conducted negotiations with the prospective purchaser, turned the matter over to plaintiffs, who were acting for the corporation as brokers in other matters, with directions that they should

conclude the contract, plaintiffs were not, as to such purchaser, acting as brokers.

14. CORPORATIONS ⟸407(1)—CONSTRUCTION—COMPENSATION.
An agreement by a corporation to pay $300,000 for services in partly assisting to bring a well-developed negotiation to a close on a contract of $6,400,000 is void as unconscionable, amounting to a gift, which neither the president, who had the management of the affairs, nor the board of directors, could authorize.

15. CORPORATIONS ⟸427—RECOVERY OF MONEY PAID UNDER PRESIDENT'S CONTRACT.
Where plaintiffs, at the request of the president of a corporation, performed services in concluding negotiations with a prospective purchaser, and there was nothing fraudulent in their conduct in so doing, amounts paid plaintiff, though unconscionable, cannot, in an action by them for commissions claimed for other services, be recovered by the corporation.

16. CORPORATIONS ⟸407(2)—CONTRACTS—VALIDITY.
An agreement by the president of a corporation, who had management of its affairs, to pay brokers commissions amounting to more than 13 per cent. for concluding a contract, where the negotiations were well under way and might readily have been consummated by the president, is unconscionable, and cannot be upheld as against the corporation.

17. BROKERS ⟸86(1, 4)—CONTRACTS—EVIDENCE.
In an action for commissions as brokers, evidence *held* to show that plaintiffs were not only not the efficient cause of the contract, but that they were not in any sense brokers.

18. CORPORATIONS ⟸427—CONTRACTS—VALIDITY.
Payments made to brokers, who performed services in connection with closing a contract, cannot be recovered back by the corporation for which they acted, though flagrantly out of proportion to the service.

19. BROKERS ⟸86(8)—CONTRACTS—EVIDENCE—SUFFICIENCY.
In an action by brokers for commissions for effecting an alleged sale, evidence *held* to warrant recovery of the commissions claimed.

20. BROKERS ⟸86(4)—COMMISSIONS—EVIDENCE—SUFFICIENCY.
In an action by brokers to recover commissions for effecting an alleged sale, evidence *held* insufficient to show that they were the producing cause of the sale or entitled to commissions.

21. CORPORATIONS ⟸417—CONTRACTS—VALIDITY—GIFTS.
Where brokers were not entitled to any compensation as commissions on account of a sale, a so-called compromise contract entered into by the president of the seller corporation, who had charge of its affairs is invalid as a gift, and does not bind the corporation, it not being within the scope of the president's authority to compromise a wholly baseless claim, and hence such agreement could not be rendered valid by ratification by the directorate.

22. BILLS AND NOTES ⟸335—ACTIONS—DEFENSES.
Holders of notes with notice take them subject to all defenses and counterclaims against the original parties.

23. CORPORATIONS ⟸487(2)—CONTRACTS—ULTRA VIRES—PART PERFORMANCE.
Part performance will not save an ultra vires contract, and the fact that a corporation made payment on notes issued without authority does not render them efficacious.

At Law. Actions by Edgar W. Bassick and by Herbert F. John against the Ætna Explosives Company, Incorporated, and George C. Holt and another, as receivers of the Ætna Explosives Company, Incorporated. Defendants set up a cause of equity, and prayed for affirmative relief. Judgment in part for plaintiffs, and in part for defendants.

James A. O'Gorman, George Gordon Battle, Louis B. Eppstein, and Harry A. Rosenberg, all of New York City, for plaintiffs.

George L. Ingraham and John B. Stanchfield, both of New York City, Robert G. Dodge, of Boston, Mass., and William M. Parke and J. Arthur Leve, both of New York City, for defendants.

MAYER, District Judge. The substantial amount involved, the number of the agreements between the parties in controversy and the contracts to which they relate, and the varied facts and circumstances leading up to and surrounding them, require a rather full statement of the case. The actions are at law. The defendants, inter alia, set up a cause of equity (Ætna Explosives Co. v. Bassick, 220 N. Y. 767, 116 N. E. 1032), and ask for affirmative relief. By stipulation, the causes were tried by the court without a jury.

The original complaints were framed on the theory that the services performed by plaintiffs in all instances were those of brokers, and the recovery demanded was for commissions, or for the amount of certain notes arising out of commissions. As all the litigants are desirous of a decision on the merits, without danger of the case going off on some technicality, permission was given liberally to amend the pleadings to conform with the proof. Reference to the pleadings, where necessary, will be made as the different phases of the litigation are discussed.

In November, 1914, Arthur J. Moxham (hereinafter called Moxham) and Frederick L. Belin (hereinafter called Belin), who had been associated in an executive capacity with the Du Pont Powder Company, organized the defendant Ætna Explosives Company, Incorporated (hereinafter called Ætna), and caused it to be incorporated under the laws of New York on November 28, 1914. Thereafter Ætna acquired the plants and assets of Keystone National Powder Company, Ætna Powder Company, and Miama Powder Company, which theretofore had been engaged in manufacturing dynamite and black powder for commercial purposes. At the outset Ætna had an authorized capital stock of $7,000,000 common and $5,500,000 preferred, but by subsequent action it was provided that the amount of capital should be $18,000,000. Presumably the stock is widely held by the public.

From the beginning until March, 1916, the board of directors of Ætna (with the exception of the first few days when there were dummy directors) was composed of Moxham, Egbert Moxham, his son, Belin, and his cousin, C. A. Belin, and Josiah Howard, who had been connected with the Keystone Company. Moxham was president from February, 1915, until March, 1916, and Belin was treasurer from February, 1915, until November, 1916. In March, 1916, the board of directors was increased from five to nine, the personnel was changed, and later this new board ordered that no more notes be given and that no further payments be made on account of the agreements with Bassick.

One of the actions brought by Bassick and the action brought by John are based upon notes—18 to Bassick, aggregating $321,583.78, and 5 transferred by Bassick to John on account of the latter's share, aggregating $141,564. The complaint (as amended) in the other action

of Bassick (called in the case the contract action) alleges various causes of action in which Bassick asserts a claim either as a broker or for services rendered to Ætna in connection with the sale of explosives. The total amount of the judgment demanded is upwards of $3,000,000. The amounts represented by the notes sued on by Bassick and John, as well as by certain other notes transferred by Bassick upon which actions have been brought in the New York Supreme Court by one Delancey Smith (on a note for $135,973.71) and Lenpier Trading Company, Incorporated (on a note for $101,931.91), are included in the amount sought to be recovered in the contract action, and no credit is given by Bassick in his complaint for any of the sums represented by those notes.

The answers to these actions set forth that the agreements with Bassick were made without authority, that the amounts involved were so excessive as to amount to a gift of corporate funds, and that Bassick, in violation of his duty as a broker, concealed material facts from Moxham, and thus induced him to enter into certain of the attacked agreements. The answers further set forth that large sums in cash, $170,000 in the form of 1,700 shares of preferred stock, and large sums in payment of notes have already been paid out by the president and treasurer of Ætna without authority and in violation of their duties. The affirmative relief sought is:

"(1) That the alleged agreements for commissions and all notes assumed to be given in pursuance of said agreements be declared void, and that said agreements and notes be delivered up and canceled; (2) that the fair value of any services that may have been rendered by Bassick in connection with the sales of explosives, if it be found that services were rendered and that they had any value, be ascertained; (3) that Bassick be ordered to account; and (4) that Bassick and John be ordered to reconvey to the Ætna Company so much of the 1,700 shares of its preferred stock as is now owned and controlled by them and to account for and repay all sums of money received by way of dividends on said shares. In addition to the above, the answer sets forth counterclaims for money had and received, based upon the misconduct of the plaintiff as broker for the defendant, the fact that the agreements were made without authority, and the unconscionable character of the agreements, and asks for the recovery of the money paid to the plaintiff under the various agreements."

There were in all 11 contracts of sale by Ætna to various vendees, upon which Bassick claimed commission or compensation. In the pending actions, plaintiffs' complaint in the contract action seeks recovery for commissions or services on 9 of these contracts. Seven of these contracts were with the French government, represented in four instances by Col. Johannet, controller of the French Purchasing Commission, and in three instances by J. P. Morgan & Co. Two contracts were made with Canadian Car & Foundry Company, Limited (hereinafter called Canadian Co.). Besides these 9, there are 2 other sales to the French government, through Col. Johannet (of smokeless powder, dated March 15, 1915, and March 26, 1915), which, while not made the basis of any recovery by Bassick, enter into the counterclaims of defendants.

It has been agreed that the ascertainment of the exact figures involved in each action and in each contract shall be delayed until the judgment upon this decision is ready for entry. The following table displays data as to the contracts:

Cause of Action.	Plaintiff's Exhibit.	Date.	Purchaser.	Material.	Amount.	Price.
1st	26	Mar. 1/15	French government through H. J. Johannet	Toluene	82,000 gallons	$ .60
2nd	27	Mar. 9/15	French government through H. J. Johannet	Gun cotton	5,400,000 lbs.	.60
(Note: Option for additional 2,100,000 lbs. was provided for in this contract and accepted on October 15, 1915. Plaintiff's Exhibit 37).						
5th	28	Mar. 9/15	French government through H. J. Johannet	T N T	4,000,000 lbs.	1.00
3rd	29	Mar. 9/15	French government through H. J. Johannet	Picric acid	4,000,000 lbs.	1.45
	30	Mar. 13/15	French government through H. J. Johannet	Smokeless powder	2,805,000 lbs.	.97
	31	Mar. 26/15	French government through H. J. Johannet	Smokeless powder	1,800,000 lbs.	.97
8th	32	May 12/15	Canadian Car & Foundry Co., Limited	Smokeless powder	6,400,000 lbs.	1.00
9th	33	May 20/15	Canadian Car & Foundry Co., Limited	T N T	1,000,000 lbs.	1.15
4th	34	Dec. 17/15	French government through H. J. Johannet	Gun cotton	5,250,000 lbs. and 750,000 lbs. a month beginning July 31/16 until 30 days after close of war.	.55
(Note: The 55 ct. price on this contract of December 17, 1915, was subject to a discount of 2½ cts., making 52½ cts. net.)						
6th	35	Mar. 31/15	French government through H. J. Johannet	Smokeless powder	3,000,000 lbs.	.80
7th	36	Mar. 31/15	French government through H. J. Johannet	Smokeless powder	1,000,000 lbs. a month beginning May 1/16 until 30 days after close of war;	.80 for 1st 3 months delivery; 75 cts. for all deliveries thereafter.

The following table shows the total of the amount heretofore paid plus the amount claimed by Bassick to be still payable:

Plaintiff's Ex. No.	The Contract	Amounts Payable to Bassick.
26	Toluene	$ 49,200.00
27 & 37	Gun cotton	585,000.00
28	T. N. T.	400,000.00
29	Picric acid	1,800,000.00
30	Smokeless powder	272,085.00
31	Smokeless powder	174,600.00
32	Smokeless powder	316,800.00
33	T. N. T.	150,000.00
34	Gun cotton	329,403.76
35	Smokeless powder	90,000.00
36	Smokeless powder	358,180.31
	Smokeless powder	160,000.00
	Total	$4,685,269.07

In addition to the foregoing, Bassick claims continuing commissions from March 1, 1917, of some $57,000 (in round numbers) per month on the two French contracts (per J. P. Morgan & Co.), of (a) December 17, 1915, for gun cotton, and (b) March 31, 1916, for 1,000,000 pounds of smokeless powder per month. While it is desirable to set forth the history of the transactions chronologically, in order to see the true picture of the dealings and relations between the parties, it will be helpful, preliminarily, to group the agreements into six classes:

(1) The 10 per cent. agreements relating to toluene, T. N. T., and two smokeless powder contracts—all with the French government per Johannet.

(2) The agreement relating to picric acid with the French government per Johannet.

(3) The agreement relating to gun cotton with the French government per Johannet.

(4) The Canadian Co. agreements relating to smokeless powder and T. N. T.

(5) The former Bridgeport contract, transferred to the French government per J. P. Morgan & Co.

(6) The gun cotton contract and the 1,000,000 pounds per month smokeless powder contract with the French government per J. P. Morgan & Co.

The contentions of defendants are as follows:

With regard to class 1: (a) Lack of authority, including concealment by Moxham and Belin of the facts from Howard; (b) unconscionable character of the agreement for compensation.

With regard to classes 2 and 3: (a) All of the grounds applicable to class 1, and in addition (b) concealment of vital information from Moxham by Bassick (which includes John) in violation of his duties as broker; (c) lack of power on the part of Moxham to consent to such concealment; and (d) in any event, ignorance of the board of directors

of all the facts when it is claimed the board consented to the Bassick-Moxham agreement.

With regard to classes 4, 5 and 6: (a) That John, acting for Bassick, did not find the purchasers; and (b) that the services, if any, performed by John were negligible and so insignificant that an agreement to pay these large commissions was disproportionate to the point of being unconscionable and void and equivalent to an unauthorized gift of corporate funds. In answer to these contentions, plaintiffs assert: (a) That all the agreements were made with due authority; (b) that the amounts agreed upon were matters of complete understanding which cannot be held void nor set aside by the court merely because the sums are large; (c) that, in all the circumstances, these amounts were fair and not unconscionable and that the contracts were of great service to Ætna, and (d) that the price mentioned in negotiations for picric acid was concealed with the consent of Moxham and Ætna; and (e) in respect of the French government contracts per J. P. Morgan & Co., that, in any event, after a controversy, a settlement was had whereby in consideration of such settlement, Bassick agreed to forego certain other claims against Ætna for commissions on all contracts made with the French government.

With this outline, the story of the events may be proceeded with.

In January, 1915, Charles Lanier, Jr., connected with the Lenpier Company, had written to M. Margueryol, the predecessor of Col. Johannet, offering a quantity of toluol to the French government. M. Margueryol, when he returned to Paris, submitted Lanier's letter to the French War Department, with the result that on February 12, 1915, the French Minister of War cabled to Col. Johannet, authorizing him to purchase from Lanier the offered toluol. Col. Johannet, on February 12, wrote Lanier accordingly. On February 15, Lanier answered this letter, stating that conditions had changed since he had written Margueryol, and that he believed the toluol had been sold.

Meanwhile, about February 1, 1915, M. Jusserand, the French Ambassador to the United States, had written Col. Johannet, in effect, to get in touch with Moxham in regard to the possible sale of military powders by Ætna to the French government. Col. Johannet wrote Moxham on February 1 with the result that an interview took place between Johannet and Moxham on February 3, at the French Chamber of Commerce in New York City. A full memorandum of this interview made contemporaneously by Moxham, shows that the outlook for the purchase of explosives by the French government was most encouraging, and also that the French government was keen at the moment to purchase smokeless powder. Correspondence then followed between Johannet and Moxham in which, among other things, Johannet informed Moxham that:

"Specifications of the sundry specimens of powder * * * are being sent me by mail. As soon as I am in possession of said specifications, viz. in about ten days, I shall at once communicate same to you."

To which Moxham answered:

"We will await your further advices in the matter of the powder."

This was followed on February 6 by a pleasant letter from Moxham to Johannet, stating that:

"We hope you will not hesitate to call upon us, should any occasion arise wherein we can aid you."

There the supine Moxham let matters rest. The door for negotiations was freely opened to him under the most favorable auspices, but he did not enter. Prior to February 12, the date when Lanier received the letter from Johannet regarding toluol, the Lenpier Company had had some negotiations with Bassick, and had asked him whether he could obtain sufficient toluol to fill the order to supply the previously offered toluol which it had lost. Bassick stated that he would attempt to accomplish this. At that time Bassick was in the munitions brokerage business, having organized (the previous fall) a staff of associates, of whom John was one.

In February, and prior to February 18, Bassick was desirous of securing a large quantity of gun cotton by reason of expectations arising out of pending cable negotiations with London. On February 18, 1915, a letter was written in Bassick's name to Ætna "attention of Mr. Sallade" as follows:

"On behalf of E. W. Bassick and based upon a firm acceptance by cable from a strong banking house in London, we make you an offer for gun cotton * * * as follows: * * * Total 5,000,000 pounds or more, 250 tons during May, 400 tons monthly thereafter. * * * The price is 55 cents per pound shipside New York. * * * Upon signing of contract 25 per cent. in cash will be deposited against the entire contract and the balance to be paid as shipments are ready."

Up to this time there is no question that neither Bassick nor any of his associates had met any of the officers of Ætna, and it is clear that their acquaintance began under entirely natural and proper circumstances. On receipt of the letter supra, Moxham telephoned Bassick, asked him who he was, and to whom he could refer as to his responsibility, and Bassick gave him his references. Moxham investigated these references and found and was satisfied that Bassick was a reputable and responsible business man of Bridgeport, Conn.

On the morning of February 19, 1915, Bassick and John met Moxham for the first time. Moxham told them that the price of gun cotton was about 55 cents per pound. John told Moxham about negotiations that were being carried on by Bassick and himself with Sir Frank Crisp, a London solicitor, for gun cotton, and that he was convinced of the likelihood of making a deal through Crisp. The result of this interview, so far as it related to gun cotton, is expressed in a letter dated the same day from Moxham to Bassick as follows:

"Pursuant to our verbal discussion and based upon assurance from you that you have firm cable acceptance of the purchase of a certain amount of gun cotton, we hereby authorize you to carry on the details of this negotiation with a view of drawing it to a successful conclusion. * * * The price to you is fifty-five cents (55c.) per pound on dock f. o. b. New York. * * * It is understood that the selling price above the stipulated amount of fifty-five cents (55c.) is to go to you in lieu of services rendered and disbursed according to your instructions."

On the afternoon of this same day Bassick and John went with Moxham to the Bankers' Trust Company in connection with the Crisp negotiation. There can be no doubt that Bassick and John then believed they could carry the transaction through with the London interests, that at this time they made no misrepresentations as to the sale of gun cotton, and that no questions were asked nor information desired by Moxham as to the price at which Bassick and John expected to sell the gun cotton. Moxham fixed a price for the product in regard to the adequacy of which no attack can be successfully made, and it is entirely clear that the subject of gun cotton, which was the occasion for the opening up of relations between Bassick and Ætna, was, at this time treated as separate and apart from any undertaking as to compensation for the sale of other commodities.

On this morning of February 19, the only prospect in sight, so far as Bassick and John were concerned, was the sale of gun cotton to the London interests, and at this time they were naturally dealing in this regard at arm's length to get the best quotation possible. As to gun cotton, they clearly had not as yet assumed the relation of broker to principal. Either at this interview or on the following day certain important arrangements were made as to the future relations of the parties, to which reference will presently be had. Late in the afternoon of this February 19, John was introduced to Johannet by Lanier at the French Chamber of Commerce, and the proposed sale of toluol was discussed, and the outlook for a sale seemed hopeful. On February 20, John told Moxham that he believed he could get an order for toluol, but did not tell Moxham who the purchaser was, and was not under obligation so to do.

At the interview between Moxham and Bassick and John on February 19, or on the following day, it was agreed that Bassick was to receive a commission of 10 per cent. "on all commodities that he sold for the Ætna Explosives Company," and at that time Moxham told them that the price of picric acid, smokeless powder, and T. N. T. was $1 per pound. By virtue of that interview the strict relation of broker to principal between Bassick and Ætna was established in all respects, except as to gun cotton. Moxham testified that he told Bassick and John, at either his first or second interview with them, that he had met Johannet and could do business with Johannet as well as they could, and it would seem that at this time, and until about a year and a half later, Johannet supposed that Bassick and John were employés of the Ætna and not brokers nor middlemen—Johannet not desiring, from his own viewpoint of policy, to deal with middlemen.

[1, 2] But these facts are immaterial. Moxham's failure to follow up the opening with Johannet did not impose any obligation upon Bassick and John to refrain from obtaining orders from Johannet, nor did Johannet's aversion to middlemen, even if it had been communicated to Bassick and John, concern them in their relations to Ætna. Their task was to find a purchaser, and a broker is not under any obligation to disclose his purchaser. Indeed, if he did, the principal would often go over his head. If the principal has not sense nor energy enough to do business with an obvious or possible purchaser, he cannot complain if

the broker, without his help, produces that same person as a purchaser.

Having now an agreement for broker's commission of 10 per cent., John, on February 23, told Johannet that he represented a manufacturer which could furnish the toluol, and Johannet addressed a letter to Bassick, stating that he would sign "with you or your principals" a contract for the purchase of toluene, and outlining the terms of the contract to be made (Plaintiff's Exhibit 39). On February 28, John, together with Belin, Eppstein (who was interested in the Lenpier Company), Egbert Moxham, and a Mr. Peyton, called upon Johannet, and the contract for toluene was arranged in the name of Ætna.

John succeeded in getting Ætna to agree to fill this order upon condition that the French government would accept for its earlier deliveries monitrotoluol and dinitrotoluol, and this was done and the toluol contract dated March 1, 1915 (Plaintiff's Exhibit 26) entered into. This, so far as appears, was the first contract for the sale of military explosives made by Ætna with anybody.

Prior to the closing of the toluol contract, John became convinced that the French government at Paris was in the market for gun cotton on a large scale and testified that he so informed Johannet, that Johannet stated that he had no instructions to buy gun cotton, and that if his government so desired, he would probably receive instructions at the end of the week—February 27, 1915. The instructions were not received that week and John persisted with Johannet that the French government was in point of fact in the market for gun cotton. It would seem, as a result of John's persistence that on March 5, Johannet cabled to the French War Office:

"That Ætna Explosives Company offers us gun cotton * * * at fifty-eight cents a pound. Is it correct that this produce should be looked into? If so, cable me to what extent. * * *"

Johannet testified that his first talk with John on the subject of gun cotton was on March 4 or 5. Johannet's testimony is, of course, highly reliable; but he depended, not on recollection, but upon a remarkably systematic and accurate "dossier." It is quite possible that he saw no occasion to make full entry of conversations which merely related to John's suggestion of a possible desire of the French government to buy gun cotton. There is no reason to believe that John's recollection in this regard is faulty. In any event, John, prior to March 7 (Johannet testified on March 4 or 5), had offered gun cotton on behalf of Ætna at 58 cents per pound. This was quite in accord with the figure quoted by Moxham to Bassick in a letter "to confirm our agreement with you" dated March 5, 1915 (Plaintiff's Exhibit 50), in which Moxham also stated that the order then contemplated "was subject to a ten per cent. commission to you" (Bassick). On March 7, Johannet received word from Paris that gun cotton was being offered there on behalf of Ætna at 66 cents. Immediately on receipt of this he wrote a letter, dated March 7, addressed "To the President of the Ætna Explosives Co., c/o Mr. Charles Lanier, 59 Cedar St., City," stating:

"In pursuance of our recent conversation in relation to a possible supply of gun cotton by the Ætna, * * * I have just received from my govern-

ment instructions authorizing me to follow that affair. I would be obliged to you if you could come to discuss the matter with the authorized representatives of the company to-morrow at 4 p. m."

Lanier, to whom this letter was handed—presumably by Johannet's secretary—did not wait until the next day (Monday), but got in touch with John, and on March 7 (Sunday) went to the Hotel Lafayette (Col. Johannet's headquarters) with John and Eppstein, and sent a note to Johannet stating that he had shown Johannet's letter to Eppstein and John, and requesting an interview that afternoon or evening. This interview was had, and Johannet stated that he was willing to place an order for 5,400,000 pounds of gun cotton. Picric acid and T. N. T. were also discussed at that interview, to which reference will be made infra.

Much is argued by defendants to the effect that this letter was intended for Moxham and that Lanier, John, and their associates practiced a species of deceit upon Moxham and Ætna by treating the letter as addressed to Lanier and his associates rather than to Moxham. The phraseology of the letter, "In pursuance of *our recent conversations*" (italics mine), fully refutes this accusation, and, besides, the record contains letters from Johannet previously written to Moxham, addressed to him at 2 Rector street, and other letters written to Lanier, addressed to him at 59 Cedar street, showing clearly that this letter under discussion was intended for Lanier, and, therefore, that Lanier, John, and Eppstein were fully justified in carrying on their talks with Johannet without delivering this letter to Moxham.

John, undoubtedly, did some clever and prompt work that Sunday of March 7. Laying aside, for the time being, the discussion of the picric acid contract, he (which always means as representing Bassick) had an arrangement for a 10 per cent. commission on the sale of all explosives except gun cotton, and as to that he had an understanding that he would get everything over 55 cents a pound. Moxham had indicated by his letter of March 5 (Plaintiff's Exhibit 50) that he would be satisfied with 52.2 cents net; i. e., 58 cents, less 10 per cent., or 5.8, leaving 52.2 cents net. Johannet was anxious to buy. Moxham was inert through accident or design (but that was none of John's affair at this time), and John closed, not only an agreement for gun cotton, but also for T. N. T. at $1 per pound. On March 8, John appeared at the Ætna office with orders for gun cotton, T. N. T., and picric acid. These orders eventuated in the contracts of March 9, 1915: (a) For gun cotton at 60 cents; (b) for T. N. T. at $1; and (c) for picric acid (infra).

As to gun cotton, it is perfectly clear that, while the original offer of Bassick contemplated a sale to London interests, it was immaterial to Ætna to whom Ætna sold or to whom Bassick sold. This original situation did not change. Neither Bassick nor John attempted to obtain any agreement to increase their profit on a gun cotton sale. Indeed, Moxham's letter (Plaintiff's Exhibit 50) showed that he was willing to take less net than Bassick and John originally proposed. The situation was quite different from that which developed in regard to picric acid. If, as seems to be the case, Bassick, before making the

55-cent agreement with Moxham, had seen the cablegram, Exhibit U, dated February 19, 1915 (from London & Midland Bank to Bankers' Trust containing offer from Sir Frank Crisp to buy gun cotton at 75 cents for March and April deliveries and 62 cents thereafter), he was under no obligation to disclose its contents to Moxham. If, perchance, Bassick saw this after the making of the 55-cent agreement, he was still under no obligation to disclose the Crisp price, because Moxham had fixed the price *and* no attempt was made to change the arrangement to the disadvantage of Ætna. It is true that at the end John induced Johannet to pay 60 cents and "squeezed in a cent or two more on Ætna," but that was mere open bargaining between grown-ups.[1] The net result was that Bassick and John made 7.8 cents on 60 cents, or 13 per cent.—the equivalent to Ætna of 10 per cent. on 58c.

Little time need be spent on the two (10 per cent. commission) smokeless powder sales to the French government represented by the contracts of March 13 and March 26, 1915. These were plainly obtained by John, and were for smokeless powder for small guns, while the original and not followed-up negotiation between Moxham and Johannet was for smokeless powder for large guns. The 10 per cent. agreed to be paid for commissions on the toluol, T. N. T., and these two smokeless powder contracts and the profit to Bassick on the French (Johannet) gun cotton contract were far from unconscionable amounts.

[3] Ætna was in the early stages of its career, and, while Moxham could undoubtedly have obtained the same results, that, per se, is no reason why Bassick can be deprived of compensation. The condition of Ætna was far from desperate, as Moxham would wish believed; but, because of his conduct, it needed business, and why it needed business was no concern of Bassick. The testimony of several brokers was admitted, not on the question of adequacy, but of unconscionability. Each of these brokers conducted transactions having features different from that of the case at bar, and not only on a much smaller scale, but also for different kinds of principals, under different circumstances. Such testimony is serviceable where the issue is quantum meruit, but not where the question is one of a contract, where the agreement fails only if the amount to be paid is so excessive as to shock the conscience. Nor is it material whether a broker accomplishes his result in a day or a year. It is the result which counts, and the agreement is based on the result.

[4, 5] There remains on this branch (excluding pro tempore the picric acid contract) only the question of authority. In my opinion, the employment of brokers to sell explosives for a company engaged in that business, or the agreement to sell one of these commodities at a reasonable and fair market price (as in the case of gun cotton), and allow the difference to the arm's length negotiator for his profit or compensation, is an ordinary incident of such a business. The principle is concisely stated by Mr. Justice Page in Ætna Explosives Co. v. Bassick, 176 App. Div. 582, 163 N. Y. Supp. 921, as follows:

[1] The probable explanation, partly dehors the record, is given at pages 62 and 63 of plaintiff's reply brief.

"It is well settled in this state that where a president of a trading or business corporation is given general management and control of its property, business, and affairs, the corporation is prima facie bound by contracts entered into by him in the name of the corporation, if the contracts are within the apparent power of the corporation to make, and a third party entering into such contracts is not bound by secret limitations of his authority contained in the by-laws. Oakes v. C. W. Co., 143 N. Y. 430 [38 N. E. 461, 2 L. R. A. 544]; Powers v. Schlicht, 23 App. Div. 380 [48 N. Y. Supp. 237], affd. on opinion below 165 N. Y. 662 [59 N. E. 1129]."

But, in addition to the foregoing, the record is abundant with proof that the directors knew and authorized these agreements with Bassick after a spirited discussion, and I am fully satisfied by the testimony of both Moxhams that a resolution was passed (although not recorded) in regard to commissions on the March 9 contracts. Indeed, Egbert Moxham particularly impressed me as a truthful and honorable man. The method of keeping books and the continuing payment of these commissions, elaborately illustrated by documents and extracts in evidence, serve to confirm fully the conclusion that these Bassick transactions were ratified by all the directors, if that were necessary—and I think it was not, because within the apparent power of the corporation acting through its president.

Many pages of the record and the briefs are devoted to showing whether or not knowledge of what was being done was kept from the director Josiah Howard. This controverted point is promptly disposed of when I state that Howard was hopelessly confused, and, while doubtless he is a well-meaning man, his recollection is so uncertain as to preclude reliance thereon for any finding of fact based on his memory. In addition to many other reasons, the testimony of Graham, a clear-headed and most reliable witness, still in the employ of the receivers, would resolve any doubt in this regard if such existed.

[6] Finally, the argument is advanced that plaintiffs are entitled to commissions only on so much of the explosives as were actually delivered and paid for. On this branch of the case the argument applies to the T. N. T. contract which was canceled by the French government because of delays in delivery. The rule is elementary that, in the absence of an agreement to the contrary, a broker is entitled to full commissions if the failure to deliver is due to the fault of his principal. There was a dispute in this regard between Moxham and Bassick; but, taking Moxham's testimony and his letter of July 16, 1915, claimed to be corroborative (if admissible on this point), the contention is not borne out. Moxham was asked: "* * * You never agreed * * * that they should be paid any commissions except as and when you received the money under the contract that they obtained," and he answered, "That is correct." He also wrote on July 16, 1915: "In other words, if we do not receive our pay in whole or in part, your commission is to be reduced accordingly." Both the conversation and the letter mean no more than that, if Ætna fulfilled its contracts and the vendees did not pay, Bassick would not get his commissions. They did not mean that Bassick would lose his commissions if Ætna defaulted.

For the reasons above outlined, a recovery may be had against defendants on the T. N. T. and gun cotton contracts, with interest from the dates when the respective payments of commissions were due, and

the counterclaim in respect of the two smokeless powder contracts is not sustained.

The Picric Acid Contract.

[7] From the time of the first interview between Bassick and John on February 19, with Moxham, or, in any event, the succeeding interview, Bassick and John concededly (on their own testimony) occupied the relation of broker to principal in regard to the sale of explosives as then discussed, except gun cotton. "We did not talk about picric acid specifically, but it was understood that we were to receive a commission of 10 per cent." (John, pp. 237, 238; Bassick, p. 902½.) At that time Moxham said the price of picric acid would be $1 per pound.

It is entirely clear, and was made so to Bassick and John, that Moxham fixed this price because that was what the Du Pont Company was getting. The Du Pont Company was an old established concern, highly organized and, presumably, fully equipped. At this time, Ætna did not have a picric acid plant, nor the land on which to build one, and, in order to manufacture this commodity, it would be necessary to erect a plant and have it properly manned and equipped. The suggestion that this was a provident price, based on an estimate, as stated by Moxham and Egbert Moxham, that picric acid could be manufactured at 50 cents per pound, is not borne out. While there is some testimony to that effect by both Moxhams, I am satisfied that they are in error (inadvertently), because the letter of Moxham to his son, dated May 21, 1915 (Defendants' Exhibit P1) and stating:

"The inclosed is the *first effort* on our part to get some sort of a line on the probable cost of material for both picric acid and T. N. T., and I have no doubt it will be interesting to you. * * * All this is only a rough guide for the present, but it is better than nothing" (italics mine)

—accurately fixes the date when the first estimate was made as being in May, 1915, two months after the picric acid contract was signed. As brokers, Bassick and John owed the highest duty to Ætna—a proposition admirably stated in 4 Ruling Case Law, § 22, from which the following is an extract:

"It naturally follows from the general rule requiring a broker to act with the utmost good faith towards his principal, that he is under a legal obligation to disclose to his employer all facts within his knowledge which are or may be material to the matter in which he is employed, or which might influence the action of his employer in relation thereto. A broker does not fulfill the measure of legal requirements by merely carrying out his specific instructions, for he owes the further duty of making a full, fair and prompt disclosure of all facts affecting the principal's rights or interests, or in any way pertaining to the discharge of his agency."

See, also, Cardozo v. Middle Atlantic Immigration Co., 116 Va. 342, 82 S. E. 80; Holmes v. Cathcart, 88 Minn. 213, 92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513; Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; Dickinson v. Tysen, 209 N. Y. 395, 103 N. E. 703; Low v. Woodbury, 107 App. Div. 298, 95 N. Y. Supp. 336.

At the time (whether February 19 or 20) when Moxham fixed the price of picric acid at $1 per pound, and agreed with Bassick and John

on a 10 per cent. commission, the agreement was fair and proper. The negotiation was on with Crisp for gun cotton (Exhibits S, U, and V), but negotiations for picric acid had not begun. The proposal for selling picric acid with Crisp and another party, according to John, "developed a day or two after meeting Mr. Moxham." The London negotiations proceeded in part through the London City & Midland Bank (communicating with the Bankers' Trust Company in New York) and partly through one Hodges in New York (communicating with one Proctor in London). The importance of the subject warrants the setting out of the cables interchanged; all of the following having been seen by both Bassick and John:

"Exhibit P—Cablegram, Proctor to Hodges, February 24, 1915: 'Have sold entire output picric acid eighty per cent. acid twenty per cent. water dollar sixty-five per pound net to you dollar sixty will deposit twenty-five per cent. against bond instruct principals to have New York bank cable London bank authorization to sign contract Crisp representing us other contracts progressing rapidly.'

"Exhibit N—Cablegram, Bankers' Trust Company to London City & Midland Bank, February 24, 1915 (Moxham's deleted copy is Exhibit O): 'Cablegram received. Seller will authorize you by proper resolution to be filed with us certified copy to go forward to you to close following contract with buyer to be named and be filled in by you. (Then follow details as to gun cotton at 75 cents per pound for March and April deliveries and 63 cents per pound for the remaining deliveries.) When this contract closed will take up with you picric acid contract along same lines deliveries beginning at ninety days based on capacity of 8,000 to 10,000 pounds per day on contract up to January 1916 price dollar sixty-five per pound, understand Crisp has mentioned this to you, message 168.'

"Exhibit W—Letter Bassick to Bankers' Trust Company, February 26, 1915: 'Referring to the contract for picric acid to be signed by the London City & Midland Bank, Limited, of London, for the Ætna Explosives Company of New York, I hereby authorize you or them to insert in the contract the price of one and 65/100 ($1.65) dollars per pound.'

"Exhibit X—Cablegram, Bankers' Trust Company to London City & Midland Bank, February 26, 1915 (Moxham's deleted copy is Exhibit Y): 'Ætna Explosives Company Incorporated have deposited with us certified copy resolution their board of directors authorizing you on their behalf to sign execute seal and deliver a written contract * * * for the sale of picric acid * * * at one dollar sixty-five cents per pound. * * *'

"Exhibit A1—Letter, Bassick to Bankers' Trust Company, March 2, 1915: 'I hereby authorize you to close the contract for two million pounds of picric acid, * * * the price per pound to be one dollar sixty-five cents.'

"Exhibit D1—Cablegram, Bankers' Trust Company to 'Comptonia' London, March 2, 1915: 'Refer our cable twenty-sixth cable specifications required picric acid price dollar sixty-five per pound f. o. b. New York.'"

Those cables, supra, where reference is made to "Moxham's deleted copy," were cables shown to Moxham with the prices omitted. Bassick and John both testified that at one of the early interviews with Moxham, probably the third, they changed the arrangement as to picric acid and substituted for the agreement of 10 per cent. commission, an agreement that Bassick was to receive all in excess of $1 per pound net to Ætna. John, when asked on direct-examination why an exception was made with regard to the compensation of Bassick in regard to the picric acid contract, stated:

"Well, we knew that the price of picric acid was above a dollar a pound after we had received the price at which the French and English governments,

or rather Mr. Crisp and Walter's clients were willing to pay for picric acid, and that the price of one dollar was agreed upon when we informed Mr. Moxham that a higher price than one dollar could be secured for that commodity."

Bassick testified that he could not fix the date of the conversation with Moxham changing the picric acid agreement, except that it was shortly before February 25. John finally testified that the conversation took place after Washington's birthday and was about February 23—obviously an error, as will appear infra. Moxham fixed no date. From the testimony of Hodges, it appears that Bassick and John had agreed with Proctor, prior to February 21, to furnish picric acid to him at $1.50. It is, however, not open to doubt that when the new arrangement was made with Moxham, Bassick already had the information from London as to the $1.65 price (testimony, pp. 903, 961, 962)—in other words, that the interview with Moxham must have taken place at least after Bassick and John had the information contained in Exhibit N, dated February 24, and, perhaps, a day or two later. Human nature is human nature; and there can be no explanation for the change from 10 per cent. to what plaintiffs call the "overage" above a dollar, unless plaintiffs had information that picric acid was commanding high prices in a rising market.

John is shrewd and persuasive, and he knew his man. By this time he realized perfectly that Moxham was sitting in the Ætna offices with his eyes and ears closed, and had not the faintest idea of what was going on in the market, although everybody else seemed to know (Johannet, p. 1173 et seq.; Davis, p. 1028; Peters, pp. 1138, 1139). Moxham had agreed that the cablegrams could be shown to him with the prices deleted; but, nevertheless, the subject of price was discussed. Moxham testified:

"Q. Between Sunday night, when John telephoned you as to the price he was going to get from the French government, and the time when you first saw Bassick, had they ever spoken to you about the price they expected to get for picric acid? A. Yes, frequently. Q. When? A. I cannot remember. We discussed it freely, what hope there was of getting a price, and what the price would be, and all about it. Q. What did they tell you the price would be? A. They didn't know. They didn't know until they tried. * * * They didn't tell me about the London & Midland Bank, but they did tell me about the French contract. Q. When they told you on that Sunday night? A. Yes, sir. Q. They didn't tell you then about their negotiations with the London & Midland Bank? A. They told me about the negotiations, but not the price."

John testified on redirect examination as follows:

"Q. Did he (Moxham) at any time ask you what you were expecting to get on this pending or contemplated English contract which you were trying to negotiate through the trust company here, and the London & Midland Bank in London? A. Yes, sir; he did ask. Q. What did he say? A. 'Well, now, what are you gentlemen getting for this picric acid.' * * * Q. And what did you say to him? A. We avoided the question the best we could, and told him it was understood that the price to us was to be $1, the price to the Ætna was to be $1, and that all in excess was to come to us, and that we had to divide this commission with others, and that the mode and method of the distribution of commission was a matter that we ought to be responsible for. Q. Did he press his inquiry then any further? A. Well, he said that he would like to know, and we told him that if it was just as well we would let

the matter stand as it was. Q. What did he say to that? A. Well, he says, 'I will have to find out what price picric acid is selling for.' Q. What else? A. I think that is all that he said. Q. So that you didn't furnish the information at that time to him? A. No, sir."

Finally, when informed by Bassick that the picric acid contract had been closed at $1.45, Moxham "told Bassick that if I had known that there was any possibility of picric acid selling at that price I would most certainly have changed my figure to them." The clear inference from John's testimony, in answer to the court's questions, is that, prior to the closing of the French offer on March 7, John never told Moxham of the $1.65 price and Moxham's testimony fully confirms this conclusion.

There is no doubt that Bassick and John regarded the Crisp negotiation as serious, and it was still alive on March 6, and yet about March 1, according to John, he told Moxham that "the only legitimate offer" that he had received, or "suggestion of an offer," was for $1.20, "and that offer—it was a suggestion of a possible offer—had been made by Col. Johannet." If John's recollection is right, then the impression sought to be given was that $1.20 was the highest price possibly obtainable, and then only possible. But Johannet testified that the only day on which picric acid was discussed was March 7—the same date when Johannet stated he would close on T. N. T. and gun cotton. Here there is every reason to rely on Johannet's "dossier." If Johannet had mentioned a figure, any one who saw his "dossier" and heard him testify would realize that he would make an accurate note of that fact.

There was no cable nor other corroborative circumstance as in the case of the gun cotton. It may be that John heard talk among the brokers which led him to believe that the French government would buy picric acid, or, perhaps, so concluded as a natural surmise from the fact that there was a market for any military explosive; but I am satisfied that Johannet never talked figures on picric acid until March 7. On that occasion, John asked $1.50, Johannet offered $1.40, and they closed at $1.45. Before the contract for picric acid between Ætna and the French government was executed, the directors (there is some doubt as to Howard) knew of the commission to be paid to Bassick. Howard was not at the meeting of the board on March 9, 1915, although I think Howard was told at some stage of the amount of the commissions.

[8] Egbert Moxham and C. A. Belin protested vigorously against this large commission, but were finally prevailed upon by Moxham to sustain him in the agreement he stated he had made. But this much is certain, that Egbert Moxham, C. A. Belin, and Howard never knew nor were told that Moxham had agreed to be kept in the dark as to the market price of picric and had consented that the prices should be deleted from the correspondence shown him. Egbert Moxham was in a difficult position. His father had put the proposition to him and the others that he had made an agreement and was in honor bound to keep it. That is a hard place in which to put any son. Howard was evidently taking Moxham's word and judgment at this period of the company's history and for some time later, and C. A. Belin the same. But there never can be a ratification by a corporation, acting through

its board of directors, unless the board knows all the facts and the essential fact that this contract was made blindfolded had not been communicated to the board.

[9] What, then, are the results in law to which these facts lead. Bassick was clearly a broker as to picric acid from the moment he agreed to sell explosives, including picric acid, on a 10 per cent. commission basis. The change to the more favorable terms was obtained by the broker without disclosing all the facts known to him. The case might be different if Bassick had been under any legal obligation to buy the product, yet Bassick's theory in his dealings with Moxham seemed to be that he was not under any duty to make disclosures to Moxham. In response to Moxham's request to see copies of the cables, Bassick stated, "* * * But I will not have the price in there," whereupon Moxham asked, "Why not?" to which Bassick replied:

"Because you are not entitled to know it; you made us a price of $1, and all we get over $1 belongs to us; therefore I don't see why you should know it. * * * On the things on which you made us a commission price I am willing to tell you."

It is certainly not within the apparent power of the president or general manager of a corporation to arrange with a broker to be kept in the dark as to the market price of a commodity for the sale of which the broker is to be compensated by "overage." Such an arrangement is not ordinary, but is extraordinary. To sanction it is to hold that, in the absence of express permission of the stockholders, a president or other person in charge of the management of a corporation is authorized by virtue of general authority in the ordinary conduct of business, to make agreements for commissions with purposeful disregard of the information known to his brokers and available to him. Actual fraud is often difficult of proof; but, if any such method of doing business were to be permitted, the way would be easy to commit grave wrongs against the stockholders of corporations, who must depend upon the fidelity of their directors and officers to safeguard their property. The protection against such acts is not limited to the enforcement of appropriate remedies against faithless or incompetent directors and officers. Where the transaction or the agreement is extraordinary, the person dealing with the representative of the corporation is placed on notice and may not rely on such dealing. The only hope for him is that the board of directors may ratify the agreement and such ratification is valid only (1) when made with full knowledge of all the facts, and (2) provided the board itself has power to make such a contract. As already pointed out, the ratification of the board was without full knowledge; for, if Egbert Moxham and C. A. Belin had known all the facts, it may fairly be inferred from their attitude that they would have refused to stand by Moxham's agreement.

[10, 11] But I go further. In my opinion, if it were to be found that the board knew all the facts, they had no power to authorize an agreement so disproportionate as to be unconscionable. It has been settled by Hume v. United States, 21 Ct. Cl. 328, affirmed 132 U. S. 406, 10 Sup. Ct. 134, 33 L. Ed. 393, that even in the case of a sale—

"such a contract, whether founded on fraud, accident, mistake, folly, or ignorance, is void at common law. It is not necessary to invoke the aid of a

court of equity to reform it. Courts of law will always refuse to enforce such a bargain, as against the public policy of honesty, fair dealing, and good morals."

And, as said by Mr. Chief Justice Fuller:

"And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity. When this is so, if performance has been accepted in ignorance and under circumstances excusing the nonreturn of articles furnished, and these have some value, the amount sued for may be reduced to that value."

Under this so-called "overage" arrangement, Bassick was to receive $1,800,000; i. e., 31 per cent. in round numbers, on a sale of $5,800,000—an amount obviously so far above anything which can be called reasonable, or even liberal, in the circumstances, as to characterize the agreement, within the famous observation of Lord Hardwicke in Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155, as—

"such as no man in his senses and not under delusion would make on the one hand, and as no * * * fair man would accept on the other, which are unequitable and unconscientious bargains. * * *"

The courts are holding those dealing with corporations to a constantly increasing responsibility and charging them more frequently with notice, where the subject-matter is outside of the ordinary agreements which are necessarily made in the daily conduct of business. Such a judicial trend, even in the case of trading corporations, is in response to the need of safeguarding the rights and property of stockholders often large in number, with small individual holdings, who must rely not only on the fidelity of officers and directors, but also on the rigid application of sensible rules of law developed to meet modern business conditions. A great deal of the important business of the country is necessarily done in corporate form. Sufficient capital cannot be obtained for many large enterprises without the aid of the investing public. It is in the ultimate interest of business and the projection and prosecution of large enterprises that the investing public must feel confident that a just appeal to the courts will not go unheeded, and that the courts will not permit their property to be disposed of under circumstances which amount to a gift, and those dealing with corporations cannot rely, in such event upon the proposition that a board of directors has power, in law, to authorize a gift. Doubtless a natural person, in the absence of fraud or duress, can give away his property. Not so with the directors of a corporation as to corporate property.

It is unnecessary to analyze the many cases cited by both sides. They each stand on their own facts with the applicable principles of law; but I am quite confident that the law is as above stated, whatever the facts may be, and the only question, then, is to determine whether the facts justify the application of the principle. For the reasons stated, I hold that there cannot be recovery for the commissions sued for on this branch of the case on the basis of plaintiffs' claim.

[12] Whether the equitable relief prayed for may be granted is a more difficult question. The case is peculiar. The commissions were paid with full knowledge that Bassick was to receive the "overage," and the deleting of the cablegrams was with full knowledge of Moxham. The concealment took place after Moxham had originally quoted the $1 price, and was a case of overreaching and grasping, and, while what was done in this regard amounted probably to a fraud in law, there was no such conduct as is exemplified in cases like Palmer v. Pirson, 4 Misc. Rep. 455, 24 N. Y. Supp. 333, affirmed 144 N. Y. 654, 39 N. E. 494; Braden v. Randles, 128 Iowa, 653, 105 N. W. 195, and Wadsworth v. Adams, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984. Defendants, while strenuously contending for a recovery back, nevertheless take a position consistent with equity when they say:

"If, however, the court is of opinion that the defendants, by asking for affirmative equitable relief, are in a position where they are obliged to do equity, then it is submitted that the court can determine the reasonable value of the services rendered by the plaintiff * * * to the defendant, in so far as there were any services for which they are equitably entitled to be paid, and, allowing for such reasonable value, can decree the return of the balance of the money received by plaintiffs to the receivers for the benefit of the stockholders and creditors."

The circumstances do not, in justice, require the harsh application of a complete forfeiture of compensation. The service was rendered, and Ætna is to-day manufacturing for and delivering to the French government picric acid under a modified agreement having its inception in the original agreement obtained by Bassick through John. The original agreement and price were advantageous, and, if Bassick had adhered to his 10 per cent. and Ætna had been properly managed, the contract would have been a source of substantial profit at a time of great importance in the history of Ætna. In such a situation (and more could be said) it would be inequitable to order the return of what has been paid to Bassick, viz. some $183,000.

But I think that the facts justify a further compensation to Bassick. This at first may seem inconsistent, but that inconsistency will presently disappear. In Hume v. United States, supra, the court found the market value of the goods and allowed recovery therefor. This was on the theory that the United States had actually received the goods, although the return was excused because of ignorance. If, in the case at bar, Bassick's (and John's) conduct was not such as to justify a forfeiture, then, in principle, the situation is much the same as in the Hume Case. In the Hume Case goods were received and retained, while here the result of Bassick's services was availed of. The contract, being void, could be repudiated at any time, and resort could then be had to fixing the compensation on a fair and reasonable basis. Whether, therefore, viewed from the more strict requirements of the common law or the elastic discretion of equity, the result is that Bassick is entitled on all the facts to the reasonable value of his services, which is but another way of saying he should have what, in the language of the layman, would be called fair.

It appears that, after a certain amount of picric acid was delivered, the contract was canceled, and a new contract with decreased prices

(dependent on dates of delivery) was entered into. Fair compensation, in my opinion, is at the rate of 10 per cent., without interest, on the actual selling price of Ætna to the French government of the amount covered by the commissions, less the amount already paid ($183,000) and less the amount of the Smith and Lenpier notes. In other words, plaintiffs' recovery is not to exceed said 10 per cent., and, as the Smith and Lenpier notes are outstanding, defendants are not to be required to pay those notes and, in addition, a similar amount in this action—or the same amount twice. The exact figures can be worked out in the findings.

The Canadian Company Contracts.

[13-15] Ætna entered into two contracts with the Canadian Co.: (1) Dated May 12, 1915, for 6,400,000 pounds of smokeless powder, at $1 per pound, upon which Moxham agreed to pay 5 per cent. commission; and (2) dated May 20, 1915, for 1,000,000 pounds of T. N. T., at $1.15 per pound, upon which Moxham agreed to pay the excess over $1—i. e., 15 cents per pound. The complaint was originally framed on the theory that the services performed were those of a broker, but the testimony showed that the services rendered were not in any sense broker's services.

(1) As to smokeless powder: Senator Curry, president of the Canadian Co., and Moxham, knew each other long before John appeared on the scene. Canadian Co. had a contract with the Russian government for the delivery of shells, and needed smokeless powder to fill them. Curry, for his company, was in the market for 4,000,000 pounds of smokeless powder, and was negotiating with Moxham for that quantity at $1 per pound. The specifications had been furnished by the Russian government, and therefore could not be the subject of debate or negotiation. Curry on March 15, 1915, had stated, in effect, that he would be satisfied with deliveries beginning in August, and that "there is no doubt whatever about our wanting the powder, and the advance payment named by you is all right" (Defendants' Exhibit U1; also Defendants' Exhibit M1).

Aside from the details of the formal language of the contract, the only open question of any consequence was the time and method of making payments. The Canadian Co. was at all times ready to make an advance payment of 25 per cent. on the amount of the contract price (Defendants' Exhibit M1). Moxham, at first, had asked for an irrevocable letter of credit for so much of the entire purchase price as had not been paid in advance; then he asked for a 50 per cent. advance payment, and, after that proposition was rejected, he returned to the proposition of an advance payment of 25 per cent., but demanded that it be released so that it could be used by Ætna to build a new plant in Canada.

About this time, viz. in the middle or toward the latter part of March, Moxham decided to employ John to carry on the negotiations. "I told him," testified Moxham, "I was down and out; my patience was exhausted. I could get nowhere with the Senator. I said, 'John, if you, with your patience, can bring him to book and close the con-

tract within a reasonable time, I will be glad to give you a commission for doing it;' " and he agreed to pay John 5 per cent. This was a most extraordinary performance. Here was a responsible concern anxious to buy, with price, amount, and specifications as to material arranged and time of delivery indicated, and only one substantial point outstanding and yet Moxham agreed to pay an outsider over $300,000 for something which any intelligent employé—Sallade, for instance—could doubtless have accomplished.

Of course, John was under no obligation to decline employment because Moxham chose to employ him, instead of either doing all the work himself or assigning one of the officers or employés to do it. Curry had no recollection of ever having previously met John. John testified that he had been introduced to Curry in February, but the circumstance obviously was merely casual, as John, in substance, admitted, because he stated that he did not know whether Curry remembered him. Thus there was absent the personal equation, which is sometimes important in a negotiation. John testified that he had about 50 interviews (inclusive of talks as to smokeless powder and T. N. T.) with Curry. As the T. N. T. contract was signed on May 20, and as John was employed not prior to the middle of March, this means that John saw Curry at least once almost every day for two months—a seemingly exaggerated estimate of the time and effort expended, especially in view of Curry's testimony that John had only 10 or 12 interviews with him. Memory in such matters is not reliable, unless a memorandum (à la Johannet) is kept, and the fact probably is that the number of interviews between these men was somewhere between their respective estimates.

While the discussion as to terms was proceeding, Moxham wrote letters to Bassick and John, evidently intended for Curry's perusal (as, for instance, Plaintiff's Exhibit 44 and Plaintiff's Exhibit 51), in effect threatening to call off negotiations unless the matter was closed. This procedure was the familiar practice known to lawyers as "making a record," and very much in line with what was testified by Curry in pointing out that negotiations were never broken off between him and Ætna, viz.:

"Mr. Moxham, of course, would write very different from what he talked; he would write letters, then I would meet him and, perhaps, have luncheon together, and he would say, 'Why don't we get these things fixed up?' and I would say, 'I am ready to fix them up; it must be your fault.' So the thing went along for a while, and after that, when he saw his position was not tenable, he came down and said, 'We are willing to work with you and assist each other.'"

See, also, Curry's letters to Moxham, Defendants' Exhibits M1 and N1.

The final result as to the method of financing the transaction was a plan whereby Ætna made an issue of bonds, delivered them to Canadian Co. and also elected officers of the Canadian Co. to the directorate of the subsidiary Ætna Company which was to handle the Canadian Co. contract, and Ætna received advance payments in cash under the contract which it was allowed to use for the purpose of building a Canadian plant.

There is a conflict in the testimony of John and Curry as to who suggested the plan. Curry testified that it was his suggestion and was worked out between him and Moxham. John, whose memory on most matters was very keen, was unable to recall some highly important details of the plan, although it is contended on his behalf that the plan was substantially similar to that proposed by John to the French government. Curry is a man of the virile, blunt, straightforward type, and, so far as this record discloses, entirely disinterested in and indifferent to this controversy. There is no reason to doubt that Curry's recollection in this particular is to be relied upon. What took place is very well summarized by Curry as follows:

"Q. In the working out of the details of this plan, * * * between whom were the talks had on that subject, the terms of the contract as finally executed? A. Well, the talks, of course, that were binding and would amount to anything, were had with Mr. Moxham's office and in the presence of his solicitor and two or three of the directors. * * * Mr. John had to do with some of the details of the work, but the basic principle on which we were working was detailed by Mr. Moxham's office."

Much is made of the fact that while the negotiations were pending Curry sent an expert to Canada to look over the situation, with a view to establishing a plant there for the manufacture of smokeless powder by his company. The result of these inquiries, however, was given to Moxham for his use, and the most this incident could amount to would be a natural precaution to see what could be done if Moxham adhered to impossible financing propositions.

The amount actually purchased under this contract of Ætna with Canadian Co. was 6,400,000, instead of 4,000,000, as originally contemplated. It is quite clear that John had no part in obtaining this increase. What happened was that another company from whom Curry had expected to purchase this additional amount was not able to furnish it, and thereupon Curry decided to increase the order to Ætna. Any one who saw and heard Curry on the witness stand would quickly realize that he would know what he wanted. As tersely stated in the testimony:

"Q. What I want to know is, who mentioned that additional 2,400,000? A. I did, of course. Nobody else would know it was wanted except me. Q. Who did you mention it to? A. Mr. Moxham. * * *"

From the foregoing it is obvious that John was not a broker. To be a broker, one must find the customer to whom to sell, or from whom to buy, as the case may be. What John did was to render services in partly assisting to bring a well-developed negotiation to a close. For such service, $300,000 (in round numbers) on a contract of $6,400,000 is nothing more nor less than a gift, which neither the president nor any board of directors had any power to authorize, and the agreement must be declared void, as unconscionable and without authority.

Bassick, of course is entitled to compensation for John's services, and, as the employment was undoubted, and no wrongful element of inducement or concealment enters into the situation, recovery back as matter of law is so doubtful that I have concluded to let the matter rest where it now is. This conclusion is strengthened by the fact that,

while I think the amount paid is more than the services were worth, yet I cannot say that it was excessive to the point of unconscionability. In other words, if originally Moxham had agreed to pay the amount already paid, the court could not have held that such amount, though large was so large as to be unconscionable.

As to T. N. T.

[16] Curry testified that it was his best recollection that he had told Moxham in February that he would require over 4,000,000 pounds of T. N. T., and that subsequently Moxham asked him to get in touch with Bassick in regard to T. N. T. John testified that, on the first occasion when Moxham spoke of the Canadian Co. matters, Moxham informed him that Curry was prepared to make a purchase of T. N. T. in addition to smokeless powder. In Defendants' Exhibit N1, from Curry to Moxham, dated March 17, 1915, Curry wrote:

"Re Trinitrotoluol: I have been unable to get in touch with Mr. Bassick. The telephone people say he has no office in this city. Am anxious to have this matter settled."

We thus have again a situation where Moxham and John knew that there was a willing purchaser and all that was needed was to follow up the negotiation, and yet the compensation of everything over $1 resulted in giving Bassick 15 cents per pound on a contract of $1,150,000; i. e., $150,000, or a trifle over 13 per cent. In other words, the agreement was to pay Bassick (John), who had not found the purchaser, over 3 per cent. more than was accorded to him in those original transactions in the early period of Ætna's career, where Bassick (John) had found the purchaser. In addition to what has been said about John, the evidence establishes that nothing was done by Bassick, for the interviews between Curry and Bassick related to other commodities which Bassick desired to sell. It needs no argument to characterize such a contract as void, because unconscionable and a manifest waste of corporate assets.

Here, again, however, the employment is unquestioned, and, as by his abdication Moxham had left the arrangement of the details, including price, to Bassick, the matter will be left where it is, for the same reasons as stated in connection with the Canadian smokeless powder contract.

The J. P. Morgan & Co. Contracts.

[17, 18] (1) The contract of December 17, 1915. In December, 1915, J. P. Morgan & Co. were representing the French government in the purchase of explosives. About December 10, 1915, Mr. Catchings, of J. P. Morgan & Co., the assistant of Mr. Stettenius (who was in charge of purchases for that firm and with whom Moxham was acquainted), called up Moxham on the telephone and in Moxham's absence was put on Sallade's wire. Sallade, at that time, was Moxham's assistant in handling the military products. Catchings asked whether Ætna was interested in making an offer on gun cotton to the French Republic, and, if so, to let him know. Sallade told Catchings he would

take the matter up "with Mr. Moxham when he came in." Sallade, after talking to Moxham, saw Catchings, quoted a price of 57 cents at first, which Catchings refused, and then Sallade, after telephoning Moxham, offered 1,200,000 pounds a month at 55 cents. Catchings said he would cable the offer. When Sallade returned to the Ætna office, Moxham said he had reconsidered the amount, and wanted to change it to 750,000 pounds per month. The next day Sallade went over to see Catchings, and told him Ætna wanted to make a change; but Catchings said that it was too late, that he had already cabled, but, if the contract should be awarded to Ætna, that "no doubt we could adjust the quantity." The following day Sallade was called into Moxham's office, and John was there, and Moxham said, "You and John go over and see Catchings, and see if they have heard anything of that cable," and Sallade and John went over to Catchings together. Catchings said he had received a lower offer than 55 cents on gun cotton, and that "you had better see Mr. Moxham and see if he cannot reduce his figures." John attempted to argue with Catchings as to cost of raw materials, but Catchings said that did not interest him as in justice to the French government they (J. P. Morgan & Co.) had to accept the lowest figures. Sallade and John went to the telephone, and, in the absence of Moxham, they got Egbert Moxham on the phone. Sallade talked to him, and Egbert Moxham said, "You use your judgment about that, and, if you think it is all right to close for 52½ cents, do so," whereupon "Mr. John and myself went back to see Mr. Catchings, and we made the price of 52½ cents." The next day, according to Sallade's understanding, John was with Moxham and one or the other of them arranged to bill the gun cotton at 55 cents with a 2½ cents discount. (See contract, plaintiffs' Exhibit 34.) "I think," testified Sallade, "Mr. John went over there [to Catchings] alone; I don't know whether they telephoned Mr. Catchings and fixed that up." The next morning Catchings telephoned Sallade that he had heard from France, and wanted to know whether Moxham wished to put in 1,200,000 pounds per month, or the 750,000 pounds per month. After Moxham had instructed Sallade that the amount was to be 750,000 pounds per month, Sallade telephoned Catchings accordingly. The final result was the contract for gun cotton (Plaintiffs' Exhibit 34), whereby Ætna agreed to sell 5,250,000 pounds to be delivered by July 31, 1916, and, thereafter, 750,000 pounds per month, beginning July 31, 1916, until 30 days after the close of the war.

Bassick's claim is that this contract for additional gun cotton was brought about by John's persistent urging of Johannet to purchase more gun cotton, and that, because thereof, Johannet cabled to his government and thus set in motion the inquiry which J. P. Morgan & Co. made to Ætna through Catchings. On this point the evidence, on first impression, seems somewhat confused, but an analysis of the situation discloses a reasonable explanation of what took place.

Under the contract for gun cotton of March 9, 1915 (Plaintiffs' Exhibit 27) the French government had the option 90 days prior to the expiration of the contract (i. e., prior to December 31, 1915) to purchase 700,000 pounds for three additional months, making a total of

2,100,000 pounds additional. John undoubtedly was present at discussions with Johannet relating to the exercise of this option (Testimony, p. 1317), and no doubt added his arguments to those of Moxham and Sallade while these negotiations were pending.

It is contended that John urged Johannet to have his government purchase additional gun cotton. Sallade thought that John was present when the subject of exercising the option was discussed with Johannet (Testimony, p. 1317). On October 15, 1915, Johannet, in a letter to Ætna (Plaintiffs' Exhibit 37), exercised the option. Between December 10 (the day Catchings telephoned Sallade) and December 17, 1915 (the date of the contract, Exhibit 34), there must have been discussion as to the details of that contract. One of the points embodied in the contract, Exhibit 34, was that the optioned 2,100,000 pounds provided for in the original gun cotton contract of March 9, 1915 (Plaintiffs' Exhibit 27), should be applied under certain conditions against the 5,250,000 pounds of the contract, Exhibit 34.

It was sought by plaintiffs to have it appear that, according to Sallade, that arrangement was made about a month prior to December 17, 1915; but, when Sallade said he was present at the discussion that "ultimately resulted" in applying the option against the 5,250,000 pounds, it is clear that he was referring to the exercise originally of the option which after the Catchings interviews, and before the execution of the December 17 contract, finally resulted in applying the option against the 5,250,000 pounds; and this interpretation of the testimony is confirmed by the following question to and answer by Sallade:

"Q. Do you know of any prior negotiations of your own knowledge? A. That applied on this particular transaction, no."

There is nothing in the record, except hearsay, to show that Johannet, at John's instance, cabled the French government or received any answers back. The burden of showing this was on plaintiffs. Defendants were not under any obligation to prove a negative, viz. to prove that cables not offered in evidence had not been sent. It is not strange that J. P. Morgan & Co., who were then purchasing agents, got in touch with Ætna. By this time, it is fair to presume that the French government knew what explosives it wanted, and it knew from its previous transactions that Ætna manufactured gun cotton. What is more natural than that Catchings should sound Ætna on price and quantity, as he probably did other manufacturers? There was not the slightest excuse for Moxham to send John over with Sallade to see Catchings. Sallade is apparently a very capable man of attractive personality, who would not have, and obviously did not have, any trouble in closing a business-like deal.

The conclusion is irresistible that John was not the efficient cause of this contract, nor in any sense a broker. If he was, then again the compensation is flagrantly out of proportion to the service. But this transaction is another instance of the employment of John by Moxham to do something. As pointed out, it is difficult to determine what he did, and the amount Bassick has received for his services is very large. Yet here, also, the recovery back is so doubtful (and the water has gone

over the dam) that I have concluded not to sustain the counterclaim nor order an accounting back.

(2) The smokeless powder contracts of March 31, 1916.

[19] (a) The first is the so-called Bridgeport contract for 3,000,000 pounds at 80 cents per pound. The second is for 1,000,000 pounds per month at 80 cents for the first 3 months and 75 cents thereafter, until 30 days after the end of the war. The commission agreed to be paid by Moxham in his letter of March 30, 1916 (Plaintiffs' Exhibit 47), was 3 cents per pound on the first contract and 5 per cent. on the second.

Moxham had learned that a contract which Ætna had with the Bridgeport Projectile Company was for the benefit of the German government, and he refused to fill it. Moxham took up with Davison and Bacon, of J. P. Morgan & Co., the question of their taking over the Bridgeport contract for some of the Allies. John claims that Moxham found the situation a difficult one and asked John to see Johannet. Bacon testified that, during the absence of Stettenius, he had charge of the export department of J. P. Morgan & Co.; that he had known Moxham for 15 years; that Moxham came to see him in March, 1916, having been referred to him by Davison. Negotiations were opened concerning the transfer of the Bridgeport contract and the sale of additional powder. Bacon testified that he had two or three talks with John, but nothing of importance took place between them. There is no doubt that Moxham himself closed this and the 1,000,000 pounds per month smokeless powder contract with Bacon. There is equally no doubt that John busied himself with Johannet as to the Bridgeport contract at Moxham's request, and Bacon's testimony indicates that cables passed between Johannet and the French War Department in regard to this Bridgeport matter. John was in no sense a broker, but he did render service in following up Johannet.

It is difficult to determine whether this contract was consummated as the result of direct instructions from the French government to J. P. Morgan & Co. or whether John's work with Johannet was the proximate cause. In such circumstances the doubt must be resolved by the testimony of Moxham, for, whatever else may be criticized, there is no doubt that Moxham, although at times confused (for he was suffering greatly from an illness when on the stand), was a truthful witness, even to the point of making some very frank and damaging statements. Moxham said:

"I did not say that the Bridgeport projectile transfer was carried on solely by me. John did that; but the negotiations with J. P. Morgan, which negotiations led—and I have to make it clear to you—John was working through Johannet, and I was working through Bacon, practically on the same thing—John made good; I failed. * * *"

And again:

"If it had not been for John, that contract never would have been closed. * * *"

And, further, when asked if he had a conversation with Davison about furnishing the French government with the Bridgeport powder, he answered:

"No; that came directly from negotiations between John and Johannet."

See, also, Bacon's testimony, p. 1374 et seq.

On all the evidence, therefore, I hold this agreement with Bassick (John) valid, and there may be a recovery, with interest from the date of deferred payments. The amount involved was $2,400,000, the compensation $90,000, or about 3.7 per cent.—by far the most modest of all the transactions.

[20, 21] (b) The facts as to the 1,000,000 pounds per month contract are entirely different. There is no evidence of the slightest difficulty in Moxham's negotiation in this regard. The Morgan firm, under instructions of the French government, was in the market for "additional smokeless powder," and "then," as Bacon testified, "we, of course, looked over the field to see where we could get it and proceeded to buy it" (pages 1379, 1380). Not only did Moxham see Bacon before John knew anything about this, but he agreed with Bacon on quantity and price and personally closed the contract.

In the very testimony supra in which Moxham gave credit to John for the Bridgeport transaction, he said, referring to this 1,000,000 per month contract:

"But at the same time I closed this additional contract with Bacon for a million pounds a month to the end of the war. Do you get that position? Q. But I understood you a little while ago * * * to say that John did all the preliminary work, and did all the negotiations in this transaction? A. I did not mean that, referring to the J. P. Morgan million pounds per month order."

Bacon testified:

"Q. Had you had any discussions with anybody representing the Ætna Company in regard to either of these two matters before you had your first talk on the subject with A. J. Moxham? A. No."

John talked with Bacon two or three times, but apparently without any authority whatever from Moxham.

The argument is strenuously advanced that John induced Johannet to cable the French government to order additional smokeless powder, and that the instructions to J. P. Morgan & Co. were the result of these cables, and the testimony of Bacon is referred to in support of this contention. Bacon's testimony, however, does not bear this out. While he knew "generally" that there were such cables "as to the Bridgeport contract," and that "Mr. Johannet had the matter in hand," his testimony otherwise is simply to the effect that J. P. Morgan & Co. "naturally * * * never purchased except under instructions." Of course not. Obviously, a purchasing agent for a government cannot know what to purchase until instructed. Bacon was then asked: "Q. And you were not interested in this matter particularly until after you received these instructions, were you?" and replied, "A. No." He further testified:

"Q. Is it not true that the negotiations which interested the French government in the additional purchase of smokeless powder were carried on by cable between you and Col. Johannet and the War Department, and that it was only when the question of making the purchase came up that you were instructed to carry on the negotiations and close the deal? A. I think that is probably a fair statement of the case. Of course, I was not familiar with all of Mr. Johannet's cables. Q. But you do know that is a fair state-

ment of what occurred? A. I should think it might be. I could not say it was absolutely, because Mr. Johannet was here and is here, of course, representing the French government, and undoubtedly they conferred back and forth. Some cables I knew. Q. You knew that this particular matter was taken up by Col. Johannet in advance of its being taken up by you, did you not, I mean the inquiries about handling the Bridgeport projectile matter, and getting an additional contract with somebody for powder? To that extent you knew it had been taken up by Col. Johannet with the French War Department? A. I should think that was probably true with reference to the Bridgeport matter. The other, the million pounds a month, I am not sure about. Q. I will ask you if the only matter submitted to you in connection with that was not the fixing of price, and if that was not your particular function in the matter, when all the details in connection with that had been carried on? * * * A. I think that was my principal function. However, the question of capacity was gone into in this particular instance by me."

The foregoing is taken by plaintiffs as indicating that J. P. Morgan & Co., in some way, had only a minor part to perform. It is difficult to imagine what else any purchasing agent is required to do than to arrange for the price and satisfy himself of the vendor's ability to perform.

But, in addition to all this, the surrounding circumstances and the inherent probabilities refute John's claim. The war was well on in its second year, and, as above observed, the French government surely did not need John to tell it its requirements for munitions. J. P. Morgan & Co., in the previous December, had closed the gun cotton contract with Ætna for the French government, and Ætna was not a stranger to them. The fact is that the order was practically an automatic matter, and, in this instance, John did not have even a scintilla of authority from Moxham to do anything whatever. Even Moxham was tiring of the efforts of Bassick and John to inject themselves into every transaction. The claim for enormous commissions on this contract, including a continuing monthly return, is little less than preposterous, and has nothing to support it, except an alleged compromise agreement.

It is plain that Moxham had no power to compromise nothing for something; i. e., thousands of dollars of Ætna's money. Bassick testified that he insisted with Moxham that "we were entitled to the commissions as long as this war lasted for any order they received through the French commission." There is not a word of testimony to justify any such claim, and Moxham's letters of March 10, 1915 (Plaintiffs' Exhibit 41), and March 30, 1916 (Plaintiffs' Exhibit 47), distinctly repudiate any such claim. Moxham's statement to the board of directors on May 17, 1916 (Plaintiffs' Exhibit 89), makes neither mention nor intimation of a compromise based on a forbearance of other claims; nor is there anything in Plaintiffs' Exhibits 22 and 23 to support the contention of a compromise. No action was taken at the meeting of April 5, 1916 (Exhibit 22), as to Moxham's report (Exhibit 23), and there was no suggestion that any compromise was under discussion. By this time there was a new board of directors, and there is no evidence that Moxham acquainted them with all the facts. But, had he done so, they had no greater power to give away corporate property than did their predecessors.

As to the Notes.

[22] Plaintiffs are holders with notice, and therefore all defenses and counterclaims are available against the notes. The extensions of the notes, so far as those notes apply to the void contracts, were without consideration. The board of directors could pass all the resolutions they pleased, but neither they nor the officers could give vitality to promises to pay obligations which had no legal existence. The much relied on minutes of the board meeting of September 22, 1916, merely mean that, if there was liability, it was, in the opinion of the directors, a liability of the company, and not of the directors or officers, and the subsequent conduct of the board fully confirms this view. Indeed, not only did the board not know all the facts, but those facts were not and could not be developed until this trial. It follows that on those notes, which represent payments on void contracts, recovery cannot be had and the notes will be decreed canceled.[2]

[23] Finally, in regard to the agreement as to the 1,000,000 per month smokeless powder contract, it has been shown that that agreement (as in the case of some of the others) was wholly ultra vires. In the United States courts it is settled that part performance will not save an ultra vires contract, and that no amount of performance of an ultra vires contract, even over a long period, or the receipt by the corporation raising the question of the consideration for such a contract, operates to estop the corporation from challenging the validity of the contract or refusing further to perform. Thomas v. Railroad Co., 101 U. S. 71, 86, 25 L. Ed. 950; Penna. R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 316, 6 Sup. Ct. 1094, 30 L. Ed. 83; Central Trans. Co. v. Pullman's Car Co., 139 U. S. 24, 55, 59, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; Union Pacific R. Co. v. C., R. I. & P. R. Co., 163 U. S. 564, 581, 16 Sup. Ct. 1173, 41 L. Ed. 265; Pullman's Car Co. v. Central Trans. Co., 171 U. S. 138, 149, 151, 18 Sup. Ct. 808, 43 L. Ed. 108; O'Brien v. Wheelock, 184 U. S. 450, 490, 22 Sup. Ct. 354, 46 L. Ed. 636. The reasons for the doctrine, as repeatedly announced by the Supreme Court, were succinctly reiterated by it in McCormick v. Market Bank, 165 U. S. 538, 549, 17 Sup. Ct. 433, 436 (41 L. Ed. 817):

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its lawful powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

This agreement for commissions on the 1,000,000 pounds per month contract was so different from the others, and so utterly indefensible in law and equity, that defendants may have their counterclaim or setoff for the amount paid under that agreement, with interest from the date when the answers were served.

[2] The status of the stock can also be dealt with in the findings and judgments.

Briefly summarizing: The four 10 per cent. contracts, the first gun cotton contract, and the J. P. Morgan & Co. (Bridgeport) contracts are valid. The picric acid, two Canadian Company, and two J. P. Morgan & Co. contracts are void. In the case of the picric acid, a recovery of 10 per cent. (less credits) on actual sales price of 4,000,000 pounds is allowed. In the 1,000,000 pounds per month contract, recovery is to be had by defendants, and in all other instances no recovery back. This result is to be appropriately worked out in the findings and judgments applicable to the three actions.

In conclusion, I may say that it has not been possible, even in this lengthy opinion (written in the hope of making clear my views by marshaling the facts), to refer to all the facts or all the contentions of law. If anything essential has been overlooked, attention may be directed to such subject-matter on the settlement of the findings and the form of the judgments.

In re S. & S. MFG. & SALES CO.

(District Court, N. D. Ohio, E. D. July, 1917.)

1. BANKRUPTCY ⊂=43—VOLUNTARY PETITIONS—FILING.
A corporation may file a voluntary petition in bankruptcy.

2. BANKRUPTCY ⊂=43—DIRECTORS—AUTHORITY TO FILE VOLUNTARY PETITION.
Under Gen. Code Ohio, § 8660, declaring that the corporate powers, business, and property of corporations shall be exercised, conducted, and controlled by the board of directors, or, if there is no capital stock, by the board of trustees, the board of directors of a stock corporation have authority to authorize the filing of a voluntary petition in bankruptcy.

3. BANKRUPTCY ⊂=51—REPORT OF SPECIAL MASTER—REVIEW.
Ordinarily, a finding of fact by a special master, to whom an application for vacation of an adjudication in bankruptcy was referred, will not be disturbed by the court, when supported by the evidence, yet, where the facts are not in dispute, the question may be considered by the court, regardless of the master's report.

4. BANKRUPTCY ⊂=43—PETITION IN BANKRUPTCY—FILING.
Three of the six directors of a stock corporation resigned. Thereafter, at a stockholders' meeting at which were present all the stockholders of the corporation, a resolution was adopted amending the by-laws and reducing the number of directors to five, and thereupon the stockholders at that meeting elected two members to fill the vacancies thus left in the board of directors. The new directors qualified and participated in the meeting of the board held immediately after election, although the by-laws provided vacancies should be filled by a majority of the board. At a subsequent meeting a resolution was adopted, authorizing the filing of a voluntary petition in bankruptcy. Two directors were absent from such meeting, but it appeared that they signed their approval later to the resolution then adopted by the board. A stockholders' meeting was held immediately after the meeting of the directors, at which all stockholders were present in person or by proxy, and a resolution was adopted, ratifying the action of the board of directors. Gen. Code Ohio, § 8665, permits the members of a board of directors to be reduced to not less than five at any time. *Held* that, even though the change in the number of directors and the election by the stockholders to fill the vacancy was irregular, the resolution of the

board of directors, having been ratified by the stockholders, was not subject to attack by one not appearing to be a stockholder of record despite the fact he received no notice.

5. CORPORATIONS ⟸194, 198—STOCKHOLDERS—VOTING OF PROXIES.
In view of Gen. Code Ohio, § 8673, declaring that the directors of a stock corporation shall keep a record of all stock subscribed and transferred, and its secretary shall register all subscriptions and transfers of stock, notice need be given only to stockholders of record, and the voting of proxies given by stockholders of record who have transferred their shares does not make illegal or invalid the proceedings thus taken at a stockholders' meeting.

6. APPEAL AND ERROR ⟸1019—REPORT OF SPECIAL MASTER—FINALITY.
A finding of fact by a special master, based on conflicting evidence and the credibility of witnesses, will not be disturbed, where supported by evidence.

7. BANKRUPTCY ⟸51—ADJUDICATION—VACATION.
After an adjudication is had in a bankruptcy case, it cannot be vacated, except on a ground which goes to the jurisdiction of the court to make the adjudication, and a fraud perpetrated on the bankrupt in connection therewith is not sufficient, unless it enters into the order of adjudication.

In Bankruptcy. In the matter of the bankruptcy of the S. & S. Manufacturing & Sales Company. After adjudication, Frank Meckel, alleging himself to be a stockholder of the bankrupt company, filed his application to set aside the adjudication in bankruptcy. Application denied.

Julius P. Preyer, of Cleveland, Ohio, for bankrupt.
W. J. Hamilton, of Cleveland, Ohio, for exceptor.

WESTENHAVER, District Judge. The bankrupt is a corporation organized under the laws of the state of Ohio, and was adjudicated a bankrupt about December 1, 1916. Thereafter, on December 19, 1916, one Frank Meckel, alleging himself to be a stockholder of the bankrupt company, filed his application to set aside the adjudication in bankruptcy. This application was referred to a special master, to hear the evidence and to report the same, together with his finding of facts and conclusions of law. This matter is now before me on exceptions to his report, recommending that the application to vacate the adjudication be dismissed.

The questions presented for decision are briefly these: (1) That the court was without jurisdiction to make the adjudication, because the petition in bankruptcy, being a voluntary one, was filed without proper authority on behalf of the bankrupt corporation. (2) That the voluntary petition was filed pursuant to a conspiracy between the directors of the company and one Joavens, for the purpose of wrecking the corporation.

[1-3] A corporation may file a voluntary petition in bankruptcy. Collier on Bankruptcy (10th Ed.) 123. The board of directors of an Ohio corporation undoubtedly has authority to authorize the filing of such a petition. G. C. § 8660. The special master has found as a fact that the board of directors did authorize the petition to be filed, and that their action was approved before it was done, by a unanimous vote

of the stockholders. Ordinarily, and according to settled law, this finding, if supported by the evidence, will not be disturbed; but, inasmuch as the facts on which this finding is based are not in dispute, I shall consider this question, regardless of the special master's report.

[4, 5] The bankrupt corporation, prior to March, 1916, had a board of directors consisting of six members. Vacancies in this board, it was provided by the by-laws, should be filled by a majority of the board. In March, 1916, three of these six directors resigned. Thereafter, at a stockholders' meeting at which were present all the stockholders of the corporation, a resolution was adopted, amending the by-laws and reducing the number of the board of directors to five; and thereupon the stockholders at this meeting elected two members to fill the vacancies thus left in the board. These directors qualified and participated in a meeting of the board held immediately after they were elected. No further meetings of the board of directors appear to have been held until November 29, 1916. At this meeting a resolution was adopted authorizing the filing of this petition in bankruptcy. A stockholders' meeting was held immediately thereafter, at which were present in person or by proxy all of the stockholders who waived other notice, and adopted a resolution ratifying this action of its board of directors. The petition was filed pursuant to this authority.

Frank Meckel was not a stockholder of record. He contends that he bought in August, 1916, 35 shares, less than one-tenth of the entire capitalization. The special master (7) finds that there is no testimony that he was a stockholder at the date of bankruptcy, and that under the Ohio law, the certificate not being produced, there is still uncertainty as to his ownership. In any event, he neglected to have these shares transferred upon the records of the corporation into his name, and it does not appear that any other action was taken by him to bring to the notice of the corporation his ownership thereof, or to prevent the persons in whose names the stock stood, from voting the same.

Upon this state of facts the filing of this voluntary petition in bankruptcy should be held to be the duly authorized act of the corporation. All irregularity complained of respecting the alleged unauthorized reduction in the number of the board of directors, the filling of the two vacancies thus left by the stockholders, instead of by the board of directors, and the absence of two directors from the November meeting, who, it is said, signed their approval later to the resolution then adopted by the board, becomes immaterial, even if well founded, in view of the unanimous action of the stockholders authorizing the voluntary petition to be filed. Undoubtedly, under the Ohio law, notice need be given only to the stockholders of record, and the voting of proxies given by stockholders of record who have transferred their shares does not make illegal or invalid the proceedings thus taken at a stockholders' meeting. G. C. § 8673—3; Railway Co. v. Bank, 68 Ohio St. 582, syllabus 3, 67 N. E. 1075.

This conclusion dispenses with an examination of whether or not the members of the board of directors were legal or de facto directors on November 29, 1916, when this action was taken. In my opinion they were legal members. Section 8665, G. C. (second sentence), permits

the number of members of a board of directors to be reduced to not less than five at any time. The number may be increased only as provided in the first and third sentences of this section. All that is required to reduce the number to five is notice, or waiver, of the meeting and action by the stockholders, and if all of the stockholders are present and unite in action increasing or reducing the number of members, no one can complain of any irregularity, except, perhaps, a director not assenting, and refusing to resign. There was none such here. Even if irregularities existed creating a cloud on the title of two members of the board to the office held by them, the action authorizing the filing of the petition would be held justified by the following authorities: Dodge v. Kenwood Ice Co. (C. C. A. 8th Cir.) 29 Am. Bankr. Rep. 586, 204 Fed. 577, 123 C. C. A. 103; In re Hargadine-McKittrick Co. (D. C. Mo.) 39 Am. Bankr. Rep. 142, 239 Fed. 155; In re United Grocery Co. (D. C. Fla.) 39 Am. Bankr. Rep. 501, 239 Fed. 1016.

[6] The finding of the special master relating to the conspiracy or wrongdoing of the board of directors, and the solvency of the corporation will not be disturbed. His conclusion depends upon conflicting testimony and the credibility of witnesses, and is supported by evidence. It is settled law that under these conditions the special master's findings must be treated as unassailable. See the following: Callaghan v. Myers, 128 U. S. 617, 666, 9 Sup. Ct. 177, 32 L. Ed. 547; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Davis v. Schwartz, 155 U. S. 631, 636, 15 Sup. Ct. 237, 39 L. Ed. 289; In re Simon & Sternberg (D. C. Ga.) 151 Fed. 507, 18 Am. Bankr. Rep. 204; In re Wheeler (C. C. A. 7th Cir.) 165 Fed. 188, 91 C. C. A. 222, 21 Am. Bankr. Rep. 262; Collier on Bankruptcy (10th Ed.) 333. The holding of these cases is correctly summed up by Spear, District Judge, in Simon & Sternberg, supra, as follows:

"The finding of the referee is entitled to the same consideration as that of a district judge upon conflicting evidence, as in an admiralty case, or in any other case where the judges pass upon the facts, if that finding is under review by an appellate tribunal. The Inca (C. C. A.) 148 Fed. 367 [78 C. C. A. 273], opinion of Meek, District Judge, sitting with Pardee and Shelby, Circuit Judges. This court is an appellate tribunal from the rulings of the referee, but when there is evidence to support those rulings—however ingenious the suggestions to the contrary—the court will not be insistent to scan those rulings so as to find some point on which there might be a difference as to their correctness. A fine argument can be based upon almost any accumulations of facts, both pro and con, but, when the court has intrusted this particular duty to the referee, and it has been apparently well performed, the ruling should not be disturbed."

[7] Motions to vacate an adjudication were denied, on even stronger allegations of fact than are set up in the application now before me, in the following cases: In re Hargadine-McKittrick Co. (D. C. Mo.) 239 Fed. 155, 39 Am. Bankr. Rep. 142; In re United Grocery Co. (D. C. Fla.) 239 Fed. 1016, 39 Am. Bankr. Rep. 501. In the case first cited it was held:

"Stockholders of a corporation which has filed a voluntary petition in bankruptcy will not be allowed to intervene to resist the petition, for the bankruptcy law does not permit a defense in limine to a voluntary petition in bankruptcy. The proceedings upon such a petition are properly ex parte,

and no answer can be permitted. Where the directors of a corporation have the authority to put the corporation in bankruptcy and do authorize the filing of a voluntary petition, the corporation is entitled to have an adjudication of bankruptcy entered upon its voluntary petition regardless of the desire of the stockholders. * * * If a petition in voluntary bankruptcy proceedings presents facts authorizing the adjudication of the petitioner a bankrupt, the court has no discretion to refuse the adjudication, because of any views entertained by the court as to the petitioner's motives or purposes in filing the petition."

In the second case cited it was held:

"Creditors who adopt the petition of stockholders of a bankrupt corporation to have a voluntary adjudication vacated and dismissed have no right to contest the voluntary adjudication. * * * A petition by stockholders of a corporation to have a voluntary adjudication authorized by the directors vacated and set aside alleging that the adjudication was fraudulently authorized by the directors in order to escape liability in a suit pending against them by the stockholders should be dismissed where there had been no appointment of a receiver in the state court proceeding, since the creditors are interested in the collection of their debts and not in the question sought to be litigated between the stockholders and the directors, and since under section 4 of the Bankruptcy Act the adjudication of the corporation does not release its officers or directors from any liability under the state laws."

The special master, as one conclusion of law, finds that a stockholder has no authority to move to set aside an adjudication made on a voluntary petition. I am expressing no final opinion on this proposition. I am, however, inclined to the view that after an adjudication is had in a bankruptcy case, it cannot be vacated, except on a ground which goes to the jurisdiction of the court to make the adjudication, and that fraud even perpetrated on the bankrupt in connection therewith, is not sufficient, unless it enters into the order of adjudication.

An order will be entered, overruling all exceptions to the special master's report, confirming the same, and dismissing the application of Frank Meckel, at his costs.

UNITED STATES v. BACHMAN et al.

(District Court, E. D. Pennsylvania. December 5, 1917.)

No. 42.

1. CRIMINAL LAW ⟸872—TRIAL—STIPULATIONS.
   Where the case was submitted to the jury at the close of the session, and counsel stipulated that the clerk might take the verdict when rendered as if the court were in session, the agreement is binding, and questions as to the validity of the verdict must be decided as if the judge had been present and the court in actual formal session.
2. CRIMINAL LAW ⟸881(3)—TRIAL—VERDICT—CERTAINTY.
   A verdict in a criminal case must be certain in legal intendment; there being a distinction between a legal certainty and moral certainty as to what the jury in fact intended.
3. CRIMINAL LAW ⟸878(2)—TRIAL—VERDICT—SUFFICIENCY—"ALL"—"BOTH."
   Two defendants were charged with using the mails in connection with a scheme to defraud, and, while the indictment contained several counts, the court, in its charge dealing with the substance of the offenses, and

not the form of the indictment, stated that the charges against the defendants were in substance two. The parties having stipulated that the clerk might receive the verdict in the absence of the judge, the request of the jury for the indictment, which had not been sent out with the charge, was denied. The verdict found defendants guilty as indicted on "both" counts. *Held* that, as the word "both" is peculiarly appropriate to express the thought of all of two, and the word "all" indicates every one of a class, etc., though it be limited to only two, the verdict is sufficient to support a judgment indicating that the jury found defendants guilty on all of the counts; the jury having used the word "both" in the mistaken assumption that there were only two counts (citing Words and Phrases).

4. POST OFFICE ⊂=35—OFFENSES—USE OF MAILS TO DEFRAUD.
Practices may be indulged in which can be characterized as fraudulent, yet do not fall within the statutes denouncing the offense of using the mails in connection with a scheme to defraud; that offense requiring that the scheme be fraudulent in its inception.

Clawson Bachman and Joseph T. Hayden were indicted for using the mails in connection with a scheme to defraud. There was a verdict of conviction. Sur defendants' motions in arrest and for new trial. Motions denied.

Ernest Harvey and R. J. Sterrett, Asst. U. S. Attys., and Francis Fisher Kane, U. S. Atty., all of Philadelphia, Pa.

J. Washington Logue, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. [1, 2] The motion in arrest of judgment calls for a word of explanation. The case was submitted to the jury at the close of the session of the court. It was anticipated the court might not be in session when the jury were ready to return their verdict. It was in consequence of this agreed that the clerk might take the verdict, when rendered, as if the court were in session and a verdict were given in open court, with the trial judge present. The verdict was so rendered, and as a further consequence no instructions were given to the jury, but the verdict was taken under the circumstances set forth in the notes of trial. It may be further stated as a fact not disclosed by the record that the indictment had not been sent out with the jury, and that the jury, before rendering their verdict, had asked for the indictment, a request which had been denied.

Attention should be called to the further fact, which does appear in the charge of the court, that the jury had been advised that the charges made against the defendants in substance, although not in form, were two. This statement is made in explanation of how it happened that the question raised by the defendants on this motion has arisen. Had the trial judge been present, the request of the jury to have the indictment would probably have been granted, and it is further probable that, had the jury had the indictment, they would have discovered that there were four or six counts (or whatever the actual number is) which the indictment contained, and that their verdict would have been in strict conformity with the charges, or the trial judge would have refused to have accepted the verdict in the form in which it was rendered, but would have instructed them as to the form

of the verdict which they should render. Counsel, of course, whatever the consequences, stand by the agreement made, and the questions which arise are to be decided as if the trial judge had been present and the court in actual formal session. It is, of course, recognized that the verdict must be certain in legal intendment, and that there is a distinction between this legal certainty and a moral certainty as to what the jury in fact intended. In passing upon the former, however, it may be helpful to gather the latter.

[3] We think there is no doubt in fact of what the jury meant. The members of the jury were men of a high intelligence. They understood from the charge of the court that the charges against the defendants were in substance two; but they understood, further, that the court was dealing in the charge with the substance of the offenses, and not with the form of the indictment, and that the charges against the defendants, although in substance two, might have been formally stated in the indictment under a larger number of counts. To clear this up they asked for the indictment, and, not getting it, they framed their verdict in the light of such information as they had. It follows, from this, that the jury to a moral certainty intended to acquit one of the defendants of all the charges made against him, because they understood (and correctly) they had been so instructed by the court. They further intended to find the other defendants guilty of all the charges against them.

The English language provides us with few words of distribution applicable to the subject-matter with which the jury were dealing. In common speech, they are limited to two. These are the word "both" and the word "all." The word "both" is without doubt peculiarly, appropriately, and accurately applicable in expressing the thought of all of two. The word intended to embrace every member of a class, where the number of the members of the class exceeds two, is the word "all." Each word, however, embraces every member of the class to which it is applied. If the word "all" is used as applied to a class, the number of whose members is limited to two, the only conclusions which can be reached are that the user of the word has made use of the wrong word "all" in place of the right word "both," or that he thought there were more than two members of the class of which he was speaking. There could be no doubt that he meant to include every member of the class. The same comment can be made on the use of the word "both," when the appropriate word is "all." In neither case would there be any ambiguity of meaning conveyed. There is certainty to a legal intent in the thought expressed.

Words and Phrases gives us illustrations of this misuse of words, and the reading given to statutes affords many more. The certainty of the meaning of the verdict rendered in this case, both in its moral and legal aspects, is fortified by the expressions in the verdict as rendered. The jury first declared the defendants to be "guilty as indicted," and then added the words "on both counts." In reaching the conclusion indicated, we are not unmindful of the thought expressed with ability and force and advanced with a certain degree of plausibility by counsel for the defendants. We recognize that to the lay mind, however in-

telligent and well informed, there would be a difference among the several victims of the fraud with which the defendants were charged, and it would be more than possible that a jury might be ready to find fraud in the transactions with some of the persons with whom the defendants dealt, and might not be ready to find fraud in the business transactions had with others. Had the thought of making any such distinction been in the mind of the jury, there is a moral certainty that they would have used the word "two," or a like numeral word, instead of the word "both," and there is nothing in the thought advanced by counsel for defendants to weaken the legal certainty that no such distinction among the counts was intended.

The conclusion reached is in accord with the cases to which we have been referred, among which are Commonwealth v. Huston, 46 Pa. Super. Ct. 172; Klouser v. Patterson, 122 Pa. 372, 15 Atl. 444; Commonwealth v. Nicely, 130 Pa. 268, 18 Atl. 737.

The motion in arrest of judgment is denied.

[4] Respecting the motion for a new trial, there is this to be said. Practices may be indulged in or resort may be had to them by defendants which may be characterized as fraudulent and found to be such, and yet there may not be fraud within the meaning of the acts of Congress protecting the integrity of the mails. As rank illustrations of the distinction, a fraudulent scheme may be concocted, and the mails used to carry it out, to rope in intending investors by selling them certificates of stock which have no other existence than such as is due to the art and skill of the printer. Men, on the other hand, may conceive the project of raising money through the sale of the stock of a company to be used in the development of a real business project. In the course of the attempt to accomplish their purpose they may get into a cramped financial condition, and to extricate themselves they make false and fraudulent representation to particular investors. The loss to the investors, or would-be investors, may be the same, and yet one must recognize the substantial difference in the two cases. The one is a scheme to defraud. In the other frauds have been perpetrated to prop up a failing enterprise not fraudulent in itself. The distinction thus attempted to be expressed is one which the lay mind might refuse to recognize, but it nevertheless has a real existence.

Counsel for the defendants, with great force and ability, attempted to impress upon the jury the real and vital difference between business projects which end and result in loss and disaster to the investors, and schemes which were intended to defraud their victims. In the presentation of this defense, counsel were assisted by the trial judge, and the attempt was made, and we think with success, to have the jury observe this vital distinction, and to have them determine to which class the defendants belong. We feel that the jury intelligently and conscientiously discharged its duty, and that the verdict reflects the conviction of every one of the 12 men that the defendants were guilty of devising a scheme to defraud and of using the mails of the United States in its promotion.

With this finding we cannot interfere without usurping the functions of the jury. If, of course, the trial judge is convinced that a convic-

tion is unjust, or even that a defendant has not been given the benefit of the reasonable doubt, to the benefit of which he is legally entitled, sanction cannot be given to the verdict by entering judgment upon it; but we cannot do otherwise than find that the verdict rendered was well within the lawful power of a jury to render.

The motion for a new trial is therefore also dismissed.

MILL CREEK & MINEHILL NAV. & R. CO. v. UNITED STATES.

(District Court, E. D. Pennsylvania. November 22, 1917.)

No. 3980.

1. UNITED STATES ⟸125—ACTIONS AGAINST—CONSENT TO BE SUED—CONDITIONS.

   If the United States gives consent to the issuance of process against it, provided the process issues within a limited time after the claim for redress arose, this limitation is strictly a condition of the remedy given, and not a statute of limitation.

2. UNITED STATES ⟸136—ACTIONS AGAINST—PROCEDURE.

   Judicial Code (Act March 3, 1911, c. 231) § 24, par. 20, 36 Stat. 1093 (Comp. St. 1916, § 991), which with certain exceptions gives the District Courts jurisdiction concurrent with the Court of Claims of suits on claims against the United States, prescribes no special method of procedure, and the District Courts may adopt the procedure established for the Court of Claims, or follow their established practice, in which case, for all purposes of procedure, the United States is to be regarded as is any other defendant, and may be brought in by summons served on the district attorney.

3. UNITED STATES ⟸133—ACTIONS AGAINST—LIMITATION—WHEN "SUIT BROUGHT"—"BROUGHT."

   In a suit against the United States, under Rev. St. § 3327 (Comp. St. 1916, § 5950), to recover internal taxes alleged to have been erroneously or illegally collected, the suit is "brought," within the meaning of the provision limiting the time for bringing suit to two years after the cause of action accrued, when the summons subsequently served is issued.

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

At Law. Action by the Mill Creek & Minehill Navigation & Railroad Company, to the use of Philadelphia & Reading Railway Company, lessee, against the United States. Trial to court. Judgment for plaintiff.

Wm. Clarke Mason, of Philadelphia, Pa., for plaintiff.

Edwin S. Kremp, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

DICKINSON, District Judge. This cause is one of 13; the others being entitled Nos. 3982, 3984, 3986, 3988, 3990, 3992, 3994, 3996, 3998, 4000, 4002, and 4004 of the same sessions all of which can be disposed of by one ruling. There are in substance two defenses interposed between the plaintiff's demand and judgment. One goes to the merits of the demand, and the other to the legal merits of plaintiff's

right to redress at law, or, in other words, is a denial of plaintiff's right to the remedy invoked.

The previous experience of the cases in this court disposes of the first defense. The real question involved in the second is whether the plaintiff has lost its remedy through lapse of time—whether time operates to affect the remedy as one of the conditions upon which it is given, or operates through and by a statute of limitations. The distinction indicated, though important enough in itself and carrying at times important practical consequences, does not seem to be of practical value in the instant case.

A few general observations may clarify our view of the broad questions involved and thus enable us to get a clearer view of the narrower questions with which we are concerned. One of the propositions advanced by counsel for the United States is undoubtedly sound, and, as was to be expected, is admitted in all its fullness by counsel for defendant. The proposition is that the United States cannot be sued, except as it may consent, and the right to sue, when given, must be exercised in compliance with the terms and conditions of that consent. This immunity belongs to every sovereign, and is an obviously necessary principle of all governments. The lesser power cannot move the greater, and as all the power which the courts possess flows from the supreme governing power, it follows that the supreme power cannot be moved unless it moves of its own willingness. This immunity, however, flowing as it does from the attribute of sovereignty, does not belong to the individual taxgatherer. Whatever power he has flows from the law, and, if he asserts to the damage of any one a power which the law has not conferred upon him, he does a wrongful act, and the damage thereby done to another becomes a legal injury, for which the injured person has a legal right of redress against the wrongdoer. The right thus possessed is not conferred by any statute, but is a common-law right, which exists until it has been taken away or limited by statute. It is to be expected that, in the very practical art and business of governing people, individuals may exercise authority in the execution of laws which they honestly believe they possess, and may be in the performance of what they believe to be their duty in asserting a power which it may afterwards be found they did not lawfully possess. If they are made personally responsible for the consequences of acts done in the performance of a sense of duty, although a mistaken one, a moral claim upon the sovereign for indemnity at once arises and would be recognized. A like obligation to return moneys to which the sovereign had no just claim would also be recognized.

[1] The general situation as thus outlined has brought about two kinds of legislation. The one is embodied in a series of acts by which the United States has expressed its willingness and consent to be made a defendant in defined cases and has subjected itself to the process of the courts. The other kind of legislation has given recognition to the claims of governmental agents to indemnity for the legal consequences of official acts performed in good faith, and provision is made for their reimbursement by the return of any moneys which they as individuals may have been compelled to pay because of what was really an official

act, and actions against them are regulated. If the United States gives consent to the issuance of process against it, provided the process issues within a limited time after the claim for redress arose, this limitation is strictly a condition of the remedy given, and not a statute of limitations in bar of the action. The common-law right of action, however, to which we have adverted, being, as already observed, a right belonging to the plaintiff, exists until it is taken away by statute, and may be enforced at any time, unless and until it is barred by a statute of limitations. Such latter statutes, therefore, in reference to such common-law right of action are strictly and technically statutes of limitation, and, generally speaking, statutes of limitation which apply to other actions apply to these actions.

Recurring again to actions against the United States, the right to which did not belong to the plaintiff, except as given by statute, such actions may be brought and prosecuted in accordance with the conditions of the grant of the right, and with respect to the time within which they may be brought, the United States may, if Congress so disposes, be less indulgent to itself than to other defendants.

[2] This brings us to a consideration of the narrower questions involved, dependent upon a construction of the specific statutes upon the two subjects mentioned. In order that the occasion for the institution of these suits as they were instituted may be understood and appreciated, it should be premised that the payment of the taxes, which is the real subject-matter of these suits, was exacted by a collector who had gone out of office before the claims of the present plaintiffs had ripened into actions at law. The actions which were then brought were brought against his successor in office upon the mistaken theory that the acts of Congress relating to this phase of the subject gave a right of action against the incumbent of the office at the time the right was asserted. It was ruled otherwise in those cases. The plaintiff has abandoned its right of action against the collector for his wrongful act in exacting payment of taxes for which there was no lawful warrant, and is now exercising the privilege given it by other acts of Congress to institute an action against the United States itself as defendant.

This directs us to go at once to the statutes which are quoted as giving this privilege. Section 24 (20) of the Judicial Code (Comp. St. 1916, § 991) is one. It provides a method for the assertion of claims by suit against the United States, so far as concerns the District Courts, by conferring upon these courts, concurrently with the Court of Claims, jurisdiction of all claims against the United States (with some exceptions) which could be asserted by action if the United States were suable. It specifically prescribes no system of process to be followed by the District Courts, but the concurrence of jurisdiction with that of the Court of Claims would imply a sanction of like process, and the limitation provision in the statute carries a direct implication of the sanction of the writ of summons process. A condition of the situation, with respect to which Congress was legislating, pre-existent to the statute, may help us in construing it. The District Courts had already been constituted and had established methods of procedure and pro-

cess. Courts of Claims had no such existence, and, of course, no method of procedure. There was no practical necessity to enact a procedure system for the District Courts; there was such necessity to provide a system for the Court of Claims. There is room because of this for the inference (if there is verbal warrant for it in the act itself) that it was in accord with the will of Congress that the Court of Claims should follow the mode of procedure set forth in the act, but that the District Courts might follow their established practice, or adopt that established for the guidance of the Court of Claims. We think the above-mentioned provisions of the act sanction this construction of it.

Section 156 of the Judicial Code (Comp. St. 1916, § 1147) indicates the filing of a petition by limiting the time within which it must be filed. The limitation provision of the twentieth section indicates the commencement of an action and is consistent with the thought of the issuance of a writ of summons. As the time limitation is the same in each of these sections, the coincidence suggests these different modes of procedure and provides a limitation in each case, or, in other words, in effect provides that, if the action permitted to be brought is brought through and by the writ of summons process, the closing of time upon the action is marked by the impetration of the writ, but, if the petition procedure is followed, then the date of the filing of the petition marks the time limit. In still other words, there is standing ground for the construction that if the claim is prosecuted in the Court of Claims, the filing of the petition determines the question of whether the proceeding has been begun in time, but if an action be brought in the District Court by writ of summons, the question is to be determined by the date of the writ. Certain sections of the Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 506 [Comp. St. 1916, §§ 1574–1578]), which remain unrepealed, are consistent with this view, inasmuch as they indicate (section 4) that the courts may adopt any appropriate form of procedure; (section 5) that certain proceedings shall be by petition, and (section 6) how the petition shall be served; (section 7) prescribing the duties of the courts; and (section 10) for the taking of appeals by the United States.

Sections 20 and 156 of the Judicial Code each give six years' time within which plaintiffs may assert their claims by legal process. Judged by these sections, the present actions were brought in time. There are, however, other statutes limiting the time within which suits may be brought against the United States. This other provision is expressed in R. S. § 3227 (Comp. St. 1916, § 5950), which prescribes that no suit shall be maintained to recover payment of taxes collected without authority of law unless brought "within two years next after the cause of action accrued." Applying this provision to the instant cases, we find it has been complied with by the plaintiffs in each case if the issuance of a writ is a suit brought within the meaning of the Revised Statutes, but has not been complied with if the statements of claim are by this statute required to be filed within the two years.

[3] This brings us to the very narrow question involved here. That question is: Does the impetration of the writ toll the statute above

quoted (if viewed as a statute of limitations), or is the issuance of the writ a compliance with the terms and conditions upon which the right of action is conferred (if viewed as a condition of the exercise of the right given)? The question arises out of this state of the record and this state of facts: The plaintiffs "brought suit," or claim to have done so, by the filing a præcipe upon which issued a writ of summons in accordance with the established practice of the courts in like suits against individuals. These writs were served, or asserted by the plaintiffs to have been served, by lodging them with the district attorney. This was within the two-year period. Had statements of claim, or at least a petition setting forth the statement of claim, been filed within the like period, the question now raised would not have arisen. The plaintiffs, however, in each case deferred the filing of the statements of claim until after the expiration of the two years. The district attorney, denying, or at least doubting, his authority to recognize service of the writs upon him as bringing the United States as a defendant within the jurisdiction of the court, refused to view the United States as being in court. When a statement of plaintiffs' claim, however, was served upon him, the district attorney recognized that this was lawful service upon the United States and brought it into court as a defendant. In the view of counsel for the United States, the service of the statement was in law the commencement of the proceeding, and that no suit had been "brought" until this statement was filed. As this was more than two years after the cause of action arose, the position of counsel for the United States is that the plaintiff in each case has lost its right of action.

It is with something like a feeling of regret with which we reach a judgment which denies at this time a source of revenue to the United States. The exigencies of the conflict in which our people are engaged give the sanction of duty to an attitude of the closest scrutiny of all claims against the United States and of all claims to exemption from the common duty of service; but it would not justify the denial of a legal right, or even the entertaining of any feeling of regret in according that right, when once found to exist, nor does the assertion of such a right afford a basis for any just criticism of a litigant to whom such right belongs.

We are unable to get our mind in accord with the thought upon which this defense rests. Our view is that jurisdiction is given to the District Courts to determine the justness of claims against the United States, and that for all the purposes of procedure the United States is to be regarded as is any other defendant. It cannot, of course, be made a defendant without its consent; but, when that consent is once given, the merits of the claim for which the action is permitted to be brought are to be passed upon and determined as if the claim were made against any other defendant. Had the actions as brought been brought against a citizen, the action would have been found to have been brought in time, and the same finding must be made against the United States as a defendant. The ruling is not that a distinction could not have been made in favor of the United States, such as that for which counsel for the United States contends, but it is that no such distinction has been declared.

As all of the positions taken by counsel for the United States (except the denial that the issuance of a writ is the bringing of a suit within the meaning of the acts of Congress giving the District Courts jurisdiction of claims by actions against the United States) may be deemed well taken without affecting the conclusion reached, it is unnecessary for us to determine whether the two-year limitation applies to actions brought directly against the United States to recover excise taxes, the payment of which has been unjustly exacted, or only to those actions which have been brought indirectly against the United States through the Collector being made defendant. We think the judgment directed to be entered in these cases has the sanction of the approval expressed and implied in United States v. Greathouse, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130, and United States v. Emery, 237 U. S. 29, 35 Sup. Ct. 499, 59 L. Ed. 825.

It may not be out of place to make this additional statement with respect to the attitude and its effect of the United States district attorney and other counsel representing the United States toward the previous and present attempts of the plaintiffs to enforce the respective claims. The conduct of any defendant who throws procedure obstacles in the way of the plaintiff, instead of defending against the substantial merits of the complaint, is always deemed by the plaintiff to be ungracious and felt to be exasperating. Such a defense, however, it is the right of the defendant to interpose, and no law officer of the United States can, or, in this instance, has attempted to, do anything which could or has prejudiced this right in any degree. We state the situation thus broadly, as we do not understand the service of the writs to be in question, assuming the suits to have been properly instituted by the issuance of writs of summons, instead of by petition.

The request of the plaintiff for a finding in its favor is granted, and judgment in this case is accordingly rendered in favor of the plaintiff and against the United States for the sum of $553.61 as requested.

In re BERLER SHOE CO., Inc.

(District Court, S. D. New York. October 15, 1917.)

1. BANKRUPTCY ⟸387 — CORPORATIONS — STOCK ISSUED FOR INSUFFICIENT PROPERTY—RIGHT OF CREDITORS—COMPOSITION.
   Any right against stockholders, because of a corporation issuing stock in exchange for property of inadequate value, belonging, under Stock Corporation Law N. Y. (Consol. Laws N. Y. c. 59) § 55, to the creditors, is unaffected by composition with creditors by the bankrupt corporation.

2. BANKRUPTCY ⟸375—COMPOSITION—TIME OF OFFER.
   Composition by bankrupt with creditors should be rejected; the offer to creditors being before the bankrupt was examined in open court and had filed in court its schedules.

In Bankruptcy. In the matter of the Berler Shoe Company, Incorporated, bankrupt. On motion to confirm report of special master. Composition rejected.

Harold Remington, of New York City, for objecting creditors.
Williams, Folsom & Strouse, of New York City, for bankrupt.
Lesser Bros., of New York City, for creditors.

AUGUSTUS N. HAND, District Judge. This is a motion to confirm the report of the special master recommending that an offer of composition for 20 per cent. in cash should not be confirmed because the master had not satisfied himself: (1) That it is for the best interest of the creditors; or (2) that the offer and its acceptance are in good faith.

Oscar Berler, a retail shoe dealer, went into bankruptcy in May, 1915, and thereafter effected a composition with his creditors of 60 per cent. Of this 60 per cent. 10 per cent. was paid in cash, and 50 per cent. in notes of the Berler Shoe Company, Incorporated, the bankrupt in this proceeding. These notes were indorsed by B. Levy & Son. The latter were guaranteed against loss to the extent of $20,000, which was the amount of the notes by Henry Weiss. Oscar Berler executed a general assignment for the benefit of creditors prior to the filing of the petition in bankruptcy. Henry Weiss contracted with Berler to guarantee B. Levy & Son against any liability arising from their indorsement of the bankrupt's notes in return for an assignment to Weiss of the business and assets of Berler in the event of a composition. Henry Weiss assigned his interest to his son, Nat Weiss, as a gift, in order to start him in business, and proceeded to have the Berler Shoe Company incorporated to carry out the plan of composition.

Nat Weiss transferred the business and assets, including the good will and two lots of land on Morris avenue, Morris Park, to the Berler Shoe Company in return for an issue of $12,800 par of the capital stock of that company. This transfer was subject to payment out of the Berler assets of 10 per cent. upon the claims of creditors, $2,992.22 for expenses of administration in bankruptcy, $500 fees for incorporating the company, and notes of the Berler Shoe Company amounting to $20,000, which represented the 50 per cent. payment to creditors. The directors of the Berler Shoe Company found that the business and property of Berler had a value amounting to $12,800, and by resolution ordered the issue of the stock to that amount. As the payments from the Berler assets and upon the notes of the company aggregated $23,492.22, the $12,800 represented value wholly in excess of this sum of $23,492.22, or a total of $36,292.22. The $12,800 of stock was issued upon the theory that the good will of the business was worth $5,000, the fixtures $5,276, and the two lots of land, subject to a mortgage indebtedness of $2,400, had an equity of $2,400.

The Berler Shoe Company, Incorporated, began business with the assets and liabilities above referred to, paid off the $20,000 of notes, and shortly after, and in about a year, went into bankruptcy, and now offers a composition to its creditors of 20 per cent. Nearly half of the creditors voted against the composition. Shortly before the failure there was a fire in one of the stores of the Berler Shoe Company, from which insurance moneys of $4,406.87 were collected, and there was a salvage of $541.25, or altogether $4,948.12. There was paid to

Henry Weiss, the Metropolitan Shoe Company, of which he had been the president, B. Levy & Son, and to Ottensoser, the sum of $4,770.24, within a month before the petition was filed. Those are said by the objecting creditors to have been illegal preferences.

[1] I agree with the master that there is no evidence of concealment of assets. Section 55 of the Stock Corporation Law of New York provides that:

"In the absence of fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive."

It cannot be said that there was an adequate payment for the stock issued, but the remedy is statutory, and the Circuit Court of Appeals of this Circuit, as well as the Appellate Division of the Supreme Court of New York, have held that no right of recovery would pass to the trustee in bankruptcy. In re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641; Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257; Breck v. Brewster, 153 App. Div. 800, 138 N. Y. Supp. 821. The statutory remedy is only given to creditors, and does not inhere in the corporation. The latter does possess a right of action to enforce an unpaid stock subscription. Any right of the corporation is contractual. In the case at bar, where the stock was issued in exchange for the property for which it was offered, no contractual liability remains. I can see no reason why the right of the creditors against the stockholders, if it exists, would be affected by the composition.

The further objection to the composition is made upon the ground that the recovery by the trustee of the alleged preferential payments would create an estate that would yield a greater dividend than the 20 per cent. offered.

Payments which are claimed to be preferential aggregate		$4,770 24
The cash in hands of the trustee		2,332 32
Estimated value of equity in two lots on Morris avenue		1,000 00
		$8,102 56
Expenses of administration, including recovery of alleged preferred payments may be estimated at	$1,500 00	
Preferred claims	73 33	1,573 33
		$6,529 23
Net amount for division among proved unsecured claims of		$20,314 91
And claims alleged to have been illegally paid of		4,770 34
Would produce a dividend of 26 per cent		$25,085 25

On the other hand, if the litigation to recover the alleged preferential payments failed, the dividend, after deducting from existing assets aggregating $3,332.32, estimated expense of administration of $750, and preferred claims of $73.33, would amount to only about 12 per cent. While some of the payments were probably preferential, others apparently represented realization from insurance moneys pledged for current advances, and I do not think the evidence indicates that the creditors would realize more than 20 per cent. if such preferential payments as were made were recovered.

[2] In regard to the consents to the offer of composition which were signed before, and not after the bankrupt corporation had been

examined, it is argued that the matter does not properly come before me, because the only parties criticizing the master's findings as to this matter are moving to confirm the report. I have, of course, entire control over the master's report, which is only for convenient administration, and does not prevent a consideration of the record as it stands. I agree with the criticism of the common practice in compositions and regard it as irregular to have composition offers made and signed before examination of the bankrupt, even if they are not formally filed until afterwards. Such a practice does away with that access to full information on the part of the creditors which the statute aims at. If they have the right to withdraw their consents before the composition offer is filed, it may be doubted whether they are aware of this right, and they are by their signatures in fact, if not in law, committed to a course of action in a way not contemplated by the Bankruptcy Act and contrary to its spirit as well as its express language.

It is not likely that a creditor will seek any information after he has consented to an offer of composition, even if the offer has not been filed. Nor is he likely ever to attend the examination after he has taken this step. He is therefore, under the common practice, deprived of the plain safeguards of the statute.

I hold that the composition should be rejected, because it was offered to the creditors before the bankrupt was examined in open court and had filed in court his schedules. The master is allowed $150 as compensation.

In re MORRIS et al.

(District Court, D. Massachusetts. April, 1917.)

BANKRUPTCY ⇐384—COMPOSITION—DENIAL.

On petition for confirmation of an offer of composition, it appeared that approximately a month before the petition in bankruptcy was filed, the bankrupts became concerned about their affairs and consulted an attorney, that he advised them to carefully conserve all money that they took in, keeping it in their own safe, instead of depositing it in a bank, so that it would be available to make a composition offer later, and that the bankrupts followed those instructions, until an attachment was made on their stock and fixtures and a keeper placed in their store. Thereafter the bankrupts made a general assignment for creditors, and delivered to the assignee nearly $3,000 in cash, which were the funds so accumulated. Directly thereafter an involuntary petition in bankruptcy was filed, and the sum of money received by the general assignee was not then paid over to the receiver in bankruptcy, although subsequently nearly $2,000 was paid to the receiver. The schedules of assets and liabilities did not show the cash fund, and no value was placed upon the merchandise and fixtures; the schedules showing total liabilities and nothing as assets. The bankrupts thereafter made an offer of composition, which was in an amount substantially less than the value of their assets. *Held*, that the offer should be rejected, not being for the best interests of the creditors, and it further appearing that the assent of various creditors was in the main procured by one of the alleged bankrupts, who did not discuss the question of assets with assenting creditors.

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

In Bankruptcy. In the matter of the bankruptcy of James H. Morris and others, alleged bankrupts. On objections by creditors to the confirmation of the bankrupt's offer of composition. Petition for confirmation of composition denied.

The following is the opinion of Jackson, Referee:

The objections contained in the specifications filed in opposition to the composition are three in number:

First. That the composition offer is not for the best interest of the creditors.

Second. That the bankrupts have been guilty of certain acts and have failed to perform certain of their duties, which would be a bar to their discharge.

Third. That the offer and its acceptance are not in good faith and have been made and secured by means and promises and acts forbidden by the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544).

Attorney for alleged bankrupts made a motion that note be made of his objections to any evidence being taken on specifications second and third.

It appeared in evidence: That there are approximately 63 creditors of said alleged bankrupts, that at the first meeting 35 claims were proved, and 22 of said creditors assented to said composition. That 12 claims were proved at said meeting by creditors not assenting, and 4 creditors joined in filing specifications of objections to said composition.

Also, the total deposit called for on said composition was $4,226.20, and that of this amount the alleged bankrupts deposited $726.20, and the balance, $3,500, was all deposited by the receiver. There remained in the receiver's hands above his probable expenses $600, and a stock of merchandise and fixtures in a going business in Lawrence; said business being that of retailing ladies' cloaks, suits, boots, and shoes. There was conflicting evidence in regard to the present value of said merchandise and fixtures. Witnesses produced by the alleged bankrupts testified that a fair value of the cloaks and suits would be $650, and that fixtures were not worth over $150 in the store; that the boots and shoes were not worth over $250.

On the other hand, a witness offered by the objecting creditors testified that all the merchandise in the store was worth $3,000 as a going business, and that the fixtures were worth $500.

Upon all the evidence in regard to the value of the merchandise and fixtures, I find that a fair value for same at this time to be as follows:

Cloaks and suits	$1,000
Boots and shoes	400
Fixtures	200
Total	$1,600

Therefore there would be in the hands of the receiver and available for expenses, and for the creditors approximately $5,900, if no composition had been offered.

It appeared from the testimony of the alleged bankrupts that early in December of 1916, they became concerned about their affairs and consulted an attorney in Boston, and thereafter acted under his advice. That he advised that they carefully conserve all money that they took in; not to deposit any money in the bank, but to keep same in the safe in the store, so that said money would be available to make an offer in composition later, should the occasion arise; and that the alleged bankrupts followed these instructions until December 24, 1916, when an attachment was made on their stock and fixtures, and a keeper placed in their store.

On December 26th a general assignment for the benefit of creditors was made by the alleged bankrupts to Charles E. Hayes, and $2,714.15 in cash was delivered to said assignee, Hayes, which was the fund accumulated under the advice as hereinbefore stated.

That directly thereafter an involuntary petition in bankruptcy was filed, and on January 2, 1917, Matthew A. Cregg, Esq., of Lawrence, was appointed receiver, with authority to conduct said business. That the $2,714.15 above referred to was not paid to or delivered to said receiver, but that on March 14, 1917, $1,759.75 of said sum was paid to said receiver.

Schedules of assets and liabilities were filed in this court on January 30, 1917, and said fund of $2,714.15 in cash is not set out or referred to in said schedules, and no value was placed upon the merchandise and fixtures in schedule B (2) or in schedule B (4). There appears in the summary: "Total liabilities, $13,181.19." "Total assets, nothing."

It also appeared in evidence that the assent of creditors were in the main procured by one of the alleged bankrupts, Vincent A. Rice, and said Charles E. Hayes acting together, and both testified that they did not discuss assets and liabilities with the various assenting creditors.

That while it may not be material, in view of all the circumstances, it may be considered significant that one of the attorneys for the alleged bankrupts personally signs the assent to said composition for several creditors.

It also appeared in evidence that the alleged bankrupts kept no books or records of their business.

Therefore, considering all the circumstances, the substantial amount and value in the estate in excess of that required for the composition, the fact that the schedules were so improperly prepared that creditors may have been misled in regard to the value of the assets, and the fact that the alleged bankrupts were preparing to make an offer in composition almost a month before an involuntary bankruptcy petition was filed, force me to the conclusion that the objecting creditors have sustained specifications first and third, and I do so find.

I further report that in my opinion the objecting creditors have failed to sustain objection Second, and that said second specification should be dismissed.

I recommend that the composition be rejected.

Joseph B. Jacobs, of Boston, Mass., for objecting creditors.
Percy A. Atherton, of Boston, Mass., for alleged bankrupts.

MORTON, District Judge. At Boston, in said district, on the 23d day of April, 1917, upon the petition for confirmation of the composition offer made by the above named alleged bankrupts, and the specifications of objections thereto filed by Parker Holmes & Co. et al., creditors: Now, therefore, upon the report of the referee to whom said matter was referred to ascertain and report facts, and after hearing arguments of Joseph B. Jacobs, Esq., of counsel for the objecting creditors, and Percy A. Atherton, Esq., of counsel for the alleged bankrupts, and after due consideration of the same, it is hereby ordered and decreed that said petition for confirmation of composition offer be and it is hereby denied.

END OF CASES IN VOL. 246